

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY CONSTRUCTION)
LICENSING BOARD,)
)
Petitioner,)
)
vs.) Case No. 05-1973PL
)
ROBERT NEAL DAVIS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case telephonically on September 2, 2005, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Donald S. Crowell, Esquire
Pinellas County Attorney
315 Court Street, Sixth Floor
Clearwater, Florida 33756

For Respondent: Robert Neal Davis, pro se
9770 130th Avenue, North
Largo, Florida 33773

STATEMENT OF THE ISSUES

The issues presented are whether Petitioner should discipline Respondent's license as a roofing contractor for knowingly and willfully performing roof repairs without first obtaining a permit and recording a Notice of Commencement and

without obtaining interim and final inspections of the work, and, if so, whether the proposed penalty is reasonable.

PRELIMINARY STATEMENT

On March 30, 2005, Petitioner filed a two-count Administrative Complaint against Respondent. Respondent timely requested an administrative hearing. Petitioner referred the matter to DOAH to assign an ALJ to conduct the hearing.

At the hearing, Petitioner presented the testimony of two witnesses and submitted no exhibits for admission into evidence. Respondent did not testify, called no witnesses, and submitted 23 exhibits for admission into evidence. The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the official record of the hearing. Neither party requested a transcript of the hearing.

Petitioner timely filed its proposed recommended order (PRO) on September 12, 2005. Respondent filed post-hearing submissions on September 12 and 13, 2005.

FINDINGS OF FACT

1. Petitioner is the local agency responsible for disciplining contractors licensed by Petitioner. At all times material to this proceeding, Petitioner licensed Respondent as a roofing contractor pursuant to license number C-2779.

2. Sometime after October 8, 2004, Respondent knowingly and willfully repaired the roof (roof repair) of a private

residence located in the City of Dunedin (the City) without first obtaining a permit and recording a Notice of Commencement, both of which are required by the City. Respondent performed the work, valued at approximately \$4,200, on a residence located at 778 San Christopher Drive, Dunedin, Florida.

3. Respondent failed to obtain interim and final inspections of the roof repair. Respondent did not request the City Building Department (the Department) to perform interim inspections or final inspections, and the Department did not perform any inspections of the roof repair.

4. Respondent met with Rodney S. Fischer, Executive Director for Petitioner, to discuss the allegations against Respondent. During that conversation, Respondent admitted to performing the relevant roof repair without a permit.

5. Respondent offered several reasons for the failure to obtain a permit and recording a Notice of Commencement prior to performing the roof repair. The work performed was to repair damage from a previous hurricane. Time was of the essence because another hurricane was approaching. The homeowner was in the hospital and was not able to replace Respondent with another roof contractor.

6. Respondent objects to the disclosure of information required by the City in the permit application and Notice of Commencement. Respondent claims that requirements for

disclosure of the value of the work to be performed discloses to competitors the pricing structure utilized by Respondent and provides an unfair competitive advantage for large roofing contractors.

7. The evidence is insufficient to support a finding that the unauthorized roof repair caused harm to the homeowner or to any other member of the public. Neither the homeowner nor a private citizen filed a complaint against Respondent. The homeowner obtained a permit after Respondent completed the roof repair and is not subject to penalty.

8. The evidence is insufficient to support a finding that any previous discipline has been imposed on Respondent's license. As Petitioner admits in its PRO, Respondent has had similar complaints against his license in the past relating to the failure to pull permits for jobs requiring permits. Complaints are not synonymous with convictions and discipline.

9. The purpose of the relevant requirement for a permit is to protect the health, safety, and welfare of persons that come into contact with the work. The requirement is also imposed to ensure the integrity of the structure through interim inspections. There is no evidence that the roof repair is faulty or is likely to harm the health, safety, and welfare of the homeowner or others.

10. The City requires a Notice of Commencement to be filed prior to the issuance of a permit in order to ensure that all material suppliers and subcontractors are put on notice that notices to the owner of a property must be provided in accordance with the construction lien provisions of Chapter 713, Florida Statutes (2004). The requirement ensures that a property owner will not be required to pay twice for materials or services rendered. There is no evidence that the homeowner paid twice for the roof repair.

CONCLUSIONS OF LAW

11. Respondent does not challenge the validity of a rule promulgated by Petitioner. However, Respondent does challenge the validity of rules promulgated by the City that interpret relevant law to impose the contested permitting requirements on roofing contractors. The challenged rules include unpromulgated rules contained in forms such as the permit application form that the City requires Respondent to complete in order to obtain a permit.

