

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of the Administrative Order Issued to Mark & Brenda Construction, Inc., a/k/a Delzer Construction	FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION
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This matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice and Order for Hearing filed on December 10, 2008. A hearing was held on January 29, 2009, commencing at 9:30 a.m. in the meeting room of the Douglas County Library, 720 Fillmore, Alexandria, Minnesota 56308. The OAH record closed at the conclusion of the hearing.

Wendy Willson Legge, Attorney at Law, appeared on behalf of the Minnesota Department of Labor and Industry. Mark Christopherson, President, appeared without counsel on behalf of the Respondent, Mark & Brenda Construction, Inc., a/k/a Delzer Construction.

STATEMENT OF ISSUES

The issues presented in this case are as follows:

1. Did the Respondent violate Minn. Rules part 4715.3130 in connection with work it performed during May of 2008 on a project in Battle Lake, Minnesota, by installing plumbing before plans were submitted to and approved by the Department of Labor and Industry?
2. Did the Department of Labor and Industry properly issue an Administrative Order to the Respondent?
3. Was the \$2,000 nonforgivable penalty assessed in the Administrative Order reasonable under Minn. Stat. §§ 326B.082, 326B.083, and 14.045?

The Administrative Law Judge concludes that the Respondent violated Minn. Rules part 4715.3130 in connection with its work on the Battle Lake project and that the Department properly issued the Administrative Order. The Administrative Law Judge finds that the calculation of a \$2,000 nonforgivable penalty was unreasonable and recommends a reduction in that penalty.

Based on all the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Background

1. This contested case proceeding was initiated by the Department of Labor and Industry (“DOLI” or the “Department”) based upon the appeal of the Respondent, Mark & Brenda Construction, Inc., a/k/a Delzer Construction (“Delzer”), of an Administrative Order issued by DOLI on October 3, 2008. The Administrative Order alleged that Delzer committed a violation of the Minnesota Plumbing Code in connection with the plumbing work it performed on a construction project in Battle Lake, Minnesota. Specifically, the Administrative Order alleged that Delzer had violated Minn. R. 4715.3130 by performing plumbing installation prior to submitting plans to DOLI and obtaining DOLI approval.¹

2. Responsibility for enforcement of the State Plumbing Code was transferred by Executive Order of the Governor to the Department of Labor and Industry in May of 2005. Prior to that time, the Department of Health was responsible for enforcement of the Plumbing Code. James Peterson, the DOLI Plumbing Program Supervisor, previously worked in the same capacity with the Department of Health.²

3. In 2007, the Minnesota Legislature enacted legislation confirming the transfer of authority to DOLI for enforcement of the Plumbing Code. The Legislature also enacted new enforcement laws that were effective on December 1, 2007.³

The Battle Lake Project

4. The Battle Lake project at issue in this case involves construction of an addition to and renovation of Our Lady of the Lakes Catholic Church. Curtis Construction is the General Contractor on the project. Delzer Construction is responsible for plumbing installation. Todd Dalzell of Martin Engineering Design, Inc., which is located in Fargo, North Dakota, serves as the mechanical engineer on the project.⁴

5. Mark Christopherson, owner and President of Delzer Construction, and Paul Sonmor, Superintendent for Delzer Construction, were aware of the requirement under the Plumbing Code that plumbing plans be

¹ Testimony of James Peterson; Exhibits 1, 6

² Testimony of J. Peterson.

³ Minn. Stat. §§ 326B.106, subd. 3, and 326B.081 – 326B.085.

