

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case Nos. 09-2541
) 09-2545
BRENDA CARPENTER and PHILLIP)
HENLEY, d/b/a B AND P)
ENTERPRISES OF CENTRAL FLORIDA,)
INC.,)
)
Respondents.)
_____)

RECOMMENDED ORDER

A final hearing was conducted in this case on January 22, 2010, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearing.

APPEARANCES

For Petitioner: Maura M. Bolivar, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondents: Brenda F. Carpenter, pro se
Phillip J. Henley, pro se
5209 Southwest U.S. 221
Greenville, Florida 32331

STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondents each engaged in the unlicensed practice of contracting as defined in

Sections 489.105(3) and 489.105(6), Florida Statutes (2006), in violation of Section 489.127(1)(f), Florida Statutes (2006); (b) whether Respondents each engaged in the unlicensed practice of electrical contracting as defined by Sections 489.505(9) and 489.505(12), Florida Statutes (2006), in violation of Section 489.531(1), Florida Statutes (2006); and (c) if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about March 3, 2009, Petitioner Department of Business and Professional Regulation (Petitioner) issued an Administrative Complaint against Respondent Brenda Carpenter, d/b/a B & P Enterprises of Central Florida, Inc. (Carpenter). The two-count complaint alleged that Carpenter had violated Sections 489.127(1)(f) and 489.531(1), Florida Statutes (2006).

On or about March 3, 2009, Petitioner issued an Administrative Complaint against Respondent Phillip Henley, d/b/a/ B & P Enterprises of Central Florida, Inc. (Henley). The two-count complaint alleged that Henley had violated Sections 489.127(1)(f) and 489.531(1), Florida Statutes (2006).

On or about March 9, 2009, Carpenter and Henley filed separate requests for administrative hearings to contest the complaints referenced above. Petitioner referred the requests to the Division of Administrative Hearings on May 14, 2009.

The Division of Administrative Hearings assigned DOAH Case No. 09-2541 to the case against Carpenter. DOAH Case No. 09-2544 was assigned to the case against Henley.

The undersigned issued Initial Orders on May 14, 2009, in both cases. The parties filed unilateral responses, indicating that the cases against Carpenter and Henley were related. After reviewing the files, the undersigned issued an Order of Consolidation dated May 27, 2009. Herein after, Carpenter and Henley shall be referred to collectively as Respondents.

A Notice of Hearing dated May 27, 2009, scheduled the hearing for August 7, 2009.

On July 6, 2009, Petitioner filed an Agreed Motion for Continuance. On July 13, 2009, the undersigned issued an Order Granting Continuance and Rescheduling Hearing for September 18, 2009.

On August 25, 2009, Petitioner's counsel filed a Motion for Continuance based on a family medical necessity. On September 1, 2009, Respondents filed a response in opposition to the motion. On September 2, 2009, the undersigned issued an Order Granting Continuance that required the parties to file a joint status report no later than October 1, 2009.

On October 1, 2009, Petitioner filed a Unilateral Status Report. The status report requested that the hearing be rescheduled for November 13, 2009.

On October 6, 2009, the undersigned issued a Notice of Telephonic Pre-hearing Conference. The notice scheduled the conference for October 13, 2009.

After the telephone conference, the undersigned issued an Order Rescheduling Hearing. The Order scheduled the hearing for November 20, 2009.

On November 3, 2009, Respondents filed an unopposed Motion for Continuance. On November 4, 2009, the undersigned issued an Order Granting Continuance and Rescheduling Hearing for January 11, 2010.

On November 13, 2009, Petitioner filed an Agreed Motion for Continuance. On November 16, 2009, the undersigned issued an Order Granting Continuance and Re-scheduling Hearing for January 22, 2009.

On December 11, 2009, Petitioner filed an Amended Motion to Compel. Respondents did not file a response in opposition to the motion. On December 18, 2009, the undersigned issued an Order Granting Motion to Compel.

During the hearing, Petitioner presented the testimony of three witnesses. Petitioner offered eight exhibits that were admitted into evidence.

Henley testified on behalf of Respondents. Respondents did not present any other witnesses or offer any exhibits for admission into the record as evidence.

