

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAY DOUGLAS ABEL,)
)
 Petitioner,)
)
 vs.) Case No. 09-3176
)
 BUILDING CODE ADMINISTRATORS)
 AND INSPECTORS BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on September 29, 2009, by video teleconference at sites in Daytona Beach and Tallahassee, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Darren J. Elkind, Esquire
505 Deltona Boulevard, Suite 105
Deltona, Florida 32725

For Respondent: Timothy E. Dennis, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 08
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether Petitioner's applications for licensure should be granted or denied.

PRELIMINARY STATEMENT

On May 11, 2009, Respondent, Board of Building Code Administrators and Inspectors, issued a Notice of Intent to Deny Petitioner's applications for certification as a plumbing inspector and as an electrical inspector. The reason for the denials as stated in the Notices of Intent, is that Petitioner's applications "[do] not demonstrate, affirmed by affidavit signed by an architect, engineer, contractor, or building code examiner, that you have the required experience for the certifications sought."

Petitioner timely requested an Administrative Hearing to contest the Notices of Intent to Deny. The case was transmitted to the Division of Administrative Hearings on or about June 15, 2009. A Notice of Hearing was issued on June 30, 2009, setting the hearing for September 10, 2009. Petitioner filed an unopposed Motion for Continuance which was granted. The hearing was rescheduled for September 29, 2009, and took place as scheduled.

At hearing, Petitioner testified on his own behalf and presented the testimony of Gary Hiatt and Matt Adair. A portion of the deposition testimony of Dennis Franklin was offered and admitted into evidence as Petitioner's Exhibit 1. Respondent presented the testimony of Robert McCormick. Joint Exhibits numbered 1 through 5 were admitted into evidence.

A one-volume Transcript was filed on October 20, 2009.

The parties timely filed Proposed Recommended Orders, which were considered in the preparation of this Recommended Order. All references to the Florida Statutes are to 2009 unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner filed applications with the Department of Business and Professional Regulation (DBPR) for certifications as a plumbing inspector and electrical inspector.

2. The Board of Building Code Administrators and Inspectors (Board), which is part of DBPR, is the state agency charged with certification of plumbing and electrical inspectors, pursuant to Chapter 468, Florida Statutes.

3. Petitioner previously received provisional certification to perform plumbing and electrical inspections as a result of the Board's failure to take timely action on Petitioner's applications for provisional licenses. He is currently employed with the City of Deland as a commercial and residential inspector and has been employed there since September 17, 2007.

4. Accompanying his applications was a statement of "experience history", provided on a Board form. The experience history listed four places of employment covering four periods of time: 1976 to 1986: Job Foreman for Ron Abel Contracting;

2001 to 2005: Standard Inspector for the City of Winter Springs;
2005 to 2007: Standard Inspector for GFA International; and 2007
to present: Standard Inspector for the City of Deland.

5. Accompanying his applications were three affidavits relating to the 1976-1986 employment with Ron Abel Contracting; two affidavits relating to his 2001-2005 employment with the City of Winter Springs; one affidavit relating to his 2005-2007 employment with GFA International; and one affidavit regarding Petitioner's employment with the City of Deland from 2007 to present.

6. The first affidavit relating to the 1976 to 1986 period of time was from Daniel Kittinger, a licensed general contractor, who attests that when working in his father's construction business, Petitioner "assisted in the home building process, acted as foreman to oversee [sic] the subcontracting was done in a timely manner and that specifications met code requirements for residential buildings."

7. The second affidavit for the 1976 to 1986 period was from Carleen Abel, Vice President of Ronald E. Abel Contracting, and states the following:

Mr. Jay Abel is the son of the owner and worked as a field foreman from 1976-1986. During his tenure with Abel Contracting, Jay provided supervision of the field operation on overseeing trade contractors. His principle responsibilities included hands on supervision of framing, electrical, plumbing

and HVAC sub-contractors for both residential and commercial work. He primarily was to assure that the jobs were properly constructed, completed on time and confirmed that the appropriate codes were satisfied.

8. The third affidavit relating to 1976-1986 did not include the license number of the affiant. Therefore, it was not considered, and is not considered herein, as it does not comply with the statutory requirement that a licensed architect, engineer, contractor, or building code examiner affirm an applicant's experience by affidavit.

9. Regarding Petitioner's employment with the City of Winter Springs, an affidavit was submitted by a person whose first name is David (last name begins with an "A" but is not legible) which states that Petitioner was employed as a residential inspector under the direction of Dennis Franklin and under supervision of a senior inspector. This affidavit referenced an attached affidavit of Dennis Franklin which states as follows:

I have personal knowledge that Jay Abel worked as a residential inspector in Winter Springs during the time of his licensure as per Chapter 468 F.S.

10. One affidavit was submitted relating to Petitioner's work experience from 2005 to 2007. The affidavit of Jeffrey D. DeBoer states as follows:

During Jay's tenure at CFA International he performed inspections of 1 + 2 family dwellings and was in training to perform plan review of both mechanical, electrical and plumbing disciplines. This training was done under the supervision of other certified plans examiners for each discipline.

