

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY LICENSING )  
BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-4156PL  
 )  
ANDRES R. VILLARREAL, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on November 4, 2011, by video teleconference at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Kyle Christopher, Esquire  
Pooja S. Patel, Esquire  
Department of Business and  
Professional Regulation  
1900 North Monroe Street, Suite 42  
Tallahassee, Florida 32399-2202

For Respondent: Diane S. Perera, Esquire  
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the allegations contained in the Administrative Complaint, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On July 8, 2011, Petitioner, Department Business and Professional Regulation, Construction Industry Licensing Board, filed a three-count Administrative Complaint ("Complaint") against Respondent, Andres R. Villarreal. Specifically, Petitioner alleges in Count One of the Complaint that Respondent entered a plea to a crime that directly relates to the practice of contracting or to the ability to practice contracting, in violation of section 489.129(1)(b), Florida Statutes. In Count Two of the Complaint, Petitioner contends that Respondent is guilty of entering a plea to a crime that relates to the practice of his profession or to the ability to practice his profession, contrary to section 455.227(1)(c), Florida Statutes. Finally, in Count Three, Petitioner asserts that Respondent is in violation of section 455.227(1)(t), Florida Statutes, by failing to timely report his plea to the Construction Industry Licensing Board.

Respondent timely requested a formal hearing to contest the allegations, and, on August 16, 2011, the matter was referred to the Division of Administrative Hearings ("DOAH") and assigned to

Administrative Law Judge John G. Van Laningham. On November 3, 2011, Judge Van Laningham transferred the instant matter to the undersigned.

As noted above, the final hearing in this matter was held on November 4, 2011, during which Petitioner introduced 10 exhibits, numbered 1-2 and 7-14. Respondent testified on his own behalf and introduced 14 exhibits, labeled A through N. Following the final hearing, Respondent filed the deposition transcript of Jak Wadley (Respondent's probation officer), which has been accepted—in accordance with an order previously issued by Judge Van Laningham—in lieu of Mr. Wadley's personal appearance at the final hearing.

The final hearing Transcript was filed with DOAH on November 29, 2011. Both parties timely submitted proposed recommended orders, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### A. The Parties

1. Petitioner, the Department of Business and Professional Regulation, Construction Industry Licensing Board, is the agency charged with the responsibility for, among other things, the licensure of individuals who wish to engage in contracting in the State of Florida, as well as the investigation and

prosecution of complaints against individuals who have been so licensed.

2. Since 1992 and at all times material to this proceeding, Respondent has been licensed in the State of Florida as a certified general contractor, having been issued license number CGC 55103.

3. In November 2003, Respondent chose not to contest an allegation that he assisted an unlicensed person in the prohibited uncertified and unregistered practice of contracting, in violation of section 489.129(1)(d), Florida Statutes. As a penalty, Respondent was assessed an administrative fine in the amount of \$585.29. Petitioner has presented no other evidence of disciplinary history against Respondent's general contractor's license.

B. Instant Allegations

4. In an information filed on or about April 8, 2008, the State Attorney for the Eleventh Judicial Circuit of Florida charged Respondent with fourteen criminal offenses, all but two of which were later dismissed.

5. Counts Three and Four of the charging document, to which Respondent ultimately pleaded guilty, alleged that Respondent had violated section 838.016(1), Florida Statutes, a second degree felony, by accepting unlawful compensation or

reward for official behavior. Specifically, the information alleged, in pertinent part:

Count 3

ANDRES VILLARREAL, beginning on or about JANUARY 1, 2003[,] and continuing through DECEMBER 31, 2005, in the County and State aforesaid, being a public servant, to wit: CHIEF BUILDING CODE COMPLIANCE OFFICER FOR THE CITY OF MIAMI BEACH, did unlawfully, feloniously, and corruptly request, solicit, accept, or agree to accept from Michael Stern any pecuniary or other benefit not authorized by law, to wit: CHECKS and/or CASH, GOOD AND LAWFUL CURRENCY OF THE UNITED STATES OF AMERICA FOR PURCHASE OF A WAREHOUSE, for the past, present, or future performance, non-performance, or violation of any act or omission which said public servant represented as being within the official discretion of a public servant, in violation of a public duty and/or in performance of a public duty, to wit: EXPEDITING THE APPROVAL OF PLANS BY THE CITY OF MIAMI BEACH BUILDING DEPARTMENT, in violation of s. 838.016(1), Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida. . . .