⁴ Testimony of Paul Sonmor, Rick Blilie, and Mike Gallagher; Exhibits 2, 3, and 13.

submitted to and approved by DOLI with respect to a project of this type. They did not submit plans or specifications to DOLI regarding the plumbing work because the mechanical engineer was going to do that.⁵

6. Work on the Battle Lake project began on approximately May 14, 2008. The entire project has not yet been completed. The church has remained open during construction for services and other events.⁶

7. The addition to the church is being built onto the area where the main entrance to the existing church was located. At some point during construction, the main entrance to the church was no longer accessible, and a temporary entrance was created to ensure access to the existing building. Because the new water line would have crossed the temporary sidewalk, posed a potential safety concern, and interfered with the temporary access to the building, Curtis Construction wanted to install that portion of the plumbing as early as possible in the construction process, before it closed off the main entrance to the building. The church requested that the work proceed in a timely manner because they needed access to that door for Sunday services.⁷

8. A preconstruction meeting regarding the Battle Lake project was held on May 12, 2008. The meeting was attended by Rick Blilie, Project Manager and Estimator for Curtis Construction; Paul Sonmor, Superintendent for Delzer; and other subcontractors involved in the project.⁸ At or around the time of the preconstruction meeting, Mr. Sonmor was told by Mr. Blilie that the plans had been submitted, and he was told to proceed with the portion of the plumbing work involving the sewer and water line.⁹

9. After the preconstruction meeting, Mike Gallagher, President of Curtis Construction, and Mr. Blilie had a further discussion about whether or not they could bring water service to the building prior to approval of the plumbing plans by the State. Because Mr. Gallagher was not certain if they could bring the water service to the building prior to plan approval, he decided to check with Todd Dalzell, the mechanical engineer on the project.¹⁰

10. At some point after the May 12 preconstruction meeting and before May 21, 2008, Mr. Gallagher called Mr. Dalzell on the telephone and explained that they wished to install the water line as soon as possible in order to complete the temporary entrance and facilitate access to the church. Mr. Dalzell told Mr. Gallagher that the plans had not been submitted to the State at that time. Mr. Dalzell is licensed in North Dakota and does not have detailed knowledge of Minnesota plumbing laws. It was Mr. Dalzell's understanding that DOLI's

⁵ Testimony of Mark Christopherson, P. Sonmor, and M. Gallagher.

⁶ Testimony of R. Blilie.

⁷ Exhibit 2; Testimony of Mark Christopherson, R. Blilie, M. Gallagher.

⁸ Testimony of P. Sonmor, R. Blilie.

⁹ Testimony of P. Sonmor; Exhibit 2.

¹⁰ Testimony of M. Gallagher.

plumbing review was restricted to plumbing in the interior of the building and connections to the building itself. Plans issued by Mr. Dalzell's mechanical engineering firm typically do not show plumbing to the property line or connections to city sewer or water service; instead, the plans only show plumbing within five feet outside the building. He told Mr. Gallagher that some things in the plans had not been corrected and changed but he would call the State and ask for its opinion.¹¹

11. After making several attempts to reach Brad Erickson (a DOLI plan reviewer), Mr. Dalzell reached Corey Frain, another DOLI plan reviewer, by telephone on May 13 or May 16, 2008. Mr. Dalzell identified himself and the project, and told Mr. Frain that the contractor wanted to know if it could bring the water line into the building prior to finalizing and submitting plans to DOLI so the temporary entrance could be installed. Mr. Frain told Mr. Dalzell that they could not do any plumbing in the building until the plans were approved. Mr. Dalzell told Mr. Frain that he did not want to do any plumbing in the building, but just wanted to tie into the city water line. It is more likely than not that Mr. Frain told Mr. Dalzell that contractors are not required to submit plans and seek approval from DOLI with respect to connections to city water and sewer that occurred *outside* the property lines of the premises, and he indicated that it was up to the local official if the contractor wanted to tie into the city water at a point outside the property lines.¹²

12. After speaking with Mr. Frain, Mr. Dalzell called Mr. Gallagher back. He told Mr. Gallagher that he had spoken to the State and that, although the plans had not yet been approved, they could make a connection to the water line of the city under the inspection of the local official. He advised Mr. Gallagher to contact the local official.