11. The affidavit of Joseph R. Crum was submitted regarding Petitioner's current employment with the City of Deland. It states in pertinent part as follows:

Jay Abel is employed with the City of Deland as an inspector. He is required to perform inspections on commercial buildings and structures for Building, Electrical, Mechanical, Plumbing and gas installations. He is also required to perform inspections on Residential buildings and structures for all of the trades including, Building, Electrical, Mechanical, Plumbing and gas installations.

Jay currently holds a standard one and two family dwelling inspector license #BN4928. He also holds provisional licenses as follows: Building #PBI 1573, Commercial Electrical: #PCE 651, Mechanical: #PMI 549 and Plumbing: #PPI 582. Having these licenses means he has met the qualifications for each and should be issued the appropriate license as he passes the individual exams.^[1/]

12. In addition to the affidavits submitted by Petitioner, Petitioner's current supervisor testified at hearing. Matthew J. Adair is the chief building official with the City of Deland. He supervises all of the building division which includes code enforcement and building inspections personnel.

He is familiar with the work performed by Petitioner in his current employment with the City of Deland. At hearing, Mr. Adair described Petitioner's work:

Jay is our commercial and residential inspector at this time. He does primarily commercial work for us. . . . I've personally overseen the inspections that he conducts on a daily basis. . . [t]o include installation of electrical and plumbing systems in new commercial buildings, main distribution panels, underground electric, overhead, receptacles, feeders.

And on the plumbing side the same thing, water, sewer lines, undergrounds, sewer connections even back-load preventers. . . .

He's very competent. He knows the codes, but on top of just knowing the codes he knows how systems are supposed to be installed in the field.

He is a competent inspector. . . . He is one of my most valued employees.^[2/]

13. Petitioner also submitted an "Educational History" which represents that he holds an associate of arts degree in business. Further, the "Examination History" portion of the form represents that he passed the Florida Principles and Practice Examination.

14. The Board has created an application review committee (committee), consisting of three members of the Board, to review all applications and make a recommendation to the Board as to whether each application should be approved or denied.

15. Dennis Franklin is a member of the Board and the review committee. According to Mr. Franklin, the committee reviews the applications, and makes a determination as to whether an application should be approved or denied. The determination is made by majority vote of the committee. The decision of the committee is then presented to the Board which ratifies the committee's decision at a Board meeting. The Board generally does not otherwise independently review the applications, but simply ratifies the decision of the committee.

16. The committee met at some point prior to the Board's April 10, 2009, meeting. The committee reviewed Petitioner's applications and determined that his applications should be denied.

17. The decision of the committee was ratified by the full Board on April 10, 2009.

18. Robert McCormick is Chairman of the Board and is a member of the committee. According to Mr. McCormick, the Board interprets the statutory requirement of five years' combined experience to mean that an applicant must demonstrate an equivalent of five years' full-time experience. Mr. McCormick applied what he described as a "rule-of-thumb," in which he divided five years into an average of full-time work hours of 2,000 work hours per year and 10,000 work hours for a five-year period of employment.

19. Mr. McCormick determined that Petitioner's application did not establish that he had worked five years full-time in either the electrical or plumbing trade and, therefore, determined that his applications should be denied.

20. Gary Hiatt is the chief building official of Flagler County and is responsible for the day-to-day management of plumbing and electrical inspectors in that county. He reviewed Petitioner's applications and is of the opinion that Petitioner "has demonstrated through his background in contracting and licensure as well as his educational background to meet the requirements to be able to sit for that examination."

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding in accordance with Sections 120.569 and 120.57(1), Florida Statutes. This proceeding is de novo. § 120.57(1)(k), Fla. Stat. By its nature, a de novo proceeding is one intended to formulate agency action, not one to review action taken earlier or preliminarily. Beverly Enterprises-Florida, Inc. v. Department of Health & Rehabilitative Services, 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983).

22. In licensing cases, the burden is on the applicant to demonstrate entitlement to the requested license by a preponderance of the evidence. Department of Transportation v.

J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981);

Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

23. The Notices of Intent to Deny state as the reason for denial that Petitioner's applications for certification "[do] not demonstrate, affirmed by affidavit signed by an architect, engineer, contractor, or building code administrator, that you have the required experience for the certification[s] sought."

24. Section 468.609, Florida Statutes, reads in pertinent part as follows:

468.609 Administration of this part;
standards for certification; additional
categories of certification.--

(1) Except as provided in this part, any person who desires to be certified shall apply to the board, in writing upon forms approved and furnished by the board, to take the certification examination.

(2) A person may take the examination for certification as a building code inspector or plans examiner pursuant to this part if the person:

(a) Is at least 18 years of age.

(b) Is of good moral character.

(c) Meets eligibility requirements according to one of the following criteria:

1. Demonstrates 5 years' combined experience in the field of construction or a related field, building code inspection, or plans review corresponding to the certification category sought;

* * *

(4) No person may engage in the duties of a building code administrator, plans examiner, or building code inspector pursuant to this part after October 1, 1993, unless such person possesses one of the following types of certificates, currently valid, issued by the board attesting to the person's qualifications to hold such position:

(a) A standard certificate.

