

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 07-4859
)
SCOTT DELAFIELD AND CORAL ISLE)
POOLS AND SPAS,)
)
Respondents.)
_____)

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on January 4, 2008, in Dade City, Florida.

APPEARANCES

For Petitioner: Sorin Ardelean, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399

For Respondents: Jack D. Hoogewind, Esquire
33283 Cortez Boulevard
Dade City, Florida 33523

STATEMENT OF THE ISSUE

The issue is whether Respondents committed the acts alleged in the Administrative Complaint, and if so, what discipline should be imposed.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation (Department) alleged in a two-count Administrative Complaint dated January 31, 2007, that Respondents engaged in unlicensed contracting (Count 1) and unlicensed electrical contracting (Count 2). Respondents disputed the allegations in the Administrative Complaint and requested a hearing pursuant to Section 120.57(1), Florida Statutes.¹

On October 23, 2007, the Department referred this matter to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge (ALJ) to conduct the hearing requested by Respondents. The referral was received by DOAH on October 24, 2007.

The final hearing was scheduled for and held on January 4, 2008. The Department dismissed Count 1 of the Administrative Complaint at the outset of the hearing, and the case proceeded on Count 2 only. See Transcript, at 7.

The Department presented the testimony of Erin Mussori, Clara Marron, William Marron, and Scott Delafield. Respondents presented the testimony of Mr. Delafield and Tammy Wheeler. The following exhibits were received into evidence: Petitioner's Exhibits 1 through 9; Respondents' Exhibits 1 through 4; and ALJ Exhibit 1.

The one-volume Transcript of the final hearing was filed on January 22, 2008. The parties requested and were given 21 days from that date to file proposed recommended orders (PROs). The deadline was subsequently extended based upon Respondents' unopposed motion. The Department filed a PRO on February 12, 2008, and Respondents filed a PRO on February 15, 2008. The PROs have been given due consideration.

FINDINGS OF FACT

1. Richard and Clara Marron have an in-ground, fiberglass pool at their home in Zephyrhills. The pool is approximately 25 years old.

2. In December 2005, the Marrons' pool service company told them that the pool had a leak. The pool service company referred the Marrons to Coral Isle Pools and Spas (Coral Isle) in Zephyrhills.

3. Coral Isle was owned and operated by Richard Delafield--the father of Respondent Scott Delafield--until his death on January 31, 2006. Richard Delafield was a registered building contractor, registered pool/spa contractor, registered plumbing contractor, and the qualifying agent for Coral Isle.

4. On or about March 29, 2006, the Marrons went into Coral Isle's store and talked to Scott Delafield about fixing the leak in their pool.²

5. Mr. Delafield determined that the pool was leaking around the underwater light fixture and that the light needed to be replaced. He agreed to perform the necessary repairs for \$858.55.

6. The invoice prepared by Mr. Delafield described the work to be performed as follows: "dig under deck redue [sic] electrical conduit" and "labor to install light and do diagnostic on transformer."

7. On May 6, 2006, the Marrons made an initial payment of \$250.00 to Coral Isle.

8. On May 15, 2006, Mr. Delafield performed the work on the Marrons' pool.

9. Mr. Delafield did not obtain a permit from Pasco County before commencing the work on the Marrons' pool.³

10. The work was done in four stages. First, a trench was dug under the pool deck to provide access to the back of the light fixture. Second, the existing light was removed and replaced with a new light. Third, the wire for the new light was routed through PVC conduit pipe Mr. Delafield laid in the trench. Fourth, Mr. Delafield connected the wire to the "junction box"⁴ adjacent to the pool deck.

11. The trench under the pool deck was dug by Carl Lind or Mark Pickett, not Mr. Delafield. Mr. Lind and Mr. Pickett were subcontractors of Coral Isle.

12. Mr. Delafield removed the existing light by removing the screws on the front of the light fixture. He then installed the new light and ran the wire for the light through new PVC conduit pipe to the junction box.

13. On May 17, 2006, the Marrons paid the balance of the invoice, \$608.55.

14. Mr. Delafield did not perform any work on the higher voltage electrical wires between the junction box and the breaker box at the house.

15. Mr. Delafield did not drain the pool to replace the light. He was able to access the light fixture from the front because the water level in the pool was below the fixture as a result of the leak in the pool.

16. At some point after Mr. Delafield completed his work on the pool light, Mr. Lind and/or Mr. Pickett drained the Marrons' pool in order to "patch" the fiberglass bottom of the pool.⁵

17. The light installed by Mr. Delafield works, and the pool no longer leaks. Indeed, the Marrons acknowledged in their testimony at the final hearing that the work done by Mr. Delafield fixed the leak and that the pool now "holds water."

