

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Daniel Forling Peer, d/b/a
Dan's Lawn & Landscaping

FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION

The above matter came on for a hearing before Administrative Law Judge (ALJ) Richard C. Luis on November 21, 2005 at 1:30 p.m. at the Office of Administrative Hearings, 320 West Second Street, Suite 714, Duluth, Minnesota. The hearing record closed at the conclusion of the proceeding on November 21, 2005.

Michael J. Tostengard, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, represented the Department of Labor and Industry ("the Department"). Daniel Peer, 2901 London Road, Duluth, MN 55804, appeared on his own behalf at the hearing.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommended Decision. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Nancy Leppink, Deputy Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

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. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. 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, 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.

STATEMENT OF ISSUES

Did Respondent violate Minn. Stat. § 326.84, subds. 1a and 1b, by engaging in unlicensed residential building contractor activity?

Did Respondent violate Minn. Stat. § 326.91, subd. 1(2), by engaging in fraudulent, deceptive, or dishonest practice through the use of a customer's credit card for purchasing items not used in a construction project for that customer?

Did Respondent violate Minn. Stat. § 326.91, subd. 1(5), by continuing to engage in unlicensed residential building contractor activity after the issuance of a Cease and Desist Order?

Is discipline of Respondent in the public interest?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. During all times relevant to this proceeding. Respondent was not licensed by the Department or the Department of Commerce in any capacity.¹

2. In 2003, Respondent was conducting unlicensed residential building contractor activity under the business name of D&D Contractors. The Department of Commerce brought an enforcement action against Respondent and D&D Contractors. On December 19, 2003, Respondent executed a Consent to Entry of Order in which he acknowledged his right to contest the proposed action by the Department of Commerce and expressly waived that right.²

3. On January 20, 2004, the Department of Commerce issued a Cease and Desist Order that prohibited Respondent from engaging in unlicensed residential building contractor activity. Respondent did not appeal the Order.

4. On April 5, 2005, Respondent entered into a written remodeling contract with Duane Plagemann of Duluth, Minnesota, in the amount of \$3,500 for labor. Mr. Plagemann was to be responsible for all materials. Respondent agreed to build a

¹ This action was commenced by the Department of Commerce. On May 16, 2005, the Governor signed Executive Order 193, transferring the responsibility for regulation of residential building contractors to the Department of Labor and Industry.

² Ex. 1.

12x12 three-season porch on Mr. Plagemann's residence for that amount. The work to be performed included carpentry, drywall installation, flooring, and shingling.³

5. On April 6, 2005, Mr. Plagemann arranged for a local hardware store to enable Respondent to purchase materials for the remodeling job that would then be charged to Mr. Plagemann.⁴ In addition to lumber and other materials, Respondent purchased various cutting blades, telescoping pruning shears, a canvas tarpaulin, a chalk line reel, assorted tools, and a gasoline can using Mr. Plagemann's credit account.⁵

6. Mr. Plagemann became concerned as to whether some of the purchases were related his remodeling job. In May 2005, he filed a complaint against Respondent with the Department. The Department's investigation into the complaint resulted in probable cause to believe that Respondent was performing unlicensed residential contractor activity.

7. The Department issued a Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges to Respondent on July 13, 2005. The Prehearing Conference occurred on August 24, 2005, at which time the Administrative Law Judge set the hearing for November 21, 2005.

8. Mr. Plagemann described the contract for remodeling his home with Respondent and arranging for Respondent to use his credit account at a hardware store for obtaining materials for the project. Mr. Plagemann did not authorize Respondent to charge tools or other items beyond those to be used on the remodeling project. Respondent acknowledged that he had charged the items identified. Respondent maintained that he used the cutting blades, the tarp, several tools, several pairs of work gloves, and the chalk line reel on the project. Respondent did not recall several of the items that he purchased. Respondent did not leave any of the tools purchased with the homeowner. Several of the items purchased were acknowledged by Respondent as not purchased for the project. Respondent maintained that he intended to reduce the final payment at the time the project was concluded by the cost of the items not used on the project.⁶

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor and Industry have jurisdiction in this matter under Minn. Stat. §§ 14.50, 45.027, and 326.91.

