

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
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**BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF THE LICENSE OF	:	FINDINGS OF FACT,
CARIBBEAN CREATIONS, INC.	:	CONCLUSIONS OF LAW,
	:	AND ORDER
TO PRACTICE AS A CONTRACTOR	:	
IN THE STATE OF UTAH	:	
	:	Case No. DOPL-2010-440

FINDINGS OF FACT

1. The Division of Occupational and Professional Licensing ("the Division") filed a Notice of Agency Action in this matter on December 14, 2010.
2. A review of this matter was made on January 26, 2011 and, thereafter, the Division issued an order revoking Respondent's contractor's license to practice in the state, effective 60 days after the order was entered, and assessing a fine in the amount of Five Hundred Dollars and No/100 (\$500.00). See Findings of Fact, Conclusions of Law, and Order, dated January 26, 2011.
3. Respondent thereafter filed a request for agency review on March 17, 2011. See Letter from Shane T. Bandy, Caribbean Creations, Inc, to Executive Director (March 17, 2011).
4. Respondent claimed in his request for agency review that Bureau Chief, Mr. Dan S. Jones is disregarding the Board's decision in requiring that the Respondent post a bond in order to demonstrate financial responsibility rather than allowing him to demonstrate financial responsibility by paying his delinquent LRF payout and child support obligations. See id. Respondent's request for agency review stated: ". . . I am not challenging the Board's decision[.] I am only challenging the fact that Mr. Jones is requiring the bond even though I will have satisfied the Board's request to side step the bond." Id. at 2.
5. On March 23, 2011, Administrative Law Judge Masuda Medcalf advised Respondent that he could file a motion to set aside with the Division Director, Mr. Mark Steinagel, pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. See Letter from

Masuda Medcalf, Administrative Law Judge, to Shane T. Bandy, Caribbean Creations, Inc. (March 23, 2011)

6. Pursuant to Rule 60(b), Respondent thereafter filed a motion to set aside order on March 31, 2011 ("Respondent's Motion). See Letter from Shane T. Bandy, to Mark B. Steinagel, Director DOPL (March 31, 2011). Respondent's Motion reiterates the same argument presented in his request for agency review. See id. Specifically, Respondent claims that the Board gave him the alternative for future action to post a bond or to pay his two delinquent obligations. See id. Respondent further claims that since he has now satisfied one of those obligations (i.e., the delinquent LRF), the bond requirement should be waived. See id.

7. At the conclusion of the review by the Commission, the Commission made a motion to accept the recommended order submitted by Mr. Jones with only one modification that the revocation would occur 60 days after the order was issued rather than immediately.

8. Respondent's claims about the Commission's order are simply not in the order, and, therefore there is no basis whatsoever to set aside the order based upon the arguments made by Respondent about the potential future filings that may be made by Respondent.

9. The Division readily acknowledges that the Commission and Division discussed potential future actions that could be taken by Respondent to demonstrate financial responsibility. However, none of this informal advice was included in the order, and all of it was simply provided as clarification of how Respondent could, at a future time, demonstrate financial responsibility, should he attempt to do so.

10. None of the informal advice was meant or intended to be included in the order. Indeed it would be inappropriate for the Division or the Commission to decide a future request or filing without reviewing the facts available at the time of the filing and applying the appropriate laws involved at the time of the request.

11. Further, the informal advice included a review of the Respondent's financial history to tentatively determine the appropriate license bond amount that would be required should Respondent at a future time choose to attempt to demonstrate financial responsibility by posting a bond. The Commission found, based upon the facts known to the Commission on January 26, 2011, that a \$75,000 bond would be sufficient to demonstrate financial responsibility. That Decision was not final and, therefore, was not included in the order. The final determination of whether a bond would be adequate could only be made at the time such a filing was made with the Division. At the time of filing the bond, the Division would have the opportunity and obligation to review the financial history to that point. Barring any change of the Respondent's financial history, the \$75,000 bond would apply. However, if Respondent's financial circumstances had changed by the time the bond was posted, such as having judgments or tax liens entered against him, the bond amount could be increased.

12. The Division's advice to allow Respondent consideration regarding his future bond status was precisely that – a *future* possibility.

