

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 96-0939
)	
PAUL E. DYKES, d/b/a PHOENIX)	
CORPORATION,)	
)	
Respondent.)	
<hr/>)	

RECOMMENDED ORDER

A formal hearing was conducted in this proceeding before Daniel Manry, a duly designated Hearing Officer of the Division of Administrative Hearings, on May 30, 1996, in Orlando, Florida.

APPEARANCES

For Petitioner: Donna Bass, Senior Attorney
Department of Business
and Professional Regulation
Division of Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0750

For Respondent: Paul E. Dykes, pro se
3427 Leemore Place
Post Office Box 682041
Orlando, Florida 32802

STATEMENT OF THE ISSUES

The issues for determination are whether Respondent violated Section 489.533(1), Florida Statutes (1995), 1/ by wilfully and deliberately disregarding or violating applicable building codes, abandoning a project, or proceeding on a job without applicable building department inspections; and, if so, what, if any, penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner filed an Administrative Complaint against Respondent on September 15, 1993. Respondent timely requested a formal hearing.

At the formal hearing, Petitioner presented the testimony of two witnesses and submitted five exhibits for admission in evidence. Respondent presented the testimony of three witnesses and submitted two exhibits for admission in evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the transcript of the formal hearing filed with the undersigned on June 12, 1996.

Petitioner timely filed its proposed recommended order ("PRO") on June 21, 1996. Respondent timely filed his PRO on July 19, 1996. Proposed findings of fact in the parties' PROs are addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the governmental agency responsible for issuing licenses to electrical contractors. Petitioner is also responsible for regulating the practice of electrical contracting on behalf of the state.

2. Respondent is licensed as an electrical contractor. Respondent holds license number ER 0011299.

3. On February 11, 1992, Respondent obtained permit number E92-001706 to perform electrical services in a residence located at 2349 Tinian Avenue, Orlando, Florida 32812 (the "project"). The permit expired on August 12, 1992.

4. On February 11, 1992, Respondent completed the project, telephoned the Orange County Building Department, and requested a "final" inspection for the project. The inspector performed a "rough-in" inspection on February 12, 1992. The project passed the "rough-in" inspection.

5. The inspector did not perform a "final inspection." The inspector determined that the project would not have passed a "final inspection."

6. The inspector did not inform Respondent that he did not perform a "final inspection." The inspector followed routine practice for residential inspections.

7. Respondent did not follow up to make sure that the project passed final inspection. Respondent does not routinely follow up on residential projects to make sure that the final inspection is completed.

8. The project was not a large residential or commercial project. It was a small residential project.

9. Respondent was leaving the state permanently. This was the last project he worked on before leaving the state.

10. No final inspection was completed on the project. It is Respondent's responsibility to make sure that a project passes final inspection.

11. When Respondent completed the project on February 11, 1992, Respondent connected a distributing system to wiring, an apparatus, or fixture without obtaining written permission from an electrical inspector. Respondent left the state, did not perform any other work on the project for 90 days and longer, and did not complete the project by obtaining a final inspection.

12. The owners of the property hired another electrical contractor to obtain the final inspection. The second contractor did not perform any significant work on the project.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this proceeding. The parties were duly noticed for the formal hearing.

14. Petitioner has the burden of proof in this proceeding. Petitioner must show by clear and convincing evidence that Respondent committed the acts alleged in the Administrative Complaint and the reasonableness of any penalty to be imposed. *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987).

15. Section 489.533(1) provides, in relevant part, that acts which constitute grounds for disciplinary action include:

(i) Wilfully or deliberately disregarding and violating the applicable building codes or laws of the state or any municipality or county thereof;

* * *

(p) Abandoning a project which the contractor is engaged in or is under contractual obligation to perform. A project is to be considered abandoned after 90 days if the contractor terminates the project without just cause or without proper notification to the prospective owner, including the reason for termination, or fails to perform work without just cause for 90 consecutive days.

* * *

(r) Proceeding on any job without applicable local building department permits and inspection

16. Respondent did not violate Section 489.533(1)(i). Petitioner failed to show by clear and convincing evidence that Respondent's failure to obtain a final inspection was wilful and deliberate.

