

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Administrative Order Issued to Jeffrey Songer, individually and d/b/a Songer Plumbing	RECOMMENDED ORDER ON MOTION FOR SUMMARY DISPOSITION
--	--

This matter came on for disposition before Administrative Law Judge Manuel J. Cervantes (ALJ) on September 4, 2009, upon the filing of a Motion for Summary Disposition by the Minnesota Department of Labor and Industry (Department).

Wendy Willson Legge, General Counsel, Office of General Counsel, Department of Labor and Industry, 443 Lafayette Road N., St. Paul, Minnesota, represents the Department. Jeffrey Songer, individually and d/b/a Songer Plumbing (Respondent), represents himself and on October 1, 2009, replied in writing to the Department's motion. The record closed on October 13, 2009, upon receipt of the Department's reply to Respondent.

STATEMENT OF ISSUES

The issues in this case are whether Respondent violated Minn. Stat. § 326B.46, subd. 2, by contracting to perform plumbing work without a plumbing bond; whether the Department properly issued an Administrative Penalty Order (APO) under Minn. Stat. §§ 326B.082 and 326B.083; and whether the amount of the penalty was reasonable, considering the factors set forth in Minn. Stat. §§ 326B.082, subd. 1 and 14.045, subd. 3?

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the ALJ makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED THAT:

1. The Department's Motion for Summary Disposition be GRANTED; and

2. The Commissioner of the Department of Labor and Industry (the Commissioner) consider reducing the APO in light of the fact that Respondent obtained a plumbing bond immediately after receiving notice of the violation, has remained compliant thereafter, and these mitigating facts were not considered by the Department, contrary to Minn. Stat. § 14.045, subd. 3(6).

Dated: October 15, 2009

s/Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

Reported: Not recorded

NOTICE

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. The Commissioner may adopt, reject or modify this Recommended Order. Under Minn. Stat. § 326B.082, subd. 8(e), the final decision of the Commissioner shall not be made until at least five days after the date of this Report. Any person aggrieved by this Report may, within those five days, serve written comments to the Commissioner on the report and the Commissioner shall consider and enter the comments in the record. Parties should contact Steve Sviggum, Commissioner of the Department of Labor and Industry, 443 Lafayette Road, St. Paul, Minnesota 55155, (651) 284-5005, to learn the procedure for filing written comments.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the ALJ of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the ALJ by first class mail or as otherwise provided by law.

MEMORANDUM

Jurisdiction

The ALJ and the Department have jurisdiction pursuant to Minn. Stat. §§ 14.50 and 326B.082. The Respondent was given notice of the hearing in this matter and the Department has complied with all relevant procedural requirements.

Standard for Summary Disposition

An ALJ may recommend or grant summary disposition of a case where there is no genuine issue as to any material fact.¹ Summary disposition is the administrative equivalent of summary judgment in district court because summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.² The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts when considering motions for summary disposition in contested cases.³

When considering a motion for summary judgment, the facts must be reviewed in the light most favorable to the non-moving party.⁴ All doubts and factual inferences must be resolved against the moving party.⁵ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.⁶ To defeat a motion for summary judgment successfully, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.⁷ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden.⁸ Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery.⁹ To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden.¹⁰

Undisputed Facts

This contested case proceeding was initiated upon Respondent's appeal of an APO issued by the Department on May 13, 2009. The Department alleged that Respondent committed a violation of the Minnesota plumbing laws by performing plumbing in La Crescent, Minnesota, on April 4, 2008, without holding or filing a plumbing bond with the Department. Respondent contracted with a La Crescent

¹ Minn. R. 1400.5500 K.

² *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03.

³ See Minn. R. 1400.6600.

⁴ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. Ct. App. 1984).

