

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY LICENSING )  
BOARD, )  
 )  
Petitioner, )  
 ) Case No. 10-9317PL  
vs. )  
 )  
BRIAN VINCENT BURNS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on January 12, 2011, at video teleconferencing sites in Lauderdale Lakes and Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings, pursuant to the authority set forth in sections 120.569 and 120.57(1), Florida Statutes.

APPEARANCES

For Petitioner: Paul Nathan Rendleman, Esquire  
Assistant General Counsel  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399

For Respondent: Brian Vincent Burns, pro se  
3032 East Commercial Boulevard  
Fort Lauderdale, Florida 33308

STATEMENT OF THE ISSUES

In this disciplinary proceeding, the issues are:

- (1) Whether Respondent committed the violations alleged in the Administrative Complaint issued by the Petitioner; and
- (2) Whether disciplinary penalties should be imposed on Respondent if Petitioner proves one or more of the violations charged in its Administrative Complaint.

PRELIMINARY STATEMENT

On January 17, 2008, the Department of Business and Professional Regulation, Construction Industry Licensing Board ("Petitioner"), issued a two-count Administrative Complaint against Brian Vincent Burns ("Respondent"), wherein it was alleged that Respondent had violated various provisions of chapter 489, Florida Statutes. Respondent timely requested a formal hearing to contest these allegations, and the matter was referred to the Division of Administrative Hearings on September 27, 2010.

The presiding administrative law judge set the final hearing for December 10, 2010. The case was continued several times and re-scheduled for January 12, 2011. Both parties appeared at the appointed place and time.

At hearing, Petitioner presented the testimony of one witness: Donnell Bryant. Petitioner also offered Exhibits numbered 1 and 4 through 7 that were admitted into evidence.

Respondent testified on his own behalf. Respondent offered six exhibits, one which was received in evidence as a late-filed exhibit.

The proceeding was recorded and transcribed. Only the Petitioner filed a timely Proposed Recommended Order. On March 21, 2011, Respondent filed a Motion requesting the undersigned to consider his late-filed proposed recommended order asserting that the lateness was due to the death of his daughter. Petitioner does not oppose the undersigned considering the late-filed Proposed Recommended Order, which has been considered with Petitioner's Proposed Recommended Order in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Respondent, Brian Vincent Burns ("Burns"), at all times material to this matter, was a certified general contractor subject to the regulatory jurisdiction of the Petitioner.

2. Burns was first licensed on October 26, 1981. Petitioner issued Burns license number CGO 020464. Burns' license expires on August 31, 2012.

3. Action Restoration Inc. ("Action"), is and was, at all times material in this matter, the company where Burns is qualified.

4. On October 24, 2007, Brian Burns-Action Restoration entered a Contractor Agreement ("Contract") with owner, Donnell

Bryant, to construct a bathroom addition at Bryant's residence located at 3314 NW 23rd Court, Lauderdale Lakes, Florida 33311.

5. Burns admitted at the hearing that the Contract failed to include any written disclosure statement explaining consumer's rights under the Florida Homeowner's Construction Recovery Fund.

6. The Contract provided a draw schedule detailing the amount of the payment and at which points during the project payments were to be made to Action. The total contract price was \$36,000.

7. Per Bryant's Contract, Bryant paid the first draw of \$6000.00 down at contract signing and Action started the job. During the job, Burns followed the critical path method. The method consisted of each step of the job being completed before the next could take place because each built upon the other.

8. Action applied for a permit to build the bathroom addition on the house under Burns' contractor's license and became the contractor of record for the project.

9. Action began the job in November 2007. It included excavating, obtaining the soil test, forming up the plywood to form the concrete, putting the rebar in, and pouring.

10. On November 26, 2007, Bryant paid Action \$7,250 as draw two when the footing was completed.

11. The next step of the project was the block. Burns hired three workers to pour the concrete block. On or about December 20, 2007, Action put the truss anchors in the wet concrete.

12. On or about December 21, 2007, Action completed the tie beams and was paid \$8000.00 for draw three of the contract.

13. At some point, Burns and Bryant agreed to change the trusses to make them more energy efficient and structurally sound for windstorms. The design change delayed the job being finished by the deadline.

14. During December 2007, there was a period when Burns did not return Bryant's phone calls.

15. Bryant was very anxious for the bathroom addition project to be completed and became angry at Burns when he couldn't reach him. Bryant thought Burns had abandoned his job when he didn't see Burns from around the Christmas holiday until after the new year.

