

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,  
ELECTRICAL CONTRACTORS'  
LICENSING BOARD,

Petitioner,

vs.

Case No. 14-5400PL

MICHAEL ELLIS,

Respondent.

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RECOMMENDED ORDER

On January 20, 2015, a final administrative hearing was held in this case before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings, by video teleconferencing at sites in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioner: Sorin Ardelean, Esquire  
Thomas Hugh Campbell, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

For Respondent: Rosemary Hanna Hayes, Esquire  
Hayes Law, P.L.  
830 Lucerne Terrace  
Orlando, Florida 32801-3732

STATEMENT OF THE ISSUE

The issue in this case is whether the Electrical Contractors' Licensing Board should discipline the Respondent for violating section 489.533(1)(a), Florida Statutes (2013),<sup>1/</sup> by violating section 455.227(1)(j), which prohibits "[a]iding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to this chapter, the chapter regulating the profession, or the rules of the department or the board."

PRELIMINARY STATEMENT

The Petitioner, Department of Business and Professional Regulation (DBPR or Department), filed an Administrative Complaint against the Respondent in September 2014. In November 2014, the Respondent disputed the charges and requested a hearing, and DBPR referred the matter to the Division of Administrative Hearings.

At the final hearing, DBPR called Ruthanne Christie, Kathy Arundel, Clarence Tibbs, Clark Huls, and the Respondent, Michael Ellis, as witnesses. DBPR also introduced Petitioner's Exhibits 1, 2, and 5 through 9 into evidence.<sup>2/</sup> The Respondent testified on his own behalf and called Curtis Wood as his witness. The Respondent introduced Respondent's Exhibits 1, 2 (A and B), 3, 4, 5 (A through C), 7 through 9, 11 through 16, 18 (A through C), and 20.

A Transcript of the final hearing was filed on February 25, 2015. The parties filed proposed recommended orders that have been considered in the preparation of this Recommended Order. The Respondent moved for attorney's fees and costs under several provisions of the Florida Statutes.

FINDINGS OF FACT

1. The Respondent, Michael Ellis, is licensed in Florida as an electrical contractor and holds licenses EC0000680 and EC13003559. He has been licensed in Florida since 1986 and has not been disciplined prior to this case.

2. In the summer and fall of 2013, the Respondent was the primary qualifying agent of M. Ellis Electrical, Inc. (Ellis Electrical).

3. In the summer and fall of 2013, Clark Huls was not licensed as an electrical contractor in Florida.

4. In August 2013, Ellis Electrical had a subcontract with Powerhouse, Inc. (Powerhouse), which had a contract with 7-Eleven, Inc. (7-Eleven), for the installation of hot food cabinets at several different 7-Eleven retail locations in Florida. The installation required electrical work (including subpanels, new circuits, outlets, and breakers) and had to be done by a licensed electrical contractor.

5. Someone at Powerhouse referred Huls to the Respondent, and the Respondent hired him to do the installations for \$1,400

for each of nine different 7-Eleven jobsites. It was the Respondent's initial intent to hire Huls as a subcontractor. The evidence is disputed and not clear as to exactly what Huls represented to the Respondent about his license status when the Respondent hired him. The evidence is clear that Huls did not provide him with licensure and insurance information at that time and was supposed to provide this information to the Respondent at the first jobsite. The Respondent did not initially check DBPR's website to verify Huls' license status, which was the prudent and appropriate thing for him to have done.

6. The first work performed by Huls for the Respondent was on August 21, 2013. The Respondent was there to supervise and direct the work. Huls did not provide license and insurance information. By this time, the Respondent clearly knew or should have known that Huls was not licensed.

7. At the third installation Huls performed, on August 24, 2013, the Respondent had an employee named Jason Ippolito deliver an employment package to Huls. Huls refused to complete and sign the employment paperwork because it would change the terms of his agreement with the Respondent to be paid \$1,400 per jobsite.

8. The Respondent allowed Huls to continue to work on installations while trying to resolve the subcontract/employment issue. In all, Huls completed nine installations between August 21 and September 3, 2013. When Huls asked to be paid

\$1,400 per jobsite, as originally agreed, the Respondent refused to pay because Huls was not licensed as a subcontractor and refused to complete the paperwork to be paid as an employee. Huls then placed liens on all nine 7-Eleven properties and contacted Powerhouse to be paid.

9. In order to save its relationship with 7-Eleven, Powerhouse paid Huls \$5,806 and deducted that amount from what it owed Ellis Electrical.

10. On October 12, 2013, the Respondent filed a DBPR complaint against Huls for subcontracting without a license. DBPR filed an Administrative Complaint against Huls for unlicensed activity. Criminal prosecutions of Huls also were filed and were pending at the time of the final hearing in this case.

11. In mitigation, in addition to his clean record as a long-time licensee, the Respondent presented that he was dealing with his wife's serious health issues during the summer and fall of 2013, which affected his ability to manage his jobsites. In addition, no consumer or member of the public suffered financial harm. Ultimately, the financial harm was borne by the Respondent.

#### CONCLUSIONS OF LAW

12. The Administrative Complaint charges the Respondent with violating section 489.533(1)(a), Florida Statutes, by

violating section 455.227(1)(j), which prohibits "[a]iding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to this chapter, the chapter regulating the profession, or the rules of the department or the board."

