

Final Order No. BPR-2008-06285 Date: 7-29-08

FILED

Department of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By

Brandon M. Nichols

STATE OF FLORIDA

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

FILED

2008-07-29 P 12:04

DIVISION OF ADMINISTRATIVE SERVICES

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Petitioner,

vs.

Case No. 2006-005426

MICHAEL D. WHITE, JR.,

Respondent.

_____ /

FINAL ORDER

UPON CONSIDERATION of the Administrative Complaint attached hereto as "Composite Exhibit A," the transcript of the corresponding Division of Administrative Hearings (DOAH) case, the exhibits received into evidence, the Proposed Recommended Order filed by the Administrative Law Judge in this matter and attached hereto as Exhibit "B", any exceptions to the Recommended Order filed by either party, and being otherwise fully advised of the premises, it is hereby, ORDERED AND ADJUDGED:


1. The Findings of Fact, Conclusions of Law, and recommended penalty as detailed in the Recommended Order are hereby adopted.
2. Respondent shall pay an administrative fine of \$10,000.00.

3. All amounts due hereunder are due and payable to the Department of Business and Professional Regulation, Revenue Unit, 1940 North Monroe Street, Tallahassee, Florida 32399-2202 within 30 calendar days of the effective date of this order. Please refer to the case number(s) when making payment.

4. Respondent shall cease any further unlicensed activity that violates Chapters 455 or 489, Florida Statutes.

5. This Final Order shall become effective on the date of filing with the Agency Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 24th day of July, 2008.



Chuck Drago, Interim Secretary
Department of Business and
Professional Regulation
Northwood Center
1940 North Monroe Street
Tallahassee, FL 32399-0750

NOTICE OF RIGHT TO APPEAL

Unless expressly waived, any party adversely affected by this Final Order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within 30 days of the effective date of this order, in accordance with Rule 9.110, Florida Rules of Appellate Procedure, and Section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Final Order has been provided via U.S. Mail to Respondent, Micheal D. White, Jr., d/b/a Gulf Shore Pool & Spa, Inc., 306 East Paris Street, Tampa, Florida 33604 this 29th day of July, 2008.

SARAH WACHMAN, AGENCY CLERK

By: Brandon M. Nichols
~~Brandy Nichols, Deputy Clerk~~
Brandon

Copies furnished to:
Reginald D. Dixon, Informal Hearing Officer
Jeffrey J. Kelly, Chief Attorney, Construction
Division of Regulation, Bureau of Unlicensed Activity
William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings,
1230 Apalachee Parkway, Tallahassee, FL 32399-3060

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 07-5780
)
MICHAEL D. WHITE, JR.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On February 12, 2008, an administrative hearing in this case was held by video-conference at sites in Tallahassee and Fort Myers, Florida, before William F. Quattlebaum, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott A. Smothers, Esquire
Wright, Fulford, Moorhead & Brown, P.A.
Post Office Box 2828
Orlando, Florida 32801-2828

For Respondent: Michael D. White, Jr., pro se
Michael D. White, Jr., d/b/a Gulf Shore
Pool & Spa, Inc.
306 East Paris Street
Tampa, Florida 33604



STATEMENT OF THE ISSUE

The issue in the case is whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On August 13, 2007, the Department of Business and Professional Regulation (Petitioner) filed a two-count Administrative Complaint against Michael D. White (Respondent). The complaint alleged that Respondent had been a licensed pool contractor whose license had been revoked, and that Petitioner thereafter operated as a pool contractor without being properly licensed. Respondent denied the allegations and requested a formal hearing. Petitioner forwarded the request to the Division of Administrative Hearings (DOAH), which scheduled and conducted the proceeding.

At the hearing, Petitioner presented the testimony of one witness and offered seven exhibits, which were admitted during the hearing. The Petitioner requested and was granted leave to file a certified licensing document (Petitioner's Exhibit 8), which was filed on February 15, 2008, and is hereby admitted into evidence. Respondent testified on his own behalf.

The Transcript of the hearing was filed on February 25, 2008. Petitioner filed a Proposed Recommended Order on March 5, 2008.

FINDINGS OF FACT

1. Petitioner is the agency responsible for licensing and regulating pool contractors operating in the State of Florida.

2. Respondent was previously licensed as a Certified Pool Contractor by Respondent, holding license number CP C21422. On March 15, 2004, Respondent's license was revoked and was void at all times material to this case.

