

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 18-3505PL

CHRISTOPHER MICHAEL WALK,

Respondent.

_____ /

RECOMMENDED ORDER

On September 4, 2018, a duly-noticed hearing was held by video teleconference hearing at locations in West Palm Beach and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James David Burkhart, Esquire
Ian Brown, Esquire
Department of Business and
Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32399-2202

For Respondent: Kevin Michael Griffith, Esquire
766 Hudson Avenue, Suite B
Sarasota, Florida 34236

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent was adjudicated guilty of a crime which directly relates to the practice of contracting or the ability to practice contracting, or failed to report his guilty plea to a crime in writing to the Construction Industry Licensing Board within 30 days, in violation of sections 489.129(1)(b) and 455.227(1)(t), Florida Statutes,^{1/} as alleged in the Administrative Complaint; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On November 26, 2017, the Department of Business and Professional Regulation (Petitioner or Department) filed an Administrative Complaint against Christopher Michael Walk (Respondent or Mr. Walk) on behalf of the Construction Industry Licensing Board (Board). The complaint charged Mr. Walk with having been convicted or found guilty of a crime which directly relates to the practice of contracting or the ability to practice contracting and with failing to report in writing to the Board within 30 days after having entered a plea of guilty to a crime. Respondent disputed material facts alleged in the complaint and requested an administrative hearing, which was conducted on September 4, 2018.

At hearing, Petitioner offered nine exhibits, P-1 through P-9, which were admitted into evidence. Respondent offered three exhibits, R-1 through R-3, which were admitted, and testified on his own behalf.

The final hearing Transcript was filed on September 21, 2018. Both parties timely filed proposed recommended orders, which were considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with regulating the practice of contracting pursuant to section 20.165 and chapters 455 and 489, Florida Statutes. The Board is charged with final agency action with respect to contractors pursuant to chapter 489. The practice of contracting is regulated by the State of Florida in the interest of the public health, safety, and welfare.

2. Mr. Walk is licensed as a certified residential contractor in the State of Florida, having been issued license number CRC 1327370. He was subject to regulation by the Department at the time of the actions alleged in the Administrative Complaint.

3. Mr. Walk's license allows him to construct, remodel, repair, or make improvements to one-family, two-family, or three-family residences. Such residential structures may reasonably be expected to have children residing in them. A state-licensed

residential contractor is trusted by homeowners, allowed into their homes, and into contact with their children.

4. On March 15, 2016, Mr. Walk pled guilty to three counts of possession, control, or intentionally viewing a sexual performance by a child in Case Number 2015CF009085AMB in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

5. As Mr. Walk testified at hearing, he did not know any of the people in the photographs, he did not take any of the pictures. He "clicked" on child pornography pictures and dragged them into his computer file.

6. The crimes to which Mr. Walk pled guilty affect the public health, safety, and welfare, and directly relate to the practice of contracting or the ability to practice residential contracting.

7. Mr. Walk testified that at the time he signed the guilty plea, he had not seen his son in six months, his attorney at the time did not explain much to him, and the details of the plea agreement were still being worked out. He testified that his main goal was to go home to be with his son.

8. Mr. Walk testified that later, through discussions with his wife and a new attorney, he considered withdrawing his guilty plea, but ultimately he did not do so.

9. On or about November 18, 2016, Mr. Walk was adjudicated guilty of three counts of possession, control, or intentionally viewing a sexual performance by a child in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

10. On or about December 19, 2016, Mr. Walk reported his guilty plea to three counts of possession, control, or intentionally viewing a sexual performance by a child to Petitioner via a Criminal Self-Reporting Document.

11. On or about December 27, 2016, Petitioner received Mr. Walk's Criminal Self-Reporting Document.

12. An Order of Sex Offender Probation was issued against Mr. Walk in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, on or about February 3, 2017. Mr. Walk was required to register as a sex offender.

