

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 13-0238PL
)
MARK ANTHONY MCGUIRE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On March 28, 2013, Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings conducted a duly-noticed hearing by video teleconference with sites in Jacksonville and Tallahassee, Florida.

APPEARANCES

For Petitioner: Kyle Christopher, Esquire
Katie Elizabeth Sabo, Esquire
Assistant General Counsels
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399

For Respondent: Mark McGuire, pro se
900 Cesary Boulevard, Suite 109
Jacksonville, Florida 32211

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated section 489.129(1)(i), Florida Statutes (2009), by violating section 489.126(2)(a), as alleged in the Amended Administrative Complaint, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On November 5, 2012, Petitioner, Department of Business and Professional Regulation (the Department), filed an Administrative Complaint against Respondent, Mark McGuire (Respondent or Mr. McGuire), alleging that he had violated section 489.129(1)(i), by failing to apply for a permit on a project within 30 days after receipt of the initial payment consisting of over 10 percent of the contract price, in violation of section 489.126(2)(a). On November 26, 2012, Respondent submitted an election of rights form disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to section 120.57(1), Florida Statutes. On January 13, 2013, the case was referred to the Division of Administrative Hearings for the assignment of an administrative law judge.

On January 22, 2013, the case was scheduled for hearing to commence on March 28, 2013, by video teleconference. The matter proceeded as scheduled. Leave to amend the Administrative Complaint was granted March 15, 2013. At hearing, Petitioner presented the testimony of Mark McGuire; Clay County Building

Division Director David Conner; and Theresa Smith. Petitioner's Exhibits 1-9 were admitted into evidence. Respondent testified on his own behalf and presented the testimony of David Conner. No exhibits were submitted by Respondent.

The transcript of the proceedings was filed with the Division on April 17, 2013. Both parties timely submitted Proposed Recommended Orders which have been considered in the preparation of this Recommended Order. All references to Florida Statutes are to the 2009 codification unless otherwise indicated.

FINDINGS OF FACT

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

2. At all times material to these proceedings, Respondent has been licensed as a certified residential contractor in the State of Florida, having been issued license number CRC 057893 in May 2000.

3. During all times material to these proceedings, Respondent has been the primary qualifying agent of Jacksonville Home Improvements, Inc. (JHI).

4. Respondent has been the subject of prior discipline. On or about April 6, 2012, the Construction Industry Licensing Board issued a Final Order against Respondent in Case No. 2011015263, for violating section 489.129(1)(q), Florida Statutes (2009)

(failing to pay a civil judgment related to the practice of contracting within a reasonable time). The Final Order imposed an administrative fine in the amount of \$500.00, costs in the amount of \$246.21, and payment of restitution in the amount of \$39,500, or satisfaction of the outstanding civil judgment. On or about July 12, 2012, Respondent's Motion for a payment plan was denied, and the decision was memorialized by order dated October 11, 2012.

5. As a result of the prior discipline, the records for the Department indicate that his license is currently suspended for failure to comply with the Final Order described in paragraph four.

6. Respondent is also the subject of several other Administrative Complaints, submitted as Petitioner's Exhibit 3. The resolution of these complaints is not at issue in this proceeding, and no evidence was submitted to demonstrate the validity of these complaints. Petitioner's Exhibit 3 was admitted solely for the purpose of determining penalty in accordance with the Board's disciplinary guidelines, which will be discussed below.

7. On or about January 12, 2010, Respondent, d/b/a JHI, entered into a contract with Theresa Smith for renovations of her home at 2266 Mangrove Lane, Green Cove Springs, Florida. Ms. Smith's home had been damaged in a fire, and she and her son

were living in an RV on the property until the home could be repaired. The job involved a structure which is attached to an existing mobile home.

8. The contract price for the job described in the initial contract is \$46,700. The contract specified that Respondent would obtain a permit to complete the listed work; further specified that Respondent would provide all necessary architectural drawings and engineering; and that all specifications and engineering would meet existing state and local building codes.

9. The contract required that Ms. Smith pay a retainer of \$14,010, representing 30 percent of the contract price. Further payments under the contract consisted of an additional 30 percent upon framing and new roof; 30 percent upon plumbing, electric, A/C, and windows; and 10 percent upon completion.

10. On or about January 19, 2010, Respondent accepted a check from Ms. Smith for \$14,010.00, representing the retainer specified in the contract.

11. A standard permit application form must be submitted as part of any permit application to the Clay County Building Department. The application must be complete before the Building Department will accept it for processing.

12. Respondent did not submit a permit application for the job at 2266 Mangrove Lane until March 24, 2010. The application

submitted was signed by Ms. Smith on March 15, 2010, and signed by Respondent on March 24, 2010. No earlier permit application was ever submitted by Respondent to the Building Department for this project.

