

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 10-1148
)
DONALD WHYTE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On July 26, 2010, an administrative hearing in this case was held by video teleconference between Tallahassee and Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Donald Whyte, pro se
6811 Thousand Oaks Road
Orlando, Florida 32818

STATEMENT OF THE ISSUES

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

PRELIMINARY STATEMENT

On November 25, 2009, the Department of Business and Professional Regulation (Petitioner) filed a two-count Administrative Complaint against Donald Whyte (Respondent). The complaint essentially alleged that the Respondent, without being properly licensed, acted as a contractor and an electrical contractor when providing home repair services to the owner of residential properties in Orlando, Florida. The Respondent denied the allegations and requested a formal hearing. The Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of one live witness and the video-deposition testimony of a second witness (admitted as an exhibit) and had Exhibits 1 through 4, 10, and 11 admitted into evidence. The Respondent testified on his own behalf.

The Transcript of the hearing was filed on August 12, 2010. The Petitioner thereafter sought and received an extension to the deadline for filing a proposed recommended order. The Petitioner's Proposed Recommended Order was filed on August 26, 2010.

FINDINGS OF FACT

1. The Petitioner is the state agency responsible for licensure and regulation of contractors and electrical contractors operating within the State of Florida.

2. During the period at issue in this case, the Respondent was not licensed as a contractor or as an electrical contractor.

3. Beginning in 2003, the Respondent provided home remodeling and repair services for houses owned by Ms. Enid Shaw. Ms. Shaw, a resident of New York who visits Florida regularly, apparently planned to permanently relocate to Florida at some time in the future.

4. The Respondent met Ms. Shaw during one of Ms. Shaw's visits to Florida, when he was working on the house of an acquaintance of Ms. Shaw.

5. Between 2003 and 2006, Ms. Shaw paid approximately \$30,000.00 to the Respondent for the work he performed on her homes. Some of the work performed by the Respondent was outside the jurisdiction of the Petitioner.

6. The Respondent submitted written estimates and invoices to her and, other than a \$3,500.00 wire transfer referenced elsewhere herein, Ms. Shaw paid the Respondent by personal check. Ms. Shaw did not obtain receipts from the Respondent, but retained the estimates, invoices, and the processed checks.

7. Ms. Shaw owned a house located at 3411 Silverwood Drive, Orlando, Florida (hereinafter "Silverwood"), and desired to have some repair work performed on the house. Ms. Shaw contacted the Respondent who agreed to meet her at the Silverwood house and tour the house.

8. As they walked through the house, the Respondent made suggestions about how to remedy the deficiencies in the structure. They agreed that he would commence the repair work. Because she did not reside locally, Ms. Shaw was not always present at the home when the work was being done, and she provided a key to the Respondent so that he could enter in her absence.

9. There were water stains on the family room ceiling, and Ms. Shaw knew that, when it rained, water came through the ceiling and would be collected in buckets. The Respondent advised Ms. Shaw that the roof was leaking and offered to repair the roof.

10. Roof repairs were supposedly made, but the roof continued to leak during rain. The Respondent eventually called Ms. Shaw and told her that the entire roof needed to be replaced, that he had already ordered the materials required to replace the roof, that he had already secured the services of an assistant, and that the roof replacement would commence on the day following the telephone call. He informed Ms. Shaw that,

because the work was commencing immediately, he needed to have payment by a wire transfer into his account.

11. Ms. Shaw wired \$3,500.00 to the Respondent's bank account as requested by the Respondent, but the Respondent did not replace the Silverwood roof on the next day, or on any other day.

12. When the roof repair did not occur, Ms. Shaw began to ask for the return of the \$3,500.00, but the Respondent failed to return the money. Though he did not explain his entitlement to retain the money, the Respondent told Ms. Shaw that someone to whom he had loaned his truck had abandoned the vehicle and that his tools had been stolen from the truck.

13. There was no evidence to suggest that the Respondent was entitled to retain the \$3,500.00 transfer from Ms. Shaw to his bank account. The Respondent did not replace Ms. Shaw's roof or return the funds to her.

14. Additionally, the Respondent performed other work for Ms. Shaw at the Silverwood home. The Respondent installed a ceiling fan purchased by Ms. Shaw to replace one supposedly removed by previous residents from the Silverwood dining room. Ms. Shaw observed the Respondent turn off the power to the house and connect the fan to the existing electrical wiring.

15. The Respondent also repaired a range hood ventilation fan and replaced a leaking faucet in the Silverwood kitchen.

16. Ms. Shaw owned a house located at 6001 Denson Drive, Orlando, Florida (hereinafter "Denson"). She asked the Respondent to perform repairs on the Denson property, and, as they had done at the Silverwood house, they toured the home, and the Respondent made suggestions as to the work that needed to be done.

