

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FRANCISCO VINCENTE DE MOYA,            )  
  )  
          Petitioner,                        )  
  )  
vs.    )     Case No. 11-2789  
  )  
CONSTRUCTION INDUSTRY LICENSING    )  
BOARD,                                     )  
  )  
          Respondent.                     )  
\_\_\_\_\_                                   )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 20, 2011, by video teleconference between Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Diane S. Perera, Esquire  
Law Offices of Diane S. Perera, P.A.  
14540 Southwest 136th Street, Suite 208  
Miami, Florida 33186

For Respondent: Daniel R. Biggins, Esquire  
Department of Legal Affairs  
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STATEMENT OF THE ISSUE

Whether a certified general contractor's license issued to Francisco Vincente De Moya (Petitioner) that has been classified

null and void should be reinstated pursuant to the "hardship" provision of section 455.271(6)(b), Florida Statutes.<sup>1</sup>

PRELIMINARY STATEMENT

On September 1, 2006, Petitioner's general contractor's license expired because he had not completed sufficient continuing education classes to meet his continuing education requirements for the 2004-2006 biennial period. On October 2, 2008, Petitioner's general contractor's license became null and void. Petitioner thereafter applied with Respondent to have his license reinstated, citing hardship. On January 12, 2011, Respondent denied Petitioner's application. Petitioner timely requested a formal administrative hearing to challenge Respondent's denial, the matter was referred to DOAH, and this proceeding followed.

At the formal hearing, Petitioner testified on his own behalf and presented pre-lettered Exhibits A-H, each of which was accepted into evidence. Respondent presented the testimony of Amanda Wynn, who is employed by Respondent as a Senior Analyst Supervisor. Respondent presented no exhibits.

A Transcript of the proceedings, consisting of one volume, was filed on August 2, 2011. Both parties filed Proposed Recommended Orders, which have been duly considered by the undersigned in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. Respondent is the state agency that regulates general contractors in the State of Florida.

2. In 1998, Respondent issued Petitioner certified general contractor license CGC 05992.

3. Certified general contractors are required to take a total of 14 hours of continuing education courses in specified categories each biennial period.<sup>2</sup> Credit is generally posted for the biennial period during which the course was taken. All continuing education courses discussed in this Recommended Order were taken by Petitioner using the internet and reported electronically. Respondent typically posts and maintains such credits electronically. Credits are typically posted for the biennial period in which the credits are earned. If a licensee had been deficient for a prior biennial period, Respondent's staff can manually post-date credits from a subsequent biennial period to the biennial period that is deficient.

### 2004-2006 Biennial Period

4. On August 23, 2004, Petitioner submitted to Respondent a personal check in the amount of \$209.00 as payment of renewal fees for his general contractor's license for the biennial period 2004-2006.

5. Petitioner's general contractor's license was not renewed for the 2006-2008 biennial period because Petitioner had

not completed sufficient continuing education hours during the 2004-2006 biennial period to meet his continuing education requirements.

6. On September 1, 2006, Respondent classified the status of Petitioner's as "expired/delinquent." As of September 1, 2006, and as of the date of the formal hearing, Respondent's records reflected that Petitioner was deficient in his continuing education requirements for the biennial period 2004-2006 by a total of six hours in three categories.<sup>3</sup> One hour of the deficiency was in the category of advanced building code. Four hours of the deficiency were in the category of general. One hour of the deficiency was in the category of workers' compensation.

#### 2006-2008 Biennial Period

7. On September 29, 2006, Petitioner submitted to Respondent a payment in the amount of \$309.00 for renewal fees and late fees for his general contractor's license for the biennial period 2006-2008.

8. On October 20, 2006, Petitioner completed a four hour continuing education course in "core training." Petitioner testified that this credit was intended to be for the 2006-2008 biennial period.

9. Prior to the renewal deadline of August 29, 2008, Petitioner requested and obtained from Respondent an extension

of 30 days to submit proof of completion of continuing education credits for the 2006-2008 biennial period and payment of renewal fees for the 2008-2010 biennial period.

2008-2010 Biennial Period

10. On September 29, 2008, Petitioner paid Respondent \$209.00 as payment for renewal fees for his general contractor's license for the 2008-2010 biennial period.

11. On September 28 and 29, 2008, Petitioner completed 14 hours of continuing education credit and submitted the certificates of completion for each course to Respondent with the notation "Please find Certificates of Completion for my G.C. license # CGC 059992 for 2006-2008." Respondent received the certificates of completion on October 1, 2008. These hours satisfied Petitioner's continuing education requirements for the 2006-2008 biennial period.