\* \* \*

Count 4

ANDRES VILLARREAL, on or about SEPTEMBER 20, 2003, in the County and State aforesaid, being a public servant, to wit: CHIEF BUILDING CODE COMPLIANCE OFFICER FOR THE CITY OF MIAMI BEACH, did unlawfully, feloniously, and corruptly request, solicit, accept, or agree to accept from Michael Stern any pecuniary or other benefit not authorized by law, to wit: CHECK NO. 08919 PAYABLE TO TRITON INVESTMENT IN THE SUM OF

THIRTY THOUSAND DOLLARS (\$30,000.00), for the past, present, or future performance, non-performance, or violation of any act or omission which said public servant represented as being within the official discretion of a public servant, in violation of a public duty and/or in performance of a public duty, to wit: EXPEDITING THE APPROVAL OF PLANS BY THE CITY OF MIAMI BEACH BUILDING DEPARTMENT, in violation of s. 838.016(1) Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida. . . .

6. Although Respondent pleaded guilty to the foregoing charges on February 11, 2010,<sup>1/</sup> the court deferred sentencing to a later date and permitted Respondent to remain at liberty.<sup>2/</sup> Subsequently, on March 17, 2010, Respondent was adjudicated guilty on both charges and sentenced to concurrent, three-year terms of probation. In addition, as special conditions of probation, Respondent was ordered to serve nine months in the Dade County Jail—which commenced on the date of sentencing—in connection with Count Three, followed by a consecutive term of nine months incarceration for Count Four. Finally, Respondent was directed to pay \$583 in court costs, \$1,000 for the cost of prosecution, and \$5,000 to the Florida Department of Law Enforcement for the cost of investigation.

7. At the time of his plea to the criminal charges, Respondent held—in addition to his general contractor's license, which is the subject of this proceeding—a license as a

building inspector issued by the Department of Business and Professional Regulation, Florida Building Code Administrators and Inspectors Board ("Inspectors Board").

8. Although the Inspectors Board and several employees of the Department of Business and Professional Regulation—i.e., Ms. Elizabeth Henderson and Ms. Karen Shivers, who served, respectively, as an attorney and an administrative assistant with the Inspectors Board—were aware of the criminal case and timely learned of Respondent's plea to the charges, it is undisputed that Respondent did not notify the Construction Industry Licensing Board in writing within 30 days of the plea. Significantly, while the Inspectors Board and Construction Industry Licensing Board are both part of the Department of Business and Professional Regulation, each constitutes a separate and distinct entity.

9. In June 2011, following an early release from the incarcerative portion of his sentence, Respondent began to report on a monthly basis to Mr. Jak Wadley, a probation officer with the Florida Department of Corrections. To date, Respondent has fully complied with all general and special conditions of his probation.

CONCLUSIONS OF LAW

A. Jurisdiction

10. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. The Burden and Standard of Proof

11. This is a disciplinary proceeding in which Petitioner seeks to discipline Respondent's professional license. Accordingly, Petitioner must prove the allegations contained in Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

12. Clear and convincing evidence:

[R]equires 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. Petitioner's Authority to Impose Discipline; The Charges Against Respondent

13. Section 489.129, Florida Statutes, provides that disciplinary action may be taken against a certificateholder,



registrant, or licensee if it is found that the individual has committed certain enumerated offenses.

14. In Counts One, Two, and Three of the Complaint, Petitioner alleges, respectively, that Respondent has violated the following statutory provisions: section 489.129(1)(b), section 455.227(1)(c), and section 455.227(1)(t). These provisions, each of which is discussed separately below, must be strictly construed in favor of Respondent. See, e.g., Jonas v. Fla. Dep't of Bus. & Prof'l Reg., 746 So. 2d 1261, 1262 (Fla. 3d DCA 2000) ("[S]tatutes such as those at issue authorizing the imposition of discipline upon licensed contractors are in the nature of penal statutes, which should be strictly construed.").

D. Count One: Section 489.129(1)(b)

15. As noted above, Petitioner alleges in Count One of the Complaint that Respondent violated section 489.129(1)(b), which authorizes discipline for:

Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of contracting or the ability to practice contracting.

16. Respondent has demonstrated by clear and convincing evidence that Petitioner pleaded guilty to, and was subsequently convicted of, two felony counts of accepting compensation for official behavior. The pivotal issue, therefore, is whether the

crimes to which Petitioner pleaded guilty directly relate to the practice of contracting or to the ability to practice contracting.

