

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Residential Building Contractor License of Abelard Construction, Inc.	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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The hearing in this matter was held on September 16, 2009, at the Office of Administrative Hearings pursuant to a Notice and Order for Prehearing Conference issued on March 9, 2009, and Amended Statement of Charges issued on May 20, 2009.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Department of Labor and Industry (Department). John J. Steffenhagen, Hellmuth & Johnson PLLC, appeared on behalf of Abelard Construction, Inc. (Respondent).

The hearing record closed upon receipt of the Department's Reply Memorandum on October 22, 2009.

STATEMENT OF THE ISSUES

1. Did the Respondent perform negligently or in breach of its contract with homeowners Ramona and Jerome Bailey for the repair of storm damage, in violation of Minn. Stat. § 326B.84 (4)?¹

2. Did the Respondent provide misleading and incomplete information to the Department in violation of Minn. Stat. § 326B.84 (14), by failing to submit a contract document to the Department?

3. Did Respondent through Anthony Delmedico, an officer and owner of Respondent, engage in an act or practice that demonstrates untrustworthiness or financial irresponsibility, or show that Respondent is otherwise incompetent or unqualified to act under the license granted, in violation of Minn. Stat. § 326B.84 (15)?

4. By failing to pay civil penalties assessed in Florida, did the Respondent through its owner Anthony Delmedico demonstrate untrustworthiness or financial

¹ Minnesota Statutes are cited to 2008 Edition.

irresponsibility, or show that Respondent is otherwise incompetent to act under the license granted, in violation of Minn. Stat. § 326B.84 (15)?

5. Did the Respondent through its owner Anthony Delmedico fail to comply with the Consent Order issued July 12, 2007, in violation of Minn. Stat. § 326B.84 (5), by failing to notify the Commissioner of Labor and Industry that the State of Florida had revoked Anthony Delmedico's residential building contractor's license?

6. Did the Respondent through its owner Brian Southard submit a false or incomplete application form, in violation of Minn. Stat. § 326B.84 (1) and Minn. R. 2891.0040, subp. 1A,² by failing to disclose that Brian Southard, Respondent's proposed qualifying person and an owner, had business entities registered in the State of Florida?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On October 3, 2002, the Department of Commerce issued a residential building contractor license to the Respondent. It was terminated for non-renewal on March 31, 2003.³

2. In 2005, the authority to license and regulate residential building contractors was transferred to the Department of Labor and Industry (Department).⁴

3. The Department reinstated the Respondent's license on May 11, 2007, and it was due to expire on March 31, 2009. Brian Southard and Anthony Delmedico are each 50 percent owners of Respondent, and Mr. Delmedico is the qualifying person on the license.⁵

4. The Respondent currently operates in four states, including Minnesota. It has 10 to 12 employees, and 2008 revenue of over \$6 million.⁶

5. On July 12, 2007, the Commissioner of Labor and Industry (Commissioner) issued a Consent Order, censuring the Respondent and imposing a fine, because the Respondent had transacted business as Abelard Construction rather than its licensed name, Abelard Construction, Inc., and it had placed several signs for The Big Roofing Company, LLC, that did not include the business's license number.⁷ As part of that Consent Order, the Respondent agreed to provide copies of all disciplinary actions taken by any other state "against Abelard Construction, Inc., or any

² Minnesota Rules are cited to the 2007 Edition.

³ Testimony (Test.) of Chris Williams.

⁴ Reorganization Order No. 193, May 16, 2005.

⁵ Test. of Williams.

⁶ Test. of Anthony Delmedico; Test. of Jessica Wright; Respondent (Resp.) Exhibit (Ex.) 22.

⁷ Department (Dept.) Ex. 14;

other entity, including sole proprietorships that are owned, operated, or controlled by Anthony Delmedico and/or Brian Southard.”⁸

6. On February 6, 2009, the Department served the Respondent with a Licensing Order, imposing a \$10,000 monetary penalty and requiring the Respondent to cease and desist from acting or holding itself out as a residential building contractor or residential remodeler. On March 5, 2009, the Respondent received Respondent’s request for a hearing to contest the Order.⁹ The Department issued an Amended Statement of Charges, adding two additional violations, on May 20, 2009, and the Respondent challenged all of the alleged violations.

