

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TODD P. BOETZEL AND BOETZEL )  
LANDSCAPING, INC., )  
 )  
 Petitioners, )  
 )  
vs. ) Case No. 10-3325FC  
 )  
DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
 )  
 Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to stipulation, this cause came on for final disposition by Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), upon a stipulated evidentiary record and Proposed Final Orders by the parties.

APPEARANCES

For Petitioners: Gregory Turner Elliott, Esquire  
Elliott - Berger, P.A.  
10225 Ulmerton Road, Suite 4A  
Largo, Florida 33771

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

STATEMET OF THE ISSUE

The issue is whether Petitioners are entitled to an award of attorney's fees and costs pursuant to section 57.111, Florida Statutes (2007).<sup>1/</sup>

PRELIMINARY STATEMENT

On December 22, 2008, Respondent, Department of Business and Professional Regulation (Department), issued a Final Order, BPR-2008-09207, finding that Petitioners, Todd Boetzel and Boetzel Landscaping, Inc. (collectively referred to as Boetzel), were not guilty of the unlicensed practice of electrical contracting and landscape architecture and adopting the Recommended Order of Administrative Law Judge Daniel Manry in DOAH Case No. 08-1603.

On December 17, 2008, Boetzel filed a motion, seeking attorney's fees and costs pursuant to section 57.011 in DOAH Case No. 08-1603. The case relating to the request for attorney's fees and costs was assigned DOAH Case No. 08-5778.

In its response to the Initial Order in DOAH Case No. 08-5778, the Department did not dispute that the fees and costs submitted by Boetzel were reasonable; that Boetzel was the prevailing party in the underlying proceeding; that the Department was not a nominal party; and that there were no circumstances or facts that would make an award of attorney's

fees and cost unjust. The Department maintained that it was substantially justified in bringing the underlying action.

Boetzel requested an evidentiary hearing. The Administrative Law Judge entered a Final Order, denying the motion for attorney's fees and costs without giving Boetzel an evidentiary hearing. Boetzel appealed the Final Order. The Second District Court of Appeal reversed the Final Order and remanded the case to DOAH for further proceedings in accordance with the court's opinion.

The case on remand was assigned DOAH Case No. 10-3325FC. A pre-hearing conference was held by telephonic conference call on October 21, 2010. The parties agreed that an evidentiary hearing would not be necessary and that the parties would submit a stipulated evidentiary record.

On November 1, 2010, a stipulated record consisting of Volumes I through IV was filed. On November 1, 2010, an Agreed Motion to Supplement the Record was filed. The motion is hereby granted, and Volume V is deemed to be part of the stipulated record.

Both parties have filed Proposed Final Orders, which have been considered in the preparation of this Final Order.

#### FINDINGS OF FACT

1. On February 4, 2008, the Department filed a two-count Administrative Complaint against Boetzel, alleging that Boetzel

violated sections 481.323(1) and 489.531(1), Florida Statutes (2006), in that Boetzel engaged in the unlicensed practice of landscape architecture and electrical contracting.

2. The following pertinent facts were alleged in the Administrative Complaint:

At no time material hereto were Respondents the holders of valid licenses to engage in the practice of landscape architecture pursuant to Chapter 481, Part II, Florida Statutes.

At no material time hereto were Respondents the holders of valid licenses to engage in the practice of electrical contracting pursuant to Chapter 489, Part II, Florida Statutes.

At all times material hereto, Respondent TODD P. BOETZEL was the Registered Agent and Officer/Director/President of Respondent BOETZEL LANDSCAPING, INC.

Respondents' last known address is 2534 22<sup>nd</sup> Avenue North, St. Petersburg, Florida 33713.

On or about June 5, 2007 Respondents submitted an invoice to Southern Cross Construction for site preparation, including grading, placement of plantings, and installation of an irrigation system at a construction site in Reddington [sic] Beach, Florida.

The aforementioned invoice also included electrical contracting work.

On or about June 19, 2007 Respondent Todd P. Boetzel signed a sworn Claim of Lien indicating that he provided "Landscaping, Sod, and Irrigation" for the aforementioned project.

Respondent was paid a deposit of \$8,000.00  
by check number 1274 on May 25, 2007.

3. Boetzel requested an administrative hearing, and the case was referred to DOAH. A final hearing was held, and the Administrative Law Judge entered a Recommended Order, recommending that a final order be entered finding that Boetzel did not engage in the unlicensed practice of landscape architecture and electrical contracting.

