

FILED
Department of Business and Professional Regulation
Senior Deputy Agency Clerk
CLERK Brandon Nichols
Date 9/5/2019
File # 2019-07815

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION**

**DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,**

Petitioner,

v.

RICKY LEE DIEMER,

Respondent.

**DBPR CASE Nos.: 2018-009391
2018-009415**

**DOAH CASE Nos.: 18-6578
18-6579**

FINAL ORDER

The Department of Business and Professional Regulation, (the “Department” or “Petitioner”), hereby enters this Final Order against Respondent, Ricky Lee Diemer (“Respondent”), for the above-styled matter, and states as follow:

PRELIMINARY STATEMENT

This matter came before the Presiding Honorable Garnett W. Chisenhall, Administrative Law Judge, Division of Administrative Hearings (hereinafter “DOAH”), on February 19, 2019, in Tallahassee, Florida, in accordance with the provisions of Section 120.57(1), Florida Statutes, for consideration of the Department’s Administrative Complaints against Respondent in DBPR Case Numbers 2018-009415 (DOAH Case No. 18-6579) and 2018-009391 (DOAH Case No. 18-6578).

On June 10, 2018, the Department issued a two-count Administrative Complaint (“June 10th Complaint”)¹ against Respondent for violations of statutory law governing unlicensed practice of electrical contracting. A true and correct copy of the Department’s June 10th Complaint is attached hereto and incorporated herein by reference as Exhibit “A.”

¹ At the outset of the final hearing, the Department dismissed its allegation in Count II of the Administrative Complaint in DOAH Case No. 18-6579 (DBPR Case No. 2018-009415). Thus, this Final Order will only address Count I of the Administrative Complaint issued against Respondent in DBPR Case No. 2018-009415/DOAH Case No. 18-6579 and Counts I and II of the Administrative Complaint issued against Respondent in DBPR Case No. 2018-009391/DOAH Case No. 18-6578.

Respondent disputed the June 10th Complaint's allegations, and the case was referred to DOAH for a formal hearing and assigned DOAH Case No. 18-6579.

On June 11, 2018, the Department issued a two-count Administrative Complaint ("June 11th Complaint") against Respondent for violations of statutory law governing unlicensed practice of construction contracting. A true and correct copy of the Department's June 11th Complaint is attached hereto and incorporated herein by reference as Exhibit "B."

Respondent disputed the June 11th Complaint's allegations, and the case was referred to DOAH for a formal hearing and assigned DOAH Case No. 18-6578.

On December 21, 2018, the Administrative Law Judge ("ALJ") issued an Order consolidating DOAH Cases Nos. 18-6578 and 18-6579, and also issued a Notice scheduling the final hearing for February 19, 2019.

Respondent, on December 26, 2018, filed a "Request for Dismissal" asking the ALJ to dismiss the instant case. Construing the aforementioned pleading as a motion to dismiss, the ALJ issued an Order on January 4, 2019, denying the motion to dismiss. True and correct copies of Respondent's Request for Dismissal and Order Denying the Motion to Dismiss are attached hereto and incorporated herein by reference as Exhibits "C" and "D" respectively.

On February 8, 2019, the Department filed a "Motion to Deem Admissions Admitted and Relinquish Jurisdiction" (hereinafter referred to as "Motion to Relinquish"). On February 15, 2019, the ALJ issued an Order denying the Department's Motion to Relinquish, in part, due to no indication that the Pro Se Respondent was aware of the consequences associated with being nonresponsive to discovery requests. True and correct copies of the Department's Motion to Relinquish and Order Denying the Motion are attached hereto and incorporated herein by reference as Exhibits "E" and "F" respectively.

The final hearing commenced as scheduled on February 19, 2019, in Tallahassee, Florida. Respondent failed to appear at the final hearing and gave no indication afterwards of inability to attend.

The ALJ accepted the Department's Exhibits 1 through 3, 5, and 6 into the record as evidence. True and correct copies of the Department's Exhibits 1 through 3, 5, and 6 are attached hereto and incorporated herein by reference as Composite Exhibit "G."

At the outset of the final hearing, the Department dismissed its allegation in Count II of the Administrative Complaint in DOAH Case No. 18-6578 (DBPR Case No. 2018-009415).

Subsequent to the conclusion of the final hearing, the one-volume Final Hearing Transcript was filed on February 28, 2019. A true and correct copy of the Final Hearing Transcript is attached hereto and incorporated herein by reference as Exhibit "H."

The Department timely filed its Proposed Recommended Order ("Department's PRO") on March 8, 2019. Respondent did not file a Proposed Recommend Order; however, Respondent did file a Response to the Department's PRO on March 11, 2019 ("Respondent's Response"). True and correct copies of the Department's PRO and Respondent's Response are attached hereto and incorporated herein by reference as Exhibits "I" and "J" respectively.

The ALJ, on April 11, 2019, issued a Recommended Order in this matter ("Recommended Order"), which is attached hereto and incorporated herein by reference as Exhibit "K." No exceptions or any responses to same have been filed by either party with regard to the Recommended Order.

