

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,

Petitioner,

vs.

Case No. 17-1977

JONATHAN JAY JOHNSON,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on May 8, 2017, via video teleconference sites in Sarasota and Tallahassee, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Andrew Howat Butler, Esquire  
Roger R. Maas, Esquire  
Cristina Draguta, Esquire  
Department of Business  
and Professional Regulation  
2601 Blair Stone Road  
Tallahassee, Florida 32399-2202

For Respondent: Jonathan Jay Johnson, pro se  
10211 38th Court E  
Parish, Florida 34219

STATEMENT OF THE ISSUES

Whether Respondent engaged in construction contracting without a license as alleged in the Administrative Complaint; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On February 1, 2017, Petitioner, Department of Business and Professional Regulation (DBPR or Petitioner), filed an Administrative Complaint alleging that Jonathan Jay Johnson, Respondent, "violated section 489.13, Florida Statutes, by performing an activity requiring licensure under chapter 489, part I, Florida Statutes, as a construction contractor without the requisite license." Respondent disputed the material facts alleged in the Administrative Complaint and timely requested a hearing, pursuant to sections 120.569(2)(a) and 120.57(1), Florida Statutes.<sup>1/</sup>

On March 31, 2017, Petitioner referred the matter to the Division for assignment of an administrative law judge to conduct a final hearing. On April 10, 2017, a Notice of Hearing was issued, scheduling the hearing for May 8, 2017.

On April 25, 2017, Petitioner filed a Motion for Official Recognition (motion), seeking recognition of various Florida Statutes, Florida Administrative Code Rule 61-5.007, and two certificates of non-licensure regarding Johnathan Jay Johnson and J3 Pools & Pressure Washing LLC (J3). Respondent did not file a

response to the motion. The motion was granted and the undersigned took official recognition of the various Florida Statutes, Florida Administrative Code Rule 61-5.007, and the two certificates of non-licensure.<sup>2/</sup>

At the start of the hearing, Petitioner sought to amend a scrivener's error in paragraph 6 of the Administrative Complaint regarding the date on which Respondent "offered, contracted, or performed" the alleged construction. Respondent did not object, and paragraph 6 was amended to read: "On or about April 6, 2016, Respondent, D/B/A [doing business as] J3 Pools & Pressure Washing, LLC, offered, contracted, or performed regulated construction contracting services, including but not limited to, installation of a pool pump, at 3905 Cardiff Place, Parrish, Florida 34219."

Petitioner presented the testimony of Peter Sylvester, and C. Gisela Menendez, DBPR's unlicensed activity investigator supervisor. Petitioner's Exhibits 2 through 6<sup>3/</sup> were admitted without objection. Respondent testified on his own behalf. Respondent's Exhibits 1 through 5<sup>4/</sup> were admitted without objection.

The one-volume Transcript was filed on May 26, 2017. On May 30, 2017, a Notice of Filing Transcript was issued advising the parties to submit their post-hearing submissions no later than 5:00 p.m. on June 6, 2017. Both parties timely filed Proposed Recommended Orders (PRO), which have been considered in

preparation of this Recommended Order. To the extent that either PRO has information that was not subjected to cross-examination during the hearing, that information has not been considered in the preparation of this Recommended Order.

Unless otherwise indicated, all references to the Florida Statutes or rules of the Florida Administrative Code refer to the 2015 versions in effect at the time the alleged violations were committed.

#### FINDINGS OF FACT

1. DBPR is the state agency responsible for regulating the practice of construction contracting pursuant to section 20.165 and chapters 455 and 489, Florida Statutes.

2. DBPR has jurisdiction over the unlicensed practice of construction contracting pursuant to sections 455.227, 455.228, and 489.13, Florida Statutes.

3. At all times material to this matter, Mr. Johnson was the owner of J3. Mr. Johnson is not licensed, registered, or certified to perform construction contracting services in Florida. At the heart of this case is whether Mr. Johnson "offered, contracted, or performed regulated construction contracting services, including but not limited to, installation of a pool pump at 3905 Cardiff Place, Parrish, Florida."

