

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT PETITO,)
)
 Petitioner,)
)
 vs.) Case No. 10-9444
)
 CONSTRUCTION INDUSTRY LICENSING)
 BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On May 26, 2011, a formal administrative hearing was conducted by video teleconference between Orlando and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Rosemary Hanna Hayes, Esquire
Hayes & Caraballo
830 Lucerne Terrace
Orlando, Florida 32801

For Respondent: Daniel R. Biggins, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue in this case is whether the Construction Industry Licensing Board (Respondent) should approve the application of Robert Petito (Petitioner) to transfer his certified Class B air

conditioning license, issued in 2007, from one business entity to another.

PRELIMINARY STATEMENT

By Notice of Intent to Approve with Conditions (Notice) dated November 6, 2009, the Respondent notified the Petitioner that his application for a "change of status from one business entity to another contractor's license" was being approved with conditions. The Petitioner requested an administrative hearing to challenge the approval with conditions. On October 5, 2010, the Respondent forwarded the request to the Division of Administrative Hearings, which scheduled the hearing to commence on January 5, 2011, in accord with the parties' dates of availability. The hearing was continued once, at the request of the Petitioner, and was thereafter heard on May 26, 2011.

At the hearing, the Petitioner presented the testimony of one witness, testified on his own behalf, and had Exhibits 1A, 1B, 2A, 2B, 8, 9, 10, and 11 admitted into evidence. The Respondent presented no testimony or exhibits.

No transcript of the hearing was filed. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner was issued a certified Class B air conditioning license by the Respondent in 2007.

2. At the time of the 2007 application for licensure, the Petitioner acknowledged a criminal history on the application. In an attachment to the 2007 application, the Petitioner stated that the referenced offense was "Drugs and Robbery" and offered the following explanation:

25 years ago when I was younger I got caught up in a lot of things, but my rights have been restored and I have been in no trouble since.

3. Also attached to the application was a certificate dated October 16, 2003, stating that the Petitioner's civil rights had been restored on February 2, 1984.

4. According to the transcript of the board meeting at which the 2007 application was granted, the Respondent approved the Petitioner's application for licensure with little discussion of significance as to the Petitioner's criminal history.

5. In 2009, the Petitioner filed an application to transfer his license from one business entity to another. The Petitioner again acknowledged a criminal history on the application, through an affirmative response to this question on the application form:

Have you ever been convicted of a crime, found guilty, or entered a plea of guilty or nolo contendere (no contest) to a crime, even if you received a withhold of adjudication? This question applies to any violation of the laws of any municipality,

county, state or nation, including felony, misdemeanor and traffic offenses (but not parking, speeding, inspection, or traffic signal violations) without regard to whether you were placed on probation, had adjudication withheld, were paroled, or pardoned. . . . YOUR ANSWER TO THIS QUESTION WILL BE CHECKED AGAINST LOCAL, STATE AND FEDERAL RECORDS. FAILURE TO ANSWER THIS QUESTION ACURATELY MAY RESULT IN THE DENIAL OR REVOCATION OF YOUR LICENSE. IF YOU DO NOT FULLY UNDERSTAND THIS QUESTION, CONSULT WITH AN ATTORNEY OR CONTACT THE DEPARTMENT.

6. The application form required that an applicant responding affirmatively to the referenced question provide additional information regarding the response. In an attachment to the transfer application, the Petitioner offered the following explanation:

In the late 1970's I was convicted on drug & robbery related charges. Please find enclosed a copy of the Certificate of Restoration of Civil Rights.

7. The Respondent conducted a background investigation as part of the transfer application review. The investigation revealed that the Petitioner's criminal history was other than had been indicated by the Petitioner's explanation. The criminal record indicated that the felony drug and robbery convictions occurred in 1981 and that the Petitioner had been convicted of trespassing in 1996 and of battery and trespassing in 2003.

8. In the Notice dated November 6, 2009, the Respondent notified the Petitioner that the transfer was being approved with conditions.

9. According to the Notice, the conditions constituted the imposition of discipline against the Petitioner's license, including a suspension of the Petitioner's license that was stayed during a six-year period of probation. In relevant part, the Notice stated as follows:

NOTICE OF INTENT TO APPROVE WITH CONDITIONS

You are hereby notified that the Construction Industry Licensing Board (Board) voted to permit, WITH CONDITIONS, your application for change of status from one business entity to another contractor's license.

The Board reviewed and considered the application at a duly-noticed public meeting held on September 10, 2009 in Tampa Florida. The Board determined that the application should be approved with conditions based on the following:

1. The applicant failed to sufficiently demonstrate financial stability and responsibility, pursuant to section 489.115, Florida Statutes and Rule 61G4-15.005, Florida Administrative Code.