13. DBPR must prove its charge against the Respondent by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The Supreme Court has stated:

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. 2d 797, 800 (Fla. 4th DCA 1983)).

14. The evidence was clear and convincing that the Respondent violated section 455.227(1)(j) by hiring Clark Huls to be a subcontractor without verifying his licensure, despite indications that Huls was not properly licensed to be an electrical contractor, and by allowing him to continue to do electrical work on the 7-Eleven jobsites after it became clear to

the Respondent that Huls was not properly licensed and declined to become an employee of the Respondent's electrical contracting company. A violation of section 455.227(1)(j) constitutes a violation of section 489.533(1)(a) and authorizes the Electrical Contractors' Licensing Board to discipline a licensee.

15. The Respondent contends that a required element of a violation of section 455.227(1)(j) is proof that he had the specific intent to aid or abet unlicensed practice. In making this argument, the Respondent cites to Blume v. Department of Professional Regulation, Construction Industry Licensing Board, 489 So. 2d 880 (Fla. 2d DCA 1986). That case interpreted section 489.129(1)(e), Florida Statutes (1983), which provided for discipline of a licensee for "aiding and abetting an uncertified or unregistered person to evade any provisions of Chapter 489, Florida Statutes." The court held that specific intent to aid or abet was required under that statute. Since Blume, there have been changes to the statutes. In 1988, section 489.129(1)(e) was amended to prohibit:

Performing any act which assists an unlicensed person or entity in engaging in the prohibited uncertified and unregistered practice of contracting, if the certificateholder or registrant knows or has reasonable grounds to know that the person or entity was uncertified and unregistered.

Ch. 88-156, Laws of Fla. (1988). In 1998, the statute was renumbered and the quoted language became (d). Ch. 98-419, Laws

of Fla. (1998). The new language was not interpreted to require proof of specific intent to aid or abet. See Dep't of Bus. & Prof'l Reg., Constr. Indus. Licensing Bd. v. Falls, Case No. 07-5493PL (DOAH Mar. 24, 2008; DBPR Jun. 10, 2009); Dep't of Bus. & Prof'l Reg., Constr. Indus. Licensing Bd. v. Acevedo, Case No. 08-4771PL (DOAH Mar. 11, 2009; DBPR Jul. 17, 2009). Neither should the language of section 455.227(1)(j), which was added to the statute in 1994. Ch. 94-119, Laws of Fla. (1994). See Dep't of Bus. & Prof'l Reg., Div. of Real Estate v. Hendrick, Case No. 12-1264PL (DOAH Aug. 8, 2012; DBPR Oct. 22, 2012); Dep't of Bus. & Prof'l Reg., Div. of Real Estate v. Barhatkov, Case No. 09-0654PL (DOAH June 25, 2009; DBPR Oct. 26, 2009).

16. Under Florida Administrative Code Rule 61G6-10.002(3), the penalty for a violation of section 489.533(1)(a), by violating section 455.227(1)(j), is "[f]rom reprimand, and \$1,000 to \$5,000 fine, up to probation, suspension, followed by probation, or denial or revocation." A departure from these penalty guidelines can be warranted by the factors listed in rule 61G6-10.003.

17. DBPR's proposed recommended order acknowledges the mitigating evidence in this case. Based on that evidence, DBPR proposes a fine at the low end of the guideline (i.e., \$1,000), reasonable investigative costs, and two additional hours of continuing education with an emphasis on laws and rules, which is



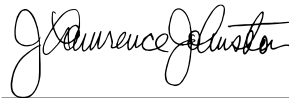
reasonable. See § 455.227(3)(a), Fla. Stat. (allowing assessment of "costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time").

18. The Respondent is not entitled to attorney's fees or costs.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Electrical Contractors' Licensing Board find the Respondent, Michael Ellis, guilty as charged, fine him \$1,000, require him to pay reasonable investigative costs, and take two additional hours of continuing education with an emphasis on laws and rules. Jurisdiction is retained for 30 days after the final order to determine reasonable investigative costs if the parties cannot reach an agreement.

DONE AND ENTERED this 13th day of March, 2015, in Tallahassee, Leon County, Florida.



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J. LAWRENCE JOHNSTON  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 13th day of March, 2015.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, all statutory references are to the 2013 codification of the Florida Statutes, which is the version in effect at the time of the alleged violation.

<sup>2/</sup> Ruling was reserved on hearsay objection to Petitioner's Exhibit 1. That objection is overruled, and the exhibit is admitted into evidence. It contains hearsay, but hearsay is admissible. § 120.57(1)(c), Fla. Stat. (2014). No findings of fact are based solely on hearsay contained in this exhibit, unless the hearsay would have been admissible over objection in civil actions. § 120.57(1)(c), Fla. Stat. (2014). See Harris v. Game and Fresh Water Fish Comm'n, 495 So. 2d 806 (Fla. 1st DCA 1986); Scott v. Dep't of Prof'l Reg., 603 So. 2d 519 (Fla 1st DCA 1992); Juste v. Dep't of HRS, 520 So. 2d 69 (Fla. 1st DCA 1988).

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.