

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
BUILDING CODE ADMINISTRATORS)
AND INSPECTORS,)
)
Petitioner,)
)
vs.) Case No. 08-2108PL
)
ROBERT KEGAN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on September 23, 2008, in Tavares, Florida.

APPEARANCES

For Petitioner: Elizabeth Duffy, Esquire
Charles Tunnicliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Harry T. Hackney, Esquire
Harry Thomas Hackney, P.A.
3900 Lake Center Drive, Suite A1
Mount Dora, Florida 32757

STATEMENT OF THE ISSUE

The issue is whether Respondent Robert Kegan (Mr. Kegan) committed violations of Chapters 455 and 468, Florida Statutes, as alleged in an Administrative Complaint filed by Petitioner Department of Business and Professional Regulation (Department).

PRELIMINARY STATEMENT

Mr. Kegan is certified as a Building Code Administrator by the Florida Building Code Administrators and Inspectors Board (Board), pursuant to Section 468.607, Florida Statutes.

The Department filed an Administrative Complaint against Mr. Kegan alleging, in Count I, that he violated Subsection 468.621(1)(g), Florida Statutes, by failing to properly enforce applicable building codes by committing willful misconduct; in Count II, that he violated Subsection 468.621(1)(a), Florida Statutes, through Subsection 455.227(1)(j), Florida Statutes, by employing an unlicensed person or entity to practice a profession contrary to Chapters 455 or 468, or Board rules; and, in Count III, that he violated Subsection 468.621(1)(a), Florida Statutes, through Subsection 455.227(1)(k), Florida Statutes, by failing to perform any statutory or legal obligation placed upon a licensee.

The allegations of the Administrative Complaint arose out of the sale of a home and alleged promises made by Mr. Kegan to the buyer with regard to repairs and upgrades to the home.

Although the discussion of other alleged discrepancies is necessary to give substance to this Recommended Order, the Administrative Complaint addresses only a hot water heater, a central heating and air conditioning system (HVAC), and wiring for a washer and dryer. There was, in the event, no evidence offered addressing a hot water heater.

The matter was forwarded to the Division of Administrative Hearings for hearing and was filed on April 28, 2008. The hearing was set for June 24, 2008. The Department twice moved for continuances. They were both granted and eventually the case was set for hearing on September 23, 2008, in Tavares, Florida.

Four joint exhibits were admitted. The Department called three witnesses and offered ten exhibits that were admitted. Mr. Kegan called two witnesses and offered five exhibits that were admitted.

A transcript was filed November 7, 2008. On November 14, 2008, a Joint Motion for Continuance was filed. This motion requested an enlargement of time for the filing of proposed recommended orders. An Order Granting Extension of Time issued setting December 17, 2008, as the deadline for filing proposed recommended orders. Both proposed recommended orders were thereafter timely filed.

FINDINGS OF FACT

1. Mr. Kegan has a Certificate of Licensure from the Florida Building Code Administrators and Inspectors Board. He was first licensed in 1994, and, unless he renewed it, the license expired on November 30, 2008. At all times pertinent, he was the Building Code Administrator in Mt. Dora, Florida. Mr. Kegan has never been employed by the City of Leesburg in any capacity.

2. The Department is the state agency charged with regulating the practice of building code administration and inspections pursuant to Section 20.165 and Chapters 455 and 468, Florida Statutes.

3. Linda Renn purchased a home located at 2407 Winona Avenue, Leesburg, Florida, from Mr. Kegan and his wife pursuant to a contract entered into during March 2001. Prior to entering into the contract for sale, Ms. Renn walked through the house with Mr. Kegan. Ms. Renn was aware that it was an older home and testified, "And I felt very comfortable after leaving the home and doing the walk through that even though I was buying an older home with older home obsolescent issues types, but that the renovations were enough that I felt comfortable."

4. Ms. Renn typed up an addendum to the contract prior to execution that stated Mr. Kegan would level a part of the house that required leveling, install an HVAC, install a 220-volt

outlet for the clothes dryer, and would accomplish certain other improvements prior to closing on the home. The addendum became part of the contract for sale.