13. Respondent claims that he did not know that he would be required to have engineered drawings for the project until he inquired at the building department on or about January 19, 2010, and received a call telling him of the requirement the next day. In his view, these discussions with the building department were sufficient to meet the filing requirement even though he admits he submitted nothing on the day he spoke to staff at the building department. His claim is belied by the language of the contract itself.

14. As noted in paragraph eight, the contract specifically indicates that the contractor will provide all necessary architectural drawings and engineering, and that all specifications and engineering will meet existing state and local building codes. These provisions do not appear to be part of the form used for the contract, but instead are part of the specifications for this job. The representation made to the homeowner receiving the proposed contract is that these issues were already contemplated. He also claimed that after the contract for this project was executed, "the governor" changed the law related to the type of structure involved, leaving the

project to the mercy of the local official.^{1/} No evidence of this supposed change was introduced.

15. On or about May 25, 2010, the parties executed an Addendum to the contract, providing for additional work to be performed and requiring an additional payment of \$14,711.00. The total cost of the job, with the work described in the Addendum included, was \$61,411.00.

16. Ms. Smith has paid a total of \$56,731 to complete the repairs on her home. To date, over three years after signing both the initial contract and the Addendum, the construction on the home is far from complete. The air conditioning, duct work, drywall, carpet, flooring, and fixtures still must be installed, and the siding needs to be replaced. Although Respondent has promised he will complete the project, Ms. Smith does not believe he will ever complete the work. She cannot live in the home, and she and her son continue to live in an RV parked on the property.

17. Ms. Smith sought and received an estimate in February 2003 to complete the work on her home and bring the structure up to code. The proposed contract price is \$63,900.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2012).

19. This disciplinary action by Petitioner is a penal proceeding in which Petitioner seeks to suspend or revoke Respondent's license as a certified residential contractor. Petitioner bears the burden of proof to demonstrate the allegations in the Amended Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

20. As stated by the Florida Supreme Court:

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)). Moreover, a licensee can only be disciplined for those violations actually charged. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); and Willner v. Dep't of Prof. Reg., 563 So. 2d 805 (Fla. 1st DCA 1990).

21. Count I of the Amended Administrative Complaint in this case charges Respondent with violating section 489.129(1)(i), by

failing in any material respect to comply with the provisions of chapter 489, part I, Florida Statutes, by having violated section 489.126(2) (a). Section 489.126 provides in pertinent part:

(2) A contractor who receives, as initial payment, money totaling more than 10 percent of the contract price for repair, restoration, improvement, or construction to residential real property must:

(a) Apply for permits necessary to do work within 30 days after the date payment is made, except where the work does not require a permit under the applicable codes and ordinances, and

(b) Start the work within 90 days after the date all necessary permits for work, if any, are issued,

unless the person who made the payment agreed, in writing, to a longer period to apply for the necessary permits or start the work or to longer periods for both.

* * *

(4) Any person who violates any provision of this section is guilty of theft and shall be prosecuted and punished under s. 812.014.

22. Petitioner has proven the allegations in the Amended Administrative Complaint by clear and convincing evidence. Respondent accepted a down payment of 30 percent of the original contract price on January 19, 2010. Accordingly Respondent should have applied for the building permit no later than February 18, 2010. He did not do so until March 24, 2010, over 60 days after accepting the initial payment.

23. Respondent claims that he could not apply for the permit within 30 days because he did not know that drawings would be required until he spoke to building code staff on January 19, 2010. As stated in the Findings of Fact, his claim that he did not know the drawings were required is not credible in light of the other evidence presented, including the express statements regarding architectural drawings and engineering contained in the contract signed on January 12, 2010. Further, section 489.126 provides for an exception to the 30-day requirement if the person making the payment agrees in writing to a longer period to apply for the necessary permits. However, there is no evidence that Ms. Smith agreed, in writing or otherwise, to extend the period of time for applying for the permits. To the contrary, she was seeking to provide a home for her son and has referred to him being "homeless" during the extended construction on the home. Time was clearly "of the essence" for her.

24. Respondent also seems to contend that his inquiry on January 19, 2010, was sufficient to satisfy the requirement of section 489.126(2)(a). However, "application" and "inquiry" are two separate acts. One does not substitute for another, and evidence that Respondent inquired about permitting requirements does not substitute for submission of something for the building department to consider. Section 489.226 does not include contacting the building department regarding the permitting

requirements as an alternative to avoid the ramifications of failing to apply.