The Transcript was filed on February 3, 2010. Petitioner filed its Proposed Recommended Order on February 15, 2009. As of the date that this Recommended Order was issued, Respondents had not filed proposed findings of fact and conclusions of law.

Except where otherwise indicated, all references hereinafter are to Florida Statutes (2006).

FINDINGS OF FACT

1. At all times material here, Respondents were married and doing business together as "B and P Enterprises of Central Florida, Inc." The "B and P" stands for Brenda and Phillip. Respondents are not and never have been licensed to engage in contracting or electrical contracting in Florida.

2. In March 2006, Carla Adams had recently purchased her first home and sought to refinance it. The lender required an inspection of the home. The lender also required that any work on the home be performed by a licensed person or entity.

3. In March 2006, an inspector employed by Pillar to Post, Inc., conducted an inspection of Ms. Adams' home. The inspection report, dated March 10, 2006, listed a number of areas that needed work and made recommendations for correction of those problems.

4. In July 2006, Ms. Adams saw an advertisement in a newspaper for the sale of a used car. Ms. Adams and Rev. Tracey

Davis went to Respondents' property with the objective of purchasing a used vehicle.

5. While on the property, Ms. Adams and Rev. Davis entered the Respondents' home. Because both women admired the home, Respondents gave them a tour. During the tour, Respondents stated that Henley had performed the work himself.

6. While in Respondents' home, Ms. Adams and Rev. Davis told Respondents that Ms. Adams needed work done on her home. Ms. Adams also told Respondents that her lender required that the work be done by a licensee.

7. Henley, both upon his own volition and after being asked, told Ms. Adams and Rev. Davis that he was a licensed contractor. Henley removed a picture-ID card from his wallet and stated this was his license to practice contracting. Respondent Carpenter condoned this statement.

8. Ms. Adams showed Respondents the March 10, 2006, inspection report. Henley assured Ms. Adams that he could do everything on the report that needed to be done.

9. Henley further stated that his license was issued by "DBPR" - the Department of Business and Professional Regulation. Carpenter affirmatively agreed with this statement.

10. Henley warned Ms. Adams that she should never have work done by anyone that was not licensed or certified and that

she could check licensure status with DBPR. Respondent Carpenter affirmed this warning.

11. Before speaking with Respondents, Ms. Adams and Rev. Davis had never heard of DBPR. It was only due to Henley's reference to DBPR that Ms. Adams knew she could contact Petitioner regarding the issues in this case.

12. Respondents advised Ms. Adams that they were willing to go to Ms. Adams' home and give her an estimate of what they would charge to perform the needed work. Ms. Adams and Rev. Davis left Respondents' property expecting to see Respondents in the near future.

13. In August 2006, Respondents went to Ms. Adams' home in Tallahassee, Florida. Ms. Adams told Respondents she needed electrical, structural and plumbing work done as set forth in the Pillar-to-Post report. Respondents then inspected the home, took measurements, and made a verbal offer to perform the needed contracting work.

14. Respondents returned to Ms. Adams' home later in August 2006. At that time, Respondents presented Ms. Adams with a written estimate of what they would charge to do certain contracting work on her home. The proposal included, but was not limited to, structural, plumbing and electrical work.

15. Respondents' proposal stated as follows in relevant part:

REMOVE ALL OLD FLOOR COVERING

Carpet

Padding

Lineoleum (sic)

Square Stick tile

Tack strip

All of the above, but not limited to
just above

1,470 Sq. Ft. @ \$1.10 Sq. Ft.

INSTALL NEW FLOOR COVERING

1,470 Sq. Ft. of tile on floor

@ \$1.75 Sq. Ft.

and install Durarock (sic) or hardi
(sic) backing board, if needed

KITCHEN

Remove wall and old 1/2 bathroom and
put back to finished product

Not including finishing drywall and
painting drywall

Remove all old plumbing and re-route
Electrical wires

HALL BATHROOM

Remove bathtub, and tub walls

Install durarock (sic) and new plumbing
fixtures [a]s provided by homeowner

Install 100 Sq. Ft. of wall tile around
old tub area @ \$1.75 Sq. Ft. [m]aking
a new shower in the room

Build a curbing, and drypack and

install shower floor tile

Install drain and rubber pan

REMOVE OLD RAILING FROM FRONT PORCH

16. The total price listed for the above referenced work was \$5,234.50. Ms. Adams had received other estimates for the work. Therefore, Ms. Adams was pleased with the price and sought assurance that it would not increase.

