

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 16-3251PL

CHARLES ROBERT BOYD,

Respondent.

RECOMMENDED ORDER

This case was presented for a determination by J. Lawrence Johnston, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on a stipulated evidentiary record in lieu of a hearing.

APPEARANCES

For Petitioner: Clayton Thomas Osteen, Esquire
Ian Brown, Esquire
Department of Business
and Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32309

For Respondent: D. Ty Jackson, Esquire
GrayRobinson, P.A.
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Post Office Box 11189
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STATEMENT OF THE ISSUE

The issue in this case is the appropriate penalty to impose on the Respondent for: proceeding on a job without obtaining the applicable local building department permits and inspections, in violation of section 489.129(1)(o), Florida Statutes^{1/}; failing to notify a customer of the Florida Homeowners' Construction Recovery Fund, in violation of section 489.1425; and failing to place his license number on a construction contract, in violation of section 489.119(5)(b).

PRELIMINARY STATEMENT

In July 2014, the Petitioner filed a four-count Administrative Complaint against the Respondent (DBPR case 2013-38631). Twice, the parties agreed to settle, but both settlements were rejected by the Construction Industry Licensing Board.

On January 13, 2016, the Petitioner referred the matter to DOAH. A final hearing was scheduled but was canceled when the Petitioner dismissed Count I for lack of evidence, and the parties entered into a stipulation to facts and law on the remainder of the Administrative Complaint and agreed to present the case for a recommended disposition on a stipulated evidentiary record consisting of Joint Exhibits 1 through 4. The parties filed a Joint Proposed Recommended Order, which has been considered.

FINDINGS OF FACT

1. The 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/}

2. At all times material to these proceedings, the Respondent was licensed as a certified general contractor in the State of Florida, having been issued license CGC 12754.

3. At all times material hereto, the Respondent was the primary qualifying agent of Charles Boyd Construction, Inc. ("Charles Boyd Construction").

4. The Respondent's license is current and active.

5. The Respondent has been subject to prior discipline. On September 21, 1988, the Construction Industry Licensing Board (CILB) issued a Final Order against the Respondent in case 78033 that imposed an administrative fine in the amount of \$2,500 for violating sections 489.129(1)(j) and (m), 489.105(4), and 489.119, Florida Statutes, in 1983 and 1984.

6. On or about December 3, 2012, Joanie Miller Drobnie entered into a contract with Respondent, d/b/a Charles Boyd Construction, for renovations to her residence located at 452 Banana River Boulevard, Cocoa Beach, Florida.

7. The original contract price was \$173,000. Charles Boyd Construction accepted \$175,000. The additional funds represented amounts for extras on the job.

8. On or about January 2, 2013, the Respondent, d/b/a Charles Boyd Construction, obtained Building Permit 13-0366 from the City of Cocoa Beach Building Department for the installation of new windows.

9. Charles Boyd Construction proceeded on interior renovations and performed additional construction contracting services requiring proper licensure without obtaining applicable local building department permits and inspections.

10. The contract at issue failed to contain a statement notifying Ms. Drobnie of her rights under the Florida Homeowner's Construction Recovery Fund.

11. The Respondent's license number does not appear on the contract.

12. The Petitioner and Respondent agree, based on the facts and circumstances in this case, that discipline should not exceed an administrative fine of \$7,000, payment of the Petitioner's costs of \$487.93, and completion of a live, approved seven-hour continuing education course.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction of this case under section 120.569(1), Florida Statutes, even though there is no disputed issue of material fact, because the parties have agreed not to apply section 120.57(2).^{3/}

14. As a state agency seeking to discipline licensee it regulates, the Petitioner has the burden of proving the allegations against the Respondent by clear and convincing evidence. § 120.57(1)(j), Fla. Stat. (2016); Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

15. 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 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); Willner v. Dep't of Prof'l Reg., 563 So. 2d 805 (Fla. 1st DCA 1990).