2. The Board had issues with applicant's moral character, pursuant to section 489.111, Florida Statutes.

3. Pursuant to section 455.227(2)(f), Florida Statutes, Applicant shall hereby be placed on PROBATION for 6 years, with 12 satisfactory appearances, according to the following terms:

A) Applicant shall be required to appear before the Probation Committee of the Board at such times as directed by the Board Office, approximately every six (6) months. Respondent's first probationary appearance requires a full day attendance at the Board meeting. In connection with each probation appearance, Applicant shall answer questions under oath. In addition, applicant shall provide such other information or documentation as is requested by either the Department, the Board, or the Probation Committee. Applicant shall forward said documentation to the Board at least 30 days in advance of the probation appearance or as otherwise directed.

B) The burden shall be solely upon Applicant to remember the requirement for said appearance and to take necessary steps in advance of said appearance to contact the Board office and ascertain the specific time, date, and place of said appearance. Applicant shall not rely on getting notice of said appearance from the Board or the Department.

C) Should Applicant violate any condition of the probation, it shall be considered a violation of Section 489.129(1)(i), Florida Statutes, and shall result in further disciplinary action by the Board.

D) Should Applicant fail to make a satisfactory appearance as determined by the Board, the term of the probationary period shall be automatically extended by six (6) months. If there occurs a second such failure then the term of the probationary period will be extended an additional year. Should the Board determine a third failure of Applicant to make a satisfactory appearance, the stay of suspension of the Applicant's license to practice contracting shall be lifted and the license shall remain in suspended status unless and until a further stay is granted by the Board.

E) Should Applicant's license to practice contracting be suspended or otherwise placed on inactive status, the probation period shall be tolled and shall resume running at the time Applicant reactivates the license, and Applicant shall serve the time remaining in the term of probation.

F) To ensure successful completion of probation, Applicant's license to practice contracting shall be suspended for the period of probation, with the suspension stayed for the period of probation. The time of the suspension and the stay shall run concurrently with the period of probation. If Applicant successfully completes probation, the suspension shall terminate. If Applicant fails to comply with the requirements set forth in the Final Order imposed in this case, or fails to make satisfactory appearances as determined by the Board, the stay shall be lifted. Once the stay is lifted, the license shall remain in suspended status unless and until a further stay is granted by the Board. (emphasis added).

10. Section 455.225, Florida Statutes (2009),^{1/} sets forth the process through which the Respondent may commence a disciplinary proceeding against a licensee. There was no evidence presented that the Respondent has commenced or concluded a disciplinary proceeding against the Petitioner pursuant to the cited statute. The Respondent presented no evidence at the hearing.

11. At the time of the Petitioner's transfer application, the Petitioner had a credit score of 590. At the hearing, the Petitioner established, through submission of a credit report,

that he had a credit score in excess of 660 as determined by the three relevant reporting agencies and that he had no pending liens or judgments.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 & 120.57(1), Fla. Stat. (2010).

13. The issue presented in this case is whether the Respondent should approve the application of the Petitioner to transfer his current license from one business entity to another. The Petitioner has the burden of establishing by a preponderance of the evidence that he is entitled to approval of his transfer application. Balino v. Dep't of HRS, 348 So. 2d 349 (1st DCA 1977). Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

14. Here, the Respondent has attempted to approve the application while imposing disciplinary penalties on the Petitioner's existing license. The Respondent lacks statutory authority to take such action in this case. Section 455.225 establishes the procedure through which the Respondent may commence a disciplinary proceeding against a licensee. The process requires an investigation, a determination of probable cause, a formal filing of charges against a licensee, and an administrative hearing at which the charging agency must

establish the truthfulness of the allegations by clear and convincing evidence, if the licensee disputes the allegations. None of that has occurred here.

15. In the Notice, the Respondent cited section 455.227(2)(f) as authorizing the imposition of the conditions to the Petitioner's license. In relevant part, section 455.227 provides as follows:

Grounds for discipline; penalties; enforcement.--

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

(a) Making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession.

(b) Intentionally violating any rule adopted by the board or the department, as appropriate.

(c) Being convicted or found guilty of, or entering a plea of guilty or 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.

* * *

(t) Failing to report in writing to the board or, if there is no board, to the department within 30 days after the licensee is convicted or found guilty of, or entered a plea of nolo contendere or guilty to, regardless of adjudication, a crime in any jurisdiction. A licensee must report a conviction, finding of guilt, plea, or adjudication entered before the effective

date of this paragraph within 30 days after the effective date of this paragraph.

* * *

(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:

* * *

(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 courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

16. The various penalties set forth in section 455.227(2) are available only upon a formal determination pursuant to a disciplinary proceeding under section 455.225 that one or more of the provisions of section 455.227(1) has been violated. Here, the Respondent has not complied with the disciplinary procedure set forth at section 455.225, has not formally charged Petitioner with any violation of section 455.227(1), and may not impose the penalties set forth in section 455.227(2).

