STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TONY L. PHILLIPS,

Petitioner,

vs. Case No. 15-5003

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,

Respondent.
_____/

RECOMMENDED ORDER

A final hearing was held in this case via video teleconference between sites in Orlando and Tallahassee, Florida, on December 16, 2015, before Suzanne Van Wyk, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Rosemary Hanna Hayes, Esquire
Hayes Law, P.L.
830 Lucerne Terrace
Orlando, Florida 32801

For Respondent: Robert Antonie Milne, Esquire
Douglas Dell Dolan, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

## STATEMENT OF THE ISSUES

Whether Petitioner's application for a certified building contractor's license should be granted, and whether Respondent relied upon an unadopted rule in formulating its intended decision to deny Petitioner's application, in violation of section 120.57(1)(e), Florida Statutes (2015).[1/]

## PRELIMINARY STATEMENT

On July 22, 2015, Respondent issued a Notice of Intent to Deny Petitioner's application for license as a certified building contractor.

Petitioner timely requested a hearing involving disputed issues of material fact to contest the Notice of Intent to Deny. The case was referred to the Division of Administrative Hearings on or about September 9, 2015, and the final hearing was scheduled for, and commenced on, December 16, 2015.

At the final hearing, Petitioner testified on his own behalf, and Petitioner's Exhibits 1 through 4 (including 4-1, 4-2, and 4-3), 6, 7 (including 7-1, 7-2, 7-3, 7-4, 7-5, 7-6, and 7F), 8, 11, and 12 were admitted into evidence. Respondent offered the testimony of Paul Del Vecchio, who was accepted as an expert in construction contracting and experience. Respondent's Exhibits 1 through 3, 5 through 16, 18, and 19 were admitted into evidence.

A two-volume Transcript of the proceedings was filed on January 21, 2016. On February 2, 2016, the undersigned granted an extension until February 12, 2016, for the parties to file their proposed recommended orders. The parties timely filed their respective Proposed Recommended Orders, which have been taken into consideration in preparing this Recommended Order.

## FINDINGS OF FACT

1. Respondent, Construction Industry Licensing Board (Respondent or Board), is charged with administering chapter 489, Part I, Florida Statutes, relating to construction contracting, and issuing licenses to certified building contractors.

2. Petitioner, Tony L. Phillips, applied to the Board for a certified building contractor's license, pursuant to section 489.111, on March 3, 2015. Petitioner passed the required written examination and his application was scheduled for hearing before the Board on May 14, 2015.

3. Building contractors are licensed to construct commercial buildings, and single-dwelling or multiple-dwelling residential buildings, not exceeding three stories in height. See § 489.105(3)(b), Fla. Stat.

4. Section 489.111(2)(c)2. provides eligibility for licensure as a construction contractor. An applicant is eligible for licensure by examination if he or she

> has a total of at least four years of active experience as a worker who has learned the trade by serving an apprenticeship as a skilled worker who is able to command the rate of a mechanic in the particular trade or as a foreman who is in charge of a group of workers and usually is responsible to a superintendent or a contractor or his or her equivalent, provided, however, that at least 1 year of active experience shall be as a foreman. (emphasis added).

5. Florida Administrative Code Rule 61G4-15.001(2)(a), provides the qualifications for certified building contractors, in pertinent part, as follows:

> In the case of applicants for certification in the general or building contractor categories, the phrases 'active experience' and 'proven experience' as used in Section 489.111(2)(c)1., 2., or 3., F.S., shall be defined to mean construction experience in four or more of the following areas:
>
> 1. Foundation/Slabs in excess of twenty thousand (20,000) square feet.
> 2. Masonry walls.
> 3. Steel erection.
> 4. Elevated slabs.
> 5. Precast concrete structures.
> 6. Column erection.
> 7. Formwork for structural reinforced concrete. (emphasis added).

6. In his application, Petitioner listed his experience as a foreman with Jacobs Engineering Group, Inc. (Jacobs), to meet the statutory and rule requirements for active experience in the trade.

7. At all times relevant hereto, Jacobs was a construction engineering inspection consultant for the Florida Department of

Transportation (FDOT). Jacobs performed the inspection of various design-build roadway projects undertaken by construction contractors on behalf of FDOT.

8. Petitioner's application included three specific projects to demonstrate Petitioner's relevant experience: Wekiva Parkway, John Young Parkway Extension, and Baseline Road.

