

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case Nos. 06-1929  
 ) 06-1934  
BENJAMIN KRICK, d/b/a BK AND H )  
CORPORATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A duly-noticed final hearing was held in these cases by Administrative Law Judge T. Kent Wetherell, II, on July 27, 2006, in Naples, Florida, and by telephone on August 18, 2006.

APPEARANCES

For Petitioner: Brian A. Higgins, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

For Respondent: Benjamin Krick, pro se  
6025 English Oaks Lane  
Naples, Florida 34119

STATEMENT OF THE ISSUE

The issue is whether Respondent committed the acts alleged in the Administrative Complaints and, if so, what penalty is appropriate.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation (Department) alleged in separate Administrative Complaints dated December 12, 2005, that Respondent performed unlicensed contracting and unlicensed electrical contracting. Respondent disputed the allegations in the Administrative Complaints and requested a hearing pursuant to Section 120.57(1), Florida Statutes.

On May 26, 2006, the Department referred these cases to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the hearing requested by Respondent. The referral was received by DOAH on May 30, 2006, and the cases were consolidated by Order dated June 6, 2006.

The final hearing was scheduled for July 27, 2006, in Naples. Respondent requested a continuance of the hearing in a letter dated June 27, 2006. The request was opposed by the Department and was denied by Order dated July 5, 2006.

Respondent renewed his request for a continuance at the outset of the final hearing. The request was denied.

The final hearing commenced as scheduled on July 27, 2006, but it was not concluded on that date. Consistent with the procedure upheld in Malave v. Department of Health, 881 So. 2d 682 (Fla. 5th DCA 2004), the record was left open to allow Respondent to testify after the criminal case pending against

him based upon the conduct giving rise to the Administrative Complaints was resolved. The final hearing reconvened by telephone on August 18, 2006, and was concluded on that date.

At the final hearing, the Department presented the testimony of Robert Brown and Michael Ossorio. The Department's Exhibits 1 through 11 were received into evidence. Respondent testified in his own behalf and presented the testimony of Kimberly Frye. Respondent's Exhibits R-1, R-2, and R-3 were received into evidence.

The one-volume Transcript of the final hearing was filed on September 15, 2006. The parties were given 10 days from that date to file proposed recommended orders (PROs). The Department filed a PRO on September 22, 2006. Respondent did not file a PRO. The Department's PRO has been given due consideration.

All statutory references in this Recommended Order are to the 2004 version of the Florida Statutes that was in effect at the time of the conduct giving rise to the Administrative Complaints, unless otherwise indicated.

#### FINDINGS OF FACT

1. Respondent provides "handyman" services through BK and H Corporation.

2. Respondent is not licensed by the Department as a contractor or an electrical contractor, and his corporation is

not licensed by or registered with the Department in those fields.

3. Respondent's corporation has an occupational license from Collier County. The classification listed on the license is "handyman repair service (no contracting)."

4. The occupational license includes the notation "HIGHLY RESTRICTED" in bold type. The license also states that it "is not a certification that the licensee is qualified" and that it "does not permit the licensee to violate any existing regulatory zoning laws of the state, county or cities nor does it exempt the licensee from any other license or permits that may be required by law."

5. On or about April 11, 2005, Respondent presented a written "Estimate" to Robert Brown for a variety of work that Mr. Brown wanted done to his home. The Estimate was on the letterhead of Respondent's corporation.

6. Respondent testified that the Estimate was not a proposal for work to be performed, but rather was an itemized list of the work that he and others hired by Mr. Brown had already performed and that Mr. Brown had already paid for. Respondent's testimony regarding the purpose of the Estimate was not credible.

7. First, if, as Respondent claims, the Estimate was intended to be an itemization of work that had already been

performed and that Mr. Brown had already paid for, there would have been no reason for Mr. Brown to pay additional money to Respondent after April 11, 2005, as he did (see Findings of Fact 12 and 13), and there would also have been no reason for Mr. Brown to execute a power of attorney after that date to give Respondent authority to "pull" building permits on Mr. Brown's behalf (see Findings of Fact 15 and 16).

8. Second, Respondent's characterization of the Estimate is inconsistent with that of his fiancée, Kimberly Frye, who credibly testified that she prepared the document "based on some handwritten notes after Mr. Brown and [Respondent] first initiated [sic] at the home, and they made a list of items that Mr. Brown solicited from [Respondent] to do services."<sup>1</sup>

9. The more persuasive evidence clearly and convincingly establishes that the Estimate was a proposal by Respondent to perform the work listed on the Estimate at Mr. Brown's home for compensation.

