

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
)	
Petitioner,)	
)	
vs.)	
)	
JIM ADAMS, JR., AND BAY BREEZE)	Case No. 06-3690
MAINTENANCE, LLC,)	
)	
Respondents.)	
<hr/>)	
DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 06-3691
)	
JIM ADAMS, JR., AND BAY BREEZE)	
MAINTENANCE, LLC,)	
)	
Respondents.)	
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RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing of this case for the Division of Administrative Hearings (DOAH) on January 24, 2007, in Sarasota, Florida.

APPEARANCES

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

For Respondents: Jim Adams, Jr., pro se
Bay Breeze Maintenance, LLC
Post Office Box 14184
Bradenton, Florida 34280

STATEMENT OF THE ISSUES

The issues in this case are whether each of the two respondents practiced contracting and electrical contracting without a license in violation of Subsections 489.113(2), 489.127(1)(f), 489.531(1), Florida Statutes (2004),¹ and, if so, what penalty, if any, should be imposed pursuant to Subsections 455.228(1) and 489.13(3).

PRELIMINARY STATEMENT

On May 23 and 24, 2006, Petitioner filed two Amended Administrative Complaints naming both of the respondents in each proceeding. The two complaints involve an identical incident. The earlier of the two complaints alleges the incident violated relevant statutes prohibiting the unlicensed practice of contracting. The later complaint alleges the incident violated relevant statutes prohibiting the unlicensed practice of electrical contracting.

The respondents timely requested a formal hearing. Petitioner referred the two matters to DOAH to conduct the formal hearings. The undersigned scheduled the two cases for hearing on the same day at 9:30 a.m. and 1:30 p.m.

At the hearing, the ALJ granted the unopposed ore tenus motion to consolidate the two cases entered on the record by Respondent, Jim Adams, Jr. Petitioner presented the testimony of two witnesses and submitted eight exhibits for admission into evidence. Mr. Adams testified, presented the testimony of two other witnesses, and submitted three exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the one-volume Transcript of the hearing filed on February 14, 2007. Petitioner timely filed its Proposed Recommended Order (PRO) on February 22, 2007. Neither of the two respondents filed a PRO.

FINDINGS OF FACT

1. Petitioner is the state agency defined in Subsection 489.105(2) that is responsible for regulating the practice of contracting and electrical contracting pursuant to Subsection 455.228(1). Neither of the respondents has ever been licensed as either a contractor or an electrical contractor.

2. On April 14, 2005, Mr. Adams and Bay Breeze Maintenance, LLC (Bay Breeze), practiced contracting and electrical contracting within the meaning of Subsections 489.105(3) and (6) and 489.505(9) and (12). Mr. Adams, as agent for Bay Breeze, submitted to Mr. Christopher King, as agent for Dome Flea Market in Venice, Florida, a written proposal to

remodel part of the Dome Flea Market for a cost not to exceed \$60,000.

3. The proposed remodeling involved an upgrade of a snack bar into a grill and bar to be known as the Sawmill Grill. In relevant part, the proposed remodeling required performance of plumbing, carpentry, and electrical contracting, including the installation of electrical wiring and electrical fixtures.

4. Between April 14 and May 20, 2005, Mr. King paid approximately \$39,350 to the respondents for the proposed remodeling job. On April 14, 2005, Mr. King paid \$8,000 and \$1,500 by respective check numbers 7725 and 7726. On April 19, 2005, Mr. King paid \$8,000 and \$1,700 by respective check numbers 7730 and 7731. On May 3 and 20, 2005, Mr. King paid \$5,150 and \$14,000 by respective check numbers 7742 and 7770. The respondents never actually performed any remodeling work.

5. Mr. Adams testified that Mr. King forged the written proposal and that neither Mr. Adams nor Bay Breeze submitted a proposal for the remodeling project. That testimony was neither credible nor persuasive.

6. The financial harm to the public was substantial. Mr. Adams and Bay Breeze have not paid any restitution. Petitioner incurred investigative costs, excluding attorney fees and costs, in the amount of \$844.07. The investigative costs are reasonable within the meaning of Subsection 489.13(3).

CONCLUSIONS OF LAW

7. DOAH has jurisdiction over the subject matter and parties. §§ 120.569 and 120.57(1), Fla. Stat. (2006). DOAH provided the parties with adequate notice of the formal hearing.

8. Petitioner has the burden of proof in this proceeding. Petitioner must show by clear and convincing evidence that each licensee committed the acts alleged in each Amended Administrative Complaint and the reasonableness of the proposed penalty. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

9. Petitioner satisfied its burden of proof concerning the alleged unlicensed contracting. Petitioner showed by clear and convincing evidence that Mr. Adams and Bay Breeze practiced contracting and electrical contracting without a license in violation of Subsections 489.127(1)(f) and 489.531(1).

10. Subsection 455.228(1) authorizes Petitioner to impose an administrative "penalty" not greater than \$5,000 for each incident that violates the statutory prohibition against practicing without a license. The relevant statute also authorizes Petitioner to recover attorney fees and costs and the cost of recovery. However, Petitioner does not seek the recovery of attorney fees and costs in this proceeding.

11. Subsection 489.13(3) authorizes Petitioner to "fine" the respondents up to \$10,000. The relevant statute also authorizes Petitioner to recover reasonable investigative costs.

12. Petitioner satisfied its burden of proving entitlement to the recovery of investigative costs in the amount of \$844.07. The investigative costs are reasonable, and Petitioner satisfied the statutory prerequisites for recovery.

13. Petitioner has not satisfied its burden of proving that separate fines of \$5,000 and \$10,000 are reasonable in this case. Petitioner proposes in its PRO to penalize Mr. Adams and Bay Breeze twice for the same incident. Petitioner seeks to impose an administrative penalty of \$5,000, pursuant to Subsection 455.228(1), and an administrative fine of \$10,000 pursuant to Subsection 489.13(3).

14. Petitioner cites no judicial precedent to support the proposed penalty. Petitioner implicitly relies on a literal interpretation of Subsection 489.13(3).

15. Subsection 489.13(3) provides in relevant part:

Notwithstanding s. 455.228, the department may impose an administrative fine of up to \$10,000 on any unlicensed person guilty of unlicensed contracting. . . .

16. The ALJ construes the "notwithstanding" language in Subsection 489.13(3) to mean that the \$10,000 "fine" authorized in Subsection 489.13(3) is not nullified by the \$5,000 limit on the "penalty" authorized in Subsection 455.228. The "notwithstanding" provision in Subsection 489.13(3) cannot be reasonably construed as legislative authority for the imposition

of two fines for the same incident. Any doubt concerning the authority of an agency to act should be resolved by refusing to exercise that authority.

17. Petitioner satisfied its burden of proving the reasonableness of imposing a \$10,000 "fine" pursuant to Subsection 489.13(3). The financial harm to the public is great, and the respondents have not mitigated that harm.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding Mr. Adams and Bay Breeze guilty of committing the violations alleged in each Amended Administrative Complaint and imposing an aggregate administrative fine against Mr. Adams and Bay Breeze, collectively, in the amount of \$10,000.

DONE AND ENTERED this 12th day of March, 2007, 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 12th day of March, 2007.

ENDNOTE

1/ All statutory references are to Florida Statutes (2004)
unless otherwise stated.

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.