

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
BOARD OF BUILDING CODE)
ADMINISTRATORS AND INSPECTORS,)
)
Petitioner,)
)
vs.) Case No. 10-2883PL
)
MORRIS TESH,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On October 5, 2010, a duly-noticed hearing was held in Bunnell, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Morris Tesh, pro se
Post Office Box 474
Bunnell, Florida 32110

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated Section 468.621(1)(g), Florida Statutes, as alleged in the Administrative Complaint, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On November 9, 2009, the Department of Business and Professional Regulation (Petitioner or DBPR) filed an Administrative Complaint against Respondent, Morris Tesh, alleging that he failed to enforce the building code in violation of Section 468.621, Florida Statutes, based on alleged deficiencies in his inspections for six structures. On December 4, 2009, Respondent filed an Election of Rights form with the Department, disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to Section 120.57(1), Florida Statutes. On May 26, 2010, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was originally scheduled for hearing July 29, 2010. However, at the request of Petitioner, the case was continued and rescheduled for October 5, 2010. At hearing, Petitioner presented the testimony of Joshua Gideon and Michael Gustafson, and Petitioner's Exhibits numbered 1 through 8 were admitted into evidence. Respondent testified on his own behalf but submitted no exhibits.

The one-volume Transcript was filed with the Division on October 20, 2010. Petitioner requested an extension of time for the filing of proposed recommended orders, and the deadline for submission was extended to November 15, 2010. Petitioner filed a Proposed Recommended Order on November 12, 2010, which has been

carefully considered in the preparation of this Recommended Order. To date, Respondent has not submitted a post-hearing submission. All references to Florida Statutes are to the 2009 version, unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of building code administrators and inspectors in the State of Florida, pursuant to Section 20.165 and Chapters 455 and 468, Part XII, Florida Statutes.

2. Respondent is a certified standard building inspector in the State of Florida, having been issued license number BN 3816. He held this license at all times relevant to this complaint.

3. Respondent provides building inspections as a private provider within the City of Jacksonville.

4. In the course of his duties as a building inspector, Respondent has inspected structures at the following locations in Jacksonville: 1142 Johnson Creek Circle; 8242 Maple Street; 9127 5th Avenue; 7053 Civic Club Drive; 11658 Pleasant Creek Drive; and 2700 Jane Street.

5. The City of Jacksonville Quality Assurance Office (QA Office) in the Building Department conducted audits of the inspections provided by Respondent at the above-named locations.

6. The QA Office determined that there were deficiencies concerning the inspections for the six structures, and prepared an "Audit Report" with respect to each structure. However, Audit

Reports are only prepared where the QA Office perceives a pattern of violations, presumably for a particular private provider. Audit Reports are not prepared with respect to every audit performed.

7. The Audit Report for the 11442 Johnson Creek Circle address listed 22 "deficiencies." Joshua Gideon, a construction trades inspector for the City of Tallahassee, testified that the "deficiencies" ranged from building code violations to missed items that that were required by the engineer. He testified that, as a whole, the deficiencies could not be considered minor, and that some individual items would not be considered minor standing alone. However, no evidence was presented to identify which alleged deficiencies represented code violations, which deficiencies were considered "major," or to identify exactly what code provisions were at issue. In addition, Mr. Gideon testified that the majority of items that were listed were items required by the engineer of record. No evidence was presented to explain whether items required by the engineer of record would also be building code violations.

8. The Audit Report for the inspection at 8242 Maple Street indicates there were seven deficiencies. It does not, however, indicate what the building code required or how those requirements were not met. Further, Mr. Gideon did not physically inspect this property and no inspector that visited the site actually testified. While Mr. Gideon assisted in

preparing the report, his assistance would be based on what was reported to him, and both his testimony and the contents of the report are uncorroborated hearsay.

9. Like the job at 8242 Maple Street, Mr. Gideon did not visit the actual property at 9127 Fifth Avenue, but simply assisted in preparing the report. Although it is alleged that the permit and plans were not posted on site, so that it would not be possible to post inspections on the permit card, no one who visited the site testified at hearing.

10. Mr. Gideon also did not perform the audit of the job located at 7053 Civic Club. Although the Audit Report indicates that there were 18 deficiencies, there is no indication which of these deficiencies represented building code violations and which were variations from the plans. Further, no one who actually visited the site testified at hearing.

11. Mr. Gideon did visit the job at 11658 Pleasant Creek Drive. The Audit report that he prepared indicated that there were 19 deficiencies. He testified at hearing that deficiencies were items that were required by the engineer of record. No evidence was presented, however, to identify a deficiency that was a violation of building code standards or, in the event of such a deficiency, what provision in the building code was at issue.