17. Respondent did not wilfully or deliberately disregard applicable building codes. Respondent made a good faith attempt to comply with applicable building codes by obtaining a "final inspection." Respondent telephoned the building department, requested a final inspection, and reasonably believed that the project had passed final inspection.

18. Respondent did not violate Section 489.533(1)(p). Respondent did not abandon the project. Respondent reasonably believed that the project was completed satisfactorily. Respondent's reasonable belief that the project had been completed, passed "final inspection," and his subsequent failure to continue work on the project did not constitute abandonment of the project.

19. Respondent violated Section 489.533(1)(r). Respondent completed the project without obtaining a final inspection. A contractor must make sure that the work he or she completes passes final inspection.

20. Section 489.533(2) authorizes the Electrical Contractors' Board (the "Board") to impose a variety of penalties on Respondent including reprimand, fine, suspension, and revocation. Section 489.533(3) directs Petitioner to follow the disciplinary guidelines established by the Board in Florida Administrative Code Rules 61G6-10.001-10.003. 2/ 21. Rules 61G6-10.001 and

61G6-10.002 prescribe disciplinary guidelines for violations of Section 489.533(1). Rule 61G6-10.001(9) lists penalties ranging from a reprimand to a \$1,000 fine and suspension for a violation of Section 489.533(1)(i). Rule 61G6-10.001(16) lists penalties for a violation of Section 489.533(1)(p) that range from a \$500 fine to one year suspension.

22. Respondent's rules list no penalties for a violation of Section 489.533(1)(r). However, Rule 61G6-10.001 authorizes the Board to issue a letter of guidance where appropriate.

23. Rule 61G6-10.003 authorizes Petitioner to deviate from its disciplinary guidelines if Petitioner shows by clear and convincing evidence that aggravating or mitigating circumstances exist to support such a deviation. Petitioner failed to show the existence of aggravating circumstances within the meaning of Rule 61G-10.003. Respondent showed the existence of mitigating circumstances including: the lack of severity of the offense; the lack of egregious harm to the consumer or the public; and the lack of previous offenses or disciplinary history involving Respondent.

24. An agency may not exercise discretion that is inconsistent with an existing rule. Section 120.68(12)(b). An agency's modification of a rule using unpromulgated policy that departs from the meaning of the rule is "forbidden" by Section 120.68(12). *University Community Hospital v. Department of Health and Rehabilitative Services*. *Lakeland Regional Medical Center, Inc. v. Department of Health and Rehabilitative Services*, 610 So.2d 1342, 1345 (Fla. 1st DCA 1992).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner enter a Final Order finding Respondent not guilty of violating Sections 489.533(1)(i) and (p), guilty of violating Section 489.533(1)(r), and imposing no penalty except a letter of guidance.

RECOMMENDED this 14th day of August, 1996, in Tallahassee, Florida.

DANIEL MANRY, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of August, 1996.

ENDNOTES

1/ All chapter and section references are to Florida Statutes (1995) unless otherwise stated.

2/ Unless otherwise stated, all references to rules are to rules promulgated in the Florida Administrative Code effective on the date of this Recommended Order.

APPENDIX

Petitioner's Proposed Findings of Fact

- 1.-5. Accepted in substance
- 6. Rejected as not supported by credible and persuasive evidence
- 7. Rejected as recited testimony
- 8.-13. Accepted in substance
- 14. Rejected as not supported by credible and persuasive evidence
- 15.-16. Accepted in substance
- 17. Rejected as not supported by credible and persuasive evidence
- 18. Accepted in substance

Respondent's Proposed Findings of Fact

- Respondent's proposed findings 1-4 are part of the Pretrial Stipulations
- 5.-7. Accepted in substance
 - 8.-12. Rejected as recited testimony

COPIES FURNISHED:

Ms. Ila Jones, Executive Director
Board of Electrical Contractors
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Lynda Goodgame, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Donna Bass, Senior Attorney
Department of Business and
Professional Regulation
Division of Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0750

Paul E. Dykes, pro se
3427 Leemore Place
Post Office Box 682041
Orlando, Florida 32802

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.