Breach of Contract Claim

7. One customer complaint has been filed against the Respondent in Minnesota.¹⁰ On September 22, 2007, one of the Respondent’s sales staff went to the home of Ramona and Jerome Bailey in Cottage Grove, Minnesota, to review storm damage and estimate the cost of repairs. The sales person completed a form agreement and recommended removal and repair of the roof, siding and fascia, with additional specifications. The form stated that it was subject to insurance company approval, and the price stated was “insurance proceeds.”¹¹

8. It is the Respondent’s ordinary practice for its salesperson to meet with the homeowner to inspect the property and outline the scope of the work. The September 22, 2007, agreement was prepared by the salesperson following this visit to the Baileys’ home. Then the Respondent contacts the insurance adjuster to determine what will be paid to assure that there are no unexpected out-of-pocket costs for the homeowner. After the insurance adjuster specifies the work that will be covered, and prior to starting work, the contract is signed, and a pre-start checklist is completed so that the scope of work is clear. These steps were followed prior to beginning work at the Bailey home.¹²

9. On October 13, 2007, following contact with the Baileys’ insurer, Farmers Insurance Group, the Respondent executed a second agreement with the Baileys to remove and replace the roof and the siding on the west elevation. There was no mention of the fascia on this agreement. It contained a specific contract price of \$11,772.84.¹³

10. In a letter to the Baileys’ insurer, the Respondent notified the insurer that there was a signed contract that differed from the original adjuster’s estimate, and stated that “Replacement of 32’ of damaged fascia on left elevation was not included.”¹⁴

⁸ Dept. Ex. 1.

⁹ Notice and Order for Prehearing Conference, issued March 6, 2009, and attachments thereto.

¹⁰ Test. of Williams.

¹¹ Dept. Ex. 2.

¹² Test. of Gina Delmedico, Respondent’s production and general manager; Test. of Brian Southard.

¹³ Respondent (Resp.) Ex. 15, Attach. A.

¹⁴ Dept. Ex. 2.

11. Although the fascia was not included in the agreement signed on October 13, 2007, the Baileys complained to the Department that the Respondent had failed to install the fascia and asserted that they believed that replacement of the fascia was included. A photo shows the missing fascia.¹⁵

12. On November 13, 2008, Chris Williams, Senior Investigator for the Department, contacted the Respondent about the alleged failure to install fascia. In its response to Ms. Williams, the Respondent clarified that the agreement between the Baileys and the Respondent did not include replacement of the fascia. It included a copy of the October 13, 2007, agreement and supporting documentation from Farmers Insurance Group, describing damage to the roof and west wall. Fascia is not included.¹⁶

13. Apart from the Baileys' complaint, there have been no complaints to the Department from customers, subcontractors or suppliers about the Respondent's work in Minnesota.¹⁷

Providing Misleading and Incomplete Information to the Department

14. In a response dated March 14, 2008, to William Gosiger at the Office of the Attorney General, the Respondent addressed several complaints raised by the Baileys. The response included the agreement signed on October 13, 2007, and supporting information from the insurance company.¹⁸ There is no reference to fascia in the correspondence with the Attorney General's Office concerning the Baileys.¹⁹

15. Ms. Williams also requested information from the Respondent. The request was not introduced into evidence, but by letter dated March 25, 2008, Respondent responded and provided documentation from its files concerning the dispute with the Baileys. The response stated that all of the correspondence or documentation with the Baileys and their insurer was included and also stated:

My client is not fully aware of the specific issues that Mr. and Mrs. Bailey may have raised with you in regards to this project. My client would like the opportunity to specifically respond to any such issues which may have been raised. My client fully believes that it adequately completed this project as agreed to by the parties. If there has been any misunderstanding or miscommunication regarding any aspect of this project, my client would like the opportunity to clarify same for the benefit of all parties involved.