4. Mr. Johnson, via J3, provided pool service, specifically pool cleaning to Mr. Sylvester. Mr. Sylvester thought the pool

cleaning service was very good, and agreed that the two men (Mr. Johnson and Mr. Sylvester) had a "good customer-client relationship."

5. In April 2016, Mr. Sylvester hired Mr. Johnson to install a pool pump motor (motor) at a residence located at 3905 Cardiff Place, Parrish, Florida.<sup>5/</sup> At that time, Mr. Sylvester did not know Mr. Johnson was not licensed to install a motor.

6. On the installation day, Mr. Johnson left a voicemail message for Mr. Sylvester advising him that the motor had been installed, but it would not work. Mr. Johnson speculated that the electricity to the motor was turned off, and the switch was located in a closed garage. After arriving at the house, Mr. Sylvester turned the electricity on, the motor did not work, and Mr. Sylvester called Mr. Johnson.

7. Mr. Johnson came to the pool location and worked on the motor. The motor started working.

8. On April 7, 2016, after the motor was installed, Mr. Sylvester (or his wife) wrote a check to "J3 Pools & Pressure Washing" for \$310.00 for the "motor." A warranty was included with the installation; however there was no description of the type or length of the warranty provided.<sup>6/</sup>

9. In April 2016, Mr. Johnson sold his "pool route," including the 3905 Cardiff Place location to another company.

When contacted about the motor not working, Mr. Johnson advised Mr. Sylvester to contact the other company for the warranty work. Mr. Sylvester credibly testified that his only contact with the other company was shortly after the notification that Mr. Johnson had sold his pool route. Mr. Sylvester called the other company and "fired" them, as he wished to engage a different pool service.

10. Approximately three to four months (July or August 2016) after the motor was installed, it stopped working. The pool turned green because the motor was not cycling on and off. This complaint was generated after the motor failed, and it came to light that Respondent was not licensed.

11. Petitioner established that it incurred \$217.09 in investigative costs while investigating this complaint.

12. The evidence is clear and convincing that Respondent's installation of the motor constituted the practice of construction contracting without a license. As a result, Respondent is guilty of unlicensed contracting, as charged in the Administrative Complaint.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has subject matter jurisdiction in this proceeding, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

14. In this matter, Petitioner seeks to impose an administrative fine against Respondent. Because Petitioner seeks to impose a fine, which is penal in nature, Petitioner has the burden of proving by clear and convincing evidence the allegations contained in the Administrative Complaint. § 120.57(1)(j), Fla. Stat; See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins. and Treas., 707 So. 2d 941 (Fla. 3d DCA 1998).

15. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Supreme Court of Florida:

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 at 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)). This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is ambiguous." Westinghouse

Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

16. The Administrative Complaint charged Respondent with violating section 489.13(1) by performing an activity requiring licensure under chapter 489, part I, Florida Statutes, as a construction contractor without the requisite license.

17. Contracting is regulated under part I of chapter 489. The relevant portion of section 489.127 provides:

(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; . . . .

18. As referenced in the foregoing statute, the term contractor is defined in section 489.105, which provides in relevant matter:

(3) "Contractor" means the person who . . . for compensation, undertakes to, submits a bid to, or does himself or herself or by others . . . repair, alter, . . . and whose job scope is substantially similar to the job scope described in one of the paragraphs of this subsection.