⁵ See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

⁶ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

⁷ *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

⁸ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

⁹ *Id.*

¹⁰ *Id.*

homeowner to install a garbage disposal unit in a home not owned by Respondent.¹¹ Respondent installed the unit on April 4, 2008, and charged the homeowner for his work. Respondent has been licensed as a Master Plumber in Minnesota since 1996. As of April 4, 2008, Respondent did not hold a plumbing bond, and had never filed any plumbing bond with the Department.¹²

By letter dated July 25, 2008, the Department's investigator sent a letter to the Respondent asking for a response to the alleged violation of failing to have the required plumbing bond. By letter dated July 29, 2008, Respondent mailed a plumbing bond form dated July 28, 2008, to the Department's investigator. Respondent's letter stated:

I was not aware that I needed to have this bond. After receiving your letter I contacted my insurance company. They did some checking and came up with this bond. Please let me know if this is not the correct bond and or bond form. I am sorry for the mistake, please contact me if you have any questions.

The Department returned the bond form to the Respondent for additional information and a filing fee. The Respondent successfully completed the filing of the July 28, 2008, plumbing bond form with the Department on August 6, 2008.

On May 13, 2009, approximately one year later, the Department issued an APO to Respondent for the violation. The Department assessed a nonforgivable penalty of \$500. The Department based the penalty calculation on the Minnesota Department of Health's Plan for the Use of Administrative Penalty, Cease and Desist Authority, and Other Division-Wide Enforcement Tools, dated November 14, 2002 (Plan). Before

¹¹ That portion of Respondent's letter cited in the facts below, and his conduct of obtaining a bond on July 28, 2008, is reasonably construed to constitute an admission of not having a bond in place before July 28, 2008. In his reply of October 1, 2009, Respondent raises a question of whether he is required to have a bond because he contends he owns the house at 533 No. 3rd Street in La Crescent, inferring that this is where the plumbing work in question occurred, and therefore, a plumbing bond would not be required. The Department's reply of October 12 points out that the APO contained a typographical error indicating that the plumbing work occurred at the 533 No. 3rd Street address. In fact, paragraph 12 of the affidavit of Charlie Durenberger, Manager of Enforcement Services, notes the typographical error and clarifies that the work performed by Respondent occurred at a different address. The ALJ rejects Respondent's theory. No where in his response, or in any other part of the record, does Respondent present facts to dispute that he performed plumbing services for another, for pay, as described by the Department.

¹² Minn. Stat. § 326B.46, subd. 2, states in pertinent part:

Any person contracting to do plumbing work must give bond to the state in the amount of \$25,000 for all work entered into within the state. The bond shall be for the benefit of persons injured or suffering financial loss by reason of failure to comply with the requirements of the State Plumbing Code. The bond shall be filed with the commissioner and shall be written by a corporate surety licensed to do business in the state.

2005, the Department of Health had authority to enforce the Minnesota plumbing laws. See Department of Administration Reorganization Order No. 193, dated April 4, 2005.

In determining the penalty amount, the Department calculated a base penalty using the matrix in the Plan which plots the degree of potential for harm of the violation against the degree of deviation from compliance of the violation. In considering the potential for harm and deviation from compliance, the gravity of the violation was considered. The Department determined that the degree of deviation from compliance was severe because no bond was in place on April 4, 2008, and no bond had been filed as of that date. The Department determined that the degree of potential for harm of the violation was minor. The matrix in the Plan shows a penalty range of \$500 to \$2000 for violations where the deviation from compliance is severe and the potential for harm is minor. The Department decided to set the base penalty at \$500.

The Department considered the willfulness of the violation, whether there was a history of past violations, the number of current violations, and whether there was any economic benefit gained from the violations. After considering these factors, the Department determined not to change the base penalty amount of \$500.

The Department made the \$500 penalty nonforgivable because, in its view, the violation could not be corrected with respect to the April 4, 2008 plumbing work, and because a \$500 penalty was consistent with penalties assessed to others for the same or similar violations.

There is nothing in the record to suggest that the plumbing work of April 4, 2008 was faulty or otherwise would have required the invoking of the protections of a bond. Likewise, there is nothing in the record to show that Respondent was not in compliance with the statute at the time the penalty was issued a year later.

Analysis

This case involves the imposition of an APO upon Respondent for failing to have a plumbing bond in place with the Department on April 4, 2008 when he performed plumbing work for hire in the City of La Crescent, Minnesota.

As stated in Minn. Stat. § 326B.46, subd. 2, the purpose of the bond is to benefit injured persons or persons who have suffered financial loss by reason of failure to comply with the requirements of the State Plumbing Code. The Department has not alleged that a person was injured, physically or financially, on April 4, 2008 because no bond was available. The Respondent did not, however comply with the statute. The Department properly issued an APO under Minn. Stat. §§ 326B.082 and 326B.083.