9. The Wekiva Parkway project consisted of a four-lane highway, three category one bridges, a toll gantry, and equipment enclosure. The general contractor charged with construction of this project was the De Moya Group. Jacobs performed the construction engineering inspection role for FDOT. Jacobs' role was quality control and inspection.

10. Petitioner indicated in his application that he was the foreman "charged with overseeing the construction of the work on the bridges, roads and related structures."

11. Jacobs employed Petitioner as a foreman of Jacobs' employees, who conducted inspections of construction work performed by the De Moya Group.

12. Petitioner's duties on the Wekiva project were to perform inspections. Petitioner did not perform construction duties, but rather inspected the construction performed to ensure compliance with the applicable FDOT and contractual requirements. While Petitioner's inspection duties were vital

to ensure the soundness of the facilities under construction, he did not perform construction work.

13. The John Young Parkway project consisted of a flyover over State Road 441, including a large steel girder with integral pier box flyover bridge, sound walls, signalization, sidewalks, asphalt, and reinforced earth walls. The general contractor charged with construction of this project was Southland Construction. Jacobs performed the construction engineering inspection role for FDOT.

14. Petitioner was project foreman for Jacobs on the John Young Parkway project. As such, Petitioner was responsible to ensure that the work was performed in accordance with the contract documents. Petitioner did not perform any construction work or supervise the construction workers employed by Southland Construction.

15. As senior roadway inspector on John Young Parkway, Petitioner had the authority to question the work of the construction crew, and redirect work if it was not being performed per the contract documents or FDOT specifications. If necessary, Petitioner, through the chain of command at Jacobs, could stop work on the project in order to conform work to specifications. However, Petitioner did not perform any construction work on the project.

16. The Baseline Road project consisted of small bridges, small animal crossings, noise walls, drainage structures and gravity walls, signalization, curb gutters, and sidewalks. The general contractor charged with construction of this project was C.W. Roberts Contracting. Jacobs performed the construction engineering inspection role for FDOT.

17. On the Baseline Road project, Petitioner supervised the inspection of all animal crossing structures, as well as the relocation and installation of utilities, and the movement of traffic through the construction site.

18. Petitioner admitted that all of the technical qualifications listed in his application were earned as a Jacobs' employee performing the task of construction engineering inspection on these three projects.

19. All of the experience Petitioner listed in his application was in the execution of projects performed on behalf of FDOT.

20. None of the job descriptions which Petitioner listed in his work experience as road inspector, bridge inspector, utility coordination facilitator, environmental monitoring personnel, and administrator of maintenance of traffic contracts is considered "construction" by the Board.

21. In fact, contracting work on roads, bridges, streets, and highways is exempt from regulation as construction

contracting. See § 489.103(1), Fla. Stat. Thus, even the work performed by the FDOT contractors on those three projects was not "construction" subject to regulation by the Board.

22. The single building or enclosed structure of any kind that Petitioner had any involvement with over the four years of work experience offered in his application was a one-story concrete enclosure to house toll-reading equipment. Petitioner did not supply any further information on this structure.

23. It is clear from the record that Petitioner did not perform any of the construction work himself nor was he a foreman on any of the construction crews. All of the work that he performed concerned the inspection of work performed by construction contractors.

24. Petitioner admitted that he has never built, or supervised the construction of, a single, two, or three-story, habitable, commercial, or residential building.

Unadopted Rules

25. Petitioner alleges that Respondent relied upon non-rule policy in formulating its decision to deny Petitioner's application, in violation of section 120.57(1)(e).

26. Section 120.57(1)(e)1. prohibits agencies from basing agency action that determines the substantial interests of a party on an unadopted rule.

27. The denial of Petitioner's application for a building contractor's license affects Petitioner's substantial interests.

28. A "rule" is "an agency statement of general applicability that implements, interprets, or prescribes law or policy." § 120.52(16), Fla. Stat.

29. Agencies are required to adopt each agency statement defined as a rule by rulemaking procedures set forth in section 120.54. See § 120.54(1)(a), Fla. Stat.

30. Petitioner alleges Respondent maintains three statements which constitute rules, pursuant to section 120.52(16), but which have not been adopted as rules, pursuant to section 120.54, and relied on those statements in formulating its decision to deny Petitioner's application, in violation of section 120.57(1)(e).