17. To resolve these questions, it is not necessary to evaluate Respondent's "technical ability" to practice contracting, nor must Petitioner necessarily demonstrate that Respondent's criminal acts are referenced in the statutory definition of contractor. See Doll v. Dep't of Health, 969 So. 2d 1103 (Fla. 1st DCA 2007). In Doll, the court held:

Several cases demonstrate that, although the statutory definition of a particular profession does not specifically refer to acts involved in the crime committed, the crime may nevertheless relate to the profession. In *Greenwald v. Department of Professional Regulation*, the court affirmed the revocation of a medical doctor's license after the doctor was convicted of solicitation to commit first-degree murder. 501 So. 2d 740 (Fla. 3d DCA 1987). The Fifth District Court of Appeal has held that although an accountant's fraudulent acts involving gambling did not relate to his technical ability to practice public accounting, the acts did justify revocation of the accountant's license for being convicted of a crime that directly relates to the practice of public accounting. *Ashe v. Dep't of Prof'l Regulation, Bd. of Accountancy*, 467 So. 2d 814 (Fla. 5th DCA 1985). We held in *Rush v. Department of Professional Regulation, Board of Podiatry*, that a conviction for conspiracy to import marijuana is directly related to the practice or ability to practice podiatry. 448 So. 2d 26 (Fla. 1st DCA 1984). These cases demonstrate, in our view, that appellee did not err by concluding Doll's

conviction was "related to" the practice of chiropractic medicine or the ability to practice chiropractic medicine. We therefore affirm appellee's actions finding appellant in violation of section 456.072(1)(c) and revoking appellant's license.

969 So. 2d at 1006 (emphasis added); Dep't of Bus. & Prof'l Reg., Constr. Industry Licensing Bd. v. Nowell, Case No. 08-4836, 2009 Fla. Div. Adm. Hear. LEXIS 463 (Fla. DOAH Jan. 27, 2009) (citing Doll and concluding that plea to mail fraud directly related to the practice of contracting or the ability to practice contracting).

18. Beginning with the question of whether the convictions directly relate to Respondent's ability to practice contracting, the foregoing authority instructs that Petitioner need not prove that the crimes demonstrate a lack of technical proficiency on Respondent's part. That begs the question, however: to what does "ability" refer in this context if not Respondent's skill as a contractor?

19. The undersigned concludes that one answer is found in section 489.111, Florida Statutes, which enumerates the necessary qualifications for a contractor's licensure:

- (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 according to one of the following criteria:

1. Has received a baccalaureate degree . . . .
2. Has a total of at least 4 years active experience as a worker . . . .

\* \* \*

(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 a 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.

(emphasis added).

20. As the foregoing language reveals, an individual is ineligible—i.e., lacks the ability—to engage in the practice of contracting where there is a absence of good moral character that bears a substantial connection to the professional responsibilities of a contractor.

21. In this case, the undersigned is persuaded, by clear and convincing evidence, that Respondent lacks good moral character by virtue of his felony convictions for accepting unlawful compensation—\$30,000 in one of the counts—in exchange for expediting the approval of building plans. Such dishonest

and corrupt<sup>3/</sup> acts—which occurred in a professional context and demonstrate Respondent's susceptibility to the allure of easy and ill-gotten remuneration—bear a substantial connection to the duties of a professional contractor, which are defined as follows:

(3) "Contractor" means the person who is qualified for, and is only responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to, submits a bid to, or does himself or herself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others. . . .

(a) "General contractor" means a contractor whose services are unlimited as to the type of work which he or she may do, who may contract for any activity requiring licensure under this part, and who may perform any work requiring licensure under this part. . . .

§ 489.105(3), Fla. Stat. (emphasis added); Alfonso v. Dep't of Bus. & Prof'l Reg., Constr. Industry Licensing Bd., Case No. 05-4711, 2006 Fla. Div. Adm. Hear. LEXIS 358 (Fla. DOAH July 26, 2006) (noting that a licensed contractor "may typically collect funds from his client and disburse them to vendors . . . . Contractors could also have access and/or keys to houses of persons from whom they are working. These responsibilities require the contractor to act prudently and reasonably.").