¹⁵ Dept. Ex. 4; Test. of Williams.

¹⁶ Dept. Ex. 3.

¹⁷ Test. of Williams.

¹⁸ Resp. Ex. 14.

¹⁹ Resp. Ex. 16, letter to William Gosiger, dated April 7, 2008.

Twenty six pages of documents, including the agreement dated October 13, 2007, and detailed information from the insurance adjuster were enclosed, but the preliminary agreement dated September 22, 2007, was not.²⁰

16. On November 3, 2008, Ms. Williams wrote to the Respondent, stating that the fascia was part of the insurance claim, that it had not had been replaced on the north and south side of the home, and enclosed a photo of the missing fascia. Ms. Williams requested clarification from the Respondent about its demand for final payment from the Baileys when the work had not been completed. She asserted that, by failing to complete the contracted work, the Respondent had performed negligently or in breach of its contract.²¹

17. On November 13, 2008, the Respondent replied to Ms. Williams, enclosing a copy of the October 13, 2007, agreement and the insurance information, and denying that installation of fascia was included in the work spelled out in the contract. The Respondent asked for any information that identified the fascia as part of the insurance claim or the Baileys' agreement with the Respondent. The September 22, 2007, agreement was not included in its response.²²

18. The Baileys provided the Department with a copy of Exhibit 2, the September 22, 2007, agreement.²³

Acts That Demonstrate Untrustworthiness, Financial Irresponsibility, Incompetence or Lack of Qualifications to Act Under the License

19. In 2007, three Administrative Complaints were filed in Florida against Respondent's owner and qualified person, Anthony Delmedico, doing business as The Big Roofing Company, LLC, a certified roofing contractor in the State of Florida. Each one alleged that The Big Roofing Company had failed to complete contracted roofing work.²⁴ Mr. Delmedico was aware of them and retained counsel to help resolve them.²⁵ All three of the complaints were settled,²⁶ there was no evidence of the resolution.

20. On February 2, 2008, an additional Administrative Complaint, No. 2007-023300, was filed in Florida, alleging that Anthony J. Delmedico, d/b/a/ The Big Roofing Company, LLC, had abandoned a roofing project prior to completion. The

²⁰ Resp. Ex. 15.

²¹ Resp. Ex. 17.

²² Resp. Ex. 18. This exhibit includes a letter from the Farmers Insurance Group claims representative, Sara O'Conner, to the Baileys. It is not clear whether the "Catastrophe Response Team" information included in the exhibit was also sent to the Baileys. However, review of the documents shows that fascia was not included. This was the information that the Respondent relied upon in putting together the October 13, 2007, agreement.

²³ Test. of Williams.

²⁴ Dept. Exs. 10 (Case No. 2006-045513), 11 (Case No. 2006-065898), and 12 (Case No. 2006-051079).

²⁵ See Dept. Exs. 8, 9; Test. of A. Delmedico (was in contact with Tiffany Harrington, Ass't General Counsel, Florida Dep't. of Business and Professional Regulation).

²⁶ Test. of Williams.

Administrative Complaint was sent to two Florida addresses, 4613 N. University Drive, #459, Coral Springs, Florida 33067, and 7819 NW 15th Street, Doral, Florida 33126.²⁷

21. Mr. Delmedico did not respond to the Complaint.

22. On May 30, 2008, a Voluntary Petition for Chapter 7 Bankruptcy was filed with the United States Bankruptcy Court, Southern District of Florida, on behalf of The Big Roofing Company, LLC. The street address of the debtor was listed as 7819 NW 15th Street, Doral, Florida, the physical address of the company when it was conducting business.²⁸ It is not clear when the office closed, but Mr. Delmedico stated that it had closed by September 10, 2008.²⁹

23. Mr. Delmedico explained that he formed the Florida business with the expectation of handling roofing projects arising from hurricane damage in South Florida. Delmedico learned that there was a shortage of supplies, which led to lengthy delays completing the roofing contracts. There were complaints filed, but Mr. Delmedico successfully resolved most of them. About one year prior to filing for bankruptcy of The Big Roofing Company, Mr. Delmedico stopped taking orders and finished up most of the remaining jobs. The Coral Springs address was a residence of Seizon Voss, an employee, and that address served as an office to wind down the business. At some point, Ms. Voss moved.³⁰ It is not clear when she moved or whether she left a forwarding address.

