

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY )  
LICENSING BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 12-1970PL  
 )  
LARRY M. PROVENCAL, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

On June 15, 2012, a hearing was held pursuant to sections 120.57(1) and 120.574, Florida Statutes (2012), by means of video teleconferencing with sites in Jacksonville and Tallahassee, Florida, before Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kyle Christopher, Esquire  
James Fortunas, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399

For Respondent: Larry M Provencal, pro se  
1232 Wild Turkey Court  
St. Johns, Florida 32259

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated section 489.129(1)(b), Florida Statutes (2010), by being convicted or found guilty of, or entering a plea of nolo

contendere to, regardless of adjudication, a crime directly related to the practice or the ability to practice contracting. If so, it must also be determined what penalty should be imposed for the violation.

#### PRELIMINARY STATEMENT

On May 4, 2012, Petitioner, the Department of Business and Professional Regulation ("Petitioner" or "the Department") filed an Administrative Complaint charging Respondent, Larry M. Provencal ("Respondent" or "Mr. Provencal") with violating section 489.129(1)(b). On May 24, 2012, Respondent filed an election of rights form disputing allegations in the Administrative Complaint and requesting a hearing pursuant to section 120.57(1). On June 1, 2012, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On that same day, the Department moved for summary hearing pursuant to section 120.574(b), alleging that the issues in the hearing would be limited in scope and that Respondent was obligated to report for incarceration on June 21, 2012. The parties were in agreement that the hearing should be conducted before Respondent was obligated to report. Accordingly, on June 5, 2012, a Notice of Summary Final Hearing by Video Teleconference was issued, scheduling the case for hearing on June 15, 2012, and the case proceeded as scheduled.

Prior to hearing, the parties submitted a Joint Prehearing Stipulation in which certain facts were stipulated to and, where relevant, have been incorporated into the Findings of Fact below. At hearing, Petitioner presented the testimony of Respondent, Larry Provencal, and Petitioner's Exhibits 1-5 were admitted into evidence without objection. Respondent testified on his own behalf and submitted no exhibits. The one-volume Transcript was filed with the Division on July 11, 2012. Both parties submitted Proposed Final Orders that have been considered in the preparation of this Final Order.

#### FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of contractors pursuant to section 20.165 and chapters 455 and 489, Florida Statutes.

2. Respondent holds an active license as a certified general contractor, having been issued license number CGC 1515398 on April 30, 2008. He is also the qualifier for Pro Group Construction, Inc. Respondent's license expires August 31, 2014.

3. On or about October 15, 2009, Respondent was charged by the United States Government in a one-count Information with conspiracy to commit wire and mail fraud in violation of 18 U.S.C. § 371.

4. On April 5, 2011, Respondent pled guilty to Count I of the Information, and was adjudicated guilty.

5. On March 20, 2012, Respondent was sentenced to incarceration for one year and one day, supervised release for a period of three years upon completion of his prison sentence, and payment of restitution in the amount of \$182,294.83 to Wells Fargo Bank.

6. Included in the terms of supervision, are the following:

\* The Defendant shall provide the probation officer access to any requested financial information.

\* The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, acquisitions or obligating himself for any major purchases without approval of the probation officer.

\* The defendant shall be prohibited from engaging in any employment related to the buying and selling of real estate.

7. The scheme to which Respondent pled guilty involved fraudulent statements to a lending institution, i.e., Wells Fargo Bank, to induce the lender to believe that buyers had the funds to make down payments on foreclosed properties in order to qualify for loans when in fact the buyers did not have those funds.

8. The conduct from which the criminal charges arose occurred prior to Respondent's licensure as a certified general contractor. The guilty plea and the judgment and sentencing all occurred while Respondent held his contractor's license.

9. Respondent admitted at hearing that his actions, which resulted in the criminal proceedings, were wrong, and he takes

responsibility for his wrongdoing. He asserts, however, that because he was not licensed at the time of the conduct, it has nothing to do with his license as a certified general contractor. He was, instead, licensed as a mortgage broker.

10. However, contractors routinely interact with customers, deal with contracts for the building of or improvement of buildings, handle money and checks, and have direct involvement with lending institutions. Respondent admitted that, if he had an employee with a conviction for a crime such as the crime for which he pleaded guilty, that employee would not be permitted to handle money on behalf of his company.

#### CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569, 120.57(1), and 120.574, Florida Statutes.

12. Ordinarily, license disciplinary proceedings initiated by the Department are presented to the Construction Industry Licensing Board for final agency action, and the administrative law judge submits a recommended order for the Board's consideration. In this case, however, the parties have invoked the summary procedures of section 120.574, which provides in pertinent part:

(1)(b) Within 15 days after service of the initial order, any party may file with the division a motion for summary hearing in accordance with subsection (2). If all

original parties agree, in writing, to the summary proceeding, the proceeding shall be conducted within 30 days of the agreement, in accordance with the provisions of subsection (2).

\* \* \*

(2) In any case to which this subsection is applicable, the following procedures apply:

\* \* \*

(b) Not later than 5 days prior to the final hearing, the parties shall furnish to each other copies of documentary evidence and lists of witnesses who may testify at the final hearing.

(c) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, and to be represented by counsel or other qualified representative.

(d) The record in a case governed by this subsection shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.
2. Evidence received.
3. A statement of matters officially recognized.
4. Proffers of proof and objections and rulings thereon.
5. Matters placed on the record after an ex parte communication.
6. The written decision of the administrative law judge presiding at the final hearing.
7. The official transcript of the final hearing.

(e) The agency shall accurately and completely preserve all testimony in the proceeding and, upon request by any party, shall make a full or partial transcript available at no more than actual cost.

(f) The decision of the administrative law judge shall be rendered within 30 days after the conclusion of the final hearing or the filing of the transcript thereof, whichever is later. The administrative law judge's decision, which shall be final agency action subject to judicial review under s. 120.68, shall include the following:

1. Findings of fact based exclusively on the evidence of record and matters officially recognized.
2. Conclusions of law.
3. Imposition of a fine or penalty, if applicable.
4. Any other information required by law or rule to be contained in a final order.

13. This is a proceeding to take disciplinary action against Respondent's license to practice as a certified general contractor. Because of the penal nature of these proceedings, the Department has the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

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 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

14. The Administrative Complaint charges Respondent with a

violation of section 489.129(1)(b), which authorizes disciplinary action against a licensee or certificateholder for "[b]eing 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."

15. There is no real dispute that Respondent has pled to and has been adjudicated guilty of conspiracy to commit wire and mail fraud. What Respondent disputes is whether the criminal proceeding has anything to do with his practice or ability to practice contracting.

16. Respondent's conviction for conspiracy to commit wire and mail fraud is clearly related to the practice or the ability to practice contracting. In Doll v. Department of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007), a chiropractor pled guilty to a charge of conspiracy to defraud a health beneficiary program in violation of 18 U.S.C. §§ 371 and 1347. In determining that the crimes for which Doll pled guilty were directly related to the practice or the ability to practice chiropractic medicine, the First District stated:

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.

17. The same can be said with respect to the crimes for which Respondent was convicted. See also Mendez v. Dep't of Health, 943 So. 2d 909 (Fla. 1st DCA 2006); Dep't of Health v. Catanese, DOAH No. 07-2864 (DOAH Dec. 19, 2007; Fla. Bd. of Chiro. Med. Mar. 10, 2008); Dep't of Health v. Zamora, DOAH No. 07-1454 (DOAH July 20, 2007; Fla. Bd. of Med. Oct. 22, 2007).

18. While Respondent asserted at hearing that his crimes were not related to his contracting practice, he acknowledged the connection in terms of those functions a contractor performs that are similar to those performed by a mortgage broker. Respondent acknowledged that as a mortgage broker, he had a fiduciary duty to the bank he defrauded. A similar duty exists with respect to clients in the contracting business. The Department argues that contractors are responsible for constructing buildings or

structures in accordance with applicable codes and laws, and are expected to deal honestly with consumers. They handle cash and checks and deal with consumers, suppliers, banks and other financial institutions as a part of the practice. Respondent's conviction, the Department argues, demonstrates Respondent's willingness to illegally profit at the expense of the entity to which he owed a fiduciary duty.

19. Section 489.105(3) defines a contractor in part as:

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; and whose job scope is substantially similar to the job scope described in one of the paragraphs of this subsection. (Emphasis supplied).

20. Respondent is a general contractor, which is further defined as 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 . . . ."

21. Respondent is also the qualifier for Pro Construction, Inc., and governed by the provisions of section 489.119, which provides in pertinent part:

(2) (b)1. An application for registration or certification to qualify a business organization must include an affidavit on a form provided by the board attesting that the applicant has final approval authority for all construction work performed by the business organization and that the applicant has final approval authority on all business matters, including contracts, specifications, checks, drafts, or payments, regardless of the form of payment, made by the business organization, except where a financially responsible officer is approved.