22. For these reasons, Respondent's convictions directly relate to his ability to practice contracting and he is therefore in violation of section 489.129(1)(b), as charged in Count I of the Complaint. In light of this conclusion, it is unnecessary to determine if the criminal offenses directly relate to the "practice of contracting."

E. Count Two: Section 455.227(1)(c)

23. Next, Petitioner contends—as an overlapping allegation—that Respondent is in violation of section 455.227(1)(c), which provides that an individual holding an occupational license issued by the Department of Business and Professional Regulation is subject to discipline for:

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.

(emphasis added).

24. As the undersigned has already found a violation of section 489.129(1)(b), which applies specifically to contractors and mirrors the language of section 455.227(1)(c), to return a finding of guilt in connection with Count Two would impermissibly subject Respondent to multiple administrative punishments for the same misconduct. See Dep't of Health, Bd.

of Physical Therapy Practice v. Cueto, Case No. 11-1271 (Fla. DOAH July 19, 2011).

25. In Cueto, a licensed physical therapist's plea to the offense of grand theft culminated in the filing of an administrative complaint that charged her with violating section 486.125(1)(c)—a provision that authorizes discipline where a plea of guilty or nolo contendere is entered to a crime that "directly relates to the practice of physical therapy"—and section 456.073(1)(c), which permits discipline where a licensed health care provider (e.g., physician, chiropractor, nurse, etc.) enters a plea of guilty or nolo contendere "to a crime relating to the practice of the licensee's profession." Although the Administrative Law Judge ("ALJ") found that the licensee's criminal plea constituted a violation of section 486.125(1)(c), the statutory provision specific to physical therapists, the ALJ declined to return a finding of guilt with respect to section 456.073(1)(c), the general statute:

Additionally, or in the alternative, the Department charged Cueto under section 486.125(1)(k) (violating any provision of chapter 486 or chapter 456 subjects licensee to punishment), alleging that her no contest plea was disciplinable pursuant to section 456.073(1)(c), which makes it an offense to enter a plea of guilty or nolo contendere to a crime relating to the practice of the licensee's profession. The undersigned need not decide in this case whether it is legally permissible to charge a physical therapist under section 456.073(1)(c)—a

general statute which applies without apparent limitation to all licensed health care providers—as an alternative to charging the therapist under section 486.125(1)(c), which is a specific statute applicable only to licensed physical therapists. See B.D.M. Fin. Corp. v. Dep't of Bus. & Prof'l Reg., 698 So. 2d 1359, 1362 (Fla. 1st DCA 1997) (agency erred in revoking registration under statute generally authorizing "affirmative action" to enforce law because another statute having more rigorous criteria specifically addressed revocations) . . . . The outcome here happens to be the same under either section. At any rate, moreover, Cueto's criminal conviction constitutes but a single disciplinable "act" for which she cannot fairly receive multiple administrative punishments. Cf. Syder v. State, 921 So. 2d 871, 873 (Fla. 4th DCA 2006) (Double Jeopardy Clause prohibits the government from securing multiple criminal convictions based on same conduct).

Id. (emphasis added); Dep't of Prof'l Reg. v. Peebles, Case No. 90-0224, 1990 Fla. Div. Adm. Hear. LEXIS 6410 (Fla. DOAH July 9, 1990) ("Penalties for the other alleged violations need not be addressed as the Respondent should not receive multiple punishments under different subsections . . . for the same misconduct"); see also Dep't of Bus. & Prof'l Reg., Bd. of Veterinary Med. v. Aleong, Case No. 07-2415, 2008 Fla. Div. Adm. Hear. LEXIS 32 (Fla. DOAH Jan. 23, 2008) (concluding that the "overlapping of statutory or rule prohibitions is not permissible.").



26. Persuaded by Cueto's reasoning, the undersigned concludes that it is unnecessary—and inappropriate—to find Respondent in violation of section 455.227(1)(c).

F. Count Three: Section 455.227(1)(t)

27. Finally, in Count Three of the Administrative Complaint, Petitioner alleges that Respondent violated section 455.227(1)(t), which provides, in relevant part, that a licensee is subject to discipline for:

Failing to report in writing to the board [i.e., the Construction Industry Licensing 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.

(emphasis added).

28. While it is undisputed that Respondent failed to notify the Construction Industry Licensing Board in writing within 30 days of his February 11, 2010, guilty plea (or subsequent conviction on March 17, 2010), he nevertheless contends that no violation of section 455.227(1)(t) has occurred because: 1) he was incarcerated and therefore unable to make a written report; and 2) employees of the Department of Business and Professional Regulation were aware of the charges.