13. After speaking with Mr. Dalzell, Mr. Gallagher informed Mr. Blilie that they had obtained verbal approval to go ahead and tie into the city water line and bring the water line into the building as long as they did not perform any other plumbing work and conducted the work under the inspection of the local authority.¹³

14. On May 21, 2008, Delzer proceeded to run the sewer line from a point inside the property line of the church up to the building and stubbed the line into the building. Delzer also ran a new water service line from the property line to the building and stubbed that line into the building. This portion of the plumbing work was completed on May 21 or May 22, 2008.¹⁴ No other plumbing work was performed at that time.¹⁵

¹¹ Testimony of M. Gallagher, T. Dalzell.

¹² Testimony of T. Dalzell.

¹³ Testimony of R. Blilie, M. Gallagher.

¹⁴ Testimony of P. Sonmor and R. Blilie.

¹⁵ Testimony of R. Blilie.

15. Prior to starting work on May 21, 2008, Mr. Sonmor understood that the plumbing plans had been submitted to DOLI and that written or verbal approval had been received. To Mr. Sonmor's knowledge, no one from Delzer checked with DOLI prior to commencing the work to verify that the plumbing plans had been approved.¹⁶

16. On May 21, 2008, Mr. Sonmor called Gary Topp, DOLI's Plumbing Standards Representative in the region that encompasses Battle Lake, and told him that Delzer would be starting to install the building sanitary sewer. Mr. Topp asked if plumbing plans had been approved and Mr. Sonmor told him that he had been told that plans had been approved.¹⁷

17. Mr. Sonmor called Mr. Topp later in the day on May 21 and told him that the work was ready for inspection. Mr. Topp gave verbal approval to have a church official or city employee witness the air test.¹⁸ Ultimately, Bert Olson, a City of Battle Lake official, witnessed the test.¹⁹

18. Mr. Dalzell first submitted the plumbing plans for the Battle Lake project by facsimile transmission to DOLI on Friday, May 23, 2008, after the completion of the plumbing work by Delzer.²⁰

19. DOLI did not enter receipt of the plumbing plans submitted by Mr. Dalzell in its Plumbing Plan Log until Tuesday, May 27, 2008, most likely because the plans were submitted on the prior Friday and Monday, May 26, 2008, was the Memorial Day holiday.²¹ The plans as originally submitted by Mr. Dalzell showed only the plumbing in the building and not the connection to the water and sewer lines. DOLI sent him a correction letter on or about June 9, 2008, informing him that DOLI was not able to approve the plans as originally submitted and asking for a utility site plan detailing water supply and connection within the property lines. Thereafter, Mr. Dalzell revised the plans to show the plumbing lines all the way to the property line of the church and resubmitted them to DOLI. The actual connection with the city water and sewer lines was under the street and outside the property lines of the church. DOLI ultimately approved the revised plans on June 25, 2008, and sent a confirming letter to Mr. Dalzell on June 27, 2008.²²

20. On June 12, 2008, Mr. Topp, Plumbing Standards Representative with the Department's Construction Codes and Licensing Division, conducted an inspection of the plumbing work involving the sewer and

¹⁶ Testimony of P. Sonmor.

¹⁷ Exhibits 1, 3; Testimony of J. Peterson.

¹⁸ Exhibits 1, 3.

¹⁹ Testimony of J. Peterson, R. Blilie, M. Christopherson.

²⁰ Testimony of T. Dalzell.

²¹ Testimony of J. Peterson, C. Frain; Ex. 3.

²² Testimony of J. Peterson, T. Dalzell; Exhibit 3.

water line.²³ Because the plumbing work was not backfilled at that point, the work remained open for viewing.²⁴ There is no evidence that the installation or materials were defective or improper in any way.