17. Respondents promised Ms. Adams that the cost would not increase. To further assure her, they both signed the contract in her presence. During the hearing, Henley admitted that he contracted with Ms. Adams to perform the labor as listed on this contract.

18. In an attempt to ascertain Henley's skill as a contractor, Ms. Adams decided to begin with the renovation of the bathroom located in the entrance way to the master bedroom. Ms. Adams agreed to buy the construction, plumbing, or electrical materials that Henley needed to do the work.

19. Ms. Adams works two jobs and was not always home when Respondents performed the contracted work. As a result, Rev. Davis, who lived nearby, was present at the home to let Respondents in and observe the work.

20. In order to enlarge the bathroom adjoining the master bedroom, Henley demolished a wall between the old bathroom and a walk-in closet. Henley also removed the door into the old bathroom and constructed a single wall with the entrance to the enlarged room through the door to the old closet.

21. In the course of this alteration and expansion, Henley damaged the adjoining wall to the living room. He subsequently repaired the damage.

22. In the enlarged bathroom, Henley removed a sink from the old bathroom area and installed it in the area that had been

a closet. The area of the old closet had no plumbing. The removal and installation of the sink required Henley to remove old piping and replace it with larger pipes to increase the water flow. During the hearing, Henley admitted removing the sink and disconnecting the plumbing.

23. Henley installed the custom-built shower as described in the contract in Ms. Adams' bathroom. During the hearing, Henley admitted cutting a hole in the floor of Ms. Adams' bathroom and installing a shower drain pan.

24. Henley removed and replaced the toilet in Ms. Adams' bathroom. Additionally, Henley, with Carpenter's help, removed the old bathtub. Henley admitted removing the bathtub and disconnecting the plumbing.

25. Henley then installed a replacement Jacuzzi bathtub at the location of the previously-removed bathtub in Ms. Adams' bathroom. Henley had to remove the old piping and replace it with larger pipes to increase the water flow for the replacement Jacuzzi.

26. The toilet, sink, and bathtub removal and the shower-installation required plumbing work that made it necessary to turn off the water to the home.

27. During the course of installing the Jacuzzi bathtub, Henley discovered that his work resulted in drainage problems he could not correct. For the first time, he told Ms. Adams that

his license did not allow him to perform plumbing work. Henley then told Ms. Adams that, as the contractor on the job, he could subcontract the needed plumbing work.

28. In early September 2006, Henley called Roto-Rooter as a plumbing subcontractor. Roto-Rooter performed the following plumbing work at Ms. Adams' home:

Hooked up all the basic [drain] lines and the toilet in new bathroom to the m/l [main line]. Also ran water lines for the new sink, but found problem with shower valve. It was put in wrong and will not work until it's moved. Note: Everything else is working at this time. Price includes parts and labor. (* * * out the tile and fix shower valve, not everything is working.)

The Roto-Rooter invoice indicates a total cost in the amount of \$1,432.78 for the work performed in Ms. Adams' home.

29. Ms. Adams and Respondents had a financial dispute about which party had to pay Roto-Rooter. The dispute ultimately led to a falling out regarding the completion of the contracted work.

30. Ms. Adams' bathroom currently is inoperable because the toilet and Jacuzzi bathtub do not work. There is raw sewage underneath her home. In order to repair her bathroom, Ms. Adams received an estimate of approximately \$5,000.00.

31. Ms. Adams' decision to begin with the renovation of her bathroom also involved ascertaining Henley's skills as an electrical contractor. Based on his assurances that he could do

the work, Ms. Adams allowed Henley to remove and relocate electrical light fixtures and switches in the bathroom, closet, and hallway. During the course of this work, Henley left hot wires exposed.

32. On or about September 14, 2006, Carpenter came to Ms. Adams' home and presented an invoice for \$1,200.00 for the contracted work that had been performed pursuant to the initial contract. The invoice was on the letter head of "Brenda & Phillip, Phillip Henley, Inc." It stated as follows in relevant part:

Remodel Master Bathroom

Take out all fixtures-sink, cabinet, cast iron tub, toilet and replace with new Jacuzzi (sic) tub, new sink and cabinet, new shower and put back old toilet. Take out old tile on walls and drywall, take out two closets to enlarge bathroom. Re-wire and re-plumb all fixtures and installed durarock (sic) on floor, walls and wet areas and installed blueboard on balance of walls. Built a custom shower and installed custom tile design on walls and floor.