24. There was no evidence that Mr. Delmedico or Ms. Voss notified the State of Florida of a change of business address when Ms. Voss left Coral Springs.

25. Upon the advice of his bankruptcy counsel, Mr. Delmedico has not paid the penalties, fines or costs imposed by the State of Florida.³¹

26. Mr. Southard had no involvement in the Florida business.

27. Gina Delmedico (also known as Gina Vasquez) is the Respondent's production and general manager. She holds a Minnesota residential building contractor license and real estate license.³² In 2007, Ms. Delmedico entered into a consent order with the Department of Commerce, relinquishing her office as a notary public in Minnesota.

²⁷ Dept. Ex. 5, Attach. Ex. A.

²⁸ Resp. Ex. 11; Test. of A. Delmedico.

²⁹ *But see* Resp. Ex. 19 (Respondent's letter, dated December 4, 2008, to the Department stated that The Big Roofing Company, LLC did not have an office at either the Coral Springs or the Doral addresses "as of approximately May 2008").

³⁰ Test. of A. Delmedico.

³¹ Test. of A. Delmedico.

³² Test. of G. Delmedico.

Failure to Comply with Consent Order

28. On September 10, 2008, the State of Florida issued a Final Order, revoking Mr. Delmedico's contractor license. In addition, the State of Florida imposed civil penalties, administrative fines and costs totaling more than \$7,000.³³ The Final Order was sent to Mr. Delmedico at 4613 N. University Drive, #459, Coral Springs, Florida 33067.³⁴ This was the last known business address on file in Florida.³⁵ Mr. Delmedico did not receive the Final Order from the State of Florida.³⁶

29. Ms. Williams learned of the Final Order upon inquiry to the State of Florida in the course of her investigation of the Respondent.³⁷ Mr. Delmedico was not aware of the Final Order until Ms. Williams brought it to his attention in a letter dated November 3, 2008.³⁸ Mr. Delmedico requested a copy of the Final Order from Florida, and submitted it to the Department by letter dated December 4, 2008.³⁹

Failure to Disclose Business Entities in Florida

30. The Respondent's Application to renew its license as a Residential Building Contractor was signed on March 24, 2009, and filed with the Department on April 1, 2009. Brian Southard completed the Qualifying Person Form. The form requested: "Qualifying person's business and/or employment history for the past five years." In response, Mr. Southard listed: Abelard Construction Georgia, LLC; Abelard Construction, LLC; Abelard Construction St. Louis, LLC; and Abelard Construction, Inc. On his disclosure form, Mr. Southard reported that he held a professional license in Florida and Illinois, as well as Minnesota.⁴⁰

31. In the course of her investigation, Ms. Williams discovered that Mr. Southard had registered three businesses in Florida that he had not disclosed on his Qualifying Person Form:

- a. Titan Construction & Design LLC, an inactive limited liability corporation for which Mr. Southard held a license as a Certified General Contractor, which expired on August 31, 2008, and Certified Roofing License, which expired on August 31, 2006;
- b. Global Catastrophe Management, Inc., an inactive limited liability corporation; and

³³ Dept. Ex. 5. The Commissioner's Order states, and Ms. Williams testified, that fines were assessed in two Florida cases, but there was no document or testimony from a Florida official clarifying against whom the second action was taken or the basis for it.

³⁴ Dept. Ex. 5, Certificate of Service.

³⁵ Test. of Williams.

³⁶ Test. of A. Delmedico.

³⁷ Test. of Williams.

³⁸ Dept. Ex. 3; Resp. Ex. 17.

³⁹ Resp. Ex. 19.