16. After the new year, in January 2008, Bryant met with Burns and a third party, Walsh. At the meeting, Bryant determined that Walsh was the foreman for Action who oversaw the work. Walsh never worked for Burns or Action and has never been paid by either. Burns had only met Walsh in 2007 and worked on one previous project with him. Burns knew Walsh to be a mason.

17. From the meeting, Bryant understood that the initial contract work had been transferred to Walsh to complete the bathroom addition project Action had contracted for originally. As a result, Bryant stopped paying Burns and agreed to pay Walsh the remaining sum of \$14,000.00 on the contract.

18. After the meeting, Burns continued to work on the Bryant contract off site. He worked to get the new trusses design approved so that the work could move forward at the residential site. Around January 17, 2008, Burns took the new trusses design to the truss shop professional engineers to do the drawings. After approval, Burns took the design to the architect, which was approved on February 1, 2008. Then, Burns processed the drawing through the City of Lauderdale, which approved them on February 18, 2008.

19. After approval by the City of Lauderdale, Burns called Bryant several times, and Bryant never returned his call or responded. Burns never returned to the Bryant residence to work on the job because he thought a new contractor had been hired to complete the job in Action's place. Action had only completed 50% of the job on the contract at the time. Plumbing, electric, duct work, and stucco were left to be done for the bathroom addition to be completed.

20. During the period when Burns was getting the new trusses design approved, Bryant paid Walsh \$4000.00, with check

number 5761 as a draw, on February 15, 2008. The Contract was amended and stated, "\$Total owe \$14,000-\$4000.00 2/15/08>New Balance \$10,000" Walsh's signature was by the total with "pd 5761 2/15"<sup>1</sup>

21. Burns admitted at hearing that Action was still the contractor of record because the permit remained open for the project in his name. Burns said, "I made an error in judgment in not going to see to it that it was closed out."

22. Walsh continued to work on Bryant's bathroom addition and got paid monies until June 2008. As Walsh completed portions of the job, Bryant paid him the following: \$800 on April 18, 2008, for the wall and tile; \$3,500 on June 3, 2008, for the construction of the bathroom; and \$325 on June 9, 2008, for the stucco for the bathroom. Walsh also was paid for other construction work beside the bathroom addition for Bryant.

23. Bryant never heard from Walsh again after paying him \$325.00 with the June 9, 2008, check. He contacted him numerous times to no avail. The job was not completed.

24. On December 30, 2008, Bryant signed a contract with Complete Property Repair to complete the bathroom addition Action had started. The contract amount was for \$36,800. The contract included redoing some of the previous work completed by Action and some upgrades including a two-person Jacuzzi and travertine rock instead of tile.

The Charges:

25. In Count I, Petitioner charges Respondent with abandoning a construction project in which the contractor is engaged or under contract as a contractor in violation of section 489.129(1) (j), Florida Statutes.

26. In Count II, Petitioner charges Respondent with failing to include a written statement explaining the consumer's right's under the Florida Homeowners' Construction Recovery Fund in the contract with Donnell Bryant in violation of Section 489.1425(1) (d)1.

CONCLUSIONS OF LAW

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

28. Section 489.129(1) (j), under which Respondent has been charged in Count I, sets forth the acts for which the Petitioner may impose discipline. This statute provides, in pertinent part:

- 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:

\* \* \*

(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.

29. Section 489.1425, under which Respondent has been charged in Count II, sets forth the acts for which the Petitioner may impose discipline. This statute provides, in pertinent part:

1) Any agreement or contract for repair, restoration, improvement, or construction to residential real property must contain a written statement explaining the consumer's rights under the recovery fund, except where the value of all labor and materials does not exceed \$2,500 . . . .

30. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Being penal in nature, section

475.25 "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

31. Here, Petitioner seeks to discipline Respondent's license and/or to impose an administrative fine. Accordingly, Petitioner has the burden of proving the allegations charged in the Administrative Complaint against the Respondent by clear and convincing evidence. Dep't of Banking and Fin. Div. of Sec. and Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932, 933-34 (Fla. 1996) (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Reg., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

32. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

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 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. Id.