10. The work listed on the Estimate included electrical work (e.g., installation of a 200 Amp service outlet box and two lights in the front yard); structural work (e.g., repairs to Mr. Brown's roof and the removal and replacement of a pool deck); and other miscellaneous remodeling work inside and around Mr. Brown's home.

11. The price listed on the Estimate was \$8,500. That amount did not include the cost of materials, which according to the Estimate, were to be paid for by Mr. Brown.

12. On April 25, 2005, Mr. Brown paid Respondent \$2,000 in cash "toward labor" and \$500 in cash "toward materials." Mr. Brown paid Respondent an additional \$2,000 in cash on May 15, 2005, and another \$2,000 by check on June 16, 2005.

13. Respondent acknowledged receiving \$6,000 from Mr. Brown related to the work listed on the Estimate.<sup>2</sup>

14. Respondent claimed that he was only serving as a conduit for the money and that he paid the money to other people that Mr. Brown had hired to perform work on his home at the same time Respondent was working there. Respondent did not present any evidence to corroborate this self-serving testimony, and it is not found credible.

15. On April 25, 2005, Mr. Brown executed a document titled "Specific Power of Attorney for Collier County and City of Naples." The document purports to give Respondent "power of [Mr. Brown's] signature for any and all necessary permits, inspections and permit pick up" related to the work on Mr. Brown's home.

16. According to Respondent, the document was prepared and given to him by Mr. Brown so that he could "pull" owner-builder

permits from the Collier County and/or the City of Naples on Mr. Brown's behalf.

17. An owner-builder permit allows the work to be performed by or under the direct onsite supervision of the owner of the building. It does not allow the work to be delegated by the owner (through a power of attorney or otherwise) to an unlicensed contractor, such as Respondent.

18. Mr. Brown testified that he asked Respondent whether he was a licensed general contractor and Respondent told him that he was. Respondent testified that he told Mr. Brown on several occasions that he was not a licensed contractor. Respondent's testimony was corroborated by Ms. Frye.

19. Mr. Brown's testimony on this issue was not credible, and it is more likely than not based upon the totality of the circumstances -- cash payments, preparation of the power of attorney, Mr. Brown's overall demeanor while testifying, etc. -- that Mr. Brown knew, or had reason to believe, that Respondent was not a licensed contractor.

20. Respondent testified that the only work that he personally performed at Mr. Brown's house was the installation of flooring, drywall, and closet doors. He claimed that the other work listed on the Estimate, including the electrical work, was performed by other persons hired by Mr. Brown.

21. Respondent denied that he was responsible for supervising the other persons that he contends were working on Mr. Brown's home, although he testified that Mr. Brown gave him money to pay those workers. Respondent did not identify any of the other workers who, according to him, performed work on Mr. Brown's home and that he allegedly paid on Mr. Brown's behalf.

22. Mr. Brown was at work while Respondent was working on his home. He did not provide direct on-site supervision of Respondent.

23. Mr. Brown did not observe other persons working with Respondent on his home, except for one occasion that Respondent had a "helper" with him. The identity of that person, and the work that he or she performed, is unknown.

24. Mr. Brown did not personally see Respondent performing all of the work listed on the Estimate. He did, however, see Respondent working on the water heater, an electrical switch in the laundry room, and the ceiling fans.

25. Respondent's testimony regarding the limited scope of the work that he performed on Mr. Brown's home was not credible or persuasive, and the totality of the evidence clearly and convincingly establishes that Respondent offered to perform and did perform contracting and electrical contracting work at Mr. Brown's home.

26. At some point after Respondent stopped working at Mr. Brown's home, Mr. Brown was advised by an electrical contractor that some of the electrical work needed to be redone because it posed a fire risk. Mr. Brown had the work redone by an electrical contractor, which cost him \$2,400. He was also required to pay \$400 to Florida Power and Light for some reason.

27. Thereafter, Mr. Brown filed complaints against Respondent with the Department and with Collier County.

28. After investigating the complaints, Collier County issued two citations to Respondent and imposed fines totaling \$900. The fines were not based upon the performance of unlicensed contracting or electrical contracting, but rather were based upon Respondent advertising his ability to provide those services through the Estimate.