⁴⁰ Dept. Ex. 6.

- c. Rainmaker Ventures, LLC, an inactive limited liability corporation.⁴¹

32. Mr. Southard did not conduct business in Florida or in any other state under any of the three business names, nor was he employed by any of the three companies. No bank accounts were opened, no employees were hired, the businesses were inactive at the time of the license application, and closing statements have been filed with the IRS. Titan Construction & Design LLC was set up so that Mr. Southard could take the Florida licensing exam, which required affiliation with a Florida company. The other two companies were set up in the event that Mr. Southard chose to make limited acquisitions in Florida, but he took no steps to do so.⁴²

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor and Industry are authorized to consider the charges against Respondent pursuant to Minn. Stat. §§ 326B.082, 326B.84, and 14.50.

2. The Respondent received due, proper, and timely notice of the charges against it. The Department has complied with all relevant procedural legal requirements. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. When the Department proposes to revoke a residential building contractor license, it bears the burden of proving the alleged violations of the governing statutes and rules by a preponderance of the evidence.⁴³

4. The Department failed to demonstrate by a preponderance of the evidence that the Respondent performed negligently or in breach of its contract with homeowners Ramona and Jerome Bailey for the repair of storm damage, in violation of Minn. Stat. § 326B.84 (4).

5. The Department failed to demonstrate by a preponderance of the evidence that the Respondent provided misleading and incomplete information to the Department, in violation of Minn. Stat. § 326B.94 (14), by failing to provide Exhibit 2 in response to the Department's investigation of the Baileys' complaint.

6. The Department failed to demonstrate by a preponderance of the evidence that the Respondent violated Minn. Stat. § 326B.84 (5), by failing to notify the Commissioner of Labor and Industry that the State of Florida had revoked Anthony Delmedico's residential building contractor's license, as required by the Consent Order issued July 12, 2007.

⁴¹ Test. of Williams; Ex. 7.

⁴² Test. of Southard.

⁴³ Minn. R. 1400.7300, subp. 5.

7. The Department demonstrated by a preponderance of the evidence that Anthony Delmedico, an officer and owner of Respondent, engaged in acts or practices that demonstrate untrustworthiness or financial irresponsibility or is otherwise incompetent or unqualified to act under the license granted, in violation of Minn. Stat. § 326B.84 (15), as evidenced by the State of Florida revoking Delmedico's Florida residential building contractor's license and imposing civil penalties. The Department failed to show that Anthony Delmedico's failure to pay the civil penalties or filing for bankruptcy on behalf of The Big Roofing Company, LLC, or Respondent's hiring or retaining of Gina Delmedico, demonstrated untrustworthiness or financial irresponsibility, or showed that Respondent is otherwise incompetent or unqualified to act under the license granted.

8. The Department failed to demonstrate by a preponderance of the evidence that Brian Southard submitted a false, misleading or incomplete application form, in violation of Minn. Stat. § 326B.84 (1), or made a "misrepresentation of material fact," in violation of Minn. R. 2891.0040, subp. 1A, by failing to disclose three inactive business entities registered in the State of Florida.

9. The Respondent's request for a hearing was not filed solely for purposes of delay nor was the request frivolous.⁴⁴

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

1. That the Commissioner of Labor and Industry's Licensing Order issued February 6, 2009, be RESCINDED.

2. That the Commissioner impose another disciplinary sanction that is appropriate under the circumstances.

Dated: November 12, 2009

s/Beverly Jones Heydinger

Beverly Jones Heydinger
Administrative Law Judge

Reported: Digitally Recorded
A-bjh-09162009

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact,

⁴⁴ See Minn. Stat. § 326B.082, subd. 8 (d).

Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Steve Sviggum, Commissioner, ATTN: Wendy Willson Legge, Director of Legal Services, Minnesota Department of Labor & Industry, 443 Lafayette Road, St. Paul, MN 55155 (651) 284-5126 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Department bears the burden of demonstrating by a preponderance of the evidence that the Respondent violated the statutes and rules governing residential building contractors. In this instance, the Department failed to meet its burden on most of its claims. The Department seemed to conclude that the Respondent was cutting corners and attempting to withhold information, and it reviewed the information through that lens. It is required to look at the full picture, and, in this case, it failed to do so.

