

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 10-0424
)
CARRIE D. JOHNSTON,)
d/b/a SIGNS UNLIMITED,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On May 4, 2010, a duly-noticed hearing was held in Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: LeChea C. Parson, Esquire
Assistant General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Carrie D. Johnston, pro se
2210 North Monroe Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated Subsections 489.533(1)(m)2., 489.533(1)(r), or 489.533(1)(s),

Florida Statutes (2008), as alleged in the Administrative Complaint, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On May 29, 2009, the Department of Business and Professional Regulation (DBPR or Petitioner) filed a three-count Administrative Complaint against Respondent, Carrie Johnston, d/b/a Signs Unlimited (Respondent or Signs Unlimited), alleging violations of Section 489.533, Florida Statutes (2008). Specifically, Count I charged Respondent with proceeding with a job without obtaining applicable local permits and inspections, in violation of Section 489.533(1)(r), Florida Statutes; Count II charged Respondent with committing financial mismanagement that causes financial harm to a customer, in violation of Section 489.533(1)(m)2., Florida Statutes; and Count III charged Respondent with practicing beyond the scope of her certification in violation of Section 489.533(1)(s), Florida Statutes.

On June 2, 2009, Respondent executed an Election of Rights form disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to Section 120.57(1), Florida Statutes. On January 18, 2010, the Department referred the case to the Division of Administrative Hearings for the assignment of an administrative law judge.

A Notice of Hearing was issued on February 9, 2010, scheduling the hearing for April 14, 2010. On April 12, 2010, Petitioner filed an emergency motion for continuance, and the

case was rescheduled for May 4, 2010. The case then proceeded as scheduled. At hearing, the Department presented the testimony of Catherine Jackson, Anthony Maccarone, and Mitesh Patel.

Petitioner's Exhibits 1-5 were admitted into evidence. At the beginning of the hearing, the Department announced that it would not pursue Count III of the Administrative Complaint, and accordingly, findings of fact and conclusions of law will be made with respect to the allegations in Counts I and II only.

Respondent presented the testimony of Edward Johnston and Respondent's Exhibits 1-3 were accepted into evidence. Official recognition was taken of Section 489.533, Florida Statutes, and Florida Administrative Code Rule 61G6-7.001.

The Transcript of the proceedings was filed with the Division on May 19, 2010. Both parties timely filed Proposed Recommended Orders that have been carefully considered in the preparation of this Recommended Order. Unless indicated otherwise, all references to Florida Statutes are to the 2008 codification.

FINDINGS OF FACT

1. At all times material to the allegations in the Administrative Complaint, Respondent was licensed as a certified specialty contractor, having been issued license number ES 12000484. Respondent's address of record is 2210 North Monroe Street, Tallahassee, Florida 32303.

2. Respondent is the qualifier for Signs Unlimited.

3. Mr. Patel and his family are the proprietors of a business in Tallahassee named the Beer Stop. On or about November 13, 2008, Mr. Patel contacted Signs Unlimited regarding the manufacture and installation of signs for Beer Stop. He wanted a sign for over the door of the business, and a sign to be added to an already existing sign for the shopping plaza, near the road in front of the plaza.

4. A sign over the door of the building simply required a new pan face. As such, it required no permit for installation. However, the plaza where Beer Stop is located had an already existing sign near the street with individual businesses listed on it. Each individual sign for the businesses advertised has a "cabinet" included on the structure, which holds the electrical connections necessary to make the sign light up and thus make the advertising more visible to passersby.

5. Any sign with these cabinets that is over 100 square feet requires a permit and engineered drawings.

6. Mr. Patel received from Edward Johnston, a Signs Unlimited employee and supervisor, an estimate for a structure permit, engineered windload drawings, and three hours use of a bucket truck. The estimate identified a price of \$1,366.33 and did not include the cost of the signs themselves. Mr. Patel also received an estimate for similar permitting and engineering services from at least one other company.

7. On November 19, 2008, Mr. Patel entered into a contract with Signs Unlimited for the signs he wanted. The contract listed the following items: 1) one pan face per sq. ft. (1:3' x 12') d/s, for \$1,086.15; 2) two acrylic 1/8' per s. ft. at \$688 each; and 3) installation, at 1 1/2 hours use of a bucket truck. With tax, the total was \$2,800. Mr. Patel paid a deposit of \$1,800 on November 21, 2008.

8. The invoice dated November 19, 2008, makes no mention of a permit or engineered drawings, and the amount of installation time identified is half of that in the original estimate. Mr. Johnston asked Mr. Patel about the permit and engineering for the road-side sign, and was directed to go forward with the fabrication of the three signs and installation of the building sign only.