Cost:		\$1,900.00
Less cash		
advances:	8/9	\$100
	8/16	\$300
	8/22	<u>\$300</u>
		\$700
		-700.00
		<u>\$1,200.00</u>

Plus:

Materials

& receipts:	8/11	\$ 81.19
	8/17	23.67
	8/19	26.84
	8/24	<u>108.51</u>

	\$240.21	<u>+\$240.21</u>
Balance Due:		\$1,440.00
Other labor		<u>-240.00</u>
		\$1,200.00

The invoice was signed by Henley and Carpenter and included the following statement: "Thank you for doing business with Brenda & Phillip!" The invoice stated that the check should be payable to Carpenter.

33. Excluding costs associated with an attorney's time, Petitioner has expended \$554 in total cost relative to the investigation and prosecution of DOAH Case No. 09-2541 against Carpenter and \$1,005.67 in total cost relative to the investigation and prosecution of DOAH Case No. 09-2545 against Henley.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction of the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

35. Petitioner is the state agency charged with regulating the practice of unlicensed construction contracting and electrical contracting pursuant to Chapters 455 and 489, Florida Statutes.

36. Petitioner has the burden of proving by clear and convincing evidence that Respondents violated Sections 489.127(1)(f) and 489.531(1)(a), Florida Statutes. See Dept. of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

Count One

37. The first issue is whether Respondents engaged in the unlicensed practice of contracting. Section 489.105 Florida Statutes, defines the terms contractor and contracting as follows in pertinent part:

(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 structure, including related improvements to real estate, for others or for resale to others
. . . .

* * *

(6) "Contracting" means, except as exempted in this part, 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. If the services offered require licensure or agent qualification, the offering, negotiation for

a bid, or attempted sale of these services requires the corresponding licensure. . . .

38. Under Section 489.113(2), Florida Statutes, "[n]o person who is not certified or registered shall engage in the business of contracting in this state."

39. Section 489.127(f), Florida Statutes, as follows:

(1) No person shall:

* * *

(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;

40. Section 489.13, Florida Statutes, states as follows in pertinent part:

(1) Any 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. Persons working outside the geographical scope of their registration are guilty of unlicensed activity for purposes of this part.

* * *

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

guilty of unlicensed contracting. In addition, the department may assess reasonable investigative and legal costs for prosecution of the violation against the unlicensed contractor.

41. In this case, clear and convincing evidence establishes that Respondents are not licensed as contractors and that they attempted to sell their services as contractors. Respondents eventually negotiated and/or made a bid for their contracting services for compensation. They performed work on Ms. Adams' home requiring licensure, thus "contracting" and acting as "contractors." Both Carpenter and Henley are guilty of violating Section 489.127(1)(f), Florida Statutes.

Count Two

42. The second issue is whether Respondents engaged in the unlicensed practice of electrical contracting, which is regulated under Part II of Chapter 489, Florida Statutes. Section 489.505, Florida Statutes, defines contracting, contractor, and electrical contractor as follows in relevant part:

(9) "Contracting" means, except where exempted in this part, engaging in business as a contractor or performing electrical . . . work for compensation and includes, but is not limited to, performance of any of the acts found in subsections (2) and (12), which define the services which a contractor is allowed to perform. The attempted sale of contracting services and the negotiation or bid for a contract on these services also constitutes contracting. If the services

offered require licensure or agent qualification, the offering, negotiation for a bid, or attempted sale of these services requires the corresponding licensure.

(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.