12. DOAH has no jurisdiction over the City. The City is not a party to this proceeding. Chapter 120, Florida Statutes (2004), does not authorize a procedure similar to impleader by which Respondent would be able to join the City in this proceeding.

13. Respondent did not file a petition seeking an administrative determination of the validity of the relevant City rules in accordance with Section 120.56, Florida Statutes (2004). Nor did Respondent show that the City is an agency, within the meaning of Subsection 120.52(1), Florida Statutes (2004), that would be subject to the relevant rule challenge provisions.

14. Subsection 120.57(1)(e), Florida Statutes (2004), authorizes Respondent to challenge an unadopted rule in a proceeding conducted pursuant to Subsection 120.57(1), Florida Statutes. Assuming arguendo that the basis of the proposed agency enforcement action is comprised, in part or in whole, of unadopted rules, the City, rather than Petitioner, is the "agency" required to satisfy the requirements in Subsection 120.57(1)(e), Florida Statutes (2004). As previously noted, however, the City is not a party to this proceeding.

15. If it were determined that Subsection 120.57(1)(e), Florida Statutes (2004), requires Petitioner to "prove-up" the prescribed statutory requirements, the evidence shows that the contested permitting requirements satisfy the statutory definition of a rule. § 120.52(15), Fla. Stat. (2004). The City requirements for a permit, Notice of Commencement, and interim and final inspections satisfy the statutory test of general applicability. The contested requirements implement

statutory requirements discussed hereinafter and do not fall within any exception in Subsections 120.52(15)(b) and (c), Florida Statutes (2004).

16. The contested requirements do not exceed the powers, functions, and duties delegated by the legislature to Petitioner, within the meaning of Subsection 120.57(1)(e)2.a., Florida Statutes (2004). Nor do the contested requirements violate any prohibition in Subsections 120.57(1)(e)2.b.-f., Florida Statutes (2004). Ch. 75-489, §§ 10, 23(2), and (3)(a) and (g), Laws of Fla.

17. Petitioner is the agency responsible for disciplinary enforcement of construction licensing requirements in Pinellas County, Florida. Ch. 75-489, §§ 10, 23(2)(a), and 24, Laws of Fla. Respondent is a licensee subject to the proposed disciplinary action. Ch. 75-489, §11(1) and (1)(c), Laws of Fla.

18. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004); Ch. 75-489, § 12(6), Laws of Fla. DOAH provided the parties with adequate notice of the administrative hearing.

19. Petitioner has the burden of proof in this proceeding. Petitioner must prove by clear and convincing evidence that Respondent committed the acts alleged in the Administrative

Complaint and the reasonableness of the proposed penalty.

Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

20. Petitioner satisfied its burden of proof. Petitioner showed by clear and convincing evidence that Respondent performed the roof repair within Pinellas County without first applying for and obtaining a permit, recording a Notice of Commencement, and completing required inspections in violation of Sections 104.1, 104.1.9, and 105.6, The Florida Building Code, and Section 713.13, Florida Statutes (2004). Ch. 75-489, § 23(3)(a) and (g), Laws of Fla.

21. Petitioner's PRO proposes to impose an administrative fine of \$1,000 per count pursuant to Chapter 75-489, § 23(4)(c), Laws of Florida. However, the authorized fine is limited to \$500 per count. Ch. 75-489, § 23(4)(c), Laws of Fla.

22. There is no evidence of aggravating circumstances in this proceeding. The evidence shows that Respondent willfully committed the alleged acts, but willfulness is a definitional requirement rather than an aggravating circumstance.

23. Several mitigating circumstances are evidenced in the record. The record reveals no prior convictions, for similar offenses or other offenses. Testimony from City officials that Respondent has engaged in prior consistent acts, i.e., roof repair without the requisite permit or inspections, is not clear and convincing evidence of prior convictions and discipline.

24. Other mitigating factors include the hospitalization of the homeowner, the need to repair prior hurricane damage, and an impending second hurricane. The evidence demonstrates that Respondent reduced the harm that otherwise would have resulted to the homeowner if the roof had not been repaired before the second hurricane. The homeowner is not the complaining witness, and there is no evidence of harm to the public.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding that Respondent is guilty of the violations alleged in the Administrative Complaint and imposing an administrative fine in the total amount of \$400.

DONE AND ENTERED this 30th day of September, 2005, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of September, 2005.

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.