33. A licensee is charged with knowing the practice act that governs his/her license. Wallen v. Fla. Dep't of Prof'l Reg., Div. of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

34. In this case, Petitioner met its burden of establishing that Respondent abandoned the Bryant construction project in violation of section 489.129(1)(j). The record demonstrates that the last work done on the project was in June 2008<sup>2</sup> and that the new company was hired in December 2008, well over 90 consecutive days. Even though Burns thought that a new contractor had taken over the project, Action was the contractor of record responsible for completing the job. Burns should have not just relied on the word of a third person that Bryant had retained a new company for the bathroom addition project. Additionally, Burns was aware that it was his responsibility to transfer the permit out of Action's name if he was no longer responsible for the project.

35. As to Count II, there is no dispute (for Burns admitted at final hearing) that a violation of section 489.1425 exists in that Burns failed to include a written statement explaining the consumer's rights under the Florida Homeowners' construction Recovery Fund in the contract with Donnell Bryant.

## Disciplinary Guidelines

36. Pursuant to Florida Administrative Code Rule 61G4-17.001 as amended November 2, 2006, Petitioner established disciplinary guidelines with a range of penalties that will be imposed on licensees guilty of violating chapter 489. Petitioner also established circumstances that can be considered mitigating or aggravating when determining the appropriate discipline in rule 61G4-17.002.

37. Petitioner concedes in its Proposed Recommended Order that Respondent has not been previously disciplined for violations under chapter 489 or 455.

38. There are numerous mitigating circumstances under rule 61G4-17.002 that are applicable in this matter including: no customers were damaged, this was the only complaint ever filed against the contractor in over 29 years, there were no jobsite code violations, and no indications of gross negligence, incompetence, misconduct, or danger to the public.

39. This case is a matter of Burns exercising poor judgment in listening to a third party regarding the project status after Bryant did not return his calls and Burns not following up and removing Action as the contractor of record when he thought Action was replaced. However, Burns' actions were not an intentional abandonment. Even though the record is not clear as to Walsh's total role in everything that occurred

relating to the project, the record does show that Bryant thought Walsh was both responsible for completing the job and paid him \$8625.00 to do so, which supports Burns' position that he believed Action was no longer on the job.

40. The guidelines mandate that the range of punishment for a violation of section 489.129(1)(j), as a "First violation, \$2500 to \$7,500 fine and/or probation or suspension. . ." The guidelines further set forth the usual range of punishment for a violation of section 489.1425, as a "First violation, \$250 to \$500 fine." Based on Burns' almost three-decade clean licensure record and the other mitigating circumstances listed in paragraph 38 above, the undersigned is imposing the minimum penalties for Respondent's violations of sections 489.129(1)(j) and 489.1425.

41. Petitioner contends that Burns should pay restitution to Bryant in the amount of \$32,675.00. However, in this matter Petitioner has failed to prove an amount of restitution. Petitioner only provided hearsay evidence to show a monetary amount owed.<sup>3</sup> Therefore, the record is void of enough evidence to make a determination of restitution.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission enter a final order that: (a) finds Respondent guilty as charged in Count I of the Administrative Complaint, imposing as a fine of \$2,500, and placing Burns' license on probation for a period of one year; (b) finds Respondent guilty as charged in Count II of the Administrative Complaint, imposing a fine of \$250.00; and (c) not imposing any restitution since it was not proven in this matter at hearing.

DONE AND ENTERED this 29th day of March, 2011, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of March, 2011.

ENDNOTES

<sup>1</sup> See Exhibit 4, Article 4. Such a notation with the testimony establishes that Bryant was working with Walsh.

<sup>2</sup> Even though Burns' personal work stopped for Bryant in February 2008, Action was still the contractor of record until Complete Property Repairs took over. Bryant considered Walsh's work under Action's contract. Hence, Walsh disappeared approximately June 9, 2008, which would be when the 90 days started.

<sup>3</sup> The undersigned would only have been able to determine restitution with additional non-hearsay testimony about Complete Property Repairs' contract and the specifics about what was done under the new contract. The record shows that Action completed at least half of the work, Walsh did additional work for which he was paid, and Complete Property Repairs finished the project by redoing some of Action's work and even providing upgrades in some areas, without any monies being delineated.

COPIES FURNISHED:

Brian V. Burns  
3032 East Commerical Boulevard  
Fort Lauderdale, Florida 33308

Paul Nathan Rendleman, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street, Suite 42  
Tallahassee, Florida 32303

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

G. W. Harrell, Executive Director  
Division of Professions  
Construction Industry Licensing Board  
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.