17. The Denson roof was not functioning properly. The ceiling was water-stained in several rooms, and a wall in the screen porch was water-damaged. The Respondent repaired the roof deficiencies and the damage caused to the house by the water intrusion. Although Ms. Shaw was not always present at the time of these repairs, she observed the Respondent on one occasion taking a container of an otherwise unidentified black substance to the roof to patch one of the leaks.

18. The interior water damage repaired by the Respondent included removal and reinstallation of ceiling fans and light fixtures in the rooms where the ceiling was repaired.

19. The stove in the Denson kitchen was not functional, and Ms. Shaw purchased a replacement appliance. Although the stove purchased by Ms. Shaw apparently had an electrical plug incompatible with the existing outlet, Ms. Shaw observed the Respondent install the appliance by cutting into the stove's electrical cord and splicing the wiring into the existing outlet, after turning off the power to the house.

20. Ms. Shaw was also present when the Respondent installed a jetted bathtub into an area previously occupied by a bathroom shower stall. The installation included turning off the water supply and the removal and replacement of plumbing lines.

21. At the hearing, Ms. Shaw admitted that the tub she bought was incorrect for the installation location, apparently because the repair access area was on the wrong side of the tub and placed against a wall. She complained that the Respondent installed it nonetheless and that any repairs to the tub will require removal of a portion of a bedroom wall.

22. Ms. Shaw also observed the Respondent remove and replace a bathroom toilet at the Denson house.

23. The Petitioner asserted that the Respondent replaced a malfunctioning swimming pool "generator" at the Denson house, but the testimony presented on this issue was not sufficient to establish the actual nature of the pool equipment replaced, if any, by the Respondent.

24. The Petitioner also asserted that the Respondent replaced an electric garage door opener at the Denson house, but the evidence failed to establish that the Respondent did anything other than replace an existing opener with a new opener and plug the power unit into an existing electrical outlet.

25. Ms. Shaw owned a house located at 5006 Tam Drive, Orlando, Florida (hereinafter "Tam"). As at the other houses, Ms. Shaw asked the Respondent to tour the property and make the repairs on which they agreed.

26. At the Tam house, the Respondent replaced a bathroom toilet and sink.

27. As at the Denson house, the Petitioner asserted that the Respondent replaced an electric garage door opener at the Tam house, but the evidence again failed to establish that the Respondent did anything other than replace the existing opener with a new one and plug the power unit into an existing electrical outlet.

28. There is no credible evidence that Ms. Shaw ever asked the Respondent whether he was licensed by the Petitioner; however, based on the Respondent's statements related to another customer, she believed he had some sort of license.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2010).

30. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the 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). As set forth herein, the burden has been met.

31. Florida Statutes (2003-2006) set forth the following applicable provisions.

32. Section 489.105, Florida Statutes, provides the following relevant definitions:

(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. For the purposes of regulation under this part, "demolish" applies only to demolition of steel tanks over 50 feet in height; towers over 50 feet in height; other structures over 50 feet in height, other than buildings or residences over three stories tall; and buildings or residences over three stories tall. . . .

* * *

(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. However, the term "contracting" shall not extend to an individual, partnership, corporation, trust, or other legal entity that offers to sell or sells completed residences on property on which the individual or business entity has any legal or equitable interest, if the services of a qualified contractor certified or registered pursuant to the requirements of this chapter have been or will be retained for the purpose of constructing such residences.
(Emphasis supplied)

33. Subsections 489.505(9) and (12), Florida Statutes, provides, in relevant part, as follows:

489.505 Definitions.--As used in this part:

* * *

(9) "Contracting" means, except where exempted in this part, engaging in business as a contractor or performing electrical or alarm 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.

* * *

(12) "Electrical contractor" or "unlimited 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. (Emphasis supplied)

34. The evidence in this case establishes that the Respondent acted as a contractor and an electrical contractor in performing home repair services at the houses owned by Ms. Shaw. The services provided by the Respondent included repairs to roofing, plumbing, and electrical systems.

35. Subsection 489.113(2), Florida Statutes, provides, in relevant part, as follows:

No person who is not certified or registered shall engage in the business of contracting in this state. However, for purposes of complying with the provisions of this chapter, a person who is not certified or registered may perform construction work under the supervision of a person who is certified or registered, provided that the work is within the scope of the supervisor's license and provided that the person being supervised is not engaged in construction work which would require a license as a contractor under any of the categories listed in s. 489.105(3)(d)-(o). (Emphasis supplied)

36. Section 489.127, Florida Statutes, provides, in relevant part, 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. . . . (Emphasis supplied)

37. Subsection 489.531(1), Florida Statutes, provides, in relevant part, as follows:

489.531 Prohibitions; penalties.--

(1) A person may not:

(a) Practice contracting unless the person is certified or registered;

(b) Use the name or title "electrical contractor" or "alarm system contractor" or words to that effect, or advertise himself

or herself or a business organization as available to practice electrical or alarm system contracting, when the person is not then the holder of a valid certification or registration issued pursuant to this part;

(c) Present as his or her own the certificate or registration of another;