(b) A limited certificate.

(c) A provisional certificate.

(emphasis supplied)

25. The Notices of Intent to Deny reference Florida Administrative Code Rule 61G19-6.0035, which reads in pertinent part as follows:

61G19-6.0035 Application for Provisional and/or Standard Certification.

(1) Each individual who wishes to obtain a provisional and/or standard certificate in any certificate category shall submit the following to the Board:

(a) A completed application form for the category in which certification is sought. The form that shall be used for this purpose shall be provided by the Department and available on the Department's website.

(b) An affidavit describing in detail each separate period of work experience listed in the application form, signed by a licensed architect, engineer, contractor, or building code administrator who has knowledge of the applicant's duties and responsibilities during the period indicated. The form that shall be used for this purpose shall be

provided by the Department and available on the Department's website. Each affidavit must include the name and address of the applicant's employer during the work experience period, the dates of employment, and a description of the applicant's duties and responsibilities during the employment including any supervisory responsibilities, in sufficient detail to enable the Board to determine whether or not the applicant has the experience required for certification.

(c) Each applicant for certification as an inspector or plans examiner shall demonstrate that he or she has at least one (1) year of hands-on experience in the category of certification sought . . .

(emphasis supplied)

26. Petitioner asserts that Respondent's procedure for reviewing all licensing/certification applications by an application committee constitutes an unpromulgated rule citing as authority Department of Business and Professional Regulation, Construction Industry Licensing Board v. Harden, 10 So. 3d 647 (Fla. 1st DCA 2009).

27. Harden was an appeal of a Final Order from the Division of Administrative Hearings finding that the committee procedure used by the Construction Industry Licensing Board, which appears to be identical to the procedure used by the Board in the instant case, constituted an unpromulgated rule. Harden v. Department of Business and Professional Regulation, Construction Industry Licensing Board (DOAH Case. No. 06-3912RU, Final Order, December 15, 2006). The court affirmed the Final

Order finding that the committee procedure by which licenses are reviewed constituted an unadopted rule and was, therefore, invalid.

28. Respondent acknowledges Harden, asserts that it has initiated rulemaking regarding the committee procedure, and further asserts that Harden should not apply to the instant case because the Board acted on Petitioner's applications just days after the Harden opinion was issued and prior to the expiration of the time for filing a motion for rehearing, citing as authority Vale v. McDonough, 958 So. 2d 966 (Fla. 1st DCA 2007). Vale is distinguishable from this case. In Vale, the court dealt with whether to retroactively apply a finding of invalidity of an existing rule, relied upon by the agency and the public, concerning refunding copying costs incurred by a prisoner.^{3/} This argument is unpersuasive. In the instant case, the Board applied a process that was never authorized by rule or statute. The Board was well aware of the Harden opinion when the Notices of Intent to Deny were sent to Petitioner on May 11, 2009.

29. Petitioner argues, and it is concluded, that the Board's "rule-of-thumb" requiring five years of full-time experience in each of the fields in which certification is sought, is inconsistent with Florida Administrative Code Rule 61G19-6.0035. Moreover, the language in Section

468.609(2)(c)1., Florida Statutes, is written in the disjunctive. That is, the statute requires "five years' combined experience in the field of construction, or a related field, building code inspection, or plans review corresponding to the certification category sought." (emphasis supplied) The five-year, full-time experience requirement employed by the application committee and the Board is not in statute or rule, and insufficient proof was presented establishing it to be a valid basis for interpreting the express requirements in statute or rule.

30. Regardless of any non-rule policy relied upon by the application committee or the Board, the preponderance of the evidence presented, viewed in its totality, established that Petitioner has demonstrated that he has met the experience required by Section 468.609(2)(c)1., Florida Statutes.

RECOMMENDATION

Upon consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a final order be entered granting Petitioner's applications for standard certification as a plumbing and electrical inspector.

DONE AND ENTERED this 3rd day of December, 2009, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of December, 2009.

ENDNOTES

1/ This final sentence is not accurate as Petitioner received his provisional licenses by default. Notwithstanding, the affidavit is considered in the context of his work experience.

2/ Although not considered by the Board or its application review committee, it is appropriate to consider Mr. Adair's testimony regarding Petitioner's experience in this de novo proceeding.

3/ Vale cites Department of Business Regulation, Division of Alcoholic Beverages & Tobacco v. Martin County Liquors, Inc., 574 So. 2d 170 (Fla. 1st DCA 1991), holding that, because an application form and policy were not promulgated as rules, they became void as of the date the court's decision became final. Martin County is also distinguishable from the instant case. The agency's form DBR 700L and Policy Section 302 in Martin County were written agency statements not properly promulgated as rules. In the instant case, the Board's application review committee procedure is not in any written statute, rule, or policy thereby affording the public no opportunity to notice, or to rely upon, such policy.

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.