

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 10-6134
)
EARNEST KNIGHT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on November 12, 2010, in Tallahassee, Florida, before W. David Watkins, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark Steven Miller, Esquire
Susan Leigh Matchett, Qualified Rep.
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Ernest Knight, pro se
3301 Sunnyside Drive
Tallahassee, Florida 32305

STATEMENT OF THE ISSUE

Whether disciplinary action should be taken against Respondent based on alleged violations of section 489.127(1)(f)¹, Florida Statutes, as charged in the Administrative Complaint.

PRELIMINARY STATEMENT

On September 24, 2009, Petitioner Department of Business and Professional Regulation ("DBPR" or "Petitioner") issued an Administrative Complaint against Respondent, Earnest Knight ("Respondent"). The complaint alleged that Respondent had violated section 489.127(1)(f), by engaging in the unlicensed practice of contracting.

On July 23, 2010, Respondent filed a Request for an Administrative Hearing. That same day, Petitioner referred the request to the Division of Administrative Hearings, where it was assigned to the undersigned for the conduct of a formal administrative hearing.

The final hearing was duly noticed for October 8, 2010, but during a prehearing conference held on October 6, 2010, Respondent moved ore tenus for a continuance. That motion was granted and the hearing rescheduled for November 12, 2010.

At the hearing, Petitioner presented the testimony of two witnesses: Laitima Wilson-Montgomery, homeowner; and Cathy Jackson, DBPR Investigative Specialist II. Petitioner's Exhibits P-2 through P-15, P-17, P-18, P-20 and P-21 were admitted in evidence. At the request of Petitioner, official recognition was taken of sections 455.228, 489.105(3), 489.105(6), 489.113(2), and 489.127(1)(f), Florida Statutes.

Respondent testified at the hearing and his exhibits R-1 and R-2 were received in evidence.

The two-volume transcript of the hearing was filed with the Division on December 1, 2010. Both Petitioner and Respondent filed Proposed Recommended Orders, and those Proposed Recommended Orders have been given due consideration in the rendition of this Recommended Order.

FINDINGS OF FACT

1. Petitioner DBPR is the state agency charged with regulating the practice of contracting, pursuant to section 20.165, Florida Statutes, and chapters 455 and 489, part I, Florida Statutes.

2. Petitioner has jurisdiction over the unlicensed practice of contracting, pursuant to section 455.228.

3. At all times material, Respondent, Earnest Knight, was not licensed, nor had he ever been licensed by the state of Florida to engage in contracting. At some point in the past Respondent had taken the state exam required for licensure but had not passed it.

4. In early June 2007, Respondent met with Izell Montgomery and Laitima Wilson-Montgomery ("the Montgomerys") to discuss building an addition to, and remodeling, the Montgomery's home in Tallahassee, Florida. According to the un rebutted testimony of Respondent, the Montgomerys initiated

the contact.^{2/} There is conflicting testimony as to whether Respondent represented himself as a licensed contractor to the Montgomerys at this initial meeting or at any subsequent time.^{3/} However, he did give the Montgomerys one of his business cards bearing the name "Knight Construction Services," drawings of a mason and a carpenter, and his contact information.

5. Although the record is clear that no written contract existed at the commencement of the project, the testimony again conflicts as to whether a verbal contract was joined before the work began, and more important, what role Respondent was to play in bringing the project to fruition. According to the Montgomerys, Respondent was to serve as the general contractor of the project and in that capacity be responsible for entering into subcontracts for certain aspects of the project as well as overall supervision of the project. According to Respondent, his role was to "assist" the Montgomerys in the construction of their owner-built project. In return, he was to be compensated for his time.

6. The project was a two-story addition to an existing home that would include the enlargement of the master bedroom upstairs and the enlargement of the kitchen downstairs. The successful completion of the project would entail foundation work, structural framing, heating and air-conditioning system work, electrical system work, roofing, and plumbing.

7. On September 14, 2007, Mrs. Montgomery and Respondent went together to the City of Tallahassee Growth Management Office and applied for, and obtained, an "owner-built" building permit. According to Mrs. Montgomery, Respondent explained that the permitting process would be quicker if she applied for the permit as an owner-builder as opposed to Respondent applying as a general contractor.

8. An owner-builder permit allows the work to be performed by or under the direct onsite supervision of the owner of the building. It does not allow the work to be delegated by the owner to an unlicensed contractor, such as Respondent.

9. On October 30, 2007, Respondent received a proposal from Jack Bryant for the structural framing work on the project. The quoted price for the framing work was \$10,000.00. The proposal was evidently accepted by Respondent since Bryant began the framing work on the project sometime thereafter. However, following a heated disagreement^{4/} between Respondent and Mr. Bryant, Respondent terminated the relationship with him.