4. On October 28, 2008, the Department filed a Final Order, which adopted the Findings of Fact and Conclusions of Law in the Recommended Order and found that Boetzel was not guilty of engaging in the unlicensed practice of landscape architecture and electrical contracting.

5. On November 17, 2008, Boetzel filed a Verified Petition and Affidavit for Attorney's Fees and Costs under Florida Statutes § 57.111 (2006). The petition included an Affidavit for Attorney's Fees executed by the attorney for Boetzel, stating that 102.2 hours of attorney time had been rendered in the case and that the usual rate was \$300.00 per hour. The total amount claimed for attorney's fees is \$30,660.00. The petition also included a Bill of Costs executed by Todd P. Boetzel, which included costs for services of process and transcripts. The total amount claimed for costs is \$1,327.30.

6. On December 8, 2008, the Department filed Respondent's Answer to Initial Order. The answer stated:

The Department does not dispute the reasonableness of the fees and costs submitted by Petitioner.

The Department does not dispute that Petitioner [sic] were a prevailing party in the underlying proceeding.

The Department does not dispute that Petitioner [sic] are a small business party.

The Department does not dispute that it was non-nominal party at the underlying proceeding.

The Department knows of no circumstances or facts that would make an award of attorney's fees to Petitioner unjust in the present case.

\* \* \*

The Department alleges that its actions in prosecuting this matter were substantially justified, thereby negating Petitioners' entitlement to attorneys' fees.

The only disputed issue in the instant case is whether the Department was substantially justified in issuing the Administrative Complaint.

7. In February 2008, Laura P. Gaffney (Ms. Gaffney) was the chief attorney in the unlicensed activity section of the Department. Her primary responsibility was to review incoming cases and determine whether the cases should be closed out, whether additional investigation was needed, or whether charges should be filed in the form of an administrative complaint.

Ms. Gaffney had been delegated the authority by the Secretary of the Department to make probable cause findings on cases dealing with unlicensed activity.<sup>2/</sup>

8. In making her determination of whether there was probable cause to file an administrative complaint, Ms. Gaffney considered the investigative report dated December 29, 2007, and a supplemental report dated January 19, 2008.

9. The investigative file included a complaint filed by Steve Petrozak (Mr. Petrozak), a licensed general contractor and manager of Southern Cross Construction, alleging that Boetzel had engaged in the unlicensed practice of landscape architecture. The complaint described the work performed by Boetzel as "landscaping, lawn irrigation, sod."

10. The complaint filed by Mr. Petrozak included an invoice from Boetzel for the work performed. The invoice was for the planting of various plants, site preparation, irrigation, installation of pine bark, and lighting. The site preparation was described in the invoice as follows: "Sodcut areas to be planted, remove unwanted vegetation and haul away, prepare areas for planting, stump grind. Grade entire property and create swale down left side." The lighting work was described in the invoice as follows: "Install Low Voltage Halogen Lights, upright 3 foxtail palms, 1 adonidia palm

and 2 lights on mailbox, with one automatic transformer.

Additional transformer."

11. The investigative file also included a letter dated November 7, 2007, from Gregory Elliott, an attorney representing Boetzel. Mr. Elliott stated that Boetzel was not in the business of landscape architecture, but was in the business of selling and installing landscape materials for residential or commercial use. Mr. Elliott described Boetzel as a laborer or materialman working under the general contractor.

12. Ms. Gaffney felt that the "single most important part of this investigative report" was the sworn claim of lien filed by Boetzel, which stated that Boetzel had furnished "labor, services and material consisting of Landscaping, Sod, and Irrigation" at the property situated at 511 161st Avenue, Redington Beach, Florida.

13. Ms. Gaffney assumed that because the work performed by Boetzel included grading the property and creating a swale that Boetzel had set the grades for the grading and had designed the swale. The investigative report does not contain sufficient information to make that determination. Such information could easily have been obtained from Mr. Petrozak, but the investigator did not get the information nor did Ms. Gaffney request the information.



14. Ms. Gaffney assumed that because transformers were being provided and that halogen lights were being installed that Boetzel hardwired the installation of the lights and transformers. She assumed that because lights were being placed near a mailbox that the work would entail more than plugging in the lights. The information contained in the investigation file is insufficient to supports such assumptions. The investigator could have obtained the necessary information from Mr. Petrozak, but did not do so nor did Ms. Gaffney request the information.

#### CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 57.011 and 120.57, Florida Statutes (2010).

16. Section 57.011(4)(a) provides:

Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

17. The Department has conceded that Boetzel is a prevailing small business party, that the fees and costs sought are reasonable, and that there are no special circumstances which would make the award of fees and costs unjust. Thus, the

remaining issue is whether the Department's filing of the Administrative Complaint was justified. The Department has the burden to show that its actions initiating the proceeding were justified. Helmy v. Dep't of Bus. & Prof'l Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998); Gentele v. Dep't of Bus. & Prof'l Regulation, 513 So. 2d 672 (Fla. 1st DCA 1987).

18. A proceeding is deemed substantially justified if there was a reasonable basis in fact and law at the time the proceeding was initiated by a state agency. In Dep't of Health v. Cralle, 852 So. 2d 930, 932 (Fla. 1st DCA 2003) (citing Fish v. Dep't of Health, Bd. of Dentistry, 825 So. 2d 421 (Fla. 4th DCA 2002)), a temporal limitation was established on the analysis of whether an agency's action was substantially justified:

In resolving whether there was a substantial justification or a reasonable basis in law and fact for filing an administrative complaint, "one need only examine the information before the probable cause panel at the time it found probable cause and directed the filing of an administrative complaint."

See also Ag. for Health Care Admin. v. Gonzalez, 657 So. 2d 56 (Fla. 1st DCA 1995) (proper inquiry is whether evidence before the probable cause panel was sufficient for institution of disciplinary action).

19. A finding of probable cause will be sustained when there is some evidence considered by the finder of probable cause that would "reasonably indicate that the violations alleged had indeed occurred." Kibler v. Dep't of Prof'l Regulation, 418 So. 2d 1081, 1084 (Fla. 4th DCA 1982). In other words, agency action is substantially justified in cases where the finder of probable cause had evidence before it that would constitute prima facie proof of a violation if credited at the final hearing.

20. As noted in Dep't of Professional Regulation, Div. of Real Estate v. Toledo Realty, Inc., 549 So. 2d 715, 719 (Fla. 1st DCA 1989), the investigative report may be the "most substantial and relevant evidence necessary to assist the panel in rendering a decision of whether probable cause exists for the issuance of a formal complaint."

21. Section 481.303(6) provides:

(6) "Landscape architecture" means professional services, including, but not limited to, the following:

(a) Consultation, investigation, research, planning, design, preparation of drawings, specifications, contract documents and reports, responsible construction supervision, or landscape management in connection with the planning and development of land and incidental water areas, including the use of Xeriscape as defined in s. 373.185, where, and to the extent that, the dominant purpose of such services or creative works is the preservation,

conservation, enhancement, or determination of proper land uses, natural land features, ground cover and plantings, or naturalistic and aesthetic values;

(b) The determination of settings, grounds, and approaches for and the siting of buildings and structures, outdoor areas, or other improvements;

(c) The setting of grades, shaping and contouring of land and water forms, determination of drainage, and provision for storm drainage and irrigation systems where such systems are necessary to the purposes outlined herein; and

(d) The design of such tangible objects and features as are necessary to the purpose outlined herein

22. Section 489.505(12) defines "electrical contractor" as follows:

[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.

23. Using the definition of landscape architecture and electrical contractor contained in sections 481.303(6) and 489.505(12), respectively, the information in the investigative report was insufficient to make a determination that Boetzel was practicing landscape architecture or performing electrical contracting without a license. Therefore, the Department was not substantially justified in filing the Administrative Complaint.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED Todd P. Boetzel and Boetzel Landscaping, Inc., be awarded \$30,660.00 in attorney's fees and \$1,327.30 in costs.

DONE AND ORDERED this 10th day of February, 2011, in Tallahassee, Leon County, Florida.



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SUSAN B. HARRELL  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of February, 2011.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, all references to the Florida Statutes are to the 2007 version.

<sup>2/</sup> Section 455.225(4) provides that a determination of probable cause may be made by the probable cause panel of a board or by the Department as appropriate. The Board of Landscape Architecture has authority to discipline registered landscape architects, and the Electrical Contractor Licensing Board has the authority to discipline applicants, contractors, or business organizations for which the contractor is the primary qualifying agent or secondary qualifying agent. §§ 481.325(3) and 489.533(2), Fla. Stat. The boards do not have authority to discipline persons for unlicensed activity. The Department disciplines persons for unlicensed activity and makes the probable cause determination of whether an administrative complaint should be filed. §§ 455.225(4) and 455.228, Fla. Stat.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.