31. First, Petitioner maintains the Board denied his application because, on the jobs he submitted to demonstrate his relative experience, he could not "hire or fire" contractors and did not control the "means and methods" of construction. Because these terms are not used in the controlling statute or rule, Petitioner argues that the Board relied upon statements of general applicability which have not been adopted as rules.[2/]

32. During the hearing on Petitioner's application, two of the seven Board members, Mr. Boyette and Mr. Cathey, questioned Petitioner about whether he had control over the "means and

methods" of construction on the projects he listed in his application. Both Board members concluded that, on the projects Petitioner listed as experience relevant to the building contractor's license, he did not control the "means and methods" of construction.

33. "Means and methods" of construction is a term of art in the construction industry referring to the plans for executing the work on a particular project. The term encompasses scheduling different aspects of a project and directing the work of a construction crew and, sometimes, subcontractors.

34. A construction foreman has the ability to direct a construction crew and subcontractors. Thus, having control of the "means and methods" of construction is integral to the job of a construction foreman.

35. At the hearing on Petitioner's application, one of the members, Mr. Boyette, questioned whether Petitioner had authority to hire and fire C.W. Roberts, the prime contractor on the Baseline Road project.

36. A construction foreman may have the authority to hire and fire members of a construction crew, depending on the size of the job.

37. The record reflects that Petitioner's application was denied because he did not meet the requirements for "active

experience" in construction, as defined in the rule, not because he was not empowered to hire and fire members of the construction crew.

38. Second, Petitioner contends that the Board refused to accept an affidavit certifying his construction experience, which is contrary to the rule requirements, thus applied an unadopted rule in reaching its decision to deny his application.

39. Rule 61G4-15.001(1)(a) provides that "[a]ctive experience in the category in which the applicant seeks to qualify shall be verified by affidavits prepared or signed by . . . an architect or engineer . . . who is licensed in good standing . . . listing chronologically the active experience in the trade, including the name and address of employers and dates of employment (which may be corroborated by investigation by the Board).

40. Petitioner did not submit an affidavit with his application. Respondent does not contend Petitioner's application was denied for failure to include the affidavit with his application.

41. At hearing, Petitioner introduced an affidavit from Anthony Caruso, Petitioner's supervisor at Jacobs.

42. In the affidavit, Mr. Caruso certified that Petitioner "has more than four years proven experience as a foreman" in the following areas of construction work: [f]oundation/slabs in

excess of twenty thousand (20,000) square feet, [s]teel erection, [e]levated slabs, [p]recast concrete structures, [c]olumn erection, and [f]ormwork for structural reinforced concrete (six of the seven criteria listed in rule 61G4-15.001).

43. At hearing, Respondent's expert, Paul Del Vecchio, a certified general contractor and former 12-year member of the Board, testified that the Board does not rely on affidavits to verify an applicant's active experience. Mr. Del Vecchio related that the Board had been advised it had no statutory authority to require an affidavit and had discontinued accepting affidavits pursuant to the rule.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to sections 120.569 and 120.57(1).

45. Petitioner, as the license applicant, bears the duty to go forward and the burden of proof by a preponderance of the evidence in this initial licensing case. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).

46. The Florida Legislature deems it necessary in the interest of the public health, safety, and welfare to regulate the construction industry. See § 489.101, Fla. Stat.

47. The Board is created to carry out the provisions of chapter 489, Part 1, relating to regulation of the construction professions. See § 489.107(1), Fla. Stat.

Experience Requirement

48. Rule 61G4-15.001 is clear on its face that Petitioner's application must be denied if it does not evince four years of active construction experience, at least one of which as a foreman.

49. Petitioner's employment with Jacobs, a construction engineering inspection consultant for FDOT, does not constitute "construction experience" pursuant to the rule. While Petitioner's role as foreman of the inspection team was integral to completion of the projects listed on Petitioner's application, he was not engaged in the construction of any of the elements thereof. He was neither engaged in construction as a tradesperson or apprentice, nor actively supervising others in the construction industry.

50. The rule requires the applicant to have active experience "in the category in which the applicant seeks to qualify." Petitioner has no experience in construction of commercial and single-dwelling or multi-dwelling residential buildings, the type of construction which defines "building contractor." See Fla. Admin. Code R. 61G4-15.001(1)(a).

51. Petitioner failed to demonstrate by a preponderance of the evidence that his application for a building contractor's license should be granted.

Reliance on Unadopted Rules

52. Petitioner's contention that the Respondent unlawfully relied upon unadopted rules in formulating its decision to deny his application is without merit. See § 120.57(1)(e), Fla. Stat.