21. By letter dated June 25, 2008, Cindy Claason, Senior Investigator for the Department, notified Mr. Sonmor of Delzer Construction that, based upon Mr. Topp's inspection on June 12, 2008, and the Department's further investigation, the Respondent may have violated Minnesota Rules part 4715.3130 by performing a plumbing installation prior to the submittal and approval of plumbing plans. The Respondent was given 10 days from the receipt of the letter to provide a written response to the allegation and submit pertinent information. The letter notified Respondent that the violation of Minnesota Statutes § 326B.082, subdivisions 2(b) and 11(b)(2) could result in formal administrative action including a fine of up to \$10,000 per violation.²⁵ On July 7, 2008, representatives of the Department met at the project site with representatives of Delzer Construction to discuss the "10 day" letter.²⁶

22. By letter dated July 7, 2008, Mr. Christopherson and Mr. Sonmor of Delzer responded to Ms. Claason's letter of June 25, 2008. They indicated that, at the May 12, 2008, preconstruction meeting held by Curtis Construction (Mark Dahlberg, Supervisor), Delzer was given approval to proceed with its work and was told that the plumbing plan had been submitted by Curtis Construction and was approved. They noted that the construction of the new church addition made the front door inaccessible and the congregation of the church had requested that the work proceed in a timely manner because they needed access to that door for Sunday services.²⁷

DOLI Administrative Order

23. In 2002, the Department of Health adopted a Plan for the Use of Administrative Penalty, Cease and Desist Authority, and Other Division-wide Enforcement Tools ("the Enforcement Plan").²⁸ The Department of Labor and Industry has not adopted its own enforcement guidelines since the transfer of enforcement authority from the Department of Health. The DOLI Plumbing Program continues to use the Enforcement Plan developed when the program was under the Department of Health.²⁹

24. If DOLI receives plans and specifications prior to construction, it makes no difference whether the general contractor, the

²³ Exhibits 1, 3, 6; Testimony of J. Peterson.

²⁴ Testimony of M. Christopherson. Backfilling over plumbing is not considered by DOLI to be part of the plumbing work. Testimony of J. Peterson.

²⁵ Exhibit 1.

²⁶ Exhibit 3.

²⁷ Exhibit 2.

²⁸ Exhibit 4.

²⁹ Testimony of J. Peterson.

mechanical engineer, the plumbing contractor, or another party submits the plans. However, if no plans are submitted, DOLI penalizes the installer because it is the installer's responsibility to see to it that plans are approved before starting any construction.³⁰

25. On July 23, 2008, DOLI convened a penalty calculation forum with respect to Delzer's work on the Battle Lake project. James Peterson and Cindy Claason participated in the forum and prepared a Penalty Calculation Summary.³¹ The forum determined that the violation of Minnesota Rules part 4715.3130 by Delzer was serious because the Enforcement Plan includes the following language:

Serious violations include conduct showing disregard of requirements or standards, or violations that present an actual or potential danger to public health or natural resources. Division regulatory programs are likely to consider the following types of violations as serious: . . . failure to secure plan approval prior to commencement of an activity.³²

The forum participants noted that there was no history of a similar previous violation by the Respondent.³³ They also found that a nonforgivable penalty was necessary to deter further violations.³⁴ The forum members found that the potential for harm was moderate, noting that "[t]here is a potential for harm if a plumbing system was installed in violation of the Minnesota Plumbing Code" and the "[f]ailure to submit plans for approval hampers the ability of the [Department] to prevent improper installations before they occur."³⁵ The forum determined that the deviation from compliance was severe because the project was completed prior to submission of the plans.³⁶ Under the grid set forth in the Enforcement Plan, a moderate potential for harm and a severe deviation from compliance yields a penalty in the range of \$2,000 to \$5,000.³⁷ The forum selected the \$2,000 amount because there were no prior violations by Delzer. The forum participants were unable to determine if the violation was willful or if economic benefit was gained by virtue of the rule violation, and they found that no adjustments should be made to the base penalty.³⁸

26. According to Mr. Peterson, the determination that there was a moderate potential for harm was warranted because DOLI does not know what materials were used when it does not have an opportunity to review plans, and

³⁰ Testimony of J. Peterson.