13. The requirement to come off of the bond requirement at a later time was again a *future* possibility. Respondent was advised when a future filing was made he would need to demonstrate financial responsibility at that time. That would include paying off the two delinquent obligations and providing a then current credit report to demonstrate that he has been paying his obligations as they become due. Financial history is not determined by the lack of delinquent items as of a single moment in time but by a review of the entire financial history. In light of Respondent's history, it is clear that simply paying two delinquent items (which were delinquent for years) fails to meet the requirements to demonstrate financial responsibility.

14. Even under the informal advice given, the Commission never found that Respondent could "side step" the bond. The Commission and Division gave advice about coming off the bond, but not avoiding the bond.

15. At the time the Commission and Division reviewed this order, it again made a preliminary review of potential future actions. In light of the changed financial condition presented by the Respondent, the Commission determined that a \$50,000 license bond is sufficient, that re-license will not be approved until a license bond is provided, and that prior to the expiration of the bond, Respondent could again submit documentation of his financial history. The Division would then review whether financial responsibility could be demonstrated without the necessity of filing a license bond. For the reasons outlined above, this advice is not binding but subject to change as of the time Respondent files this information with the Division.

16. Respondent's Motion concedes that at the time of the order he had delinquent and unpaid obligations. See Letter from Shane T. Bandy, Caribbean Creations, Inc, to Executive Director (March 17, 2011). Therefore, there could have been no other decision at the time of the order but that Respondent had failed to demonstrate financial responsibility.

CONCLUSIONS OF LAW

17. In order to prevail on a motion to set aside an order, Respondent must meet one of the criteria set forth in Rule 60 of the Utah Rules of Civil Procedure. Specifically, Respondent must show (a) clerical mistake or (b) mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, etc. See Utah R. Civ. P. 60(a) and (b).

18. A meritorious defense is one which "addresses the substance or essentials of a case rather than dilatory or technical objections." Black's Law Dictionary 430 (7th ed. 1999).

19. Under the Utah Construction Trade and Licensing Act, financial responsibility “means a demonstration of a current and expected future condition of financial solvency evidencing a reasonable expectation to the division and the board that an applicant or licensee can successfully engage in business as a contractor without jeopardy to the public health, safety, and welfare.” Utah Code Ann. § 58-55-102(19)(a). “Financial responsibility may be determined by an evaluation of the total history concerning the licensee or applicant including past, present, and expected condition and record of financial solvency and business conduct.” Id. at -102(19)(b).

20. Respondent failed to demonstrate financial responsibility at the time the order was issued, and Respondent’s Motion similarly fails to establish an argument to the contrary.

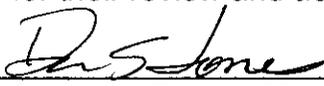
21. Respondent’s Motion fails to establish a basis recognized by Rule 60 of the Utah Rules of Civil and fails to establish a meritorious defense.

22. Respondent’s Motion is also premature in that he has failed to satisfy the conditions precedent necessary before a future consideration of his financial responsibility can be made. In order to satisfy this element, Respondent must file a bond or, alternatively, provide an updated financial history, including evidence of payoff of all delinquent obligations, and credit reports so that a current review of Respondent’s payment practice can be made.

ORDER

WHEREFORE, IT IS ORDERED Respondent’s Motion is hereby denied.

On behalf of the Construction Services Commission and the Division of Occupational and professional licensing, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Order were submitted to the Construction Services Commission and the Division on the 25th day of MAY 2011 for their review and action.

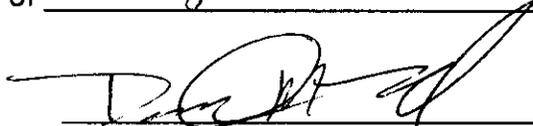


Dan S. Jones, Bureau Manager

ORDER

THE ABOVE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER in the matter of **CARIBBEAN CREATIONS, INC.**, are hereby adopted by the Construction Services Commission of the State of Utah.

DATED this 28 day of May, 2011.



CONSTRUCTION SERVICES COMMISSION
Representative

I concur with the above Order, which the Construction Services Commission has approved.

DATED this 25 day of May, 2011.

DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING



MARK B. STEINAGEL
Director

Agency review of this order may be obtained by filing a request for agency review within thirty (30) days after the date of this order. If you choose to file a request for agency review, you must adhere to the attached procedures.