29. Respondent did not contest the fines imposed by Collier County. He paid the fines in full.

30. The Department provided its investigative file related to this incident to the State Attorney's Office (SAO) in Collier County, as it was required to do by Section 455.2277, Florida Statutes.

31. The SAO makes the decision whether to file criminal charges against an individual for unlicensed contracting. The Department is not involved in that decision.

32. The SAO brought criminal charges against Respondent for the unlicensed contracting that he performed at Mr. Brown's home, but the case was "nol prossed" by the SAO.

33. Respondent is in the process of applying for a general contractor's license from the Construction Industry Licensing Board. He testified that he took and passed the licensing exam on August 16, 2006.

34. The Department incurred investigative costs of \$296.99 related to Complaint No. 2005-042280, which is DOAH Case No. 06-1929.

35. The Department incurred investigative costs of \$307.45 related to Complaint No. 2005-042281, which is DOAH Case No. 06-1934.

#### CONCLUSIONS OF LAW

##### A. Jurisdiction and Burden of Proof

36. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

37. The Department has the burden to prove the allegations in the Administrative Complaints against Respondent by clear and convincing evidence. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996).

38. The clear and convincing evidence standard requires that the evidence "must be of such weight that it produces in

the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994).

39. The Department is not barred from prosecuting the Administrative Complaints against Respondent as a result of the fines imposed by Collier County or the criminal charges that were "nol prossed" by the SAO. See, e.g., § 489.13(7), Fla. Stat. (explaining that the remedies set forth in Section 489.13, Florida Statutes, are not exclusive and may be imposed in addition to other penalties authorized by law).

B. Unlicensed Contracting (DOAH Case No. 06-1929)

(1) Violation

40. Contracting is regulated under Part I of Chapter 489, Florida Statutes. See §§ 489.101-.146, Fla. Stat.

41. "Contractor" is defined as:

the person who . . . for compensation, undertakes to, submits a bid to, or does himself or herself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others . . . .

§ 489.105(3), Fla. Stat.

42. "Contracting" is defined to mean:

engaging in business as a contractor and includes, but is not limited to, performance of any of the acts as set forth in subsection (3) which define types of

contractors. The attempted sale of contracting services and the negotiation or bid for a contract on these services also constitutes contracting. . . .

§ 489.105(6), Fla. Stat.

43. Section 489.103, Florida Statutes, exempts certain contracting activities from regulation. None of those exemptions apply to Respondent's work at Mr. Brown's home.

44. The exemption referenced by Respondent in his testimony<sup>3</sup> is not applicable because each item of work on the Estimate was part of a contract that exceeded \$1,000, and because the work involved was not "of a casual, minor, or inconsequential nature" because it involved structural work (e.g., roofing) and life-safety matters (e.g., electrical work). See § 489.103(9)(a), Fla. Stat.; Fla. Admin. Code R. 61G4-12.011(2).

45. Section 489.127(1)(f), Florida Statutes, provides that no person shall:

[e]ngage in the business or act in the capacity of a contractor or advertise himself or herself or a business organization as available to engage in the business or act in the capacity of a contractor without being duly registered or certified or having a certificate of authority[.]

46. Additionally, Section 489.13(1), Florida Statutes, provides that:

[a]ny person performing an activity requiring licensure under this part as a construction contractor is guilty of unlicensed contracting if he or she does not hold a valid active certificate or registration authorizing him or her to perform such activity, regardless of whether he or she holds a local construction contractor license or local certificate of competency. . . .

47. The evidence clearly and convincingly establishes that Respondent is not licensed as a contractor; that the work he proposed to do and that he did at Mr. Brown's home meets the definition of "contracting"; that he was compensated for his work on Mr. Brown's home; and that the contracting work he performed is not exempt from regulation under Part I of Chapter 489, Florida Statutes.

48. Therefore, the Department met its burden to prove that Respondent is guilty of unlicensed contracting in violation of Sections 489.127(1)(f) and 489.13, Florida Statutes.

(2) Amount of Fine

49. The Department is generally authorized to impose an administrative fine "not to exceed \$5,000 per incident" for unlicensed activity. See § 455.228(1), Fla. Stat.

50. However, with respect to unlicensed contracting under Part I of Chapter 489, Florida Statutes, the Department is authorized to impose an administrative fine of "up to \$10,000." See § 489.13(3), Fla. Stat.

51. The Department is seeking a fine of \$10,000 in this case for Respondent's unlicensed contracting. See Department's PRO, at 7.