43. Section 489.531(1), Florida Statutes, states as follows:

- (1) A person may not:
 - (a) Practice contracting unless the person is certified or registered;
 - (b) Use the name or title "electrical contractor" . . . or 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;

44. Part II of Chapter 489, Florida Statutes, does not provide specific administrative penalties for unlicensed electrical contracting. See § 489.13, Fla. Stats. Thus, the authority for imposition of administrative penalties for unlicensed electrical contracting is Section 455.228, Florida Statutes, which states as follows in relevant part:

(1) When the department has probable cause to believe that any person not licensed by the department, or the appropriate regulatory board within the department, has violated any provision of this chapter or 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

45. The evidence is clear and convincing that Respondents are not licensed as electrical contractors. However, they engaged in the business of electrical "contracting" and acted as electrical "contractors" under an express or implied contract with Ms. Adams. Both Respondents are guilty of violating Sections 455.228 and 489.531, Florida Statutes, by undertaking, offering to undertake, purporting to have the capacity to undertake, and/or submitting a bid to engage in the business of electrical contracting by themselves or through others.

Penalties

46. Petitioner is generally authorized to impose an administrative fine "not to exceed \$5,000 per incident" for unlicensed activity. See § 455.228(1), Fla. Stat. However, with respect to unlicensed contracting under Part I of Chapter 489, Florida Statutes, Petitioner is authorized to impose an administrative fine of "up to \$10,000." See § 489.13(3), Fla. Stat.

47. At the time of the violations at issue here, Petitioner had no guidelines to determine the appropriate fines as required by Section 455.2273, Florida Statutes. However, as of January 26, 2010, Petitioner adopted Florida Administrative Code Rule 61-5.007, Disciplinary Guidelines for Unlicensed Activity.

48. The penalties set forth in the new rule cannot be applied retroactively to Respondents' unlicensed activity that occurred in 2006. Even so, the rule is instructive regarding the circumstances that may be considered as mitigating or aggravating factors.

49. Florida Administrative Code Rule 61-5.007 states as following in pertinent part:

(8) Circumstances which may be considered for the purposes of mitigation or aggravation of the foregoing penalties shall include the following:

(a) Monetary or other damage to the unlicensed person's customer and/or other persons, in any way associated with the violation, which damage the unlicensed person has not relieved as of the time the penalty is to be assessed.

(b) The severity of the offense.

(c) The danger to the public.

(d) The number of repetitions of offenses.

(e) The number of complaints filed against the unlicensed person.

(f) The length of time the unlicensed person has been engaging in unlicensed activity.

(g) The actual damage, physical or otherwise, to the unlicensed person's customer.

(h) The deterrent effect of the penalty imposed.

(i) The effect of the penalty upon the unlicensed person's livelihood.

(j) Any efforts at rehabilitation.

(k) The unlicensed person's use of an altered license or impersonation of a licensee.

50. In mitigation, the facts here show that there was only one complaint filed against Respondents. Additionally, Respondents engaged in unlicensed activity for a very short period of time, from the initial meeting with Ms. Adams in July 2006 until the financial dispute in September 2006.

51. The aggravating factors include the following:

(a) Both Respondents are guilty of violating two statutes;

(b) Ms. Adams suffered financial harm as a result of

Respondents' defective work; (c) Respondents have never

acknowledged responsibility for their actions and have not made

any effort at rehabilitation or restitution; and (d) Respondents used a card of some kind to impersonate a license.

52. Petitioner should impose a fine in the amount of \$5,500 on each Respondent for violating Section 489.127(1)(f), Florida Statutes, and a fine in the amount of \$5,500 on each Respondent for violating Section 489.531, Florida Statutes.

53. In addition to the administrative fines referred to above, Respondents are responsible for Petitioner's costs in investigating their unlicensed activity pursuant to Section 455.228(3)(c), Florida Statutes, which states as follows:

(c) The department shall be entitled to recover the costs of investigation, in addition to any penalty provided according to department rule as part of the penalty levied pursuant to the citation.

54. It is undisputed that Petitioner incurred a total of \$554 in investigative costs in the case against Carpenter, DOAH Case No. 09-2541, and a total of \$1,005.67 in investigative cost in the case against Henley, DOAH Case No. 09-2545.

RECOMMENDATION

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

RECOMMENDED:

That Petitioner enter a final order finding that each Respondent violated Sections 489.127(1)(f) and 489.531(1), Florida Statutes, imposing a total administrative fine in the

amount of \$11,000 against each Respondent, and assessing costs in the amount of \$554 against Carpenter and \$1,005.67 against Henley.

DONE AND ENTERED this 23rd day of February, 2010, in Tallahassee, Leon County, Florida.

Suzanne F. Hood

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of February, 2010.

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.