3. On June 3, 2005, Respondent entered into a contract with Luis Vargas and Maria Rivera (Customers) for construction of a pool at their home located at 1524 Southeast 8th Avenue, Cape Coral, Florida. The total cost of the proposed construction was \$21,500.

4. The name of Respondent's company as identified on the contract was Gulfshore Pool and Spa, Inc., 207 Center Street, Tarpon Springs, Florida. At all times material to this case, Respondent was the president and owner of Gulfshore Pool and Spa, Inc.

5. During the sales presentation to the Customers, Respondent provided a copy of his license to the Customers that showed an expiration date of August 31, 2004, and told them that it was being renewed.

6. The contract contained the following notation:

Company is being retained for services of design, consultation and assistance in construction. Customer is responsible for

obtaining all necessary permits required for the pool construction.

7. Respondent testified that he told the Customers he would arrange for all subcontractors and would add a fee of ten percent as his fee for "overseeing" management of the project.

8. The Payment Schedule for the contract required that "progress payments" in an amount totaling the cost of the pool were to be made to Gulfshore Pool and Spa, Inc.

9. The Customers obtained the construction permit.

10. Respondent made all arrangements for site clearing and excavation.

11. Respondent made all arrangements for acquisition and delivery of pool construction materials to the job site. All materials invoices were billed to Gulfshore Pool and Spa, Inc.

12. Respondent made all arrangements for the laborers who appeared at the job site and was responsible for paying laborers.

13. Respondent made arrangements for all inspections and for correcting any problems resulting from the inspections.

14. The Customers paid a total of \$20,500, by checks, made payable to Gulfshore Pool and Spa, Inc. The Customers withheld the remaining \$1,000 payment for reasons that are immaterial to this proceeding.

CONCLUSIONS OF LAW

15. DOAH has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2007).

16. Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against Respondent. Department of Banking and Finance v. Osborne Stern and Company, 670 So 2d 932, 935 (Fla. 1996), Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence is that which is credible, precise, explicit, and lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). In this case, the burden has been met.

17. Section 489.127, Florida Statutes (2004), provides in relevant part as follows:

Prohibitions; penalties.--

(1) No person shall:

* * *

(e) Use or attempt to use a certificate, registration, or certificate of authority which has been suspended or revoked;

(f) Engage 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;

18. Respondent has asserted that he was not acting as a pool contractor because he did not physically perform the work himself. There is no legal support for Respondent's assertion and it is rejected. Section 489.105(3), Florida Statutes (2007), provides the following definition of the term "contractor":

(3) "Contractor" means the person who is qualified for, and shall only be responsible for, the project contracted for and means, except as exempted in this part, 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; and whose job scope is substantially similar to the job scope described in one of the subsequent paragraphs of this subsection . . .

* * *

(k) "Residential pool/spa contractor" means a contractor whose scope of work involves, but is not limited to, the construction, repair, and servicing of any residential swimming pool, or hot tub or spa, regardless of use. The scope of work includes the installation, repair, or replacement of existing equipment, any cleaning or equipment sanitizing which requires at least

a partial disassembling, excluding filter changes, and the installation of new pool/spa equipment, interior finishes, the installation of package pool heaters, the installation of all perimeter piping and filter piping, and the construction of equipment rooms or housing for pool/spa equipment, and also includes the scope of work of a swimming pool/spa servicing contractor. The scope of such work does not include direct connections to a sanitary sewer system or to potable water lines. The installation, construction, modification, or replacement of equipment permanently attached to and associated with the pool or spa for the purpose of water treatment or cleaning of the pool or spa requires licensure; however, the usage of such equipment for the purposes of water treatment or cleaning shall not require licensure unless the usage involves construction, modification, or replacement of such equipment. Water treatment that does not require such equipment does not require a license. In addition, a license shall not be required for the cleaning of the pool or spa in any way that does not affect the structural integrity of the pool or spa or its associated equipment.

19. The evidence clearly and convincingly establishes that the Respondent used his revoked license when discussing his pool proposal with the Customers, and thereafter, without being licensed, acted as the contractor for the construction of the pool.

20. Although both Mr. Vargas and the Respondent testified to matters related to the quality of construction, there are no allegations relating to construction quality set forth in the

Administrative Complaint at issue in this proceeding, and the dispute is not addressed herein.

21. Petitioner's Proposed Recommended Order seeks imposition of a penalty of \$10,000 for the two counts of the complaint, and states that the penalty guidelines should be those applicable for repeat violations, in that Respondent was the subject of a previous administrative proceeding that ultimately resulted in revocation of his license.

