OAH 82-1902-37190

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Administrative Order Issued to Mark E. Waterman, Individually and d/b/a Waterman Home Solutions	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Barbara Case for a hearing on March 18, 2021, and the record closed at the end of the hearing.

Christopher M. Kaisershot, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Mark Edward Waterman, (Respondent) appeared on his own behalf without legal counsel.

STATEMENT OF THE ISSUES

1. Whether Respondent performed or offered to perform plumbing and electrical work in Minnesota without having the required plumbing or electrical contractor licenses issued by the Commissioner. Minn. Stat. §§ 326B.082, subd. 7, 326B.33, subds. 14-16, 326B.46, subd. 1 (a)-(c) (2020).

2. Whether Respondent acted or held himself out as a residential building contractor, residential remodeler, or residential roofer in Minnesota without having a license issued by the Commissioner. Minn. Stat. §§ 326B.082, subd. 7, 326B.805, subds. 1, 3 (2020).

3. Whether Respondent failed to fully comply with a request for information from the Commissioner. Minn. Stat. §§ 326B.082, subds. 1-2, 7, 326B.84(16) (2020).

SUMMARY OF RECOMMENDATION

The Department demonstrated by a preponderance of the evidence that Respondent offered to perform and performed residential remodeling, electrical, and plumbing work without the required licenses. Therefore, the Administrative Law Judge respectfully recommends that the Commissioner **AFFIRM** the Administrative Order issued May 11, 2020. For reasons set forth in the Memorandum below, the Administrative Law Judge respectfully recommends that the Administrative Penalty issued in this matter be **REDUCED** to $3000.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent, a father of three, has over the past few years worked full-time as a union carpenter.[1] In the Spring of 2020 he was expecting his third child, the Covid-19 Pandemic situation was negatively impacting his employment and society generally. Nervous about being able to support his family, Respondent looked for ways to make some extra money and placed one advertisement on Craigslist offering services.[2]

2. The advertisement, placed March 19, 2020, stated:

> Fast and affordable Home and Commercial Repair and service. Plumbing, Carpentry, TILE, HVAC. I also Install Appliances, Sinks, Faucets, Ceiling Fans, Lighting, Home Automation, Furniture Assembly.[3]

3. Because of Respondent's training and work as a union carpenter, he understands, and is supportive of, the importance of the Department's oversight of licensing.[4]

4. The Department's investigators search for advertisements such as the one placed by Respondent, performs cross-searches on various state databases to determine the identity of the advertiser and their license status, and initiate complaints based on its findings.[5] The Department does not require a complaint from a home owner to initiate a complaint and in this case had not received one.[6]

5. On March 30, 2020, Senior Department Investigator, Troy Okerlund, wrote to Respondent telling him, in part, that to "enable us to conduct a fair and complete investigation, you are requested to provide our Department with a written response to the allegation that you engaged in unlicensed activity."[7] The letter set a deadline of April 22, 2020, for a response including all of the work in which Respondent engaged, who he performed the work for, all of his advertising and an explanation of why Respondent had not obtained state licensure.[8] The letter also stated that failure to provide a response within the time specified is a violation of Minn. Stat. §§ 326B.082, subd. 11(b)(6) and 326B.84(16).[9]

---

[1] Testimony (Test.) of M. Waterman.
[2] *Id.*
[3] Ex. 1 at 002. (Craigslist advertisement, March 19, 2020). Ex. 1 at 0003, listed by the Department as an advertisement, is not an advertisement. It is a rating company that lists advertisers, like Respondent, without their knowledge. Respondent received no ratings, an indication of how infrequently he did jobs.
[4] *Id.*
[5] Test. of Troy Okerlund.
[6] *Id.*
[7] Ex. 2 (Letter, March 30, 2020).
[8] *Id.*
[9] *Id.*

6. Respondent told Mr. Okerlund that he would do his best to get him the information within the timeline but that he had a child due on April 2, 2020, had two other children at home and was working full-time.[10]