13. As a result of Mr. Walk's conviction, he served 18 months in state prison. He is currently serving ten years of sex offender probation and attending sex offender therapy once a week. He must wear a GPS monitor at all times, must keep a log whenever he drives a vehicle, and must pay \$23,226.50 for his supervision and other financial obligations.

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 (2018).

15. A proceeding to suspend, revoke, or impose other discipline upon a professional 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)).

16. 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)).

17. 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 I

18. Petitioner charged Respondent with a violation of section 489.129(1)(b), which at the relevant time authorized the Board to take disciplinary action against a licensee for:

(b) Being 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.

19. It is undisputed that on or about November 18, 2016, Respondent was adjudicated guilty of three counts of possession, control, or intentionally viewing a sexual performance by a child in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Respondent argues, however, that this is not a crime which directly relates to the practice of contracting or the ability to practice contracting.

20. The practice of contracting is regulated by the State of Florida in the interest of the public health, safety, and welfare. § 489.101, Fla. Stat. In fact, an applicant is not even eligible for licensure in Florida if the person has a lack of "good moral character" substantially connected to the professional responsibilities of a certified contractor. §§ 489.111(2), (3); 489.115(3)(a), Fla. Stat.

21. In considering license discipline cases involving violations of statutes similar to the one involved here, courts have not required the crime to directly relate to the technical ability to practice a profession. As the court noted in Doll v. Department of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007):

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.

22. The possession of child pornography has specifically been found to be a crime which relates to the practice of, or the

ability to practice, licensed professions: medicine in Department of Health, Board of Medicine v. Carter, Case No. 12-1575

(Fla. DOAH Dec. 26, 2012; Fla. DOH Feb. 12, 2013); and dentistry in Department of Health, Board of Dentistry v. Borges, Case No. 12-0005 (Fla. DOAH Mar. 12, 2015; Fla. DOH June 17, 2015).

23. Petitioner also cites to Raines v. Construction Industry Licensing Board, Case No. 08-2718 (Fla. DOAH Dec. 15, 2008), in which, in recommending denial of licensure as a certified residential contractor, the Administrative Law Judge noted:

Petitioner's crimes/convictions are related to the practice of contracting, because a licensed residential contractor has greater access to private homes than laymen or many other professionals; because a licensed residential contractor is automatically extended a higher level of trust by consumers' families than is a typical unlicensed construction worker; and because there is a substantial potential that homeowners will entrust a licensed residential contractor in their home and near their children, while expecting the licensee to oversee his on-premises staff.

24. While the license applicant in Raines had been convicted not only of possession of child pornography, but also exposing himself to his minor stepdaughter, there can be no doubt that child pornography alone presents a similarly grave danger to the public welfare. Respondent has been classified as a sexual offender under section 943.0435(1)(a)1.a., Florida Statutes. Section 943.0435(12) expressly provides that sexual offenders,

especially those who have committed offenses against minors, often pose a high risk of engaging in further sexual offenses even after being released from incarceration or commitment and that protection of the public from sexual offenders is a "paramount government interest."

25. Classification as a sexual offender may of course stem from various acts. There is no evidence here that Respondent further disseminated the images, exposed himself, personally viewed or photographed children in his home or at other locations, or physically touched children or used violence against them. Still, the gravity of Respondent's more "passive" offense against society and the abused children who were exploited in the creation of the child pornography cannot be minimized.

26. As the United States Supreme Court, in a decision struggling with quantification of damages, noted:

The demand for child pornography harms children in part because it drives production, which involves child abuse. The harms caused by child pornography, however, are still more extensive because child pornography is "a permanent record" of the depicted child's abuse, and "the harm to the child is exacerbated by [its] circulation." New York v. Ferber, 458 U.S. 747, 759 (1982). Because child pornography is now traded with ease on the Internet, "the number of still images and videos memorializing the sexual assault and other sexual exploitation of children, many very young in age, has grown exponentially."