22. Petitioner's Proposed Recommended Order fails to include specific citations to the applicable penalty guidelines as required by Section 489.129(4), Florida Statutes (2007). The applicable guidelines appear to be set forth at Florida Administrative Code Rule 61G4-17.001, which provides for a penalty of up to \$5,000 for each offense for repeat violators.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a Final Order finding that Michael D. White violated Subsections 489.127(e) and (f), Florida Statutes (2004), and impose a total administrative fine of \$10,000.

DONE AND ENTERED this 3rd day of April, 2008, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of April, 2008.

COPIES FURNISHED:

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Michael D. White, Jr.
Michael D. White, Jr., d/b/a Gulf Shore
Pool & Spa, Inc.
306 East Paris Street
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Nancy S. Terrel, Hearing Officer
Office of the General Counsel
Department Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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

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.

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,

Petitioner,

v.

Case No. 2006-005428

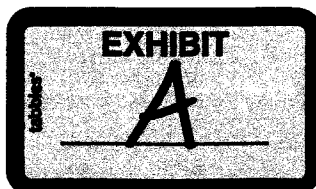
MICHAEL D. WHITE, JR.,

Respondent.

ADMINISTRATIVE COMPLAINT

Petitioner, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, ("Petitioner"), files this Administrative Complaint against MICHAEL D. WHITE, JR., ("Respondent"), and says:

1. Petitioner is the state agency charged with regulating the practice of contracting pursuant to section 20.165, Florida Statutes, and Chapters 455 and 489, Florida Statutes.
2. Petitioner has jurisdiction over the unlicensed practice of contracting pursuant to section 455.228, Florida Statutes.
3. Respondent is not duly registered or certified to engage in the practice of contracting pursuant to Part I, Chapter 489, Florida Statutes, as his license as a Certified Pool



Contractor, license number CP C21422, was revoked on or about March 15, 2004 and currently and at all times material hereto has been null and void..

4. Respondent's last known address of record is 306 East Paris Street, Tampa, Florida, 33604.

5. On or about May 2, 2005, Maria Rivera entered into a contract with Respondent d/b/a Gulf Shore Pool & Spa Inc. for the construction of a pool at Rivera's home located at 1524 SE 8th Avenue, Cape Coral, Florida, 33990. Contract price was \$21,500.00.

6. At the time of contract, Respondent showed Rivera an expired license and assured her that it had been renewed. Respondent failed to tell Rivera that the license had been previously revoked.

7. An owner building permit was obtained from the City of Cape Coral and Respondent commenced work on or about May 24, 2005. Thereafter, Respondent failed to show up for a couple weeks and Rivera fired him.

8. Rivera had paid the Respondent \$20,500.00 on the contract.

9. Section 489.113(2), Florida Statutes, provides that "[n]o person who is not certified or registered shall practice contracting in this state."

COUNT I

10. Petitioner realleges and incorporates the allegations set forth in paragraphs one through nine as though fully set forth herein.

11. Based on the foregoing, Respondent has violated section 489.127(1)(f), Florida Statutes, which 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...without being duly registered or certified or having a certificate of authority."

COUNT II

12. Petitioner realleges and incorporates the allegations set forth in paragraphs one through nine as though fully set forth herein.


13. Based on the foregoing, Respondent has violated section 489.127(1)(e), Florida Statutes, which provides that no person shall "[u]se or attempt to use a certificate, registration, or certificate of authority which has been suspended or revoked."

14. As of the date signed below, Petitioner finds probable cause for the charges contained herein.

WHEREFORE, Petitioner respectfully requests the entry of an Order imposing one or more of the following penalties: an administrative fine not to exceed \$10,000.00 per incident; assessment of costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time; refusal to certify, or to certify with restrictions, and application for licensure; restriction of practice; issuance of a reprimand; corrective action and/or any other relief the Department of Business and Professional Regulation is authorized to impose pursuant to Chapter 455 and 489, Florida Statutes, and the rules promulgated thereunder.

Signed this 13th day of August, 2007.

FILED
Department of Business and Professional Regulation
AGENCY CLERK



Joshua B. Moyer
Assistant General Counsel

CLERK Sarah L. Wachman
DATE 8-14-2007

COUNSEL FOR DEPARTMENT:

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Case #: 2006-005428

JBM/dld

PC Found: 8-13-07