17. In the Notice, the Respondent stated that disciplinary conditions were being imposed against the Petitioner in part because the "Board had issues with applicant's moral character, pursuant to Section 489.111, Florida Statutes," which provides in relevant part as follows:

Licensure by examination.--

(1) Any person who desires to be certified shall apply to the department in writing.

(2) A person shall be eligible for licensure by examination if the person:

(a) Is 18 years of age;

(b) Is of good moral character; and

(c) Meets eligibility requirements. . . .

* * *

(3) (a) The board may refuse to certify an applicant for failure to satisfy the requirement of good moral character only if:

1. There is a substantial connection between the lack of good moral character of the applicant and the professional responsibilities of a certified contractor;
And

2. The finding by the board of lack of good moral character is supported by clear and convincing evidence.

(b) When an applicant is found to be unqualified for a certificate because of a lack of good moral character, the board shall furnish the applicant a statement containing the findings of the board, a complete record of the evidence upon which the determination was based, and a notice of

the rights of the applicant to a rehearing and appeal. (emphasis added).

18. The Respondent's Notice does not state that the Respondent found the Petitioner to be unqualified based on a lack of good moral character. A statement that the Respondent "had issues with the applicant's moral character" is insufficient to comply with the requirements of section 489.111(3)(b), Florida Statutes.

19. In the Notice, the Respondent also stated that the Petitioner "failed to sufficiently demonstrate financial stability and responsibility, pursuant to section 489.115, Florida Statutes and Rule 61G4-15.006, Florida Administrative Code." Section 489.115(7) provides in relevant part as follows:

An initial applicant shall, along with the application, and a certificateholder or registrant shall, upon requesting a change of status, submit to the board a credit report from a nationally recognized credit agency that reflects the financial responsibility of the applicant or certificateholder or registrant. The credit report required for the initial applicant shall be considered the minimum evidence necessary to satisfy the board that he or she is financially responsible to be certified, has the necessary credit and business reputation to engage in contracting in the state, and has the minimum financial stability necessary to avoid the problem of financial mismanagement or misconduct. The board shall, by rule, adopt guidelines for determination of financial stability, which may include minimum requirements for net worth, cash, and bonding for Division I certificateholders of no more than \$20,000

and for Division II certificateholders of no more than \$10,000. Fifty percent of the financial requirements may be met by completing a 14-hour financial responsibility course approved by the board. (emphasis added).

20. Florida Administrative Code Rule 61G4-15.006 provides as follows:

Financial Responsibility and Financial Stability, Grounds for Denial.

(1) The financial responsibility ground on which the Board shall refuse to qualify an applicant is failure to provide a current consumer credit report, as defined in Rule 61G4-12.011, F.A.C., which consumer credit report does not disclose any unsatisfied judgments or liens against the applicant. In addition, there must not be any unsatisfied judgments or liens against the business entity which the applicant previously qualified as a primary qualifier or which the applicant has applied to qualify.

(2) The financial stability ground on which the Board shall refuse to qualify an applicant is failure to provide proof of either a financial stability bond or an irrevocable letter of credit from a bank authorized to do business in the State of Florida. The bond or letter of credit must be in a form acceptable to the Board and must remain in effect until the applicant can demonstrate a credit score, FICO derived, of 660 or higher, and must be payable as provided in Rule 61G4-15.0021, F.A.C., for Financially Responsible Officers in the amount of:

- (a) \$20,000 for Division I applicants.
- (b) \$10,000 for Division II applicants.

(3) Fifty percent of the financial stability bond or the letter of credit requirement may be met by completion of a 14-hour financial responsibility course approved by the Board.

(4) An applicant may meet both the financial responsibility and financial stability requirements by providing proof of a current consumer credit report, as defined in Rule 61G4-12.011, F.A.C, with a credit score, FICO derived, of 660 or higher, which consumer credit report does not disclose any unsatisfied judgments or liens against the applicant. In addition, there must not be any unsatisfied judgments or liens against the business entity which the applicant previously qualified as a primary qualifier or which the applicant has applied to qualify. (emphasis added).

21. The evidence established that the Petitioner's most recent credit report meets the requirements of section 489.115(7) and rule 61G4-15.006(4), and, therefore, the Petitioner has sufficiently demonstrated financial stability and responsibility.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Construction Industry Licensing Board enter a final order granting the Petitioner's application to transfer his license from one business entity to another.

DONE AND ENTERED this 1st day of July, 2011, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
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 1st day of July, 2011.

ENDNOTE

1/ References to Florida Statutes are to Florida Statutes
(2009), unless otherwise indicated.

COPIES FURNISHED:

Daniel R. Biggins, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Rosemary Hanna Hayes, Esquire
Hayes & Caraballo
830 Lucerne Terrace
Orlando, Florida 32801

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

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

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.