12. On October 2, 2008, Petitioner's certified general contractor's license became "null and void."<sup>4</sup>

13. With knowledge that his contractor's license was considered null and void,<sup>5</sup> Petitioner took 26 hours of continuing education credit between November 24, 2008, and August 7, 2009, and submitted his certificates of completion to Respondent. Respondent did not apply any of the 24 credits Petitioner earned between September 29 and December 11, 2008, to the 2004-2006

biennial period, nor was there any evidence that Petitioner requested Respondent to do so.<sup>6</sup>

14. In 2006, Petitioner's mother-in-law (Ms. Careaga) was diagnosed with degenerative dementia and began to deteriorate physically and mentally. From 2007 until her death on December 15, 2008, Ms. Careaga became immobile, more disoriented and confused, and required 24 hour supervision. Petitioner had a close relationship with his mother-in-law. Petitioner and Petitioner's wife became Ms. Careaga's 24-hour primary caregivers so she would not have to go to a nursing home. Petitioner continued to work full-time and serve as a primary caregiver until Ms. Careaga's death. During this period, Petitioner assisted other family members in closing down the restaurant that his mother-in-law had owned and operated.

15. On January 12, 2011, Respondent denied Petitioner's application for the reinstatement of his general contractor's license. The Notice of Denial was not admitted as an exhibit in this proceeding. However, a "Notice of Intent to Deny," purporting to be the Respondent's proposed denial, was attached to the Petition for Formal Hearing. That Notice of Intent to Deny recites that the Petitioner's license expired due to "non payment" [sic] of renewal fees. That statement is incorrect. The license became null and void because of the deficient continuing education requirements for the 2004-2006 biennial

period. The Notice of Intent to Deny also found that Petitioner failed to establish hardship within the meaning of section 455.271(6)(b).

16. Petitioner is eligible to obtain a new license by retaking the licensure exam and by establishing that he is of good moral character and financially stable and responsible. His experience has been established by virtue of his prior license.

17. Petitioner also holds licensure as an architect. That license also became null and void during the same time frame as his contractor's license. On February 17, 2011, the Florida Board of Architecture, considering the same facts described above, approved Petitioner's application for reinstatement of his architecture license.

#### CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1).

19. This is a de novo proceeding designed to formulate final agency action. See Hamilton Cnty Bd. of Cnty Comm'rs v. Dep't. Env'tl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991) and section 120.57(1)(k), Florida Statutes.

20. As the applicant, Petitioner has the burden of proving his entitlement to the relief he seeks by a preponderance of the

evidence. See Dep't of Banking and Fin. v. Osborne Stern, 670 So. 2d. 932 (Fla. 1996) and Dep't of Transp. v. J. W. C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

21. A "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942).

22. Section 455.271(6) applies to multiple professions, including general contracting, and provides, in relevant part, as follows:

(6) (a) A delinquent status licensee must affirmatively apply with a complete application, as defined by rule of the board, or the department if there is no board, for active or inactive status during the licensure cycle in which a licensee becomes delinquent. Failure by a delinquent status licensee to become active or inactive before the expiration of the current licensure cycle shall render the license void without any further action by the board or the department.

(b) Notwithstanding the provisions of the professional practice acts administered by the department, the board, or the department if there is no board, may, at its discretion, reinstate the license of an individual whose license has become void if the board or department, as applicable, determines that the individual has made a good faith effort to comply with this section but has failed to comply because of illness or unusual hardship. The individual must apply to the board, or the department if there is no board, for reinstatement in a manner prescribed by rules of the board or the department, as applicable, and shall pay an applicable fee in an amount determined by



rule. The board, or the department if there is no board, shall require that such individual meet all continuing education requirements prescribed by law, pay appropriate licensing fees, and otherwise be eligible for renewal of licensure under this chapter.

23. Petitioner made good faith efforts to comply with his continuing education requirements.

24. Although the Respondent's authority to grant or deny reinstatement due to "illness or unusual hardship" is discretionary, that discretion cannot be exercised in an arbitrary fashion.

25. An agency's action will be deemed arbitrary if "'it is not supported by logic or the necessary facts,' [or] if it is adopted without thought or reason or is irrational.'" Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006); see also Bd. of Clinical Lab. Pers. v. Fla. Ass'n of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998) ("An 'arbitrary' decision is one not supported by facts or logic."); Dravo Basic Materials Co., Inc. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992) ("If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is [not] arbitrary."); and Agrico Chemical Co. v. State Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA

1978) ("An arbitrary decision is one not supported by facts or logic, or despotic.").