(d) Use or attempt to use a certificate or registration that has been suspended, revoked, or placed on inactive or delinquent status;

(e) Employ persons who are not certified or registered to practice contracting;

(f) Knowingly give false or forged evidence to the department, the board, or a member thereof;

(g) Operate a business organization engaged in contracting after 60 days following the termination of its only qualifying agent without designating another primary qualifying agent;

(h) Conceal information relative to violations of this part;

(i) Commence or perform work for which a building permit is required pursuant to part VII of chapter 553 without the building permit being in effect; or

(j) Willfully or deliberately disregard or violate any municipal or county ordinance relating to uncertified or unregistered contractors. (Emphasis supplied)

38. The evidence establishes that at no time relevant to this proceeding was the Respondent properly registered, certified or licensed as a contractor of any type.

39. Although Ms. Shaw testified about the alleged poor quality of the repair work performed by the Respondent, there were no quality-related allegations set forth in the Administrative Complaint at issue in this proceeding, and such allegations have not been addressed herein. It must be noted that there was no evidence to establish any basis for crediting Ms. Shaw's testimony regarding the quality of the roofing, plumbing or electrical system repairs made by the Respondent. It must also be noted that Ms. Shaw employed the Respondent for a period of years, presumably satisfied with the quality of work being performed during that time.

40. The Petitioner's Proposed Recommended Order seeks to impose of a penalty of \$15,000.00 for the two counts of the complaint and to assess costs of \$2,264.60.

41. Although (as noted in the Petitioner's Proposed Recommended Order) the disciplinary guidelines applicable to these violations were adopted after the period relevant to this proceeding, they are an indication of the range of penalties that may be appropriate for the statutory violations set forth herein. The current guidelines are set forth at Florida Administrative Code Rule 61-5.007 and provide as follows:

61-5.007 Disciplinary Guidelines for
Unlicensed Activity.

(1) In imposing disciplinary penalties upon
unlicensed persons, the Department of

Business and Professional Regulation (hereinafter, "Department") shall act in accordance with the following disciplinary guidelines and shall impose a penalty consistent herewith absent the application of aggravating or mitigating circumstances and subject to the provisions of Sections 455.228 and 489.13, F.S.

(2) For the purpose of this rule, the term "license" shall mean the professional license, registration, certificate or certification issued by the Department to authorize the practice of a profession pursuant to a professional practice act administered by the Department.

(3) All penalties established herein are for each count or separate violation found.

(4) For using a professional title or designation without holding the requisite license to do so, the following penalties shall apply:

(a) First violation--\$1000 administrative fine;

(b) Second violation--\$2500 administrative fine; and

(c) Third and subsequent violations--\$5000 administrative fine.

(5) For advertising or offering to practice a profession without holding the requisite license to do so, the following penalties shall apply:

(a) First violation--\$1500 administrative fine;

(b) Second violation--\$3000 administrative fine; and

(c) Third and subsequent violations--\$5000 administrative fine.

(6) For practicing a profession without holding the requisite license to do so, the following penalties shall apply:

(a) First violation--\$3000 administrative fine;

(b) Second violation--\$4000 administrative fine; and

(c) Third and subsequent violations--\$5000 administrative fine.

(7) Notwithstanding the foregoing, violations of Section 489.127(1), F.S., may result in the imposition of a \$10,000 administrative fine.

(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.

(9) The disciplinary guidelines established by this rule are only applicable to final orders issued by the Secretary of the Department or his/her appointed designee.

42. The Administrative Complaint filed in this case included one count of violating Subsection 489.127(1)(f), Florida Statutes, by engaging in the unlicensed practice of contracting, and a second count of violating Subsection 489.531(1), Florida Statutes, by engaging in the unlicensed practice of electrical contracting.

43. As to aggravating or mitigating circumstances, there was no evidence presented that the Respondent has been the subject of prior disciplinary action. There was no evidence that the Respondent has been the subject of prior complaints or that he presents a danger to the public. There was no evidence that any actual damage resulted from the work the Respondent performed on Ms. Shaw's properties, and the asserted potential for damage caused by the Respondent's repairs, including the splicing of a stove's electrical connection, was speculative.

There was no credible evidence that Ms. Shaw requested to see a license or that the Respondent displayed an altered license. The evidence established that the violations had continued for a period of years. The effect of a penalty on the Respondent's livelihood is unknown. There have been no efforts at rehabilitation; to the contrary, the Respondent's testimony about his interactions with Ms. Shaw was self-serving and lacked credibility. Consideration of aggravating and mitigating circumstances does not warrant variance from the adopted penalty guidelines.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation enter a final order finding that Donald Whyte violated Subsection 489.126(1), Florida Statutes, and imposing a fine of \$10,000.00, and, further, violated Subsection 489.531(1), Florida Statutes, and imposing a fine of \$3,000.00, for a total administrative fine of \$13,000.00.

DONE AND ENTERED this 28th day of September, 2010, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 28th day of September, 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.