29. Respondent's first argument is rejected, as section 455.227(1)(t) contains no exceptions to the reporting

requirement. In any event, Respondent's contention is unavailing in light of the fact that he remained out on bond for over 30 days following the entry of his guilty plea on February 11, 2010 (which triggered his statutory obligation to report), during which time he could have easily complied with section 455.227(1)(t).

30. Turning to Respondent's second argument, it is true that two employees of the Department of Business and Professional Regulation were timely made aware of his criminal charges. Significantly, however, those employees did not serve the Construction Industry Licensing Board, but rather, the Florida Building Code Administrators and Inspectors Board—a separate and distinct entity within the Department of Business and Professional Regulation. As the plain language of section 455.227(1)(t) obligated Respondent to make a written report to "the board" (the Construction Industry Licensing Board, for the purposes of this proceeding), as opposed to some other professional board or to the Department of Business and Regulation generally, Respondent's guilt has been demonstrated by clear and convincing evidence.

#### G. Penalty

31. To determine the appropriate punitive action to recommend in this case, it is necessary to consult the "normal penalty ranges" enumerated in Florida Administrative Code Rule

61G4-17.001. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

32. Beginning with Count One, Respondent's violation of section 489.129(1)(b), the guidelines provide the following penalty range:

Minimum: \$2,500 fine and/or probation, or suspension.

Maximum: \$10,000 fine<sup>[4/]</sup> and revocation.

Fla. Admin. Code R. 61G4-17.001(1)(b).

33. Various aggravating and mitigating factors are enumerated in Florida Administrative Code Rule 61G4-17.002, which include, but are not limited to, the following:

(1) Monetary or other damage to the licensee's customer . . . .

(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.

34. In its Proposed Recommended Order, Petitioner argues for the revocation of Respondent's general contractor's license and the imposition of the maximum fine—the harshest possible penalty—based upon Respondent's prior disciplinary history (a single violation in 2003 that resulted only in a fine) and "other aggravating factors," which include:

[T]he serious nature of the criminal offense, the duration of the criminal activity, and Respondent's lack of compliance with the order of the [Florida Building Code Administrators and Inspectors Board] . . . .

(Pet. PRO at 26-27).

35. While Respondent's prior instance of discipline constitutes a valid aggravating circumstance, the undersigned is not persuaded that the "nature" of the criminal offense in this case is meaningfully worse than myriad other illegal acts that relate to the practice of contracting or a licensee's ability to practice contracting. Indeed, in the undersigned's judgment, Respondent's behavior—accepting unlawful compensation from a willing accomplice to expedite the approval of building plans—is, for example, less egregious in the licensure context than a

contractor who steals funds from an innocent homeowner and causes tangible financial harm. Accordingly, the nature and duration of Respondent's offense will not be treated as aggravating factors that warrant revocation.

36. With respect to the argument the penalty should be maximized based upon Respondent's concession during the final hearing that he has yet to pay the fine imposed in the case involving his building inspector's license (which has been revoked), Petitioner ignores the fact that the unpaid fine is unrelated to Respondent's general contractor's license, which is regulated by a separate professional board. Further, even assuming that non-compliance with an order of a different professional board could be properly considered, there is no evidence that Respondent's non-payment of the fine is willful. On the contrary, Respondent credibly testified that he intends to pay the fine and that his attorney is attempting to establish a repayment plan with the state.

37. The lone aggravating factor in the case—the single instance of prior discipline—and the nature of Respondent's misconduct must be weighed against two applicable mitigating circumstances. First, Respondent has been licensed as a general contractor for nearly 20 years, which constitutes a significant mitigator. Further, in light of Respondent's credible testimony

that he presently earns a living as a general contractor, revocation of his license would destroy his livelihood.

38. Had Respondent's felonious behavior occurred in a setting in which he directly utilized his general contractor's license (e.g., stealing property from a customer's residence while on the job or misappropriating funds intended for the payment of subcontractors), the undersigned would not hesitate to recommend the revocation of Respondent's license. Under the facts presented, however, it is concluded that Respondent is amenable to rehabilitation and will be able to practice contracting in the future without presenting a danger to the public.