5. Mr. Kegan provided Ms. Renn with his business card indicating that he was the Building Code Administrator in Mt. Dora. Ms. Renn observed Mr. Kegan in a shirt with the Mt. Dora logo upon it, indicating that he was a building official of Mt. Dora, and she visited him in his office in Mt. Dora. There is no question Ms. Renn was aware that he was a building official in Mt. Dora. Ms. Renn claimed that because he was a building official she completely relied on the representations he made to her. However, this assertion lacks credibility because she employed an independent home inspector prior to closing.

6. During the walk-through, the HVAC was resting upon the floor of the home's garage. However, at a time between March 17 and April 29, 2001, Mr. Kegan had the HVAC installed, as he agreed. Subsequently, Ms. Renn discovered this work was accomplished by an unlicensed individual.

7. An inspection of the premises was conducted by Guy Medlock of Benchmark Building Inspections, Inc., on March 29, 2001. A report was issued on March 30, 2001. The report noted that the dwelling was 53 years old and had problems that one

would expect from a home that old. Mr. Medlock also noted that the house had a lot of charm.

8. Mr. Medlock's inspection noted that the dwelling required roof repairs and wood rot repairs. It was noted that it was necessary to ameliorate water leaks and correct electrical deficiencies, among other items. There were seven items noted with estimated costs of repair ranging from \$50.00 to \$150.00. At the time of the inspection, the 220-volt receptacle had not been installed for the washer and dryer. Mr. Medlock further noted that there was no plumbing available for the washer.

9. Because of Mr. Medlock's report, Ms. Renn was well aware of the defects he noted, and she knew this prior to closing. The report stated that he, Mr. Medlock, had discussed the electrical deficiencies with Ms. Renn and suggested that she have an electrician inspect the dwelling. Ms. Renn testified that she gave greater weight to Mr. Kegan's knowledge than to the home inspector that she hired, but there is no basis in the record for her to arrive at that conclusion.

10. On April 29, 2001, the day before closing, Economy Electric of Eustis, Florida, installed a 220-volt line, and Mr. Kegan paid for this work. Economy Electric's principal is Larry New. He is licensed to accomplish electrical work. He performed additional electrical work that was paid for by Ms.

Renn, including upgrading wires so that her computer would not be damaged by bad wiring.

11. On April 30, 2001, Mr. and Mrs. Kegan conveyed the premises to Ms. Renn by warranty deed. Subsequently, Ms. Renn concluded that she was not happy with certain facets of the house, and tried to contact Mr. Kegan to have her perceived problems corrected.

12. Mr. Kegan was difficult to contact.

13. In a letter dated November 4, 2001, Ms. Renn filed a 16-page complaint with the Department alleging numerous Florida Building Code violations by Mr. Kegan. She requested that the Department investigate these alleged violations.

14. Sometime immediately prior to January 10, 2002, Ms. Renn had Raymond Anderson of Suter Air Conditioning, Inc., of Leesburg, inspect the HVAC. He made Ms. Renn aware of several city code infractions involving the HVAC.

15. Sometime immediately prior to January 11, 2002, Ms. Renn had someone named James A. Dolan inspect the electrical service at the premises. In a letter dated January 11, 2002, Mr. Dolan stated that there were "national electrical code violations" at the house and that it was his opinion that an electrical inspector or building code official should look into the situation. Ms. Renn believed this to be true.

16. Sometime immediately prior to February 5, 2002, Ms. Renn had the electrical service inspected by Bronson Electric Service, Inc., of Eustis, Florida. In a letter dated February 5, 2002, David E. Bronson reported numerous electrical deficiencies, including an improperly fused air conditioning unit. Mr. Bronson found that the electrical service to the house required an upgrade to 150 amps because the current service was inadequate. He quoted a price of \$1,546.00 to accomplish the required modifications. Ms. Renn believed this to be accurate.

