

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

ELECTION OF RIGHTS

DBPR v. Michael Smithem

Case No. 2011-027895

PLEASE CHECK ONLY ONE (1) OF THE THREE (3) OPTIONS.

Option (1) I do dispute the allegations of material fact in the Administrative Complaint. This is a petition for a hearing involving disputed material facts pursuant to Sections 120.569(2)(a) and 120.57(1), Florida Statutes, ("formal hearing") before an Administrative Law Judge of the Division of Administrative Hearings. I specifically dispute the following material facts alleged in the Administrative Complaint (attach extra pages or write on the back if needed).

See attached Motion to Dismiss

In addition to the above election for formal hearing, if you wish to enter into settlement negotiations, check the box below:

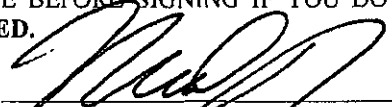
Section 120.569(2)(a), Florida Statutes, requires the department to send this case to the Division of Administrative Hearings (DOAH) for a formal hearing within 15 days after receiving your Election of Rights. I am interested in settling this case and waive the 15 day requirement in order to enter into settlement negotiations with the department

Option (2) I do not dispute the allegations of material fact in the Administrative Complaint. I wish to submit oral and written evidence in mitigation at a hearing pursuant to Section 120.57(2), Florida Statutes ("informal hearing") and that this oral and written evidence be considered before any penalty and fines are imposed.

Option (3) I do not dispute the allegations of material fact in the Administrative Complaint and waive my right to any form of hearing. I request that a Final Order imposing a penalty and fines be entered in this case.

THIS IS A LEGALLY BINDING DOCUMENT. SEEK LEGAL ADVICE BEFORE SIGNING IF YOU DO NOT FULLY UNDERSTAND THE TERMS. YOUR SIGNATURE MUST BE NOTARIZED.

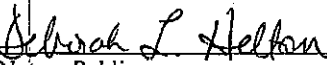
Michael Smithem
RESPONDENT c/o Michael D Randolph Esq.
Gray Robinson, PA 5551 Ridgewood Dr Suite 101
Street Address
Naples FL 34108
City State Zip
(239) 552-4810 (239) 598-3164
Telephone Number and Fax Number (if any)
April 18 2012
Date Received the Administrative Complaint


ATTORNEY OR QUALIFIED REPRESENTATIVE
5551 Ridgewood Dr. Suite 101
Street Address (where service shall be made)
Naples FL 34108
City State Zip
239-552-4810
Telephone Number
239-598-3164
Facsimile Number

STATE OF Florida
COUNTY OF Lee

Before me, personally appeared Michael D Randolph, whose identity is known to me or by _____ (type of identification) and who, acknowledges that his/her signature appears above.

Sworn to or affirmed by Affiant before me this 27th day of April 2012.


Notary Public
Deborah L. Helton
Type or Print Name

NOTARY PUBLIC-STATE OF FLORIDA
Deborah L. Helton
Commission # DD830194
Expires: DEC. 10, 2012
BONDED THRU ATLANTIC BONDING CO, INC


My Commission Expires: 12/10/12

THE ELECTION OF RIGHTS FORM AND ANY ATTACHMENTS SHOULD BE RECEIVED BY THE DEPARTMENT WITHIN 21 DAYS AND MAILED TO:

RECEIVED

MAY 01 2012

DBPR Service of Process Unit

ATTN: Service of Process Unit
Office of the General Counsel

Department of Business and Professional Regulation
1940 N. Monroe St., Tallahassee, FL 32399-2206
Telephone: (850) 488-0062 Fax: (850) 488-5700

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,

Petitioner,

vs.

Case No. 2011-027895

MICHAEL SMITHEM,

Respondent.

MOTION TO DISMISS

Respondent, MICHAEL SMITHEM, moves to dismiss the Administrative Complaint and in support thereof states:

1. Records of the Department indicate Respondent accepted employment with the City of Marco on May 21, 2001 and began employment no earlier than May 30, 2001.

2. Records of the Department also indicate Respondent filed his application in late June and the Department date stamped receipt as of July 2, 2001.

3. Fla. Stats. §468.609(7)(d) allows Respondent to perform duties for 90 days if a provisional application has been submitted, provided he is under the direct supervision of a certified building code administrator who holds standard certification and who as found such person qualified for a provisional certificate.

4. The gravamen of at least part of the Administrative Complaint is that at the time of employment Respondent's supervisor was Robert Mahar and that Respondent performed inspections under the direct supervision of a provisional license holder. Compl. at pars. 10 & 13(b).

