

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 17-4510PL

MARK LEWIS JENKINS,

Respondent.

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RECOMMENDED ORDER

Upon joint request of the parties, this matter came before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings, on the submitted exhibits and stipulations of the parties, in lieu of hearing.

APPEARANCES

For Petitioner: Ramsey D. Revell, Esquire
Department of Business and
Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32399-2202

For Respondent: Labeed A. Choudhry, Esquire
Ward Damon, Attorneys at Law
4420 Beacon Circle, Suite 100
West Palm Beach, Florida 33407-3281

STATEMENT OF THE ISSUES

Whether Respondent performed an act which assisted a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting, or whether he applied for and obtained a permit without having entered into a contract to perform the work specified in the permit, as set forth in the Administrative Complaint; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On July 8, 2016, the Department of Business and Professional Regulation (Petitioner or Department) issued an Administrative Complaint against Mark Lewis Jenkins (Respondent or Mr. Jenkins) on behalf of the Construction Industry Licensing Board (Board). The complaint charged Respondent with: (1) performing an act which assists a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting; and (2) obtaining a permit without having entered into a contract to perform the work specified in the permit. Respondent disputed material facts alleged in the complaint and requested an administrative hearing.

At a pre-hearing conference held on August 15, 2017, the parties indicated that they believed it might be possible for them to submit a joint stipulation of facts to support a recommended order, without the necessity of conducting a final

hearing. On August 21, 2017, the parties filed stipulated facts as part of a Joint Pre-hearing Stipulation. The stipulation included a request that the final hearing be canceled, and that this tribunal make a recommendation as to the appropriate penalty. An Order canceling the hearing and setting a date for submission of proposed recommended orders was issued on August 22, 2017.

The parties subsequently stipulated to four exhibits, which were accepted into evidence and numbered as Exhibits J-1 through J-4. The parties filed a joint Proposed Recommended Order on August 23, 2017, which was considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect during the last quarter of 2015, when the violations were allegedly committed.

FINDINGS OF FACT

1. The Department of Business and Professional Regulation is the state agency charged with regulating the practice of construction contracting pursuant to section 20.165 and chapters 455 and 489, Florida Statutes.

2. At all times material to these proceedings, Mr. Jenkins was licensed as a certified general contractor in the state of

Florida, having been issued license number CGC 1513481.

Mr. Jenkins' license is current and active.

3. At all times relevant to the Administrative Complaint, Mr. Jenkins was the primary qualifying agent of Abacoa Construction, LLC (Abacoa).

4. Mr. Jenkins was responsible for supervision of all operations of Abacoa; for all field work at all sites; and for financial matters, both for Abacoa in general and for each specific job.

5. On or about October 29, 2015, Robert Maione entered into a contract with John Martinache, d/b/a All 4 One Project, LLC, for renovations to his residence located at 364 Golfview Road, Unit 407, North Palm Beach, Florida 33408.

6. Mr. Maione was aware that Mr. Martinache was unlicensed.

7. On or about December 8, 2015, Mr. Jenkins, d/b/a Abacoa, obtained Building Permit No. 16063 from the Village of North Palm Beach Building Department for electric, HVAC, and plumbing. The permit was for the renovations at the Golfview Road residence.

8. Mr. Martinache proceeded on interior renovations requiring proper licensure without having been certified or registered to engage in the practice of construction contracting in the state of Florida. Mr. Jenkins was aware that Mr. Martinache was not licensed for this work.

9. Mr. Jenkins did not have a contract for the construction at Golfview Road, did not supervise it, and received no compensation for it.

10. Restitution cannot be calculated based on the available facts, as the value of the work and actual damages are unclear. There is no evidence of financial loss suffered by a consumer in this case.

11. It was clearly and convincingly shown that Mr. Jenkins assisted a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting.

12. It was clearly and convincingly shown that Mr. Jenkins applied for and obtained a permit without having entered into a contract to perform the work specified in the permit.

13. Mr. Jenkins has not been subject to prior discipline.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017).

15. Petitioner has authority to investigate and file administrative complaints charging violations of laws regulating the construction industry. § 455.225, Fla. Stat.

16. Section 489.1195(1)(a) provided that all primary qualifying agents for a business organization are jointly and

equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job. Shimkus v. Dep't of Bus. & Prof'l Reg., 932 So. 2d 223, 224 (Fla. 4th DCA 2005).

17. Petitioner seeks disciplinary action against Respondent's license. A proceeding to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Petitioner must therefore prove the charges against Respondent by clear and convincing evidence. Fox v. Dep't of Health, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) (citing Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996)).