16. In December 2012, section 489.129(1)(o) made it a violation to proceed on a job without obtaining applicable local building department permits and inspections; section 489.129(1)(i) made it a violation to fail to comply with the provisions of chapter 489, part I; section 489.1425(1) made it a violation to fail to notify a customer of the Florida Homeowners Construction Recovery Fund; and section 489.119(5)(b) required licensees to place their license numbers on construction contracts.

17. It is clear from the evidence and stipulations of the parties that the Respondent violated section 489.129(1)(o) and, by not complying with sections 489.1425 and 489.119(5)(b), violated section 489.129(1)(i).

18. The Respondent is subject to disciplinary action by the CILB pursuant to section 489.129. Disciplinary action under this statute includes, but is not limited to: placing the licensee on probation; reprimanding the licensee; revoking or suspending, or denying the issuance or renewal of, the certificate or registration of a licensee; requiring financial restitution to the consumer; imposing an administrative fine; requiring continuing education; and assessing costs associated with investigation and prosecution of charges.

19. Section 455.2273(5) states that "[t]he administrative law judge, in recommending penalties in any recommended order, must follow the penalty guidelines established by the board or department and must state in writing the mitigating or aggravating circumstances upon which the recommended penalty is based."

20. Florida Administrative Code Rule 61G4-17.001(1)^{4/} sets out the guidelines for penalties to be used, absent aggravating or mitigating circumstances, and subject to other provisions of chapter 489: for a violation of section 489.129(1)(o), a minimum fine of \$2,500 to a maximum fine of \$10,000 and suspension or revocation; for a violation of section 489.1425, a \$1,000 fine; for a violation of section 489.119(5)(b), formerly section 489.119(6)(b), a minimum fine of \$500 to a maximum fine of \$2,500 and probation.

21. Rule 61G4-17.002 provides:

Circumstances which may be considered for the purposes of mitigation or aggravation of penalty shall include, but are not limited to, the following:

(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.

(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.

There was no evidence of mitigating or aggravating circumstances that would justify a departure from the penalty guidelines in rule 61G4-17.001(1).

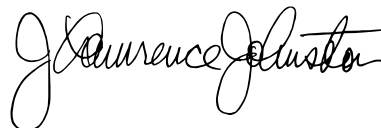
22. Rule 61G4-17.003(1) states that a repeat violation is any violation on which disciplinary action is being taken where the same licensee "previously had disciplinary action taken against him . . . regardless of whether the violations in the present and prior disciplinary actions are of the same or different subsections of the disciplinary statutes." If "the repeat violation is the very same type of violation as the first violation, the penalty . . . will generally be increased over what is otherwise shown for repeat violations" Fla. Admin. Code R. 61G4-17.003(2). The Respondent was disciplined in 1988

for violations occurring in 1983 and 1984 that were not the same as the violations proven in this case and do not justify an increased penalty in this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Construction Licensing Board enter a final order: finding that the Respondent violated section 489.129(1)(o) and, by failing to comply with sections 489.1425 and 489.119(5)(b), violated 489.129(1)(o); imposing an administrative fine of \$7,000; assessing costs in the amount of \$487.93; and requiring the Respondent to complete an approved, live seven-hour continuing education course in addition to any otherwise-required continuing education, with an emphasis on chapter 489 and the rules implementing it.

DONE AND ENTERED this 2nd day of August, 2016, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of August, 2016.

ENDNOTES

^{1/} The substantive law applicable to the alleged violations in this case are the 2012 Florida Statutes.

^{2/} These statutes, which describe the responsibilities of the Petitioner, are found in the 2016 Florida Statutes.

^{3/} These statutes, which state DOAH's jurisdiction in this case, are in the 2016 Florida Statutes.

^{4/} The applicable penalty guidelines are those in version of the Florida Administrative Code that was in effect at the time of the alleged violations.

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.