52. The Department has not adopted guidelines to be used in determining the appropriate fine within the range established by Section 489.13, Florida Statutes, nor has it enumerated the aggravating and mitigating circumstances that are to be considered in determining the appropriate fine. See § 455.2273, Fla. Stat. (requiring the Department to adopt disciplinary guidelines which establish penalty ranges and designate aggravating and mitigating circumstances and requiring the Administrative Law Judge to follow the guidelines in the penalty recommendation included in the Recommended Order).

53. In a recent case, a \$1,000 penalty was recommended for unlicensed contracting where it was the Respondent's first offense and no aggravating circumstances were present. See Dept. of Business & Professional Reg. v. Antoney Manning d/b/a Manning Builders, Case No. 06-0601, 2006 Fla. Div. Adm. Hear. LEXIS 286 (DOAH June 28, 2006).<sup>4</sup>

54. A fine of \$1,000 for Respondent's unlicensed contracting work is reasonable under the circumstances of this case. First, there is no evidence that the contracting work done by Respondent was defective, as was the case with the electrical contracting work. Second, a \$900 fine has already

been imposed on Respondent as a result of this incident. Third, since the incident, Respondent has made a diligent effort to become a licensed contractor.

55. The Department is authorized to "waive up to one-half of any fine imposed if the unlicensed contractor complies with certification or registration within 1 year after imposition of the fine under this subsection." § 489.13(3), Fla. Stat. It should do so in this case.

(3) Investigative Costs

56. Section 489.13(3), Florida Statutes, authorizes the Department to "assess reasonable investigative and legal costs for prosecution of the violation against the unlicensed contractor" in addition to any fine imposed. See also § 455.228(3)(c), Fla. Stat. (authorizing the Department to "recover costs of investigation" in addition to any fine imposed).

57. The evidence clearly and convincingly establishes that the Department incurred \$296.99 in investigative costs related to DOAH Case No. 06-1929. No prosecution costs were sought.

C. Unlicensed Electrical Contracting  
(DOAH Case No. 06-1934)

(1) Violation

58. Electrical contracting is regulated under Part II of Chapter 489, Florida Statutes. See §§ 489.501-.538, Fla. Stat.

59. Section 489.505, Florida Statutes, defines "contracting," "contractor," and "electrical contractor" as follows:

(9) "Contracting" means, except where exempted in this part, engaging in business as a contractor or performing electrical . . . work for compensation . . . . The attempted sale of contracting services and the negotiation or bid for a contract on these services also constitutes contracting. . . . .

(10) "Contractor" means a person who is qualified to engage in the business of electrical . . . contracting pursuant to a certificate or registration issued by the department.

\* \* \*

(12) "Electrical contractor" . . . means a person who conducts business in the electrical trade field and who has the experience, knowledge, and skill to install, repair, alter, add to, or design, in compliance with law, electrical wiring, fixtures, appliances, apparatus, raceways, conduit, or any part thereof, which generates, transmits, transforms, or utilizes electrical energy in any form, including the electrical installations and systems within plants and substations, all in compliance with applicable plans, specifications, codes, laws, and regulations. The term means any person, firm, or corporation that engages in the business of electrical contracting under an express or implied contract; or that undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to engage in the business of electrical contracting; or that does itself or by or

through others engage in the business of electrical contracting.

§ 489.505(9), (10), (12), Fla. Stat.

60. Section 489.503, Florida Statutes, exempts certain electrical contracting activities from regulation. None of those exemptions apply to Respondent's work at Mr. Brown's home.

61. Section 489.531, Florida Statutes, provides in pertinent part:

(1) A person may not:

(a) Practice contracting unless the person is certified or registered;

(b) . . . advertise himself or herself or a business organization as available to practice electrical . . . contracting, when the person is not then the holder of a valid certification or registration issued pursuant to this part;

\* \* \*

§ 489.531(1)(a), (b), Fla. Stat.

62. A person who violates these prohibitions is subject to criminal penalties. See § 489.531(3), Fla. Stat.

63. Part II of Chapter 489, Florida Statutes, does not provide specific administrative penalties for unlicensed electrical contracting. Compare § 489.13, Florida Statutes (providing a specific administrative fine for unlicensed contracting under Part I of Chapter 489, Florida Statutes).