Breach of Contract

The Department asserts that the Respondent breached its contract with the Baileys to replace a portion of fascia, and relies upon a preliminary agreement, Department Exhibit 2, in support of its position. However, the Department failed to prove its claim. Exhibit 2 includes replacement of fascia, but specifically states that it is subject to insurance company approval, and lists insurance proceeds as the payment amount. The subsequently signed October 13, 2007, agreement, attached to Respondent Exhibit 15, does not include fascia and does include a specific contract amount. Respondent's communication with the insurance company, indicating that the fascia had not been approved, is further support for Respondent's position.⁴⁵ It is unclear why the Department pursued this allegation in light of the plain language of the

⁴⁵ See *also* Dept. Ex. 3, Catastrophe Response Team itemization.

October 13, 2007, agreement and Respondent's response, and it is significant that the Baileys were not called to testify in support of their complaint. Ms. Williams conceded that there was no evidence that the insurance company had approved replacement of the fascia, and no evidence that Respondent failed to perform the work included in the October 13, 2007, agreement. The "subjective belief" of the Baileys, as communicated to the Department, is insufficient to support the claim.

The Department implied that the Respondent should have executed a change order to make clear that the fascia had been removed from the agreement. It is not clear why a change order would be preferable to the Respondent's practice of executing a new agreement after the insurance company had specified the work that would be covered and the price that would be paid. The October 13, 2007, agreement is later in time and included a description of the work to be performed and a specific price for it.

The tone of Ms. Williams' letter of November 3, 2008, first raising the question of the fascia, implies that she had already concluded that the Respondent was in breach of contract, even though the documents she had received from the Respondent prior to that time, including the information from the insurance company, did not refer to fascia. She acknowledged at hearing that she was relying on the subjective opinion of the Baileys and the preliminary agreement. Ms. Williams seemed unwilling to accept what appeared to be the Respondent's reasonable practice of assuring that the homeowner would have a clear understanding of the insurance coverage before it proceeded with the final agreement.

The Department did not offer evidence that any other Minnesota customer had complained about Respondent's failure to perform competently or according to the contract. The Respondent has done millions of dollars of business with thousands of customers. It appears that the Department blew the Baileys' complaint out of proportion to its significance.

Providing Misleading or Incomplete Information to the Department

The Department also made too much of the Respondent's failure to provide a copy of the September 22, 2007, agreement, to its investigator. Based on that omission, the Department charged that the Respondent "provided false, misleading, or incomplete information to the commissioner..."⁴⁶ Under the facts of this case, that conclusion is unreasonable. The Department failed to offer into evidence its initial request for information, so the scope of the request cannot be reviewed. However, the Respondent's response implies that the dispute about fascia was not referenced in the first request. The response included the insurance information and the signed agreement with the Baileys. When the issue of the fascia was specifically raised in Ms. Williams' letter of November 3, 2008, it was in the context of whether the fascia was part of the insurance claim. Once again, the Respondent provided the October 13, 2007, agreement and the insurance information. Although the Respondent omitted the September 22, 2007, agreement from its response, the Department failed to show that

⁴⁶ Minn. Stat. § 326B.84 (14).

this was more than a *de minimis* violation, insufficient to support the serious charge that Respondent provided false, misleading or incomplete information in response to an investigation. The Respondent replied promptly, submitted information, and offered to answer any remaining questions that the Department had.

Full cooperation with an investigation is to be expected, but under the facts presented here, it appears that the Respondent made a good faith effort to respond to the request for information.