17. Ms. Renn employed an inspector from Ocala, Florida, who prepared an inspection report dated May 10, 2002. She learned there were plumbing, electrical, and mechanical problems. She also learned that the roof did not meet building code standards. She noted that for a period of two and one-half years, the HVAC neither cooled nor heated, although it did make some noise.

18. Permits were required for the electrical upgrade and for the air conditioning installation in Ms. Renn's house. No permits were obtained by Mr. Kegan, or his friends, or persons he employed to work on Ms. Renn's house, as were required by the City of Leesburg. By April 18, 2002, all permits had been obtained.

19. Unlicensed persons worked on both the HVAC installation and the electrical upgrade. Work of that sort is lawful only if accomplished by licensed persons. The work accomplished without the appropriate permit and the work done by unlicensed persons, was done under the control of Mr. Kegan.

20. Ultimately, Larry New, a licensed electrician, and Jimmy Harris, a licensed person, fixed all of the problems; got the work inspected; and ensured that all permits were in place.

21. After her complaint to the Department which was drafted November 4, 2001, and submitted in early 2002, Ms. Renn was informed by the Department that she should handle the case locally. Complaints were made by Ms. Renn to the Leesburg Building Department and to many other officials of the Leesburg municipal government. Ultimately, a hearing regarding Mr. Kegan was held before the Lake County Board of Building Examiners (County Board) on August 7, 2003, in Tavares, the county seat of Lake County. Both Leesburg and Mt. Dora are in Lake County.

22. The County Board heard charges against Mr. Kegan's contractor's license for accomplishing work in the trades of roofing, electrical, mechanical, and plumbing using unlicensed workers and failing to obtain permits. It imposed sanctions, including a \$1,000 fine. The County Board required Mr. Kegan to do the work he promised, but it was clear that he had already accomplished that work, except for some roofing issues not

further identified. The County Board did not address his position as the Building Code Administrator in Mt. Dora, Florida. The action of the County Board was subsequently reversed by a circuit court.

23. Relations between Ms. Renn and Mr. Kegan eventually deteriorated to the point where Ms. Renn had a trespass warning served on Mr. Kegan and sought to have the state attorney prosecute him for trespass. She was not successful in this. She also sued Mr. Kegan civilly, but eventually she voluntarily dismissed the case. None of the actions taken by Ms. Renn, resulted in Mr. Kegan being disciplined.

24. At some point thereafter, Ms. Renn appeared to be satisfied with her house and the retaliation she had visited upon Mr. Kegan. However, while Ms. Renn was "working on legislation" in Tallahassee, Florida, in 2006, she was asked by a Department attorney to reopen the case. Other than the transcript from the County Board hearing of August 7, 2003, nothing had changed. Every problem she had with the house that should have been ameliorated, had been ameliorated. Nevertheless, she did as asked by the Department attorney, and this case was filed.

25. Ms. Renn sent two letters dated April 3, 2006, and one letter dated April 21, 2006, to the Chief Professions Attorney of the Department. The latter missive was a follow-up to the

April 3, 2006, communications. The April 3, 2006, communications are considered complaints as contemplated by Subsection 468.619(4), Florida Statutes (2005). There is no evidence of record that Mr. Kegan was informed of the complaint or that he was permitted 30 days to respond as contemplated by Subsection 468.619(4)(b), Florida Statutes (2005). There is no evidence of record that the Department submitted the complaint regarding Mr. Kegan to a probable cause panel for review as contemplated by Subsection 468.619(4)(b), Florida Statutes (2005), within 180 days. There is no evidence to the contrary, either.

26. In summary, the Department has proven that Mr. Kegan, during 2001 and 2002, caused work to be accomplished at 2407 Winona Avenue, Leesburg, Florida, when he owned the house, as well as after he sold the house to Ms. Renn, and this work was done without proper permits and, on occasion, by persons who had no license when a license was required.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat. (2008)

28. The Department has the burden of proving the specific allegations of fact by clear and convincing evidence.

Department of Banking and Finance, Division of Securities and

Investor protection v. Osborne Stern and Co., 670 So. 2d 932

(Fla. 1996) and Subsection 120.57(1)(j), Florida Statutes (2008).