10. On December 22, 2007, Mrs. Montgomery wrote a check for \$700.00 to Respondent with the intention that it be used to pay Mr. Bryant for the work he had performed prior to his termination. In fact, Mr. Bryant was paid only \$600.00 by Respondent for the framing work while the \$100.00 balance was retained by Respondent.

11. Respondent hired Derrick Smith as the replacement framer to complete the framing of the project. It was agreed between Respondent and Mrs. Montgomery that payments to Mr. Smith would be made directly by Mrs. Montgomery upon approval by Respondent.

12. On May 14, 2008, Mrs. Montgomery wrote a check for \$500.00 payable to Respondent. As noted in the "memo" line of the check, this payment was compensation to Respondent for arranging for the subcontractors on the project.

13. Respondent hired Jesse Shabazz of Al Hajj Services to perform the necessary HVAC work on the project. Respondent paid Mr. Shabazz \$700 for completion of phase I of the HVAC system. During the time Respondent was supervising the project there was no written contract between the Montgomerys and Mr. Shabazz.^{5/}

14. Respondent engaged George E. Gunn Surveying and Mapping to conduct a boundary survey of the project site. That survey was completed on June 15, 2007.

15. Respondent hired R. Carver to do the electrical work on the project. Following approval by Respondent for work completed, R. Carver was paid directly by the Montgomerys.

16. On January 24, 2008, the Montgomerys contracted directly with the Frasca Plumbing Company for all of the plumbing work associated with the project. Following approval

by Respondent for work completed, Frasca Plumbing was paid directly by the Montgomerys.

17. The Montgomerys contracted directly for the tile work and cabinetry work associated with the project.

18. Respondent installed the insulation for the project, and did some of the landscaping and job site cleanup.

19. Upon the completion of each phase of the project, Respondent would inform the Montgomerys that it was time to call the city and arrange for an onsite building inspection.

20. On June 17 or 18, 2008, Respondent abandoned the project. On June 24, 2008, Respondent delivered a hand-written statement to the Montgomerys detailing the amounts he claimed were owed to him by the Montgomerys. In addition to several line items of materials costs to be reimbursed, there was also the line item "oversee job" with a corresponding charge of \$2,000.00.

21. Respondent contends that he was not paid the \$2,000.00 fee appearing on the June 24, 2008, statement he presented to the Montgomerys. Ms. Montgomery contends that Respondent was paid some or all of the \$2,000.00 fee, although she was not able to produce any cancelled checks or receipt to corroborate payment. However, there is no dispute that Respondent was paid at least \$500.00 for his role in hiring subcontractors and "overseeing" the project.

22. The Montgomerys were not happy with the quality of the work done on their home. Among their complaints were a leaking roof, walls that were cracking, and holes around some of the electrical outlets.

23. The Department incurred investigative costs of \$195.49 related to Complaint No. 2008-040905.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2010).

25. Herein, Petitioner has the duty to go forward and the burden of proving, by clear and convincing evidence, the allegations against Respondent. Section 120.57(1)(j); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Dep't of Banking & Fin. Div. of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Evans Packing Co. v. Dep't of Agric. & Customer Servs., 550 So. 2d 112, 116, Fn. 5 (Fla. 1st DCA 1989).

26. The clear and convincing evidence standard requires that the evidence "must be of such 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 Davey, 645 So. 2d 398, 404 (Fla. 1994).

A. The Violation

27. The single-count Administrative Complaint relates to the unlicensed practice of contracting and cites sections 489.113(2), 489.105(3), 489.105(6) and 489.127(1), Florida Statutes.

28. Section 489.127 provides, in pertinent part, that:

(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.

29. Section 489.113 provides in pertinent part:

(2) No person who is not certified or registered shall engage in the business of contracting in this state. . . .

30. Section 489.105(3) defines a contractor as:

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.

31. Section 489.105(6) provides, in pertinent part:

(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.

32. The authority for the imposition of administrative penalties for unlicensed practice of a profession is section 455.228(1), Florida Statutes, which provides in pertinent part:

When the department has probable cause to believe that any person not licensed by the department . . . has violated . . . any statute that relates to the practice of a profession regulated by the department, or any rule adopted pursuant thereto, the department may . . . impose an administrative penalty not to exceed \$5,000 per incident pursuant to the provisions of chapter 120

33. However, as it relates specifically to unlicensed contracting, section 489.13, Florida Statutes, provides, in pertinent part:

(1) Any person performing an activity requiring licensure under this part as a construction contractor is guilty of unlicensed contracting if he or she does not hold a valid active certificate or registration authorizing him or her to perform such activity, regardless of whether he or she holds a local construction

contractor license or local certificate of competency. . . .

(3) Notwithstanding s.455.228, the department may impose an administrative fine of up to \$10,000 on any unlicensed person guilty of unlicensed contracting. In addition, the department may assess reasonable investigative and legal costs for prosecution of the violation against the unlicensed contractor.