39. Accordingly, with respect to Count One, the undersigned recommends a 12-month suspension of Respondent's license, to be followed by a two-year term of probation, and the imposition of a \$4,000 fine. It is further recommended that the Construction Industry Licensing Board impose whatever probationary conditions it deems appropriate.

40. Turning to Count Three, Respondent's violation of section 455.227(1)(t) for the failure to timely report his guilty plea, Petitioner argues for the revocation of Respondent's license and the imposition of a \$5,000 fine.

41. As the penalty guidelines provide no recommended penalty for a violation of section 455.227(1)(t), it is helpful

to examine the punishment ranges established by other professions regulated by the Department of Business and Professional Regulation, which typically provide that a first offense should be penalized by a reprimand and/or a fine.<sup>5/</sup> See Fla. Admin. Code R. 61G15-19.004(2)(m) (board of professional engineers; providing guideline punishment of reprimand up to a \$5,000 fine for a first violation of section 455.227(1)(t)); Fla. Admin. Code R. 61H1-36.004(2)(aa) (board of accountancy; establishing reprimand as recommended penalty for first violation of section 455.227(1)(t)); Fla. Admin. Code R. 61J1-8.002(3)(ii) (real estate appraisal board; establishing reprimand and administrative fine of \$1,000 for first violation of section 455.227(1)(t)); see also Fla. Admin. Code R. 61G1-12.005(3)(d) (board of architecture and interior design; providing that a violation of section 455.227(1)(t) may be resolved by the issuance of a citation and the imposition of a \$250 fine).

42. Informed by the guidelines established by other professional boards for violations of section 455.227(1)(t), the undersigned concludes that an appropriate penalty under the circumstances of this case is the issuance of a reprimand and the imposition of a \$1,000 fine.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Construction Industry Licensing Board:

1. Finding that Respondent violated section 489.129(1)(b), Florida Statutes, as charged in Count One of the Complaint; suspending Respondent's general contractor's license for a period of 12 months, followed by a two-year term of probation with any conditions deemed appropriate by the Board; and imposing a fine of \$4,000.

2. Dismissing Count Two of the Complaint.

3. Finding that Respondent violated section 455.227(1)(t), Florida Statutes, as charged in Count Three of the Complaint; issuing a reprimand; and imposing a fine of \$1,000.

DONE AND ENTERED this 19th day of December, 2011, in Tallahassee, Leon County, Florida.



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EDWARD T. BAUER  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of December, 2011.

ENDNOTES

<sup>1/</sup> See page one of Petitioner's Exhibit Ten.

<sup>2/</sup> Although Petitioner argues that Respondent was sentenced on February 11, 2010, the date Respondent pleaded guilty, the exhibits refute this contention. Specifically, page two of Petitioner's Exhibit Ten, which is part of a three-page court document dated February 11, 2010, reads, "court costs deferred until sentencing." Further, page four of Petitioner's Exhibit Ten demonstrates that Respondent's fingerprints were not taken until March 17, 2010, which indicates—consistent with Petitioner's Exhibit 11, the Order of Probation—that sentencing did not occur on the date of the guilty plea.

<sup>3/</sup> The crime to which Respondent pleaded guilty, accepting unlawful compensation for official behavior, requires proof that the public servant acted "corruptly." § 838.016(1), Fla. Stat. In turn, section 838.014(4), Florida Statutes, defines "corruptly" as "acting knowingly and dishonestly for a wrongful purpose."

<sup>4/</sup> To the extent that rule 61G4-17.001(1)(b) authorizes a maximum fine of \$10,000, it is in conflict with section 455.227(2)(d), Florida Statutes, which provides for the imposition of an administrative fine "not to exceed \$5,000 for each count or separate offense." Petitioner stipulates, and the undersigned agrees, that the statutory provision controls.

<sup>5/</sup> The undersigned is aware that in the absence of a guideline penalty for a particular statutory or rule violation, "the guidelines penalty for the offense most closely resembling the omitted violation shall apply." See Fla. Admin. Code R. 61G4-17.001(6). It is determined, however, after a careful review of the entire disciplinary guidelines, that none of the violations enumerated in rule 61G4-17.001 bear even a remote resemblance to section 455.227(1)(t), and as such, it would be fundamentally unfair to Respondent for the undersigned to choose one arbitrarily. For that reason, the penalty guidelines established by other professional boards were consulted in the formulation of an appropriate penalty for Count Three.

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.