7. On April 20, 2020, by email, Mr. Okerlund reminded Respondent of the deadline for the requested documents.[11] Respondent emailed a reply on April 21, 2020, stating he would respond by the end of the day.[12]

8. On April 27, 2020, Mr. Okerlund emailed Respondent stating:

> Three separate times you have stated you will send or have sent information that this department has requested. To date our department has never received anything. I will be out in all day training today but if I have not received the requested information from you by end of day our department will move to an Administrative Order. In an Administrative order NONE of the penalty amount is stayed. As stated before it was our departments hope to work towards a Consent Order (cease and desist) where some or all of the penalty could be stayed.[13]

9. On April 27, 2020, Respondent replied by email stating:

> This is what I have for records for you, I am not a licensed contractor as you know, nor have I ever claimed to be. I have a full-time job. I did this on the side periodically for extra cash. But that's it. handyman work. there are more jobs and whatnot that I have done that I've never had any paperwork or anything like that. So I don't know all the info for you. I don't have any advertisement materials business cards and never have had any because I am not a business. I do handywork on the side and rarely even do that anymore. Here's what I have.[14]

10. Apparently considering Respondent's April 27, 2020, email to be inadequate, on May 1, 2020, Mr. Okerlund emailed Respondent and stated that he had not received a response and would be moving forward with the Administrative Order.[15]

11. Respondent provided the following information about the jobs he had done in Minnesota:

- 3/22/20, clean out traps/snake line, $40.00

[10] Test. of Respondent.
[11] Ex. 3 (Email, April 20, 2020).
[12] Ex. 3 (Email, April 21, 2020).
[13] Ex. 4 (Emails, April 27, 2020).
[14] Ex. 4.
[15] Ex. 5 (Email, May 1, 2020).

- 10/27/18, basement cleaning, paint and prep, carpet tear out, $750.00

- 01/20/2020, sheetrock, frame plumbing wall, tile, $1,465.00

- 05/25/2018, tile floor tear out, install new tile floor, dura-rock, window tear out, mud and tape, install vanity, install faucet, install new fan and switch, paint, install lights, $2,795.00

- 2/22/2018, laundry sink plumbing, $325.00

- 2/12/2018, washer pump replacement, $160.00[16]

12. Because Respondent was slow to respond to the Department's requests for information and because Mr. Okerlund believed Respondent's responses were incomplete, the Department issued an Administrative Order to respondent on May 11, 2020.[17]

13. Respondent sent an email on June 10, 2020, requesting a hearing on the administrative order. He stated:

> Hello, I'm writing this letter to request a hearing for an administrative order I've been subject to. The reason for my request is that I don't believe that that the investigator conducted himself nor this investigation in a manner that should be expected of a government agency. He was very deceiving in his tactics and flat out lied about how this investigation began. I have never claimed to be anything more than a handyman. I've never claimed to be licensed in any form or fashion in the state of Minnesota or anywhere else as a contractor. I complied and provided the information he wanted oh, and he told me if I did so that the order would be stayed. And I believe that's how this should have resulted. I was not aware that you needed a license to do handyman work then have since ceased and desisted all side work. I work a full-time job during the day and have for almost two years now so I really haven't done any type of side work in those two years. I was in communication with him from the very beginning of this and told him that I had a child being born that week and that I may possibly be a little late getting him info. Not to mention all of the pandemic stuff just getting started at that point and he told me that would be fine. I did get him the info of everything that I had to give him I don't believe this order is fair.[18]

[16] Ex. 6. Items paraphrased.
[17] Test. of T. Okerlund ; Ex. 7 (Letter, May 11, 2020); Ex. 7 (Administrative Order with Penalty).
[18] Ex. 8 (Hearing Request, June 11, 22020).

14. Respondent's request for a hearing was not solely for the purpose of delay and was not frivolous.

15. Any Conclusion of Law more properly considered a Finding of Fact is adopted herein.

16. Any portion of the Memorandum more properly considered as a Finding of Fact is incorporated herein.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Department and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 326B.082, (2020).

