

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,

Petitioner,

vs.

Case Nos. 18-6578  
18-6579

RICKY LEE DIEMER,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on February 19, 2019, in Tallahassee, Florida, before Garnett W. Chisenhall, a duly designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Carlos Conrado Lloreda, Esquire  
Jackson Alexander Pellingra, Esquire  
Mike Joseph Gordon, Esquire  
Department of Business  
and Professional Regulation  
2601 Blair Stone Road  
Tallahassee, Florida 32399

For Respondent: No Appearance

STATEMENT OF THE ISSUES

The issue is whether Respondent ("Ricky Lee Diemer") offered to engage in unlicensed contracting as alleged in the

Administrative Complaint, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation ("the Department") issued a two-count Administrative Complaint on July 10, 2018, alleging that Mr. Diemer violated section 489.127(1)(f), Florida Statutes (2017),<sup>1/</sup> by advertising "regulated electrical contracting services via the Internet at craigslist.org for compensation in Florida" on or about January 12, 2018. The Administrative Complaint also alleged that Mr. Diemer violated section 455.227(1)(q), Florida Statutes, "by practicing electrical contracting [at 4034 Blairstone Road, Tallahassee, Florida 32311-3307] without the requisite license, in violation of section 489.531(1)(a), Florida Statutes."

Mr. Diemer disputed the Administrative Complaint's allegations, and the Department referred this matter to DOAH on December 17, 2018, where it was assigned DOAH Case No. 18-6579.

The Department issued another two-count Administrative Complaint on July 11, 2018, alleging that Mr. Diemer violated section 489.127(1)(f), by advertising "regulated construction contracting services via the Internet at craigslist.org for compensation in Florida" on or about January 12, 2018. The Administrative Complaint also alleged that Mr. Diemer violated section 489.13(1), by offering "regulated construction

contracting services, including but not limited to, removal and replacement of exterior doors and [a] kitchen sink at 4034 Blainstone Road, Tallahassee, Florida 32311-3307" on approximately February 7, 2018.

Mr. Diemer also disputed this Administrative Complaint's allegations, and the Department referred this matter to DOAH on December 17, 2018, where it was assigned DOAH Case No. 18-6578.

On December 21, 2018, the undersigned issued an Order consolidating DOAH Case Nos. 18-6578 and 18-6579. The undersigned also issued a notice scheduling the final hearing for February 19, 2019.

On December 26, 2018, Mr. Diemer filed a "Request for Dismissal" asking the undersigned to dismiss the instant case. The undersigned construed the aforementioned pleading as a motion to dismiss and issued an Order on January 4, 2019, denying the motion to dismiss.

The Department filed a "Motion to Deem Admissions Admitted & Relinquish Jurisdiction" ("the Motion to Relinquish") on February 8, 2019. In support of its request that DOAH relinquish jurisdiction over this matter, the Department asserted that Mr. Diemer had failed to respond to any of the Department's discovery requests, including requests for admissions.

On February 15, 2019, the undersigned issued an Order denying the motion to relinquish, in part, because there was "no

indication that the pro se Respondent was aware of the consequences associated with being nonresponsive to the discovery requests.”

The final hearing took place as scheduled on February 19, 2019. At the outset of the final hearing, the Department dismissed its allegation that Mr. Diemer violated section 489.127(1)(f), Florida Statutes, by advertising “regulated electrical contracting services via the Internet at craigslist.org for compensation in Florida” on or about January 12, 2019, as alleged in Count Two of the Administrative Complaint in DOAH Case No. 18-6579. During the remainder of the final hearing, the Department presented testimony from two employees, Donald Jacobs and Andrew Mazyck, who had performed the undercover investigation on which the Administrative Complaints were based. The undersigned accepted the Department Exhibits 1 through 3, 5 and 6 into evidence.

Mr. Diemer did not appear at the final hearing and gave no indication afterwards that he had been unable to attend.

The one-volume Transcript from the final hearing was filed on February 28, 2019. The Department filed a timely proposed recommended order on March 8, 2019. Mr. Diemer filed a response to the Department’s proposed recommended order on March 11, 2019.

## FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, matters subject to official recognition, and the entire record in this proceeding, the following Findings of Fact are made:

1. The Department is the state agency responsible for regulating the practice of contracting pursuant to section 20.165, Florida Statutes, and chapters 455 and 489, part I, Florida Statutes.