64. Thus, the authority for imposition of an administrative fine for unlicensed electrical contracting is Section 455.228, Florida Statutes. Subsection (1) of that statute provides in pertinent part:

When the department has probable cause to believe that any person not licensed by the department . . . has violated . . . any statute that relates to the practice of a profession regulated by the department, or any rule adopted pursuant thereto, the department may . . . impose an administrative penalty not to exceed \$5,000 per incident pursuant to the provisions of chapter 120 . . . .

§ 455.228(1), Fla. Stat.

65. The evidence clearly and convincingly establishes that Respondent is not licensed as an electrical contractor; that the work he proposed to do and that he did at Mr. Brown's home included electrical contracting, as defined by statute; that Respondent was compensated for his work on Mr. Brown's home; and that the electrical contracting work performed by Respondent is not exempt from regulation under Part II of Chapter 489, Florida Statutes.

66. Therefore, the Department met its burden to prove that Respondent is guilty of unlicensed contracting in violation of Sections 455.228 and 489.531, Florida Statutes.

(2) Amount of Fine

67. Section 455.228(1), Florida Statutes, authorizes the Department to impose an administrative fine "not to exceed \$5,000."

68. The Department is seeking a fine of \$5,000 in this case for Respondent's unlicensed electrical contracting. See Department's PRO, at 7.

69. The Department has not adopted guidelines to be used in determining the appropriate fine within the range established by Section 455.228, Florida Statutes, nor has it enumerated the aggravating and mitigating circumstances that are to be considered in determining the appropriate fine. See § 455.2273, Fla. Stat. (requiring the Department to adopt disciplinary guidelines which establish penalty ranges and designate aggravating and mitigating circumstances and requiring the Administrative Law Judge to follow the guidelines in the penalty recommendation included in the Recommended Order).

70. In a recent case, a \$1,000 fine was imposed for unlicensed electrical contracting where it was the Respondent's first offense and no aggravating circumstances were present. See Dept. of Business & Professional Reg. v. Thomas Joseph Pyche, Sr., d/b/a Sundance Home Remodeling, Inc., Case No. 06-1145 (DOAH July 27, 2006; DBPR Sep. 27, 2006).

71. A \$1,000 fine for Respondent's unlicensed electrical contracting work is reasonable under the circumstances of this case, taking into account the aggravating circumstances (e.g., the electrical work performed by Respondent was defective and cost Mr. Brown \$2,800 to remedy) and the mitigating circumstances (e.g., this was Respondent's first offense and he has already been fined \$900 by Collier County for this incident) established by the evidence.

### (3) Investigative Costs

72. Section 455.228(3)(c), Florida Statutes, authorizes the Department to "recover costs of investigation" in addition to any fine imposed.

73. The evidence clearly and convincingly establishes that the Department incurred \$307.45 in investigative costs related to DOAH Case No. 06-1934.

### RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation issue a final order that:

1. finds Respondent guilty of unlicensed contracting in violation of Sections 489.127(1)(f) and 489.13, Florida Statutes, and imposes an administrative fine of \$1,000, with \$500 payable upon entry of the final order and the other \$500

payable one year from that date unless Respondent provides satisfactory evidence to the Department that he obtained a state contractor's license within that period;

2. finds Respondent guilty of unlicensed electrical contracting in violation of Sections 455.228 and 455.531, Florida Statutes, and imposes an administrative fine of \$1,000; and

3. requires Respondent to pay the Department's investigative costs of \$604.44.

DONE AND ENTERED this 9th day of October, 2006, in Tallahassee, Leon County, Florida.



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T. KENT WETHERELL, II  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of October, 2006.

ENDNOTES

<sup>1</sup>/ Transcript, at 60.

<sup>2</sup>/ Transcript, at 91.

<sup>3/</sup> Transcript, at 80 (referring to Section 489.103(9), Florida Statutes).

<sup>4/</sup> Compare Dept. of Business & Professional Reg. v. Domenick Spallina d/b/a New Look Contracting, Inc., Case No. 06-1949, 2006 Fla. Div. Adm. Hear. LEXIS 440 (DOAH Sep. 13, 2006) (recommending a \$10,000 fine); Dept. of Business & Professional Reg. v. Douglas Claiborne d/b/a Claiborne Home Improvement and Maintenance Service, Case No. 06-1427, 2006 Fla. Div. Adm. Hear. LEXIS 389 (DOAH Aug. 11, 2006) (recommending a \$5,000 fine).

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.