25. Pursuant to section 455.2227, the Construction Industry Licensing Board has adopted disciplinary guidelines to provide notice to both the public and licensees of the range of penalties that can be expected for specific violations. In this instance, the violation would be considered a second offense, because rule 61G4-17.003 provides that "a repeat violation is any violation on which disciplinary action is being taken where the same licensee had previously had disciplinary action taken against him . . . ; and said definition is to apply regardless of whether the violation in the present and prior disciplinary actions are of the same or different subsections of the disciplinary statutes."

26. There is not a specific guideline penalty for a violation of section 489.126. Florida Administrative Code 61G4-17.001(1)(i) provides that, for failing in any material respect to comply with the provisions of Part I of chapter 489, the penalty should be the "penalty herein listed for the violation most closely resembling the act underlying the local discipline." There is no local discipline at issue in this case. However, rule 61G4-17.001(6) provides that "the absence of any violation from this chapter shall be viewed as an oversight, and shall not be construed as an indication that no penalty is to be assessed. The

guideline penalty for the offense most closely resembling the omitted violation shall apply.”

27. There are some alternatives to consider in deciding which offense most closely resembles the omitted violation. One possibility, favored by the Department, is the penalty for violation of sections 489.129(1)(b) and 455.227(1)(c) (conviction of a crime relating to contracting). They urge this comparison based upon 489.126(4), which makes any violation a theft punishable pursuant to section 812.014. The guideline penalty for this violation would be a minimum of a \$2,500 fine and/or probation, or suspension to a maximum of a \$10,000 fine and revocation.

28. Another alternative would be the guideline penalty listed in rule 61G4-17.001(m), which provides the penalty range for violating section 489.129(1)(m) (committing incompetency or misconduct in the practice of contracting). The penalty guidelines provide that misconduct or incompetency in the practice of contracting shall include but is not limited to failure to honor a warranty; violation of any provision of Florida Administrative Code Chapter 61G4, or chapter 489, part I; and failure to abide by the terms of a mediation agreement. For violation of any provision of chapter 489, the penalty range for a repeat violation starts with a \$2,500 fine and/or probation or

suspension to a \$10,000 fine and suspension or revocation. Fla. Admin. Code R. 61G4-17.001(1)(m)2.

29. The second alternative, outlined in paragraph 28, appears to be the most appropriate penalty guideline to apply in this case.

30. Rule 61G4-17.001 provides that the Board shall assess the costs of investigation and prosecution, and shall "order the contractor to make restitution in the amount of financial loss suffered by the consumer to that extent that such order does not convene federal bankruptcy law." Fla. Admin. Code R. 61G4-17.001(4) and (5). In addition, rule 61G4-17.002 identifies aggravating and mitigating circumstances that may be considered in the determination of penalty. Those factors include monetary or other damage to the customer, in any way associated with the violation, which damage the licensee has not relieved at the time the penalty is assessed; the danger to the public; the number of complaints filed against the licensee; the length of time the licensee has practiced; the deterrent effect of the penalty imposed; the effect of the penalty upon the licensee's livelihood; and any efforts at rehabilitation.

31. In this case, Respondent is a repeat offender with more disciplinary actions in the pipeline. While the guidelines reference the number of complaints against the licensee as an aggravating factor, the undersigned has given no weight to the

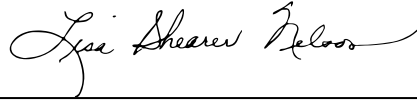
complaints in Petitioner's Exhibit 3, as at this point they remain allegations as opposed to any findings of actual misconduct. However, Ms. Smith continues to be without a home, and Respondent's attitude regarding the requirements of permitting and the responsibilities of fulfilling the contracts to which he has committed is nothing short of cavalier.

32. That being said, the Department did not charge Respondent with misconduct, mismanagement, or abandonment. It charged Respondent with failing to timely apply for a permit after accepting a 30-percent down payment. The recommended discipline must be reasonably related to the charge alleged.

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 finding that Respondent violated section 489.216(2) (a) and therefore violated section 489.219(1) (i). It is further recommended that the Department impose an administrative fine of \$5,000; assess costs to be determined by the Board; suspend his license for a period of two years; and that he be directed to pay restitution to Theresa Smith in the amount of \$56,731.00 (the amount she paid him on the contract).

DONE AND ENTERED this 29th day of May, 2013, in Tallahassee,
Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2013.

ENDNOTE

^{1/} The undersigned is mindful that while the Governor, as head of the executive branch, may advocate new building requirements, it is up to the Legislature to actually file and pass legislation.

COPIES FURNISHED:

Mark Anthony McGuire
Suite 109
900 Cesery Boulevard
Jacksonville, Florida 32211

Katie Elisabeth Sabo, Esquire
Department of Business and
Professional Regulation
Suite 42
1940 North Monroe Street
Tallahassee, Florida 32399

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

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

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.