2. The Department initiated an undercover operation by gaining access to a house needing numerous repairs. The Department employees then utilized websites, such as Craigslist and HomeAdvisor, to identify people offering unlicensed contracting services.

3. The Department employees found an advertisement posted by "RLD Handyman Services" on December 26, 2017, offering to perform multiple types of contracting work. This advertisement caught the Department's attention because it did not list a contracting license number. Section 489.119(5)(b), requires every advertisement for contracting services to list such a number.<sup>2/</sup>

4. The advertisement listed a phone number, and the Department utilized the Accurint phone system to ascertain that the aforementioned phone number belonged to Mr. Diemer.

5. The Department examined its records and ascertained that Mr. Diemer was not licensed to perform construction or electrical contracting in Florida.

6. The Department contacted Mr. Diemer and approximately 12 other people offering contracting services and scheduled appointments for those people to discuss contracting work with an undercover Department employee at the house mentioned above.

7. An undercover Department employee told Mr. Diemer and the other prospective contractors that he had recently bought the house and was hoping to sell it for a profit after making some quick repairs.

8. An undercover Department employee met Mr. Diemer at the house and described their resulting conversation as follows:

A: We looked at remodeling a deck on the back, the southern portion of the home. We looked at cabinets, flooring and painting that are nonregulated in nature, but also plumbing and general contracting services such as exterior doors that needed to be replaced, and the electrical, some appliances and light fixtures.

Q: All right. So was there any follow-up communication from Mr. Diemer after your discussion at the house?

A: Yes. We walked around the house. He looked at the renovations that we were asking. He took some mental notes as I recall. He didn't make any written notes as some of the others had done. He did it all in his head, said that he was working on another project in the Southwood area at the time and just left his work crew there to

come and visit with me and was rushed for time. So he was in and out of there in 10 to 15 minutes. It was pretty quick.

Q: Okay.

A: But he took the mental notes and said that he would go back and write something up and send me a proposal through our Gmail. . . .

9. On February 7, 2018, Mr. Diemer transmitted an e-mail to the Department's fictitious Gmail account offering to perform multiple types of work that require a contracting license: kitchen sink installation, bathroom remodeling, construction of an elevated deck and walkway, installation of light fixtures, and installation of front and back doors.<sup>3/</sup> Mr. Diemer proposed to perform the aforementioned tasks for \$13,200.00.<sup>4/</sup>

10. The work described in Mr. Diemer's e-mail poses a danger to the public if done incorrectly or by unlicensed personnel.<sup>5/</sup>

11. The Department incurred costs of \$118.55 for DOAH Case No. 18-6578 and \$91.45 for DOAH Case No. 18-6579.

12. The Department proved by clear and convincing evidence that Mr. Diemer advertised or offered to practice construction contracting without holding the requisite license. The Department also proved by clear and convincing evidence that Mr. Diemer practiced construction and electrical contracting when he transmitted the February 7, 2018, e-mail.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

14. The Department has the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996).

15. 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).

16. Contracting is regulated under part I of chapter 489. See §§ 489.101-146, Fla. Stat.

17. "Contractor" is defined as:

[T]he 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 . . . .

§ 489.105(3), Fla. Stat.

18. "Contracting" is defined to mean:

[E]ngaging 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 . . . .

§ 489.105(6), Fla. Stat. (emphasis added).

19. Section 489.127(1)(f) provides that no person shall engage:

[I]n 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.

20. The Department provided by clear and convincing evidence that Mr. Diemer violated section 489.127(1)(f).

21. Section 489.13 provides in pertinent part that

(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.

22. The Department proved by clear and convincing evidence that Mr. Diemer violated section 489.13(1).

23. The Department also alleges that Mr. Diemer engaged in unlicensed electrical contracting. Section 489.505(12) defines an "electrical contractor" as:

[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.

§ 489.505(12), Fla. Stat. (emphasis added).

24. Section 489.531(1)(a) prohibits one from practicing electrical contracting without being "certified or registered," and section 455.227(1)(q) subjects one to discipline for violating the practice act governing contractors.

25. The Department proved by clear and convincing evidence that Mr. Diemer violated section 455.227(1)(q) via section 489.531(1)(a).

26. Mr. Diemer argued in pleadings filed prior to the final hearing that his work falls under the "handyman exemption" in section 489.103(9). The aforementioned statute exempts from licensure "[a]ny work or operation of a casual, minor, or inconsequential nature in which the aggregate contract price for labor, materials, and all other items is less than \$1,000. . . .")