³¹ Testimony of J. Peterson; Exhibit 5.

³² Testimony of J. Peterson; Exhibit 4 at 15.

³³ Testimony of J. Peterson; Exhibit 5.

³⁴ Testimony of J. Peterson; Exhibit 5 at 1, 2, 5.

³⁵ Testimony of J. Peterson; Exhibit 5 at 2.

³⁶ Testimony of J. Peterson; Exhibit 5 at 2.

³⁷ Testimony of J. Peterson; Exhibit 4, Appendix C at 3.

³⁸ Exhibit 5 at 4, 5; Testimony of J. Peterson.

the determination that the deviation from compliance was severe was justified because Delzer violated a written rule. Mr. Peterson determined that the penalty should be nonforgivable to be consistent with prior cases involving similar violations. Moreover, in Mr. Peterson's view, a forgivable penalty should only be ordered when the violation can be repaired or corrected. Because Delzer's work was performed prior to plan submission and approval, and it was not possible to "go back and unring the bell," he believed a forgivable penalty would not be appropriate.³⁹

27. On October 3, 2008, the Department issued an Administrative Order to the Respondent assessing a \$2,000 non-forgivable penalty for violation of Minn. Rules part 4715.3130, based upon the Respondent's failure to submit plans to the Commissioner "prior to installing and covering the plumbing."⁴⁰ The Order and the accompanying letter informed the Respondent of its right to contest the Administrative Penalty in a hearing before an Administrative Law Judge.⁴¹

28. By letter dated October 31, 2008, the Respondent requested a hearing. In the letter, Mr. Christopherson and Mr. Sonmor asserted that Burt Olson (the Battle Lake City Water Superintendent), and the State of Minnesota had given verbal approval to Mike Gallagher, the Project Manager for Curtis Construction, before any work was started, and Mr. Gallagher had in turn given Delzer approval to proceed with the project.⁴²

29. Reviews of plumbing plans are conducted by a separate DOLI office called the Plan Review Department. Occasionally, on a case-by-case basis, DOLI's Plan Reviewers give a contractor verbal authority to proceed after plans have been submitted and reviewed so they do not have to wait for a formal approval letter. There is no evidence that Corey Frain or any other DOLI Plan Reviewers have given verbal approval for a contractor to go forward with plumbing installation inside the property lines if the plans have not yet been submitted.⁴³

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 over this matter pursuant to Minn. Stat. §§ 14.50, 326B.02, subd. 1, 326B.106, subd. 3, and 326B.082 – 326B.085 (2008).

³⁹ Testimony of J. Peterson.

⁴⁰ In fact, plans were submitted to DOLI on May 23, 2008, before the work was covered, and the work remained open until at least June 12, 2008.

⁴¹ Exhibit 6.

⁴² Exhibit 7.

⁴³ Testimony of J. Peterson, C. Frain.

2. The Notice and Order for Hearing are proper in all respects and the Department has complied with all procedural requirements of law and rule.

3. The Minnesota Plumbing Code, which is set forth in Minnesota Rules Chapter 4715, “applies to all new plumbing installations, including additions, extensions, alterations, and replacements connected to a water or sewage disposal system owned or operated by or for a municipality, institution, factory, office building, hotel, apartment building, or other place of business regardless of location or the population of the city or town in which it is located.”⁴⁴ In new buildings, “[a]ll plumbing materials and plumbing systems or parts thereof must be installed to meet the minimum provisions of this code.”⁴⁵ The Code further specifies that, “[i]n existing buildings or premises in which plumbing installations are to be altered, renovated, or replaced, the new materials and work must meet the provisions of this code. If the administrative authority finds that the full performance of bringing the work into compliance with all requirements of this code would result in exceptional or undue hardship by reason of excessive structural or mechanical difficulty, or impracticability, a deviation may be granted by the administrative authority only to the extent the deviation can be granted without endangering the health and safety of the occupants and the public.”⁴⁶

4. Minnesota Rules 4715.0100, subp. 81, defines the term “plumbing system” to include “all potable water supplies and distribution pipes, all plumbing fixtures and traps, all drainage and vent pipes and all building drains, including their respective joints and connections, devices and appurtenances *within the property lines of the premises* and shall include potable water treatment or using equipment.” (Emphasis added.)