18. Mr. Delafield and Coral Isle were not licensed, registered, or certified to perform electrical contracting work

at the time Mr. Delafield performed the work on the Marrons' pool light.

19. In April 2006, the Department issued temporary emergency certifications to Mr. Delafield as a registered building contractor, registered pool/spa contractor, and registered plumbing contractor.

20. The certifications authorized Mr. Delafield to complete Coral Isle's "projects in progress" at the time of Richard Delafield's death. The certifications did not authorize Mr. Delafield to enter into new contracts, nor did they authorize him to perform electrical contracting work.

21. The Marrons' project was not in progress at the time of Richard Delafield's death. The agreement to perform the work was not entered into until several months after his death.

22. In June 2006, the Marrons filed an unlicensed activity complaint against Mr. Delafield and Coral Isle. The Department incurred costs of \$206.69 in its investigation of the complaint, not including costs associated with an attorney's time.

23. In February 2007, the Marrons made a claim for \$150,000 against Richard Delafield's estate in which they alleged that their pool and deck were "rendered useless" due to the negligence of Coral Isle. They also filed a civil suit against Mr. Delafield and others for damage to their pool. The

Marrons did not pursue the claim against the estate, but the civil action is still pending.

24. Coral Isle is no longer in business. Mr. Delafield testified that he planned to pursue licensure so that he could keep the business operating after his father's death, but that he never did so.

25. Mr. Delafield was unemployed at the time of the final hearing.

CONCLUSIONS OF LAW

A. Jurisdiction and Burden of Proof

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

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

28. 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).

B. Unlicensed Electrical Contracting

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

30. Electrical contracting includes the installation and repair of "electrical wiring, fixtures, appliances, apparatus, raceways, conduit, or any part thereof, which generates, transmits, transforms, or utilizes electrical energy in any form" § 489.505(12), Fla. Stat. (definition of "electrical contractor"). See also § 489.505(9), Fla. Stat. (defining "contracting" to include "performing electrical . . . work for compensation").

31. Section 489.503, Florida Statutes, exempts certain electrical contracting activities from regulation. None of the exemptions apply to Mr. Delafield's work on the Marrons' pool light.

32. A person may not practice electrical contracting unless he or she is duly certified or registered. See § 489.531(1)(a), Fla. Stat.

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

34. The authority for the imposition of administrative penalties for unlicensed electrical contracting is Section 455.228(1), Florida Statutes, which 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

35. The evidence clearly and convincingly establishes that Mr. Delafield was not licensed as an electrical contractor at the time he performed work on the Marrons' pool light; that the work he performed on the Marrons' pool light falls within the broad statutory definition of electrical contracting; that Mr. Delafield was compensated for the work; that the work was not exempt from regulation under Part II of Chapter 489, Florida Statutes; and that the work was not authorized by the temporary emergency certifications issued to Mr. Delafield.

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

C. Amount of Fine

37. Section 455.228(1), Florida Statutes, authorizes the Department to impose an administrative fine "not to exceed

\$5,000." Compare § 489.13(3), Fla. Stat. (authorizing an administrative fine of up to \$10,000 for unlicensed contracting).

38. The Department did not identify the fine that it is seeking in this case, either at the final hearing or in its PRO. Its PRO (at page 7) simply requests the imposition of "a fine not to exceed \$5,000."

39. The Department has not adopted disciplinary guidelines for violations of Section 455.228, Florida Statutes, as required by Section 455.2273, Florida Statutes.⁶

40. Respondents argue that the Department may not impose a fine in the absence of disciplinary guidelines. In support of this argument, Respondents cite Arias v. Department of Business and Professional Regulation, 710 So. 2d 655 (Fla. 2d DCA 1998), review dismissed, 718 So. 2d 167 (Fla. 1999).

41. In Arias, the court reversed a final order disciplining a real estate agent because the Florida Real Estate Commission (FREC) had not adopted disciplinary guidelines for the violation at issue in that case. The court held that "the statutory language at issue in the instant case, combined with the total lack of guidance for enforcement, left the licensee in a predicament ripe for arbitrary and erratic enforcement, and obviously provided no standards sufficiently governed by the

legislature as to constitute judicially reviewable discretion."
Arias, 710 So. 2d at 659.

42. The holding in Arias must be viewed in context of the statute at issue in that case, which broadly authorized FREC to:

place a licensee . . . on probation; . . .
suspend a license . . . for a period not
exceeding 10 years; . . . revoke a
license[;] . . . impose an administrative
fine not to exceed \$1,000 for each count or
separate offense; and . . . issue a
reprimand, and any or all of the foregoing,
if it finds that the licensee . . . has
violated a duty imposed upon her or him by
law

Id. at 657 (quoting Section 475.25(1)(b), Florida Statutes
(1995)).