\* \* \*

(k) "Residential pool/spa contractor" means a contractor whose scope of work involves, but is not limited to, the construction, repair, and servicing of a residential



swimming pool, or hot tub or spa, regardless of use. The scope of work includes the installation, repair, or replacement of existing equipment, any cleaning or equipment sanitizing that requires at least a partial disassembling, excluding filter changes, and the installation of new pool/spa equipment, interior finishes, the installation of package pool heaters, the installation of all perimeter piping and filter piping, and the construction of equipment rooms or housing for pool/spa equipment, and also includes the scope of work of a swimming pool/spa servicing contractor. The scope of such work does not include direct connections to a sanitary sewer system or to potable water lines. The installation, construction, modification, or replacement of equipment permanently attached to and associated with the pool or spa for the purpose of water treatment or cleaning of the pool or spa requires licensure; however, the usage of such equipment for the purposes of water treatment or cleaning does not require licensure unless the usage involves construction, modification, or replacement of such equipment. Water treatment that does not require such equipment does not require a license. In addition, a license is not required for the cleaning of the pool or spa in a way that does not affect the structural integrity of the pool or spa or its associated equipment.

19. As it relates specifically to unlicensed contracting, section 489.13, 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. Persons

working outside the geographical scope of their registration are guilty of unlicensed activity for purposes of this part.

\* \* \*

(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. The department may waive up to one-half of any fine imposed if the unlicensed contractor complies with certification or registration within 1 year after imposition of the fine under this subsection.

20. Petitioner has proven the allegation in the Administrative Complaint by clear and convincing evidence. Respondent or someone working at Respondent's direction installed a motor at the residence listed above, and Respondent was compensated for the work.

21. Petitioner has adopted Disciplinary Guidelines to provide the range of appropriate penalties to be imposed for unlicensed activity.

22. Florida Administrative Code Rule 61-5.007 provides in pertinent part, the following guidelines:

(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 455.227 and 489.13, F.S.

\* \* \*

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

\* \* \*

(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.

23. Pursuant to rule 61-5.007(3), the range of penalties for a violation of section 489.127, is \$3,000 for each count. In this case, the penalty of \$3,000 per count is warranted.

24. Petitioner is also authorized to "waive up to one-half of any fine imposed if the unlicensed contractor complies with certification or registration within 1 year after imposition of the fine under this subsection." § 489.13(3), Fla. Stat. It would be appropriate to do so if Respondent meets the requirements.

25. Section 489.13(3) authorizes Petitioner to assess reasonable investigative costs for prosecution of the alleged violation against an unlicensed contractor, in addition to any appropriate fines. The evidence clearly and convincingly

establishes that the Department incurred investigative costs in the amount of \$217.09 related to this matter.

RECOMMENDATION

Based on the foregoing Findings of Fact 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 section 489.13(1), as alleged in the Administrative Complaint;
2. Imposes an administrative fine of \$3,000; and
3. Requires Mr. Johnson to pay the Department's investigative costs of \$217.09.

DONE AND ENTERED this 12th day of June, 2017, in Tallahassee, Leon County, Florida.



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LYNNE A. QUIMBY-PENNOCK  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of June, 2017.

ENDNOTES

1/ The Election of Rights form contains three options and Respondent selected option (1). In the space allotted for persons to "specifically dispute" the material facts at issue, the following words appear: "See Paperwork Sent." No additional pages were attached when the material was transferred to the Division, and the undersigned has no knowledge of what was disputed.

2/ One certificate of non-licensure identified that Jonathan Jay Johnson did not have (and has never had) an active license as a construction contractor in the state of Florida.

The other certificate of non-licensure identified that J3 Pools & Pressure Washing, LLC, did not have (and has never had) an active license as a construction business in the state of Florida.

3/ Exhibit 6 contained Bates stamped pages numbered 9 through 39. Bates stamped pages 14 through 22 contained illegible documents or pictures. Only Bates stamped pages 15 (the right side of the page), 16 (the left side of the page), 17 and 18 (only the left side of the page) were provided by Petitioner in readable fashion.

4/ Respondent's Exhibits 3 and 4 were the enlarged documents found on Petitioner's Bates stamped page 19.

5/ Mr. Sylvester is the authorized caretaker of the property, including the pool, at this location.

6/ The warranty is a non-issue in this case. The Administrative Complaint is based on the installation (construction) of the motor.

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.