³ Ex. 2.

⁴ Testimony of Plagemann.

⁵ Testimony of Plagemann; Ex. 3. The purchases took place between April 6 and 11, 2005.

⁶ Testimony of Peer.

2. The Respondent was given timely and proper notice of the hearing in this matter.

3. The Department has complied with all procedural requirements of law.

4. The Department must prove by a preponderance of the evidence that the alleged violations occurred.⁷

5. Minn. Stat. § 326.84, subs. 1a and 1b require residential building contractors and residential remodelers to be licensed. Residential building contractors and residential remodelers may not perform work without a valid license. Subdivision 1a of section 326.84 provides that specialty contractors may be licensed as residential building contractors or residential remodelers unless they are required to be licensed as a specialty contractor.

6. A residential building contractor contracts to build or improve residential real estate by providing two or more special skills, including carpentry, masonry and concrete, interior finishing, exterior finishing, drywall and plaster, and roofing.⁸ A residential remodeler also provides two or more special skills, but only in the context of improving residential real estate.⁹ A specialty contractor both builds and/or improves residential property, but by providing only one special skill.¹⁰

7. A licensed residential contractor is prohibited from engaging in fraudulent, dishonest, or deceptive practices, such as charging materials to a project that are not used for that project.¹¹ The Department has proved by a preponderance of the evidence that Respondent engaged in fraudulent, dishonest, or deceptive practices by performing remodeling without a license and by charging unrelated materials to the remodeling project, to be paid by the homeowner.

8. The Department has demonstrated by a preponderance of the evidence that Respondent performed unlicensed residential building contractor activity in violation of Minn. Stat. § 326.84, subs. 1a and 1b. The Department has also demonstrated that Respondent violated Minn. Stat. § 326.91, subd. 1(5), by continuing to engage in unlicensed residential building contractor activity after the issuance of a Cease and Desist Order by the Department of Commerce.

9. The Commissioner may deny, suspend, revoke, censure, or fine a licensee if the action is in the public interest.¹² The Commissioner may take action, including a cease and desist action and the imposition of penalties, against a person required to be licensed under sections 326.83 to 326.991, based on conduct that would provide

⁷ Minn. R. pt. 1400.7300, subp. 5.

⁸ Minn. Stat. § 326.83, subd. 15.

⁹ Minn. Stat. § 326.83, subd. 16.

¹⁰ Minn. Stat. § 326.83, subd. 20.

¹¹ Minn. Stat. § 326.91, subd. 1(2).

¹² Minn. Stat. § 326.91, subd. 1.

grounds for administrative action against a licensee under the statute. The Department has established that taking such action against Respondent is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that disciplinary action be taken against Daniel Peer for unlicensed residential contractor activity, dishonest practices, and violating a cease and desist order.

Dated this 15th day of December 2005.

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

Reported: Tape-Recorded.
One Tape, No Transcript Prepared.

MEMORANDUM

The Department's allegations that Respondent performed unlicensed residential construction work and violated an existing cease and desist order were not contested in this proceeding. The Department has proven those violations by a preponderance of the evidence.

The only issue contested by Respondent was the dishonest practice allegation. Respondent argues that he had an agreement with the homeowner that Respondent could use the charge account for tools, supplies, and materials. As of the date of the hearing, Respondent had not returned to the homeowner the items charged or reimbursed the homeowner for the cost of those items. Respondent maintains that this settling up will be done at the conclusion of the project (which is apparently not done). The Department has shown that Respondent exceeded his authority to charge items and that Respondent has not timely reimbursed Mr. Plagemann. The Department has proven the dishonest practice violation by a preponderance of the evidence.

R.C.L.