Paroline v. U.S., 572 U.S. 434, 439-40 (2014). As Paroline went on to describe, as an adult, the victim lived in constant fear that she would be recognized from her disseminated childhood pictures and felt as if she was "being abused over and over again."

27. Licensure by the State of Florida as a residential contractor properly must take into account not only the technical ability of the licensee, but consideration of the public health, safety, and welfare more generally. As noted above, a state-licensed residential contractor is trusted by homeowners, allowed into their homes, and into contact with their children.

28. Petitioner proved by clear and convincing evidence that Respondent was adjudicated guilty of possession, control, or intentionally viewing a sexual performance by a child, and that his crime directly relates to the practice of contracting or the ability to practice contracting, in violation of section 489.129(1) (b).

Count II

29. Petitioner also charged Respondent with violation of section 455.227(1) (t), which at the relevant time provided:

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(t) Failing to report in writing to the board or, if there is no board, to the department within 30 days after the licensee is convicted or found guilty of, or entered a plea of nolo contendere or guilty to, regardless of adjudication, a crime in any jurisdiction. A licensee must report a conviction, finding of guilt, plea, or adjudication entered before the effective date of this paragraph within 30 days after the effective date of this paragraph.

30. Petitioner showed that Respondent entered a plea of guilty to the charged offenses on March 15, 2016. He did not report his plea until December 19, 2016. While there was some evidence that Respondent did not fully understand all of the terms of his guilty plea, that he was still attempting to bargain as to these terms, and that he considered withdrawing it, this evidence was insufficient to negate his responsibility to report that plea within 30 days.

31. Petitioner proved by clear and convincing evidence that Respondent failed to report his plea of guilty to a crime in writing to the Board within 30 days, in violation of section 455.227(1)(t).

Penalty

32. Section 489.129(4) provides that the Department shall follow the penalty guidelines established by Board rule. Penalties imposed must be consistent with these guidelines

prescribed. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

33. Florida Administrative Code Rule 61G4-17.001(1) (b) provided at the time of the offense charged that the recommended penalty for being convicted or found guilty of a crime relating to contracting should range from a "\$3,500 fine or probation or suspension" to a "\$10,000 fine and probation, suspension or revocation."

34. In Count II, Respondent was also charged with violation of section 455.227(1) (t) for failure to report his plea of guilty in writing to the Board within 30 days. Rule 61G4-17.001 contains no penalty for violation of this paragraph of the statute. As Respondent was not adequately put on notice by the rule of the penalty he might face for violation of the statute, no additional penalty has been recommended for the violation of Count II.^{2/}

35. Rule 64G4-17.002 provided that the following aggravating and mitigating circumstances should also be considered:

(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. As discussed earlier, the danger to the public is grave. There was no evidence of other complaints filed against Respondent or damage to any of Respondent's customers. Respondent has practiced as a residential contractor for a long time and suspension or revocation of his license would have a great effect upon his livelihood. These aggravating and mitigating circumstances do not warrant deviation from the already broad range of penalties afforded by the rule.

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 Christopher Michael Walk in

violation of section 489.129(1)(b), Florida Statutes, and
revoking his license as a certified residential contractor.

DONE AND ENTERED this 18th day of October, 2018, in
Tallahassee, Leon County, Florida.

F. Scott Boyd

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 18th day of October, 2018.

ENDNOTES

^{1/} All references to the Florida Statutes or provisions of the Florida Administrative Code refer to versions in effect in March 2016, when the guilty plea was allegedly made, except as otherwise indicated.

^{2/} See § 455.2273, Fla. Stat., also at issue in *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). The "catch all" provision in rule 61G4-17.001(6) is noted, but it does not address the concern of the courts. Requiring a licensee to guess which offense the Board might conclude "closely resembles" the charged one fails to provide a licensee with a meaningful penalty guideline. It is unclear if the Department has reviewed the Board penalty guidelines as required by section 455.2273(4).

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.