5. Minnesota Rules part 4715.3130 states in relevant part:

Prior to the installation by any person, corporation, or public agency, of a system of plumbing that serves the public or that serves any considerable number of persons, or any plumbing system that shall affect the public health in any manner, complete plans and specifications, together with any additional information that the commissioner of health may require, shall be submitted in duplicate and approved by the Commissioner. The appraisal of the commissioner shall reflect the degree to which these plans and specifications affect the public health and conform to the provisions of the Minnesota Plumbing Code. No constructions shall proceed except in accordance with approved plans. Any material alteration or extension of the existing system shall be subject to these same

⁴⁴ Minn. R. 4715.0320, subp. 1.

⁴⁵ Minn. R. 4715.0320, subp. 2.

⁴⁶ Minn. R. 4715.0320, subp. 3.

requirements. This rule shall not apply to cities of the first class, except those plumbing installations in hospitals or in buildings in these cities owned by the federal or the state government.

(Emphasis added.)

6. The plumbing installed by Delzer Construction at the Battle Lake project in May of 2008 constituted a “system of plumbing” that “serves the public” or a “considerable number of people” or “affects the public health” within the meaning of the relevant rules.⁴⁷ Moreover, Battle Lake, Minnesota, is not a city of the first class.⁴⁸ Accordingly, the requirements of Minn. Rules 4715.3130 relating to the submission and approval of plans prior to the installation of plumbing apply to the work at issue.

7. Delzer Construction installed a system of plumbing within the church property lines in May of 2008 prior to the submission to and approval of plans by DOLI, in violation of Minn. Rules part 4715.3130.

8. The Department of Labor and Industry properly issued an Administrative Order to Delzer Construction based on the violation of Minn. Rules part 4715.3130.

9. The Commissioner of the Department of Labor and Industry is authorized to require Delzer Construction to pay an appropriate monetary penalty. Because the penalty proposed by the Department is unreasonable, it should be reduced.

10. These Conclusions are reached for the reasons set forth in the Memorandum below, which is incorporated by reference in these Conclusions.

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

RECOMMENDATION

IT IS RECOMMENDED that:

The Commissioner of the Department of Labor and Industry affirm the Administrative Order issued against Delzer Construction but reduce the monetary penalty to an appropriate level.

Dated: March 2, 2009

s/Barbara L. Neilson

⁴⁷ Minn. Rules parts 4715.0100, subp. 81, and 4715.3130.

⁴⁸ See Minn. Stat. § 410.01 (defining “cities of the first class” as those having more than 100,000 inhabitants).

BARBARA L. NEILSON
Administrative Law Judge

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 and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 326B.082, subd. 8(e), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least five days. Any person aggrieved by this Report may, within those five days, file written comments on the Report with the Commissioner. The Commissioner must consider the comments and enter them in the record. Parties should contact Nancy Leppink, Deputy Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155, to discuss the procedure for filing 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. 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.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

In this case, the Commissioner seeks to impose a penalty on Delzer Construction for installing sewer and water lines inside the property lines of the premises in a project at Our Lady of the Lakes Catholic Church in Battle Lake, Minnesota. Delzer Construction argues that the Administrative Order and monetary penalty should be rescinded.