With regard to the amount of the penalty, the relevant statute states that “the administrative law judge may not recommend a change in the amount of the penalty unless the administrative law judge determines that, based on the factors in

section 14.045, subdivision 3, the amount of the penalty is unreasonable.”¹³ The factors in section 14.045, subdivision 3, which are relevant to this case are:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, and the natural resources of the state;¹⁴
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors that justice may require.¹⁵

Specifically, the Department found that (1) the violation was not willful; (2) that the gravity of the violation was severe; (3 & 4) that this was Respondent’s first and only violation; and (5) that the Department saw no economic benefit gained by Respondent from the violation. It does not appear, as required in (6) above, that the Department considered reducing the APO in light of the fact that Respondent obtained a plumbing bond immediately after receiving notice of the violation or that he remained law abiding relative to bond coverage thereafter. Failure to consider these mitigating facts may make the penalty amount unreasonable.

The Department arrived at the penalty amount of \$500 after considering the aforementioned statutory factors. A penalty of \$500 is the lowest penalty in the Plan’s penalty matrix for a violation with a severe deviation from compliance and a minor potential for harm.

The Department reasoned that the penalty should be nonforgivable because there was nothing Respondent could do to demonstrate that he had a plumbing bond on April 4, 2008, as a bond cannot be made retroactive. A reasonable argument can be made that Respondent did, indeed, correct the statutory violation by obtaining a plumbing bond on July 28, 2008, within days after being contacted by the Department investigator, and more than a year before the APO was issued. There is no specific evidence of harm to the public by the absence of a bond on April, 4, 2008. No where in the record before the ALJ are these facts taken into account as mitigating the admitted offense.¹⁶ Likewise, the reasonable inference from the record is that a bond was in

¹³ Minn. Stat. § 326B.083, subd. 3(c) (2008).

¹⁴ While Respondent purchased the bond on July 28, 2008, it was returned to Respondent by the Department because Respondent had not provided a filing fee and other relevant information. The fee and information were submitted by Respondent shortly thereafter.

¹⁵ Minn. Stat. § 14.045, subd. 3(a) (2008). The factors listed in Minn. Stat. § 14.045, subd. 3(b) are not relevant because this is an initial violation.

¹⁶ See Affidavit of C. Durenberger.

place when the APO was issued. Therefore, based on this record, the Department erred by failing to consider the mitigating circumstances as required by Minn. Stat. § 14.045, subd. 3 (6).¹⁷

The Department also reasoned that the APO meted out in this case is consistent with other cases involving same or similar violations. In reviewing the Department's public website,¹⁸ the ALJ notes that APOs of \$100 and \$500 were meted out by the Department during the period in question for the violation of "bond not filed." No other information is available, so it is impossible from this review to discern what additional factor(s) were considered to determine that an APO should be \$100 rather than \$500. Suffice it to say, that the Department has exercised discretion to reduce the base penalty in similar cases. Given the lack of information as to what other factors were considered by the Department when issuing APOs in other similar cases, coupled with an ALJ's obligation to consider each case on its own merit, the ALJ cannot give much weight to the consistency of penalty argument.

Conclusion

The Respondent has failed to establish the existence of any genuine issue of material fact by substantial evidence. Summary disposition in favor of the Department is appropriate. The Department erred in not considering the mitigating factors of Respondent providing the plumbing bond immediately after being notified of the violation and remaining law abiding thereafter. It is recommended that the Commissioner consider an adjustment to the base penalty based on mitigating factors, consistent with Minn. Stat. § 14.045, subd. 3(a) (6) (2008). Given these recommendations, no hearing on this matter is required.

M. J. C.

¹⁷ See Ex. 4, Administrative Penalty Order Calculation Worksheet Summary, Step 3: adjustments to the base penalty under item (5), no adjustments were made because "no other factors were identified."

¹⁸ See www.dli.mn.gov/CCLD/plumbing_2008actions.pdf. The only public data available for plumbing enforcement actions is for the period of January 1 through July 31, 2008.