2. The Department has complied with all relevant procedural requirements of statute and rule and this matter is properly before the Administrative Law Judge and Commissioner.

3. Respondent received timely and proper notice of the hearing in this matter.

4. Minn. Stat. § 326B.46, subd. 1 (2020) prohibits an individual from engaging in or working at the business of a master plumber, restricted master plumber, journeyworker plumber, or restricted journeyworker plumber unless licensed to do so by the commissioner.

5. A person who performs or offers to perform plumbing work in Minnesota is required, under Minn. Stat. § 326B.46, subd. 2 (2020), to be bonded and insured.

6. Minn. Stat. § 326B.33, subd. 1(a) (2020) prohibits an individual from performing or supervising electrical work:

> unless the individual is (a) licensed by the commissioner as a master electrician; and (b)(i) the electrical work is for a licensed contractor and the individual is an employee, partner, or officer of, or is the licensed contractor, or (ii) the electrical work is performed for the individual's employer on electrical wiring, apparatus, equipment, or facilities that are owned or leased by the employer and that are located within the limits of property operated, maintained, and either owned or leased by the employer.

7. An individual who performs, or offers to perform, work as an electrical contractor, must have a contractor's license, under Minn. Stat. § 256B.33, subd. 14 (2020). A licensed electrical contractor must be bonded and insured under Minn. Stat. § 256B.33, subds. 15-16 (2020).

8. The Department proved by a preponderance of the evidence that Respondent performed or offered to perform plumbing and electrical work in Minnesota without having the required plumbing or electrical contractor licenses issued by the Commissioner. Minn. Stat. §§ 326B.082, subd. 7, 326B.33, subds. 14-16, 326B.46, subd. 1 (a)-(c) (2020)

9. Minn. Stat. § 326B.802, subd. 12 (2020), defines "Residential remodeler" as "a person in the business of contracting or offering to contract with an owner to improve existing residential real estate by providing two or more special skills as defined in this section."

10. Minn. Stat. § 326B.805, subd. 1 (2020), provides, in relevant part, that: A person who meets the definition of a residential remodeler as defined in section 326B.802, subdivision 12, must be licensed by the commissioner as a residential remodeler or residential building contractor.

11. Minn. Stat. § 326B.805, subd. 1 (2020), provides, in relevant part, that: no person "required to be licensed by subdivision 1 may act or hold themselves out as a residential building contractor, [or] residential remodeler, ... for compensation without a license issued by the commissioner."

12. The Department proved by a preponderance of the evidence that Respondent acted or held himself out as a residential remodeler in Minnesota without having a license issued by the Commissioner in violation of Minn. Stat. §§ 326B.082, subd. 7, 326B.805, subds. 1, 3 (2020).

13. The Department may sanction an individual required by law to hold a license if the individual has failed to comply with requests for information, documents, or other requests from the department within the time specified in the request.[19]

14. The Department proved by a preponderance of the evidence that by failing to timely respond to the Department's information request, Respondent failed to fully comply with a request for information from the Commissioner in violation of 326B.84(16) (2018).

15. Remedies available. The commissioner may enforce all applicable law under Minn. Stat. § 326B.082, subd.1 (2020), as follows:

> The commissioner may use any enforcement provision in this section, including the assessment of monetary penalties, against a person required to have a license ... under the applicable law based upon conduct that would provide grounds for action against a licensee ... under the applicable law. The use of an enforcement provision in this section shall

[19] Minn. Stat. 326B.84, subd. 16.

not preclude the use of any other enforcement provision in this section or otherwise provided by law.[20]

16. The commissioner may issue an administrative order to any person who the commissioner determines has committed a violation of the applicable law. The commissioner shall issue the administrative order by serving the administrative order on the person. The administrative order may require the person to correct the violation, may require the person to cease and desist from committing the violation, and may assess monetary penalties. The commissioner shall follow the procedures in section 326B.083 when issuing administrative orders. Except as provided in paragraph (b), the commissioner may issue to each person a monetary penalty of up to $10,000 for each violation of applicable law committed by the person. The commissioner may order that part or all of the monetary penalty will be forgiven if the person to whom the order is issued demonstrates to the commissioner by the 31st day after the order is issued that the person has corrected the violation or has developed a correction plan acceptable to the commissioner.[21]

17. In determining the amount of a penalty assessed under section 326B.082, subdivision 7 or 12, the Commissioner shall consider the factors described in section 14.045, subdivision 3.