Based upon review of the entire record in this case, the Administrative Law Judge concludes that it is more likely than not that Mr. Frain simply informed Mr. Dalzell during their telephone conversation in May 2008 that the contractor was not required to submit plans and seek approval from DOLI with respect to connections to city water and sewer that occurred *outside* the property lines of the premises, and that Mr. Dalzell misunderstood what he was told. It appears that this unfortunate misunderstanding by Mr. Dalzell of the information conveyed by Mr. Frain led to his sincere but mistaken belief that the plumbing work at issue here could be completed before the submission and review of the plumbing plans, and ultimately led to a situation in which Delzer Construction performed plumbing work inside the property lines of the church without first submitting and gaining approval of the plumbing plans by the Department.

Although Mr. Frain frankly acknowledged that he had no specific recollection of his conversation with Mr. Dalzell in May of 2008, he credibly testified that he would never have advised Mr. Dalzell that the contractor could go forward with installing water and sewer lines to the church itself prior to submission of plans. By May of 2008, Mr. Frain had worked as a Plumbing Plan Reviewer with either the Department of Health or DOLI for approximately nine years. In light of his extensive experience with the rule requiring plan review, he was well aware that plans had to be submitted and approved by DOLI with respect to not only the interior plumbing, but all of the plumbing work within the property lines of the premises.

In contrast, Mr. Dalzell is not licensed in Minnesota and admitted that he did not have an exhaustive understanding of the requirements of the Minnesota Plumbing Code. In fact, as evidenced by his initial submission of plans on May 23, 2008, he believed that only the plumbing in the interior of the building required DOLI plan approval. While Mr. Dalzell testified that he believed that Mr. Frain did make a distinction during their conversation between plumbing inside the building and plumbing outside the building (rather than the distinction between plumbing inside the property lines of the premises and plumbing outside the property lines that is required by the rules), Mr. Dalzell did not take notes at or near the time the conversation occurred. In fact, he admitted that he did not write the notes that formed the basis of his testimony until the day of the hearing, more than eight months after the conversation occurred.

There is no dispute that the plans in the present case were not submitted until after the plumbing work was completed. Mr. Frain and Mr. Peterson both

provided convincing testimony that those in the plan review department of DOLI would not verbally approve plans in situations where the plans have not even been received by DOLI. Mr. Christopherson's testimony that Mr. Topp (one of DOLI's regional plumbing inspectors) allowed him to submit plans for approval after commencing work on a different project several years ago, without pursuing an enforcement action, is of limited relevance here because Mr. Topp is not a plan reviewer for the Department.

The Administrative Law Judge agrees that a violation of Minn. Rules part 4715.3130 occurred when the plumbing work was performed within the property lines before the plumbing plans were submitted to DOLI and approval was received. It is appropriate to hold Delzer Construction accountable for the violation since, as the entity that installed the plumbing, it ultimately bears the responsibility to ensure that the plans had been submitted and appropriate approval had been obtained. DOLI was guided by the Enforcement Plan previously issued by the Department of Health with respect to violations of the Plumbing Code, and provided evidence that all of the factors required by statute were considered in issuing the Administrative Order and monetary penalty.⁴⁹

Under the Enforcement Plan, the Department is to consider "both the extent of the potential for harm from the violation and the deviation from compliance with the rule or statute violated by a regulated party."⁵⁰ The Enforcement Plan authorizes issuance of a nonforgivable administrative penalty for repeated or serious violations, and it indicates that serious violations "include conduct showing disregard of requirements or standards, or violations that present an actual or potential danger to public health or natural resources."⁵¹ The Enforcement Plan expressly includes the "failure to secure plan approval prior to commencement of an activity" as one of the types of violations that "Division regulatory programs are likely to consider . . . serious."⁵² Accordingly, it appears that DOLI's determination that the violation in the current case was serious and warranted imposition of a nonforgivable penalty was in accordance with the Enforcement Plan and must be assumed to be reasonable.