\* \* \*

(c) The board may deny an application for registration or certification to qualify a business organization if the applicant, or any person listed in paragraph (a), has been involved in past disciplinary actions or on any grounds for which an individual registration or certification may be denied. (Emphasis supplied).

22. Clearly, the definitions delineating the scope of Respondent's practice demonstrate that actions taken pursuant to his license involve far more than the technical aspects of construction. The financial aspect of managing construction projects is an integral part of the practice. For Respondent, restrictions on his actions during his supervised release described in paragraph six, restricting his financial activities and prohibiting him from engaging in any employment related to the buying and selling of real estate, would have a direct bearing on his practice of contracting. The conviction is directly related to his ability to practice contracting. The Department has proven a violation of section 489.129(1) (b) by clear and convincing evidence.

23. Section 455.2273, Florida Statutes, requires all professional boards within the Department to adopt disciplinary guidelines which "specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses." Administrative law judges are required to follow the disciplinary guidelines established by the applicable regulatory entity and must state in writing the mitigating or aggravating circumstances upon which the recommended penalty is based.

24. For a violation of section 489.129(1)(b), Florida Administrative Code Rule 61G4-17.001 provides that the minimum penalty is a \$2,500 fine and/or probation or suspension. The maximum penalty is a \$10,000 fine and revocation.

25. Rule 61G4-17.002 identifies the aggravating and mitigating circumstances to be considered in determining the appropriate penalty as follows:

(1) Monetary or other damage to the licensee's customer, in any way associated with the violation, which damage the licensee has not relieved, as of the time the penalty is to be assessed. (This provision shall not be given effect to the extent it would contravene federal bankruptcy law.)

(2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.

(3) The danger to the public.

(4) The number of complaints filed against the licensee.

(5) The length of time the licensee has

practiced.

(6) The actual damage, physical or otherwise, to the licensee's customer.

(7) The deterrent effect of the penalty imposed.

(8) The effect of the penalty upon the licensee's livelihood.

(9) Any efforts at rehabilitation.

(10) Any other mitigating or aggravating circumstances.

26. While Respondent was not licensed at the time of the underlying conduct, he did have a client as a mortgage broker who was harmed, and restitution to the institution is still pending. The second factor does not apply, as the conduct did not involve construction by Respondent. To the extent that there was financial fraud on a lending institution, the public was harmed. A single complaint with a single count was filed against Respondent, and he has been licensed a relatively short period of time. There was no physical damage to the lending institution, and the monetary damage has been considered under paragraph (1). Suspension or revocation will have a significant effect on Respondent's livelihood. Given the amount of the restitution outstanding to be paid upon Respondent's release, Respondent will be paying for his conduct for quite some time.

27. While the Department asserts that Respondent presented no evidence in mitigation, that assertion is incorrect. Respondent testified credibly that what he did was wrong and he

took responsibility for his actions. His un rebutted testimony is that he provided substantial assistance to the federal authorities. His incarceration obviously prevents him from using his license while imprisoned, and he will face significant difficulties when he is released from prison.

28. That being said, the penalty for engaging in the scheme described in the information must be significant enough to create a deterrent effect, yet not deprive Respondent of the ability to ever repay the debt he owes. While Respondent's conduct is serious, it is a single count for conduct that occurred prior to Respondent's licensure.

#### CONCLUSION

In view of the foregoing findings of fact and conclusions of law it is hereby

ORDERED that Respondent has violated section 489.129(1)(b), Florida Statutes (2010) as alleged in the Administrative Complaint. For this violation, Respondent shall pay a fine of \$5,000 and have his license to practice contracting suspended for a period of two years. Following the two-year suspension, Respondent's license shall be on probation for a period of three years, subject to terms to be set by the Construction Industry Licensing Board upon reinstatement.

DONE AND ORDERED this 19th day of July, 2012, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of July, 2012.

COPIES FURNISHED:

Kyle Christopher, Esquire  
Department of Business and  
Professional Regulation  
Suite 42  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202  
kyle.christopher@dbpr.state.fl.us

Larry M. Provencal  
PRO Group Construction, Inc.  
1232 Wild Turkey Court  
Jacksonville, Florida 32259

James Fortunas, Esquire  
Department of Business  
and Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399  
james.fortunas@dbpr.state.fl.us

Ken Lawson, Secretary  
Department of Business  
and Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399

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

Drew Winters, Executive Director  
Construction Industry Licensing Board  
Department of Business  
and Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.