18. 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.[22]

19. Minnesota Statutes section 14.045, subdivision 3 (2020), states, in part:

> (a) If a statute or rule gives an agency discretion over the amount of a fine, the agency must take the following factors into account in determining the amount of the fine:
>
> (1) the willfulness of the violation;
>
> (2) the gravity of the violation, including damage to humans . . . ;
>
> (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 . . . .

[20] Minn. Stat. § 326B.082, subd. 1.
[21] Minn. Stat. § 326B.082, subd. 7(a).
[22] Minn. Stat. § 326B.083, subd. 3 (c).

Because Respondent violated the provisions of Minn. Stat. § 326B.84(2), (12), (15), the Commissioner was authorized under Minn. Stat. § 326B.082, subds. 1, 7(a), 11(b)(8), (9), to issue the Administrative Order with Penalty, impose a monetary penalty, censure Respondent, and order that he cease and desist from acting or holding himself out as a residential building contractor, residential remodeler, or residential roofer in the state of Minnesota.

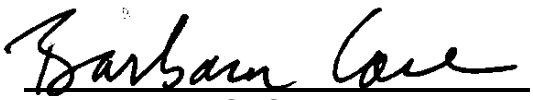
20. Applying the provisions of Minn. Stat. §§ 326B.083, subd. 3(c), and 14.045, subd. 3, the monetary penalty in the amount of $5,000.00 issued by the Commissioner in the Administrative Order with Penalty is not reasonable.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner **AFFIRM** the Administrative Order issued May 11, 2020. For reasons set forth in the memorandum below, the Administrative Law Judge respectfully recommends that the Administrative Penalty issued in this matter be **REDUCED** to $3000.

Dated: April 27, 2021



BARBARA J. CASE
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

Pursuant to Minn. Stat. § 326B.082, subd. 8 (2020), this Report is a recommendation, not a final decision. The Commissioner of the Department of Labor and Industry (Commissioner) will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions, and Recommendation. The Commissioner shall not issue a final order 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 on the Report. Parties should contact the Commissioner of the Department of Labor and Industry, Attention: Jessica Stimac, Director of Legal Services, Minnesota Department of Labor & Industry, 443 Lafayette Road, St. Paul, MN 55155, telephone (651) 284-5177, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

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 (2020). 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 Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1 (2020), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.61 (2020), this Report becomes a final decision.

MEMORANDUM

There is no dispute that Respondent offered to perform plumbing and electrical services without a license. Early in his communication with the Department, Respondent admitted that he did so, and stated that he would, and did, cease doing so. At the hearing, he explained that he understood the necessary function of the Department's oversight and apologized. However, he did feel deceived and unfairly treated by the Department's investigator because when he first contacted respondent, the investigator told him there had been a complaint received about him.[23] The investigator clarified at hearing that "complaint" can be initiated from within the Department by investigators searching for advertisements and then checking whether those advertising are licensed. This is how Respondent came to the attention of the Department.[24] Since Respondent's understanding of a complaint having been filed is the common understanding, it is not surprising he felt the investigator misrepresented the facts. However, ultimately, as Respondent admits, he performed activities requiring a license from the Department, without one.

The Administrative Law Judge questions whether the Department's levying a $5000.00 fine against Respondent is, considering the factors in section 14.045, subdivision 3, reasonable. The undersigned respectfully submits, after applying the factors, the fine is unreasonable. The Department did not address the 14.045 factors at hearing and offered little reasoning about the amount of the fine.