27. However, the "handyman exemption" is inapplicable to the instant case because Mr. Diemer proposed to perform work requiring licensure for \$13,200.00. Also, he proposed to perform all of the work at issue for \$35,100.

28. With regard to the penalty to be imposed, section 489.13(3) provides as follows:

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.

29. Florida Administrative Code Rule 61-5.007 sets forth disciplinary guidelines for unlicensed activity. Rule 61-5.007(5) (a) provides that a first offense for advertising or offering to practice a profession without holding the requisite

license is subject to a \$1,500.00 administrative fine. Rule 61-5.007(6)(a) provides that a first offense for practicing a profession without holding the requisite license is subject to a \$3,000.00 administrative fine.

30. The Department proved by clear and convincing evidence that Mr. Diemer committed one violation of advertising unlicensed contracting services. The Department proved by clear and convincing evidence that Mr. Diemer committed two additional violations by practicing construction and electrical contracting without a license.

31. Rule 61-5.007(6)(a) indicates that Mr. Diemer should be fined \$7,500.00 for the aforementioned violations.

32. Rule 61-5.007(8) sets forth circumstances that may be considered for mitigating or aggravating the guideline penalties. Pertinent to the instant case are factors relating to the danger to the public and the deterrent effect of the penalty imposed.

33. As noted above, Mr. Diemer offered to perform certain activities that represent a substantial danger to the public if performed poorly. The undersigned concludes that increasing Mr. Diemer's administrative fine by \$1,500.00 accounts for the danger posed to the public and deters Mr. Diemer from committing additional offenses in the future.<sup>6/</sup>

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 requiring Ricky Lee Diemer to pay a \$9,000.00 administrative fine and costs of \$210.00.

DONE AND ENTERED this 1st day of April, 2019, in Tallahassee, Leon County, Florida.

*Garnett Chisenhall*

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Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of April, 2019.

ENDNOTES

<sup>1/</sup> All statutory references shall be to the 2017 version of the Florida Statutes unless indicated otherwise.

<sup>2/</sup> Mr. Diemer's advertisement is a hearsay statement. However, it can form the basis for a finding of fact because it is admissible as a hearsay exception. See § 90.803(18)(a), Fla. Stat. (providing that a statement offered against a party that is the party's own statement is admissible as a hearsay exception).

<sup>3/</sup> Mr. Diemer's e-mail is another hearsay statement, but it is also admissible under section 90.803(18)(a), Florida Statutes.

4/ Mr. Diemer's e-mail offered to provide other services that did not require a contracting license. The cost of those services was not included in the calculation of the \$13,200.00 figure. The cost of all the services Mr. Diemer offered to provide was \$35,100.

5/ Andrew Mazyck, one of the Department's witnesses, explained during the final hearing why unlicensed contracting is dangerous to the public:

There [are] a lot of safety issues that go into [electrical contracting]. Even installing a kitchen sink you could have your whole kitchen and bottom floor flooded if it's not installed properly and sealed properly. In this case no permits would be pulled because he's not a licensed individual for the front and back doors or the deck. So all of that can come back on the homeowner. Since [unlicensed contractors] don't carry any insurance, the homeowner doesn't really have any recourse besides to sue him personally and not a business. So [homeowners] can be hurt financially in that way.

The Department's other witness, Donald Jacobs, offered similar testimony by explaining that:

[T]he homeowner is taken advantage of. They're usually charged exorbitant fees. They're not being permitted. They're not being inspected, so the homeowner never knows if it's being done to Florida standards of the Florida code, would it withstand some of our weather conditions that we have here in north Florida. They also have no recourse should there be shoddy work or some sort of negligence on the part of the contractor. There's no insurance. There is no workers' compensation. If someone were to be injured while on the job site, the homeowner could be held liable. Then the natural things. If not put up correctly, it's liable to fall down. If it's not hooked up correctly, it's liable to start a fire. You could lose

everything by not utilizing a licensed professional.

<sup>6/</sup> In its Proposed Recommended Order, the Department asserted that the penalty should be aggravated because Mr. Diemer has been cited on three previous occasions for unlicensed activity and that his record of unlicensed activity dates back to 2013. However, the aforementioned allegations cannot serve as grounds for aggravating the penalty because the Department offered no evidence at the final hearing to substantiate them.

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.