43. It was the breadth of the statute at issue in Arias, more so than the absence of disciplinary guidelines that failed to alert licensees of proscribed actions and the potential discipline for such actions.

44. The statute at issue in this case is much more narrow and focused than the statute at issue in Arias; it simply prohibits unlicensed persons from engaging in activities that require licensure. See § 455.228(1), Fla. Stat. Moreover, unlike the broad range of discipline authorized by the statute at issue in Arias, the only discipline authorized by the statute at issue in this case is the imposition of a cease and desist

order and an administrative fine of up to \$5,000. Id.

Accordingly, Arias is distinguishable.

45. A \$5,000 fine would be excessive in this case. First, it is undisputed that the electrical work done by Mr. Delafield was satisfactorily done, that the pool light works, and that the pool no longer leaks. Second, the electrical work done by Mr. Delafield was limited to the low voltage lines between the pool light and the junction box. Third, the contract price for the work done by Mr. Delafield was only \$858. Fourth, Coral Isle is no longer in business and Mr. Delafield is currently unemployed.

46. A \$1,000 fine is reasonable and appropriate in this case. A fine in that amount was imposed in several recent cases where, as here, it was the Respondent's first offense and no aggravating circumstances were present. See, e.g., Dept. of Business & Professional Reg. v. Krick, Case Nos. 07-1929 & 07-1934, 2006 Fla. Div. Adm. Hear. LEXIS 485 (DOAH Oct. 9, 2006; DBPR Dec. 29, 2006); Dept. of Business & Professional Reg. v. Pyche, Case No. 06-1145, 2006 Fla. Div. Adm. Hear. LEXIS 362 (DOAH July 27, 2006; DBPR Sep. 27, 2006).

D. Investigative Costs

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

48. The evidence clearly and convincingly establishes that the Department incurred \$206.69 in investigative costs related to this case.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department issue a final order that:

1. Finds Mr. Delafield guilty of unlicensed electrical contracting in violation of Sections 455.228 and 489.531, Florida Statutes;
2. Imposes an administrative fine of \$1,000 on Mr. Delafield; and
3. Requires Mr. Delafield to pay the Department's investigative costs of \$206.69.

DONE AND ENTERED this 25th day of February, 2008, in
Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of February, 2008.

ENDNOTES

1/ All references to provisions in Chapter 120, Florida Statutes, are to the 2007 version, and all other statutory references are to the 2005 version in effect at the time of the acts alleged in the Administrative Complaint.

2/ There is conflicting evidence as to whether the Marrons previously contacted Richard Delafield and Coral Isle regarding replacing their existing pool with a new pool. The evidence on this issue was not clear and convincing one way or the other, and resolution of this issue is immaterial to the outcome of this proceeding because it is undisputed that the agreement to perform the electrical work giving rise to the Administrative Complaint was not entered into until March 2006.

3/ There is conflicting evidence as to whether a local permit was required. Mrs. Marron testified that she spoke to someone in the County building department and was told that a permit was required to attach new electrical wiring to a junction box. By contrast, Mr. Delafield testified that he spoke to someone at the County building department and a "master electrician" with whom he frequently worked and that they both told him that a permit was not required to replace the pool light because the work was considered to be a "service repair." All of the

evidence on this issue was uncorroborated hearsay, which cannot support a finding of fact. See § 120.57(1)(c), Fla. Stat. Moreover, resolution of this issue is immaterial to the outcome of this proceeding because the issue in this case is whether the work done by Mr. Delafield is electrical contracting under state law, not whether the work required a permit under the local code.

4/ The junction box converts the electricity coming from the breaker box at the house at 110 volts to the 12 volts that goes to the pool light.

5/ There is conflicting evidence as to whether this additional work was done under the direction of Coral Isle and Mr. Delafield or whether it was done pursuant to a "side-agreement" between the Marrons and Mr. Lind and/or Mr. Pickett. The evidence on this issue was not clear and convincing one way or the other, and resolution of this issue is immaterial to the outcome of this proceeding because it is undisputed that the electrical work that is the basis of the Administrative Complaint was completed by Mr. Delafield prior to the pool being drained.

6/ The Department has been in the process of developing such guidelines for more than a year. See 32 Fla. Law Weekly 5572-73 (Nov. 22, 2006) (publication of proposed rule 61-5.007 entitled "Disciplinary Guidelines for Unlicensed Activity"); 33 Fla. Law Weekly 196 (Apr. 6, 2007) (notice of withdrawal of proposed rule 61-5.007); 33 Fla. Law Weekly 1676 (Apr. 13, 2007) (notice of development of proposed rule 61-5.007 "to set disciplinary guidelines for violations of the unlicensed activity statutes articulated by Chapters 455 the professional practice acts administered by [the Department]").

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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.