9. Mr. Patel testified that he assumed the contract price on the November 19, 2008, invoice included Respondent's costs to obtain all necessary permits and everything necessary for completion of the contract. Mr. Patel's testimony to this effect is not credited.

10. Signs Unlimited makes and installs signs. However, it is not unusual for the company to make the signs and provide them to a customer who either has them installed by someone else or installs the signs itself, or for Signs Unlimited to install signs made by other companies. In this case, it would have been feasible for the pan faces to be installed in an existing cabinet

on the sign if, for example, they replaced the advertising of a prior tenant. To do so would require no permit.

11. In this case, Signs Unlimited made and installed the pan face above the door of the business. It was not required to obtain a permit for doing so. It also fabricated the pan faces for the sign near the street and delivered them to the Beer Stop location. Signs Unlimited did not install these signs. On December 15, 2008, Mr. Patel paid the remaining balance on the invoice dated November 19, 2008.

12. Nonetheless, a new cabinet (of lesser quality than those already included on the existing structure) was added to the sign by the road. No permit was obtained for this sign.

13. On or about December 15, 2008, the City of Tallahassee received a complaint about the sign near the road from a competitor who had bid on the project. Anthony Maccarone, an inspector for the city, confirmed that no permit had been obtained. He also took pictures of the sign and spoke with Mr. Patel, who showed him the invoice from Signs Unlimited. Mr. Maccarone called Signs Unlimited about the sign, and issued a Stop Work Order to the owner to be posted at the site.

14. Edward Johnston told Mr. Maccarone that Signs Unlimited installed the sign above the door but did not install the other signs. At Mr. Maccarone's request, he removed the cabinet and pan faces from the sign by the road. Both the cabinet and the pan faces were left on the sidewalk by the door of the Beer Stop.

15. Mr. Johnston testified that he tried to contact Mr. Patel to see if he wanted the job properly engineered and permitted, and to have the signs reinstalled. However, he received no response. Mr. Patel, on the other hand, testified that he felt Signs Unlimited should have refunded him some money because not all three signs were installed. However, he admitted that he never made such a request of Signs Unlimited. He filed a complaint with DBPR instead and was waiting for a "judgment" from DBPR.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2009).

17. Petitioner is the state agency charged with the licensing and regulation of electrical contractors, including specialty contractors such as Respondent, pursuant to Section 20.142 and Chapters 455 and 489, part II, Florida Statutes.

18. Petitioner seeks to take disciplinary action against Respondent's license as a specialty contractor. Because disciplinary actions are considered penal proceedings, Petitioner bears the burden of proof to demonstrate the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern & Co.,

670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

19. As stated by the Florida Supreme Court:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a 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 Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983).

20. Count I of the Administrative Complaint charged Respondent with violating Section 489.533(1)(r), Florida Statutes, which makes it a disciplinary violation for

(r) Proceeding on any job without obtaining applicable local building department permits and inspections.

21. Clear and convincing evidence was not presented at hearing to support a finding that Respondent committed the violation alleged in Count I. The more persuasive evidence presented indicates that Mr. Patel contracted for the manufacture of three sign faces, and the installation of a single face over the door of his business, and that the installation of the single sign face above the door did not require a permit.

22. Count II of the Administrative Complaint alleged that Respondent violated Section 489.533(1)(m)2., Florida Statutes. That subsection provides that a licensee may be disciplined for

(m) Committing financial mismanagement or misconduct in the practice of contracting that causes financial harm to a customer. Financial mismanagement or misconduct occurs if:

* * *

2. A contractor has abandoned a customer's job and the percentage of completion is less than the percentage of the total contract price that had been paid to the contractor as of the time of abandonment, unless the contractor is entitled to retain the excess funds under the terms of the contract or refunds the excess funds within 30 days after the date of abandonment;

23. Clear and convincing evidence was not presented to demonstrate a violation of this provision. First, Respondent did not abandon the job. The scope of services contained in the November 19, 2008, invoice includes manufacture of three sign faces and installation of the sign over the door. The more persuasive evidence submitted at hearing indicates that these signs were made and delivered, and the sign over the door installed. Although Mr. Patel feels that Signs Unlimited should have installed the two sign faces made for the road sign, he did not contract or pay for such an installation. Moreover, he admitted at hearing that he never made a request to Signs Unlimited for any type of refund and did not explain exactly what, according to the invoice, would entitle him to a refund. No violation of Section 489.533(1)(m)2., has been established.

RECOMMENDATION

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

RECOMMENDED:

That the Electrical Contractors' Licensing Board enter a Final Order dismissing the Administrative Complaint in its entirety.

DONE AND ENTERED this 21st day of June, 2010, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of June, 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.