However, the Administrative Law Judge finds that the Department's determination in this case that the deviation from compliance was severe and the potential for harm was moderate to be unreasonable and not in accordance with the Enforcement Plan. The Plan provides the following guidance for applying these factors:

⁴⁹ There is no evidence that DOLI has formally adopted the Enforcement Plan previously issued by the Department of Health. Minn. Stat. § 326B.082, subd. 14, authorizes the Commissioner of DOLI to "prepare a plan for assessing penalties" in Administrative Orders after providing a 30-day period for public comment on the plan. The statute goes on to state that "[p]enalties assessed by the commissioner in accordance with the plan shall be presumed reasonable." Similar authority was given to the Department of Health under Minn. Stat. § 144.99, subd. 7, but that statute does not include the presumption of reasonableness.

⁵⁰ Exhibit 4 at 11.

⁵¹ Exhibit 4 at 14-15; see also Appendix A at A-7, Appendix B at B-2, and Appendix C at 2.

⁵² Exhibit 4 at 15; see also Appendix A at A-7; Appendix B at B-2; and Appendix C at 2.

When calculating the potential for harm to humans, animals, air, water, land, or other natural resources of the state, you should consider the risk of actual harm caused by the violation. Because many division laws and regulations are preventive in nature, the focus is on potential for harm and not on actual harm. Where you observe actual harm from a violation, the potential for harm has been realized and the rating may reflect this fact.

When calculating deviation from compliance, you should consider the quantity or extent of the violation, i.e., how much, how far.

It is evident that Delzer Construction was aware of the Plumbing Code requirements with respect to the submission and approval of plans, did not intend to violate those requirements, and went forward in good faith with the plumbing installation after being told by the general contractor, Curtis Construction, that the plans had been submitted and, at a minimum, oral approval had been obtained. Upon completion of the plumbing installation, the work remained exposed for some length of time, and Delzer promptly called for an inspection by Mr. Topp, the DOLI plumbing inspector. There is no evidence that Delzer installed any improper materials or employed any deficient methods, and the plans were ultimately approved. Under these circumstances, it appears that the deviation from compliance should be reduced to “moderate” and the potential for harm should be reduced to “minor.” Under the matrix set forth in the Enforcement Plan, the appropriate penalty range for a minor potential for harm and a moderate deviation from compliance is \$200 to \$1,000.

Moreover, the information set forth on the DOLI website with respect to Plumbing Enforcement Actions taken between January 1, 2008, and July 31, 2008, suggests that a \$1,000 nonforgivable fine is typically ordered for a failure to submit plans, which is the only violation alleged and substantiated here.⁵³ Because the information on the DOLI website is sketchy and does not provide many details about the alleged violations in those cases, it is not possible to assess the similarity between the current case and those cases. The Administrative Law Judge recommends that the Commissioner review these

⁵³ According to the website, DOLI imposed \$1,000 nonforgivable fines for failure to submit plans on Green's Plumbing and Hank's Heating on Feb. 8, 2008; Berg Plumbing, Inc. and Hanson's Plumbing & Heating on Feb. 12, 2008; and Ness Backhoe Service on March 11, 2008. In addition, a \$1,000 nonforgivable fine was ordered against Blue Creek Trading on March 4, 2008, for failure to submit plans and call for inspection; a \$1,000 nonforgivable fine was ordered against Rich's Plumbing and Heating on May 15, 2008, for plans not submitted, but work stopped. Situations in which higher penalties were ordered apparently involved additional violations beyond the failure to submit plans: a \$2,000 nonforgivable fine and \$4,000 forgivable fine was ordered against DeFrance Plumbing & Heating on March 11, 2008, for plans not submitted and inspections not requested; a \$1,500 nonforgivable fine and a \$2,500 forgivable fine was ordered against Thomas Gergen on April 17, 2008, for no bond, no plans (subsequently approved), and corrections; and a \$1,000 nonforgivable fine and a \$5,000 forgivable fine was ordered against Neil Lown on May 13, 2008, for work done prior to plan submittal, no inspections, and corrections.

actions and consider whether the amount of the penalty should be reduced to be consistent with other recent penalties imposed in similar cases.

B. L. N.