18. The clear and convincing standard of proof has been described 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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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 Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

19. Disciplinary statutes and rules "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992).

Count One

20. Respondent was charged with performing an act which assists a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting, in violation of section 489.129(1)(d). Proof of this charge requires that Respondent knew, or had reasonable grounds to know, that the person or entity was uncertified and unregistered.

21. The evidence showed that Respondent applied for a building permit for the renovations at 364 Golfview Road, Unit 407, in North Palm Beach. This act assisted John Martinache, d/b/a All 4 One Project, LLC, who was not certified or registered as a contractor, to engage in the practice of contracting. Respondent admitted that he knew Mr. Martinache was unlicensed.

22. Petitioner proved by clear and convincing evidence that Respondent assisted a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting, in violation of section 489.129(1)(d).

Count Two

23. Respondent was also charged with violation of section 489.129(1)(i), which provided that discipline may be imposed for failing in any material respect to comply with the provisions of sections 489.101 through 489.146.

24. Section 489.127(4)(c) provided in relevant part:

A certified or registered contractor . . . may not apply for or obtain a building permit for construction work unless the certified or registered contractor . . . or business organization duly qualified by said contractor, has entered into a contract to make improvements to, or perform the contracting at, the real property specified in the application or permit.

25. The evidence clearly showed that Respondent had not entered into a contract to renovate the Golfview Road property at the time he applied for and obtained the building permit.

26. Petitioner showed by clear and convincing evidence that Respondent is subject to discipline under section 489.129(1)(i) through his violation of section 489.127(4)(c).

Penalty

27. Penalties in a licensure discipline case may not exceed those in effect at the time the violation was committed. Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

28. Section 455.2273(1), Florida Statutes, required the Board to adopt disciplinary guidelines for specific offenses.

29. Penalties imposed must be consistent with the disciplinary guidelines prescribed by rule. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

30. The legislative intent behind mandatory disciplinary guidelines includes the provision of reasonable and meaningful notice to the public of likely penalties which may be imposed for proscribed conduct. § 455.2273(2), Fla. Stat.

31. The Board adopted Florida Administrative Code Rule 61G4-17.001(1)(d), which provided that the penalty for assisting an unlicensed person to evade provisions of chapter 489 shall range from a \$5,000.00 fine and probation or suspension to a \$10,000.00 fine and probation, suspension, or revocation.

32. The Board also adopted rule 61G4-17.001(1)(i), which provided that the penalty for failing in any material respect to comply with the provisions of Part I of chapter 489 was use of the "penalty herein listed for the violation most closely resembling the act underlying the local discipline." The meaning of "local discipline" in this context is not at all clear, as there has been no evidence of local discipline in this case, and routinely would not be for violation of Part I of the state statute. Perhaps this language was inadvertently copied from the immediately preceding offense in rule 61G4-17, that of being disciplined by a local government for an act in violation of the statute. In any event,

the penalty guidelines did not adequately put Respondent on notice of the penalties he might face for applying for or obtaining a building permit for construction work when he had not entered into a contract to perform the specified construction on the property. Consequently, no additional penalty has been recommended for this violation. See Arias v. Dep't of Bus. & Prof'l Reg., 710 So. 2d 655, 659 (Fla. 3d DCA 1998). See also Fernandez v. Fla. Dep't of Health, 82 So. 3d 1202, 1204-05 (Fla. 4th DCA 2012).

33. Rule 61G4-17.001(4) provided that the Board shall assess the costs of investigation and prosecution, excluding costs related to attorney time.

34. Rule 61G4-17.001(5) provided that the Board shall order the contractor to make restitution in the amount of financial loss suffered by a consumer to the extent not in violation of federal bankruptcy law. As noted earlier, there is no evidence that there was any financial loss suffered by a consumer in this case.

35. Rule 61G4-17.002 listed circumstances which may be considered for the purposes of mitigation or aggravation of penalty:

(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.

36. No circumstances were shown that would warrant deviation from the range of penalties already allowed under the guidelines.

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 Mark Lewis Jenkins in violation of sections 489.129(1)(d) and 489.129(1)(i), Florida Statutes; placing his contractor's license on probation for a period of two years; imposing an administrative fine of \$8,500.00; and requiring him to complete an additional live continuing education

course of seven hours emphasizing chapter 489 and implementing rules and to pay costs in the amount of \$171.66.

DONE AND ENTERED this 14th day of September, 2017, in Tallahassee, Leon County, Florida.



F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of September, 2017.

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.