53. Petitioner applied for a building contractor's license as a foreman with four years of active construction experience, pursuant to section 489.111(2)(c)2. Control of the "means and methods" of construction is commonly understood in the construction industry as the role of the construction foreman.

54. As stated by the First District Court of Appeal in State Board of Administration v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010):

> As we said in St. Francis Hospital, Inc. v. Department of Health and Rehabilitative Services, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989):
>
> > It is well established that an agency interpretation of a statute which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create certain rights, or require compliance, or

> to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rulemaking.

See North Star Assoc., Inc. v. Dep't of Fin. Servs., Case No. 11-2433RU (Fla. DOAH July 1, 2011)(agency's statement that registrations as a claimant's representative are licenses is apparent from a literal reading of the statute); My Friend Home Care, Inc. v. Ag. for Health Care Admin., Case No. 10-2657RU (Fla. DOAH July 6, 2010)(agency's denial of licensee's renewal application based upon actions occurring within two years of the renewal application date was readily apparent from the plain language of the statute and, thus, not an unadopted rule); cf. Leonard v. Dep't of Mgmt. Servs., Case No. 11-1529 (Fla. DOAH Sept. 8, 2011; Fla. DMS Nov. 10, 2011)(agency's definition of the phrase "active" employment as synonymous with perfect attendance is an interpretation not readily apparent from a literal reading of the statute); Vazquez v. Dep't of Health, Case No. 08-0490RU (Fla. DOAH Apr. 9, 2008); aff'd, 11 So. 3d 994 (Fla. 1st DCA 2009)(agency statement that statute imposes a "rebuttable presumption" and establishes what will be considered a "prima facie case" was not a simple reiteration of the statutory mandate and was, in fact, "contrary to any reasonable interpretation of the statute.").

55. Petitioner proved that the agency maintains a statement that an applicant for a building contractor's license must have control over the "means and methods" of construction to meet the experience requirement under section 489.111(2)(c)2. However, that statement does not, in and of itself, create rights, require compliance, or otherwise have the direct and consistent effect of law. The term is apparent to members of the industry from a literal reading of the statute.

56. Petitioner did not prove that the Board maintains a statement that an applicant must have the authority to hire and fire construction contractors to qualify for a building contractor's license. The statement by one member of the Board that Petitioner did not "have the ability to hire and fire" does not constitute an agency statement of general application. See Rollins v. Constr. Indus. Lic. Bd., Case No. 09-2968 (Fla. DOAH Nov. 24, 2009)("[A] simple question posed by a single Board member is meaningless.").

57. As to Petitioner's final contention, that, contrary to its rule, the Board refused to accept the affidavit from Petitioner's supervisor, Petitioner likewise failed to demonstrate the Board's reliance on an unadopted rule. Petitioner did not submit the affidavit with his application for consideration by the Board. Petitioner submitted the affidavit as an exhibit at the final hearing.

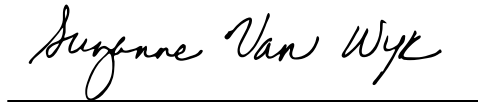
58. Petitioner's application was not denied on the basis that he failed to include an affidavit certifying his active experience, as stated in the rule. Thus, Petitioner's argument that Respondent relied upon an unadopted rule in denying his application is without merit.[3/]

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Business and Professional Regulation, Construction Industry Licensing Board, enter a final order denying Petitioner's application.

DONE AND ENTERED this 10th day of March, 2016, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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 10th day of March, 2016.

ENDNOTES

[1/] Unless otherwise specified herein, all references to the Florida Statutes are to the 2015 version.

[2/] Petition at 3.

[3/] Petitioner apparently sought to introduce the affidavit to bolster his position that his experience with Jacobs qualified as "active experience" pursuant to the rule. The affidavit, accepted over a hearsay objection, did not bolster Petitioner's own testimony. Neither Petitioner's testimony nor the affidavit was persuasive in light of the facts of this case.

COPIES FURNISHED:

Douglas Dell Dolan, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050
(eServed)

Rosemary Hanna Hayes, Esquire
Hayes Law, P.L.
830 Lucerne Terrace
Orlando, Florida 32801
(eServed)

Robert Antonie Milne, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050
(eServed)

Daniel Biggins, Executive Director
Construction Industry Licensing Board
Department of Business and Professional
Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399
(eServed)

William N. Spicola, General Counsel
Department of Business and Professional
Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399
(eServed)

## 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.