Violation of the Consent Order

The Department alleged that the Respondent violated the terms of the Consent Order issued on July 12, 2007, because Mr. Delmedico failed to inform the Department that his license had been revoked in Florida, by order issued September 10, 2008. Notice of the Florida action was sent to the last business address on file with the State of Florida. Mr. Delmedico acknowledged that he was aware that investigations were ongoing in Florida; he offered no explanation for his failure to provide an up-to-date address to the Florida regulators, and no explanation for failing to file a forwarding address when business operations wound up at the Coral Springs address. Ms. Williams learned of the Florida Order and notified Mr. Delmedico's counsel of the Order in a letter dated November 3, 2008.

Although Mr. Delmedico's difficulties may support another violation, they do not support the claim that Mr. Delmedico failed to provide the information required by the Consent Order. He should have known of Florida's license revocation, but the Department failed to show that he did know. Without knowledge of the order, he could not report it.

Acts Demonstrating Untrustworthiness or Financial Irresponsibility, Incompetence or Lack of Qualifications to Hold the License

The Department demonstrated that Mr. Delmedico displayed untrustworthiness and financial irresponsibility in the operation of The Big Roofing Company in Florida. Mr. Delmedico failed to file a change of address or withdraw his registration, and he failed to respond to a complaint made to the Florida Department of Business and Professional Regulation.

Mr. Delmedico acknowledged that he made a poor business decision when he entered the Florida market, that he failed to anticipate the delays in getting supplies, and that many homeowners were upset with those delays. He attempted to work out the problems, and after closing the Doral office from which the business operated, he maintained a business address at the home of an employee while efforts to wind up business continued. He lost a great deal of money in the process, which led to filing for bankruptcy for The Big Roofing Company in Florida. Despite these efforts, he did not cooperate in the resolution of a complaint made to the Florida regulators, and the Department concluded that these actions bring into question Mr. Delmedico's trustworthiness and financial responsibility. His mismanagement left a customer at risk.

For that, the Department may take action. However, it failed to demonstrate that it could take action for Mr. Delmedico's failure to pay Florida's civil penalty.

The Department asserts that Mr. Delmedico's attempt to use the Florida bankruptcy filing as an excuse for not paying the civil penalty is evidence of Mr. Delmedico's untrustworthiness and financial irresponsibility. Bankruptcy is a legal process for dissolving an unprofitable business in an orderly way. A governmental unit may not revoke or suspend a license of a bankrupt or debtor, or another person with whom the bankrupt or debtor has been associated, solely for being insolvent or having debts dischargeable in bankruptcy.⁴⁷ However, bankruptcy filing does not prohibit an enforcement action for underlying behavior that may violate the law.⁴⁸ Moreover, the penalties imposed by the State of Florida may not be dischargeable in bankruptcy.⁴⁹ Nonetheless, Mr. Delmedico asserted that his bankruptcy counsel had advised him not to pay the civil penalties during the pendency of the bankruptcy proceeding, and the Department offered no evidence or legal argument to refute the reasonableness of that advice.

The Department also failed to offer any evidence that the Respondent has been financially irresponsible in Minnesota. In contrast, the Respondent offered testimony that it is in good standing with the Better Business Bureau and Angie's List. Also, Paul Wellnitz, the regional representative for one of Respondent's major suppliers, ABC Supply, testified that he has done business with the Respondent since 2006 or 2007, including over \$1.5 million in the last 24 months, and that Respondent's representatives are accurate and timely in the placement of orders and scheduling of deliveries. Mr. Wellnitz stated that he "would like to have a hundred" contractors with the level of professionalism and responsibility that the Respondent's representatives have displayed.

The Department introduced evidence of Ms. Delmedico's relinquishment of her notary commission, and it is undisputed that she is the general manager for the Respondent's Minnesota operation. Apparently the Department's argument is that employing Ms. Delmedico is evidence of the Respondent's incompetence or irresponsibility. However, Ms. Delmedico continues to hold Minnesota real estate and building contractor licenses, and there was no evidence that the State has attempted to take action to revoke those licenses. The Department failed to show that retaining Ms. Delmedico after she lost her notary commission demonstrated Respondent's untrustworthiness, financial irresponsibility, incompetence or lack of qualifications to hold the license.