5. The material allegations giving rise to the foregoing aspects of the Administrative Complaint have been addressed by the Department in Case No. 2010-103927 which found insufficient evidence to indicate Mr. Mahar violated sections 468.629 or 455.227. See attached Closing Order.

6. With such findings of fact and conclusions of a law in Case 2010-103927, the issue is *res judicata* and the instant Administrative Complaint against Respondent must be dismissed.

DATED this ^{22nd} 26th day of April, 2012.



MICHAEL D. RANDOLPH
Florida Bar No. 119970
GrayRobinson P.A.
Attorneys for the Respondent
5551 Ridgewood Drive, Suite 101
Naples, FL 34108
(239) 552-4810
(239) 598-3164 facsimile
michael.randolph@gray-robinson.com

COPY

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

PROFESSION: Building Code Administrator
CASE NUMBER: 2010-013927
COMPLAINT MADE BY: DBPR
1940 N. Monroe St.
Tallahassee, FL 32399
DATE COMPLAINT RECEIVED: March 17, 2010
COMPLAINT MADE AGAINST: Robert Mahar
7041 Appleby Dr.
Naples, FL 34104
LICENSE NUMBER: BU 1369
INVESTIGATED BY: Sharlene Slosar
REVIEWED BY: Elizabeth Fletcher Henderson/maf
STAFF RECOMMENDATION: R-41: Insufficient Evidence to
Prosecute

CLOSING ORDER

THE COMPLAINT: Subject is alleged to be in violation of Section 468.629(1)(a), Florida Statutes, which states that no person may "[f]alsely hold himself or herself out as a certificate holder." Under 468.629(2), Florida Statutes, any person who violates 468.629(1) commits a misdemeanor of the first degree. Subject is also alleged to be in violation of 455.227(1)(o), Florida Statutes, which states: "[p]racticing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities the licensee knows, or has reason to know, the licensee is not competent to perform" is grounds for disciplinary action.

THE FACTS This investigation was predicated upon the receipt of a complaint which alleged that the Subject worked as a building official for four (4) months without holding a proper license.

Complainant alleged that Robert Mahar was hired as a building Official for the city of Marco Island on December 26, 2000. Complainant alleged that Robert Maher did not receive his Provisional Building Code Administrator License until April 4, 2001. Thus,

Complainant alleges Robert Maher operated as a building code official without a proper license for four (4) months.

Subject responded to the allegations via telephone on March 31, 2010. Subject stated that Greg Niles, his boss in late 2000, called DBPR and was informed that once Mr. Mahar applied for a license, he would be eligible to work for 90 days. Mr. Mahar applied for a license on December 22, 2000, and a memo from Mr. Niles dated December 26, 2000, confirms his belief that Mr. Mahar was eligible to work as a building code official based on his license application. Subject stated he does not deny signing documents as an Acting Building Official without holding a proper license. However, Subject stated he acted based on the instructions of his boss, Mr. Niles.

After investigating the Complaint, it has been determined that there is insufficient evidence to indicate that Subject violated sections 468.629(1)(a) or 455.227(1)(o), Florida Statutes.

Based on the investigation, the Probable Cause Panel determined that there is insufficient evidence to take this case to hearing.

THE LAW: Although the evidence was sufficient for a finding of probable cause in this case, further investigation in anticipation of litigation reveals that there is insufficient evidence to prosecute further. Therefore, the case should be closed without further prosecution.

It is ORDERED that this case is CLOSED, without prejudice to reopen if the Department receives additional evidence or determines, upon further review, that the determination to close was in error.

DONE and ORDERED this 27th day of August, 2011.

Elizabeth Fletcher Henderson
Elizabeth Fletcher Henderson
Assistant General Counsel
Case No. 2010-013927

EFD/maf

Ken Lawson, Secretary

Rick Scott, Governor

August 26, 2011

Robert Mahar c/o Daniel Abbott
200 E. Broward Blvd.
Suite 1900
Fort Lauderdale, FL 33312

RE: DBPR v. ROBERT MAHAR
DBPR Case No. 2010-013927

Dear Mr. Abbott,

Please be advised the above-referenced case has been reviewed by the Department and closed without a finding of probable cause to believe your client violated the provisions of Chapters 455 or 468, Florida Statutes, and/or the rules promulgated pursuant thereto. The case has been closed without prejudice, if the Department receives additional evidence or determines, upon further review, that the determination to close was in error, the Department reserves the right to reopen the case. If the case is reopened, your client will be promptly notified.

As this case has been dismissed without a finding of probable cause, the materials included within the file are confidential and may not be disclosed to the public without your client's written permission.

Please contact me if you have any questions.

Sincerely,

Elizabeth Fletcher Henderson
Elizabeth Fletcher Henderson
Assistant General Counsel

EFH/maf