After careful review of the complete record in this matter, including consideration of the Recommended Order, the Department makes the following findings and conclusions:

AGENCY STANDARD OF REVIEW

Pursuant to Section 120.57(1)(l), Florida Statutes, the Department may not reject or modify findings of fact unless it first determines, from a review of the entire record, and states with particularity, that the findings of fact were not based on competent substantial evidence. Competent substantial evidence is such evidence that is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” *Comprehensive Medical Access, Inc. v. Office of Ins. Regulation*, 983 So. 2d 45, 46 (Fla. 1st DCA 2008) (quoting *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)). In reviewing the record, the agency is not permitted to reweigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion. *Bill Salter Adver., Inc. v. DOT*, 974 So. 2d 548, 551 (Fla. 1st DCA 2008) (citing *Rogers v. Dep’t of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005)).

Pursuant to Section 120.57(1)(l), Florida Statutes, when rejecting or modifying conclusions of law or interpretations of administrative rules, the Department must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rules and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

FINDINGS OF FACT

1. There is competent, substantial evidence to support the Findings of Fact as set forth in the ALJ’s Recommended Order as set forth in Exhibit “K.”
2. Accordingly, the Findings of Fact as set forth in paragraphs 1 through 12 of the Recommended Order are approved, adopted, and incorporated herein by reference as the Findings of Fact of the Department.

CONCLUSIONS OF LAW

3. The Department has jurisdiction over this matter pursuant to sections 120.569, 120.57, and Chapters 455 and 489, Florida Statutes.

4. Accordingly, the Conclusions of Law as set forth in paragraphs 13 through 32 of the Recommended Order attached hereto as Exhibit "K" are approved, adopted, and incorporated herein by reference as the Conclusions of Law of the Department.

5. Section 120.57(1)(l), Florida Statutes, provides that the "agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction."

6. Pursuant to Section 120.57(1)(l), Florida Statutes, when rejecting or modifying conclusions of law or interpretations of administrative rules, the Department "must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rules and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified."

7. The Department rejects the ALJ's Conclusions of Law as it pertains to paragraph 33 of the Recommended Order.

8. In paragraph 30 and 31 of the Recommended Order the ALJ concluded administrative fines in the amount of \$7,500 should be levied against Respondent based upon the violations proven by the Department.

9. Although reaching such conclusions, the ALJ in paragraph 33 of the Recommended Order, determined to increase Respondent's total administrative fine amount by \$1,500 based upon the underlying danger posed to the public and the deterrent effect from committing future offenses.

10. The Department finds that under all the facts and evidence in this case and based upon a review of the entire record, it cannot be concluded the aggravating factors cited by the ALJ in paragraph 33 of the Recommended Order are reasonable and warrant a departure from the administrative fine amount concluded by the ALJ in paragraph 31 of the Recommended Order.

11. The Department finds a substituted conclusion of law affirming the ALJ's conclusion in paragraph 31 of the Recommended Order of an administrative penalty of \$7,500 to be imposed against the Respondent is as or more reasonable than that concluded in paragraph 33 of the Recommended Order which is being rejected.

12. Based on the foregoing, the Department finds Respondent in violation of Chapters 455 and 489, Florida Statutes, by advertising unlicensed practice of construction contracting and practicing construction and electrical contracting without a license.

13. Accordingly, there is competent, substantial evidence to support the Department's substituted conclusions of law which is as or more reasonable than the Administrative Law Judge's Conclusions of Law as it pertains to paragraph 33 of the Recommended Order which was rejected.

ORDER

WHEREFORE, based upon the foregoing Findings of Facts and Conclusions of Law, as adopted from the Administrative Law Judge's Recommended Order of the Final Hearing in DOAH Case Nos. 18-6578 (*DBPR 2018-009391*) and 18-6579 (*DBPR 2018-009415*), it is hereby **ORDERED** that the:

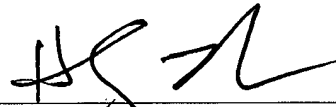
1. Respondent shall pay to the Department an **administrative fine** in the amount of **Seven Thousand Five Hundred Dollars (\$7,500.00)** and **investigative costs** in the amount of **Two Hundred Ten Dollars (\$210.00)**, for a **total amount** of **Seven Thousand Seven Hundred Ten Dollars**

(\$7,710.00) payable **within thirty (30) days** of the date of filing of this Order with the Agency Clerk of the Department of Business and Professional Regulation;

2. Respondent shall pay the administrative fine of and costs by certified check, cashier's check, or money order made payable to the Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399-2202. Respondent shall ensure Case Numbers DBPR 2018-009391 (DOAH 18-6578) and DBPR 2018-009415 (DOAH 18-6579) are referenced on the submitted form of payment; and

This ORDER shall become effective upon the date of filing with the Agency Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED on this 4th day of September, 2019,
in Tallahassee, Florida.



HALSEY BESHEARS, SECRETARY
Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

NOTICE OF RIGHT TO APPEAL

Any party to this proceeding has the right to seek its judicial review under Section 120.68, Florida Statutes, by the filing of an original Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Agency Clerk, 2601 Blair Stone Road, Tallahassee, Florida 32399-2202 (email: AGC.Filing@myfloridalicense.com), **and** by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate Florida District Court of Appeal. The Notice of Appeal must be filed (received) in the Office of the Agency Clerk within thirty (30) days after the date this Order is filed with the Clerk.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 5th day of September, 2019, that a true and correct copy of the foregoing "Final Order" has been furnished via U.S. Mail to:

RICKY LEE DIEMER
822 Ridge Road
Tallahassee, Florida 32305-7039



AGENCY CLERK'S OFFICE
Department of Business and Professional Regulation

Copies Furnished To:
Keneidra Williams, AAIH OGC
Jackson Pellingra, Attorney
Maureen White, Chief Attorney