Thus, the Department proved only one instance of untrustworthiness, financial irresponsibility, incompetence or lack of qualification to hold a license: Mr. Delmedico's failure to respond to one Florida complaint and cooperate in that state's investigation.

⁴⁷ 11 U.S.C. § 525 (a). See also 11 U.S.C. § 362 (b)(4) (the automatic stay provisions do not preclude government enforcement action, except to enforce a money judgment).

⁴⁸ See *Massachusetts Bd. of Pharmacy v. Drug Assistance Health Solutions*, 337 B.R. 5 (D. Mass. 2006).

⁴⁹ 11 U.S.C. 523 (a)(7).

Failure to Disclose Business Entities Registered in Florida

The Department alleged that Brian Southard provided incomplete and misleading information on his Qualifying Person Form by failing to disclose that he had registered three companies in Florida, Titan Construction and Design LLC, Global Catastrophe Management, Inc., and Rainmaker Ventures, LLC, as of February 24, 2006. However, the question on the application form asks for the qualifying person's business and/or employment history for the past five years. Mr. Southard testified credibly that none of the three entities ever conducted any business, and that all three were inactive at the time of the application. The Department acknowledged that the three businesses were inactive, and failed to offer any evidence that Mr. Southard had actually operated or been employed by any of them. The question on the Qualifying Person Form does not ask the applicant to disclose the existence of any legal entity registered in his name. It asks for business and employment history, and Mr. Southard truthfully provided that information.

Ms. Williams claimed that Mr. Southard was required to disclose the business entities because they could have been activated at any time. Although the businesses could have been activated, they were not. The purpose of the question is to assure that the Department can investigate any business activities to determine if there have been complaints, investigations, litigation or any other problems that may warrant further investigation of the qualifying person. Mr. Southard believed he was answering the question completely and accurately because the entities created in Florida had not conducted any business, nor had he been employed by them.

Determination of the Penalty Amount

The Licensing Order states that in determining the amount of the penalty, the Commissioner considered: the extent of deviation from compliance; whether the violations were willful; the gravity of the violations; the number of violations; whether there is a history of past violations; whether Respondent gained economic benefit in not complying with the law; and other factors as justice may require.

The only substantiated violation was that Mr. Delmedico did not respond to a Florida customer complaint that he failed to complete work on a contract. In light of Mr. Delmedico's failure to perform the Florida contract and to notify the Florida licensing board of his change of address, the violation may be characterized as willful.

The Respondent does have a history of prior violations concerning using the appropriate name and including the correct license number on its signs. These were relatively minor violations since the public could have correctly identified the business from the information that was included on the signs, but they may be considered in assessing a penalty in this case.

Based on the allegations in the complaint that led to Florida's revocation of Mr. Delmedico's license, it would appear that he gained some economic benefit from his failure to complete the reroofing of a home. Mr. Delmedico accepted \$7000 and failed

to complete the project. Thus, absent evidence to the contrary, it may be inferred that he benefited by that amount.

Consideration of Mitigating Circumstances

It is appropriate for an agency to consider mitigating circumstances in its decision to impose discipline.⁵⁰ In this case, the Respondent offered evidence of the size of its business, the taxes it pays, the number of persons it employs, its reputation and its good works in support of its position that discipline should not be imposed. Had the Department demonstrated significant violations, the fact that a going concern would be put out of business would not be particularly persuasive. However, the single violation concerning conduct in Florida should be evaluated in the context of the amount of business the Respondent does and the few complaints that have been received. In this case, there has apparently been only one customer complaint in Minnesota, and no evidence that the Department has received any complaints from Minnesota subcontractors or suppliers. There was testimony from a supplier and a letter from a homeowner, praising the Respondent's business practices and contributions. Even if Mr. Delmedico ran into problems in Florida, the Respondent's performance in Minnesota and the other states where it does business should be considered. The weight of the evidence does not support revocation of the Respondent's license or imposing a \$10,000 penalty.

B. J. H.

⁵⁰ *Falgren v. Board of Teaching*, 545 N.W. 2d 901 (Minn. 1996).