34. The evidence clearly and convincingly establishes that Respondent is not licensed as a contractor; that the work he did at the Montgomerys' home meets the definition of "contracting"; that he was compensated (albeit not as much as he demanded) for his work on the Montgomerys' home; and that the contracting work he performed is not exempt from regulation under Part I of chapter 489, Florida Statutes.

35. Therefore, the Department met its burden to prove that Respondent is guilty of unlicensed contracting in violation of sections 489.127(1) (f) and 489.13.

B. Amount of Fine

36. Petitioner is seeking a fine of \$10,000 in this case for Respondent's unlicensed contracting. See DBPR's Proposed Recommended Order, at page 12.

37. At the time of the violation at issue, DBPR had not adopted guidelines to be used in determining the appropriate fine within the range established by section 489.13, nor had it enumerated the aggravating and mitigating circumstances that are

to be considered in determining the appropriate fine.^{6/} However, as of January 26, 2010, Petitioner adopted Florida Administrative Code Rule 61-5.007, which establishes disciplinary guidelines for unlicensed activity. The guidelines for establishing penalties pursuant to the new rule cannot be applied retroactively to Respondent's unlicensed activity that occurred in 2007 and 2008.

38. A fine of \$2,000.00 for Respondent's unlicensed contracting work is reasonable under the circumstances of this case. Aggravating factors are that the construction done under Respondent's oversight was defective, resulting in a leaking roof and cracks in walls, among other things. Second, Respondent testified that he had taken the contractor's licensure exam, and he should therefore have been fully aware of the limitations imposed on non-licensed individuals. Mitigating factors are that Respondent has no prior complaints or offenses, he did not solicit the engagement, and there is evidence to suggest that the homeowners were complicit in the unlicensed arrangement.

39. The Department is authorized to "waive up to one-half of any fine imposed if the unlicensed contractor complies with certification or registration within one year after imposition of the fine under this subsection." § 489.13(3), Fla. Stat. It should do so in this case.

(C) Investigative Costs

40. Section 489.13(3) authorizes DBPR to "assess reasonable investigative and legal costs for prosecution of the violation against the unlicensed contractor" in addition to any fine imposed. See also § 455.228(3)(c), Fla. Stat. (authorizing the Department to "recover costs of investigation" in addition to any fine imposed).

41. The evidence clearly and convincingly establishes that the Department incurred \$195.49 in investigative costs related to this case. No prosecution costs were sought.


RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Department of Business and Professional Regulation issue a final order that:

1. Finds Respondent guilty of unlicensed contracting in violation of sections 489.127(1)(f) and 489.13, and imposes an administrative fine of \$2,000, with \$1,000 payable upon entry of the final order and the other \$1,000 payable one year from that date unless Respondent provides satisfactory evidence to DBPR that he obtained a state contractor's license within that period;
2. Requires Respondent to pay the Department's investigative costs of \$195.49.

DONE AND ENTERED this 7th day of February, 2011, in
Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of February, 2011.

ENDNOTES

^{1/} All statutory references in this Recommended Order are to the 2007 version of the Florida Statutes in effect at the time of the alleged violation, with the exception of the jurisdictional reference contained in the Conclusions of Law.

^{2/} According to Respondent, the Montgomerys had previously approached other (licensed) contractors, and the prices quoted for the project exceeded the Montgomerys' available budget.

^{3/} Mrs. Montgomery testified that she asked Respondent whether he was a licensed general contractor and Respondent told her that he was. Respondent testified that Mrs. Montgomery was well aware that he was not a licensed contractor through Respondent's contacts with Mrs. Montgomery's mother, and that he never told Mrs. Montgomery that he held a contractor's license. Mrs. Montgomery's testimony on this issue was not credible. The totality of the circumstances: Mrs. Montgomery's direct contracting with some of the subcontractors, her direct payments for some of the building materials, her willing participation in obtaining the "owner-built" building and roofing permits, and her overall demeanor while testifying, lead to the conclusion that the Montgomerys knew, or had reason to believe, that Respondent was not a licensed contractor.

^{4/} The disagreement involved a nail gun that apparently was stolen from the project site. After being threatened with having a lien placed on her property by Mr. Bryant, Mrs. Montgomery gave Respondent a check for \$200.00 to give to Mr. Bryant in settlement of the remaining framing labor fee and reimbursement for the stolen nail gun.

^{5/} Following Respondent's abandonment of the project, the Montgomerys entered into a contract with Mr. Shabazz to complete the HVAC work.

^{6/} See § 455.2273, Fla. Stat., requiring the Department to adopt disciplinary guidelines which establish penalty ranges and designate aggravating and mitigating circumstances and requiring the Administrative Law Judge to follow the guidelines in the penalty recommendation included in the Recommended Order.

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.