29. Section 468.603, Florida Statutes (2000), provides in pertinent part as follows:

468.603 Definitions.--As used in this part:
(1) "Building code administrator" or "building official" means any of those employees of municipal or county governments with building construction regulation responsibilities who are charged with the responsibility for direct regulatory administration or supervision of plan review, enforcement, or inspection of building construction, erection, repair, addition, remodeling, demolition, or alteration projects that require permitting indicating compliance with building, plumbing, mechanical, electrical, gas, fire prevention, energy, accessibility, and other construction codes as required by state law or municipal or county ordinance. This term is synonymous with "building official" as used in the administrative chapter of the Standard Building Code and the South Florida Building Code. One person employed by each municipal or county government as a building code administrator or building official and who is so certified under this part may be authorized to perform any plan review or inspection for which certification is required by this part.

* * *

30. Section 468.604, Florida Statutes (2000), provides in pertinent part as follows:

468.604 Responsibilities of building code administrators, plans examiners, and inspectors.--

(1) It is the responsibility of the building code administrator or building official to administrate, supervise, direct, enforce, or perform the permitting and inspection of construction, alteration, repair, remodeling, or demolition of structures and the installation of building systems within the boundaries of their governmental jurisdiction, when permitting is required, to ensure compliance with the Florida Building Code and any applicable local technical amendment to the Florida Building Code. The building code administrator or building official shall faithfully perform these responsibilities without interference from any person. These responsibilities include:
(emphasis added)

* * *

31. Section 468.619, Florida Statutes (2005), provides in pertinent part as follows:

468.619 Building code enforcement officials' bill of rights.--

* * *

(4) The investigation of a complaint against an enforcement official is subject to the time restrictions set forth in this subsection, and failure to comply with any time restriction set forth in this subsection shall result in dismissal of the complaint against the enforcement official. An investigation of a complaint against an enforcement official that was dismissed for failure to comply with a time restriction set forth in this subsection may not be reopened. However, in any instance of an additional complaint being initiated, information or investigation related to the dismissed complaint may be used.

(a) The department must inform the enforcement official of any legally sufficient complaint received, including the substance of the allegation, within 10 days after receipt of the complaint by the department.

(b) The enforcement official shall be given 30 days to respond to any legally sufficient complaint.

(c) No longer than 180 days from the date of the receipt of the complaint, the department shall submit the investigation, whether complete or not, to the probable cause panel for review. In the event the investigation is not complete, the probable cause panel shall review and instruct the department to complete the investigation within a time certain and, in no event, greater than 90 days or dismiss the complaint with prejudice.

* * *

32. Section 468.621, Florida Statutes (2000), provides in pertinent part as follows:

468.621 Disciplinary proceedings.--

(1) The following acts constitute grounds for which the disciplinary actions in subsection (2) may be taken:

(a) Violating or failing to comply with any provision of this part, or a valid rule or lawful order of the board or department pursuant thereto.

* * *

(g) Failing to properly enforce applicable building codes or permit requirements within this state which the certificateholder knows are applicable or committing willful misconduct, gross negligence, gross

misconduct, repeated negligence, or negligence resulting in a significant danger to life or property.

* * *

(2) When the board finds any person guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

(a) Denial of an application for certification.

(b) Permanent revocation.

(c) Suspension of a certificate.

(d) Imposition of an administrative fine not to exceed \$5,000 for each separate offense. Such fine must be rationally related to the gravity of the violation.

(e) Issuance of a reprimand.

(f) Placement of the certificateholder on probation for a period of time and subject to such conditions as the board may impose, including alteration of performance level.

(g) Satisfactory completion of continuing education.

(h) Issuance of a citation.

33. Section 455.227, Florida Statutes (2007), provides in pertinent part as follows:

455.227 Grounds for discipline; penalties; enforcement.--

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(j) Aiding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to this chapter, the chapter regulating the profession, or the rules of the department or the board.