12. The final property at issue is a property located at 2700 Jane Street. This structure, which Mr. Gideon visited, is a

multi-story wood-framed hotel. Several deficiencies were noted with respect to this building, including fire assemblies not constructed according to their tested assemblies, incorrect insulation installed, incorrect channeling in the ceiling, and multiple cut or broken floor truss joists. However, as with the other properties, no evidence was presented to indicate which deficiencies were items required by the engineer of record, and which deficiencies actually represented violations of the building code. In addition, it was stated at hearing that there were multiple framing inspections of this property because of its size. However, there is no testimony that provides the sequence of events related to the alleged deficiencies. In other words, while there is an attachment to the Audit Report indicating the times of different inspections, there was no evidence presented that indicated what was wrong each time Respondent inspected the property, and what he should have but did not flag as not meeting building code requirements.

CONCLUSIONS OF LAW

13. 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 (2010).

14. This is a disciplinary proceeding against Respondent's license as a building code inspector. Because the Department seeks to take disciplinary action against Respondent's license,

it is required to prove 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).

15. 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).

16. Moreover, in disciplinary proceedings, the statutes and rules for which a violation is alleged must be strictly construed in favor of Respondent. Elmariah v. Department of Professional Regulation, 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Department of Professional Regulation, 534 So. 782, 784 (Fla. 1st DCA 1988).

17. The Administrative Complaint in this case alleged the following:

11. Section 468.621(1)(g), Florida Statutes, says: "[f]ailing 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" constitutes grounds for disciplinary action.

12. Based on the foregoing, the Respondent violated Section 468.621.(1)(g), Florida Statutes, when he failed to enforce the building code.

18. The Department has failed to prove the allegations in the Administrative Complaint by clear and convincing evidence.

19. As a preliminary matter, the Department sought to introduce the Audit Reports prepared by the QA Office as business records, and thus an exception to the hearsay rule pursuant to Section 90.803(6), Florida Statutes. That subsection provides an exception to the definition of hearsay, regardless of the availability of the declarant,

(6)(a) Any memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such a memorandum report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and 90.902(11), unless the sources of information or other circumstances show a lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

20. In this case, Mr. Gideon testified that the Audit Reports were not prepared in every case, but only in those cases

where the QA Office determined that there was a pattern of conduct involved. Under these circumstances, it cannot be said that it was the regular practice of the QA Office to prepare the Audit Reports. Accordingly, the Audit reports must be considered to be hearsay. Harris v. Game & Fresh Water Fish Commission, 495 So. 2d 806 (Fla. 1st DCA 1986).

21. To the extent that Mr. Gideon testified about audits he prepared, the information in the audits may supplement or explain his testimony, but standing alone, cannot support a finding of fact. § 120.57(1)(c), Fla. Stat. As applied to the evidence presented in this case, the Audit Reports may supplement or explain Mr. Gideon's testimony regarding the projects at Jane Street, Johnson Creek Circle and Pleasant Creek Drive. However, even with both Mr. Gideon's testimony about what he observed and what is recorded in the Audit Report, there is no clear and convincing evidence that building code violations existed at these three locations, and that Mr. Tesh saw those violations and passed the structures despite those violations.

22. With respect to the Maple Street, Fifth Avenue and Civic Club inspections, Mr. Gideon's testimony is also hearsay, as he did not visit any of these locations but relied on the observations of a co-worker and statements by the contractors at each job location reported to him. Neither the co-worker nor the contractors testified in this proceeding.

23. Most important, however, is the failure to identify the

specific code violations at issue for these structures. Mr. Tesh is charged with failing to enforce the building code, in violation of Section 468.621(1)(g), Florida Statutes. In order to prove that he failed to enforce the building code, it is incumbent upon Petitioner to demonstrate what building code provisions are at issue and how Respondent failed to enforce those provisions. Purvis v. Department of Professional Regulation, 461 So. 2d 134 (Fla. 1st DCA 1984). Here, only general references to the building code as a whole were made, and with respect to some locations, it is unclear whether the "deficiencies" dealt with building code violations at all. These general references are not clear and convincing evidence needed to support a determination that Respondent failed to enforce the building code, as alleged in the Administrative Complaint.

RECOMMENDATION

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

RECOMMENDED that the Florida Building Code Administrators and Inspectors Board enter a Final Order dismissing the Administrative Complaint in its entirety.

DONE AND ENTERED this 8th day of December, 2010, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of December, 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.