26. During the period in which he became delinquent in his continuing education credits, Petitioner worked full-time, served as a primary caregiver for his mother-in-law, and participated in closing down a restaurant. It is clear that Petitioner was busy and consumed by family matters during that period. That being said, the license renewal process entails the payment of modest fees and the taking of 14 continuing education credits during a two-year period. As reflected by the evidence, a licensee can earn that continuing education credits by taking approved courses over the Internet over a two-year period. Petitioner lacked six hours of continuing education credit for the 2004-2006 biennial period. It would have taken Petitioner less than a day to complete his continuing education requirements for that period.

27. That Petitioner himself was not ill during the period at issue, that he worked full-time during that period, and that the licensure renewal requirements can be met with relative ease are facts that preclude the undersigned from concluding that Respondent's denial of Petitioner's application for reinstatement was an arbitrary exercise of its discretion. It is within Respondent's sound discretion whether to grant or deny Petitioner's application for reinstatement.

28. There was insufficient evidence to establish that the staff of the Department of Business and Professional Regulation's Bureau of Education and Testing acted in an arbitrary manner by not applying credits earned subsequent to the expiration of the 2004-2006 biennial period retroactively to the 2004-2006 biennial period so as to cure the deficiency in continuing education credits for that period.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Construction Industry Licensing Board enter a final order denying Petitioner's application for reinstatement of his certified general contractor's license based on the hardship provision set forth in section 455.271(6)(b).

DONE AND ENTERED this 22nd day of August, 2011, in Tallahassee, Leon County, Florida.



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CLAUDE B. ARRINGTON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of August, 2011.

ENDNOTES

<sup>1</sup> All statutory references are to Florida Statutes (2011).

<sup>2</sup> Florida Administrative Code Rule 61-6.001 pertains to license renewal for licensees, including certified general contractors. This rule was not cited by either party. Subsection (3) of the rule is as follows: "Biennial period shall mean a period of time consisting of two 12 month years [sic]. The first biennial period for the purposes of each board shall commence and continue on the dates specified in the department plan as set forth for each respective profession." Thereafter, the date listed for certified general contractors was August 31 of each even year.

<sup>3</sup> Neither party cited Florida Administrative Code Rule 61G-4-18.001(2). That rule pertains to the continuing education requirements for general contractors, but it does not list the category of "general." The rule is as follows:

- (2) All registered contractors and certified contractors are required to complete fourteen (14) hours of continuing education each renewal cycle. Of the fourteen (14) hours, one (1) hour shall be required in each of the following topics:
  - (a) Specialized or advanced module course approved by the Florida Building Commission, or the Board;
  - (b) Workplace safety;
  - (c) Business practices;
  - (d) Workers' compensation;
  - (e) Laws and rules regulating the construction industry;
  - (f) Wind mitigation methodologies, if license is held in the following category: General, Building, Residential, Roofing, Speciality Structure, or Glass and Glazing.

<sup>4</sup> Section 455.271(6) (a) provides as follows:

(6) (a) A delinquent status licensee must affirmatively apply with a complete application, as defined by rule of the board, or the department if there is no board, for active or inactive status during the licensure cycle in which a licensee becomes delinquent. Failure by a delinquent status licensee to become active or inactive before the expiration of the current licensure cycle shall render the license void without any further action by the board or the department.

<sup>5</sup> This finding is based on Petitioner's testimony. No written communication from Respondent to Petitioner as to the status of his licensure was introduced as an exhibit. Likewise, no written communication from Petitioner to Respondent inquiring as to the status of his licensure was introduced as an exhibit.

<sup>6</sup> Ms. Wynn testified on cross-examination as follows beginning on Page 49, line 20, of the Transcript:

Q. . . . If a contractor takes continuing education credit - if a contractor is deficient in continuing education credits during a certain renewal cycle and he takes them subsequent to that renewal cycle so that he can reinstate the license, do the excess credits apply to the retroactive cycle, to the prior cycle in which the deficiency occurred?

A. Generally they do not unless the staff [of the Department of Business and Professional Regulation's Bureau of Education and Testing] manually post-dates the CEs.

Q. So in this situation these September - at least the September 29th, 2008 credits would have had to have been manually post-dated to apply to his 2004-2006 period.

A. Correct.

Ms. Wynn was not asked why credits earned subsequent to the expiration of the 2004-2006 biennial period were not applied retroactively so as to cure the deficiency.

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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.