* * *

(k) Failing to perform any statutory or legal obligation placed upon a licensee.

* * *

34. Mr. Kegan asserts that the Department failed to comply with Section 468.619, Florida Statutes. That section, the Building Code Enforcement Officials' Bill of Rights, requires dismissal of a complaint when the Department fails to accomplish acts within a particular time. Mr. Kegan, in his Answer and Affirmative Defenses, argues that the case should be dismissed because the time limits of Subsections 468.619(4)(a), (b), and (c), Florida Statutes, were not met by the Department.

35. Because the Building Code Enforcement Officials' Bill of Rights provides a specific remedy for failure to adhere to its time provisions, a failure to adhere to statutory time limits will result in dismissal of the complaint. See Carter v. Dep't of Prof'l Regulation, 633 So. 2d 3, at 6 (Fla. 1994) where it was said, "Consistent with our reasoning in *Hyman*, we believe that if the Legislature had intended the dismissal of administrative complaints in actions in which the Department or

Board acted outside the time limits of section 455.225, the Legislature would have expressly included a sanction of dismissal within the statute." See also Chalfonte Condo. Apt. Ass'n. v. QBE Ins. Corp., 526 F. Supp. 2d 1251 (2007).

36. Clearly in this case, the Florida Legislature provided a sanction for the Department's failure to act timely--dismissal of the complaint. It is, however, the burden of the Respondent to not only allege a lack of timeliness pursuant to Section 468.619, Florida Statutes, but to prove it. Carter at 7. There is no proof available in the record to establish a time line sufficient to conclude that dismissal should be had.

37. With regard to Count I, it was alleged that Mr. Kegan violated Subsection 468.621(1)(g), Florida Statutes, by failing to enforce applicable building codes. The proof demonstrated that he failed to comply with applicable building codes in Leesburg, Florida. Leesburg was not in his bailiwick. He had no duty to enforce building codes in Leesburg. Subsection 468.604(1), Florida Statutes, makes clear that as a Building Code Administrator, his responsibilities were limited to the confines of Mt. Dora, Florida.

38. With regard to Count II, it was alleged that Mr. Kegan violated Subsection 468.621(1)(a), Florida Statutes, through a violation of Subsection 455.227(1)(j), Florida Statutes, by employing unlicensed persons to practice a profession contrary

to this chapter (Chapter 455, Florida Statutes); the chapter regulating the profession (Chapter 468, Florida Statutes); or the rules of the board. No rules adopted by the Board were provided.

39. Mr. Kegan employed two unlicensed persons, but there was no allegation in Count II as to what specific action was contrary to Chapter 455, Florida Statutes, and none could be found. He could not have employed unlicensed persons to violate Chapter 486, Florida Statutes, because that chapter only applies to Mr. Kegan in his capacity as building code administrator in Mt. Dora, Florida, and the employment of unlicensed personnel occurred in Leesburg, Florida. Accordingly, the allegations of Count II were not proven.

40. With regard to Count III, it was alleged that Mr. Kegan violated Subsection 468.621(1)(a), Florida Statutes, through a violation of Subsection 455.227(1)(k), Florida Statutes, by failing to perform any statutory or legal obligation placed upon a licensee. Mr. Kegan's obligations ended at the boundary of the City of Mt. Dora. He had no obligations connected to his license in Leesburg. Accordingly, the allegations of Count III were not proven.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation dismiss the Administrative Complaint in the case of Robert Kegan.

DONE AND ENTERED this 13th day of January, 2009, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
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 13th day of January, 2009.

COPIES FURNISHED:

Harry T. Hackney, Esquire
Harry Thomas Hackney, P.A.
3900 Lake Center Drive, Suite A1
Mount Dora, Florida 32757

Elizabeth F. Duffy, Esquire
Charles Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

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

Robyn Barineau, Executive Director
Building Code Administrators and Inspectors
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.