This was Respondent's first sanction from the Department in comparison to individuals who violate prior Department orders or agreements. Respondent ceased his activity upon being contacted by the investigator. While he missed the 30-day deadline for providing information by a few days, all of the information the Department has about his work was received from him. The total amount received from the work he did that the investigator deemed in violation of Department regulations amounted to $5,335. While he did some of his work prior to placing his one advertisement, so discrediting his reasoning that he was just responding to insecurity about supporting his family during

[23] Test. of M. Waterman.
[24] Test. of T. Okerlund.

the pandemic, there is no doubt he faced uncertainty in employment as well as the general year of upheaval everyone has experienced. While none of this is an excuse for performing unlicensed work, it does favor the Department erring on the side of restraint in its sanction.

Among the limited arguments it made for the penalty, the Department speculated that Respondent was unforthcoming in the information he provided and he did not provide the name of the homeowner for whom he did his largest job on May 25, 2018. The investigator also believed, for unexplained reasons, Respondent did not take the matter seriously. But Respondent explained that he was preoccupied by his third child's birth and expected to be slow in his response time. He did not ignore the Department. The investigator also believed the information provided was incomplete. But that there was information regarding other jobs or that there were contracts, is mere conjecture. From the list of work Respondent provided it appears he listed every possible job in order to satisfy the investigator, including jobs that the investigator said were not violations because the work did not require a license or was performed out of state.[25] Similarly, there is nothing to indicate respondent used written contracts and then failed to produce them for the investigation. The Department had opportunity to prove that Respondent's business practices included written contracts, that he failed to produce, because it contacted the homeowners. But the one customer who claimed she had a contract also claimed she would submit it to the Department but never did.[26] Because it was hearsay, and not even provided in an affidavit or other written form, and because she was unreliable when she failed to follow through, her hearsay testimony is given no weight.

Turning to the factors at Minnesota Statutes section 14.045, subdivision 3: (1) Respondent admitted that his actions were willful, in that he was aware of licensing requirement. However his actions were not on the extreme continuum of willful in the sense of being manipulative or malicious as does occur in these cases; (2) the Department provided no evidence that Respondent's actions were grave or included damage to humans, to the extent one homeowner's complaints were offered for that purpose, for the reasons addressed above, the undersigned gave them no weight and finds them not credible; (3) while he performed more than one unlicensed job, Respondent has no history of past violations in the sense of having been sanctioned by the Department and then continuing to violate its orders; (4) Respondent performed four jobs over two years that the Department found rose to the level of being sanctionable, any belief on the part of the department that respondent did more was mere conjecture and the Respondent's explanation of his circumstances was more credible on this point; (5) given the range of economic benefit in these types of cases, Respondent's was minuscule. There is no evidence he exhibited any of the fraudulent behavior the Department confronts such as taking money without performing work; (6) finally, justice requires not only that this case be viewed in comparison to other fines levied by the Department, but also the circumstances of the past year in terms of the economic insecurity caused by the global Covid-19 pandemic. Given the final consideration, it is

[25] Test. T. Okerlund.
[26] *Id.*

hard to fathom why the Department did not at least slow its process, especially given that Respondent immediately stopped performing work.

While the $5000. levied here is within the range of financial sanctions the department imposes for unlicensed remodeling type of work, it has also exercised its discretion for lesser penalties. By comparison to the $5000. fine levied here, in a case where a Respondent engaged in fraudulent, deceptive and dishonest practices, took Community Development (CDC) funds in the amount of $26,500. to improve his own home contrary to the rules, allowed an unlicensed company to use the expired license of another, solicited and pulled permits for an entity he knew was not licensed, the Department levied a $3000. fine.[27]

In light of Respondent's circumstances and the amount he gained from his unlicensed work, a lower fine is appropriate and still serves the purpose of sending a message to Respondent and others that unlicensed work will not be rewarded. The Administrative Law Judge respectfully recommends that the fine be reduced to $3000.

B. J. C.

[27] In the Matter of The Administrative Order Issued to Veniamin Melnichuk, 2015 WL 7621418 (Minn. Off. Admin. Hrgs.), OAH 14-1902-32565.