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STATE OF RHODE ISLAND
DEPARTMENT OF BUSINESS REGULATION
CONTRACTORS' REGISTRATION AND LICENSING BOARD
560 JEFFERSON BOULEVARD, SUITE 200
WARWICK, R.I. 02886

In the Matter of:

Bert Smith a/k/a Bertie Smith
d/b/a ACS Construction,

Respondent.

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CRLB 23-373

DECISION

I. INTRODUCTION

This matter arose pursuant to a Notice of Hearing (“Notice”) issued on September 4, 2024 by the Department of Business Regulation Contractors’ Registration and Licensing Board (“Department” or “Board”) to Bert Smith a/k/a Bertie Smith d/b/a ACS Construction (“Respondent”). The Respondent was previously registered as a contractor pursuant to R.I. Gen. Laws § 5-61-1 *et seq.* but his registration expired on September 1, 2021. However, the Board still has jurisdiction in disciplinary proceedings over the Respondent pursuant to R.I. Gen. Laws § 5-65-10(a)(10).¹ A hearing was scheduled for October 22, 2024 at which time the Respondent did not appear. Pursuant to R.I. Gen. Law § 5-65-6 and § 1.15.1 of 440-RICR-10-00-1 *General Rules and Regulations for Applications, Registration, Licensing, Claims, Violations, and Administrative Hearings* (“Regulation”), service may be made by first-class mail or certified mail and service is complete upon mailing when sent to the last known address of the party. In this matter, the Notice

¹ R.I. Gen. Laws § 5-65-10(a)(10) provides in part, “[t]he board may take disciplinary action against a contractor who performed work, or arranged to perform work, while the registration was suspended, invalidated, or revoked.”

was sent to the Respondent's last known address by first class and certified mail and by email.² Since the Respondent was adequately noticed of hearing, a hearing was held before the mail undersigned on October 22, 2024.³ Additionally, § 1.17 of the Regulation⁴ provides that a default judgment may be entered based on pleadings and/or evidence submitted at hearing by a non-defaulting party. The Board was represented by counsel who rested on the record.

II. JURISDICTION

The administrative hearing was held pursuant to R.I. Gen. Laws § 42-14-1 *et seq.*, R.I. Gen. Laws § 5-65-1 *et seq.*, R.I. Gen. Laws § 42-35-1 *et seq.*, and 440-RICR-10-00-1 *General Rules and Regulations for Applications, Registration, Licensing, Claims, Violations, and Administrative Hearings*.

III. ISSUE

Whether the Respondent violated R.I. Gen. Laws § 5-65-1 *et seq.*, and if so, what should be the sanction(s).

² The September 4, 2024 Notice was sent by certified and first class mail and email to the Respondent's addresses on record with the Department. Department's Exhibit One (1) (Notice, certified mail receipts, United States Post Office tracking sheet showing one (1) Notice sent by certified mail was returned to sender but the other certified mail Notice was delivered to Respondent). A prehearing conference was held on September 26, 2024 at which time the Respondent did not appear. A full hearing was scheduled for October 22, 2022 and notice was sent by letter dated September 26, 2024 by certified and first class mail and email to the Respondent. Department's Exhibits Two (2) (September 26, 2024 letter with hearing date, certified mail receipts, United States Post Office tracking sheet showing both certified mail notices delivered to Respondent); and Three (3) (Respondent's registration record with mailing addresses and email address).

³ The undersigned hearing officer heard this matter pursuant to R.I. Gen. Laws § 5-65-12.

⁴ Section 1.17 of the Regulation provides as follows:

If any Party to a proceeding fails to answer a complaint, plead, appear at a prehearing conference or hearing or otherwise fails to prosecute or defend an action as provided by these Rules, the Hearing Officer or Board may enter a default judgment against the defaulting Party or take such action based on the pleadings and/or other evidence submitted by the non-defaulting Party as the forum deems appropriate. Challenge to such an order shall be made as a motion for reconsideration per § 1.15.6 of this Part.

IV. MATERIAL FACTS

Based on the pleadings and exhibits entered at hearing, it is undisputed as follows: The Respondent entered in an agreement on or about February 27, 2023 with a homeowner in Westerly who was over 60 years to perform roofing services. The Respondent was not registered as a contractor and the type of work to be performed required registration as a contractor. The Respondent accepted a deposit in the amount of \$3,000 from the homeowner. The Respondent accepted the deposit but failed to perform any work on the project for which he contracted to perform. The Respondent did not include a mechanic's lien on the contract and did not include the statutory right of rescission for people over 60 years old. The Respondent's contract referred to his license number. Department's Exhibits One (1) (Notice); Five (5) (Board inspection report); Six (6) (contract between homeowner and Respondent); Seven (7) (copy of homeowner's deposit check); and Eight (8) (complaint filed).

V. DISCUSSION

A. **Legislative Intent**

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM*, 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous

language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134 (R.I. 1998).

B. Standard of Review for an Administrative Hearing

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 (2002). Unless otherwise specified, a preponderance of the evidence is generally required to prevail. *Id.* See *Lyons v. R.I. Pub. Employees Council 94*, 559 A.2d 130 (R.I. 1989) (preponderance standard is the “normal” standard in civil cases). This means that for each element to be proven, the factfinder must believe that the facts asserted by the proponent are more probably true than false. *Id.* When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87 (R.I. 2006).

C. Relevant Statutes

R.I. Gen. Laws § 5-65-10 provides in part as follows:

(a) The board or office may revoke, suspend, or refuse to issue, reinstate, or reissue a certificate of registration if the board or office determines, after notice and opportunity for a hearing:

(10) The board may take disciplinary action against a contractor who performed work, or arranged to perform work, while the registration was suspended, invalidated, or revoked. Deposits received by a contractor and ordered returned are not considered a monetary award when no services or supplies have been received.

(13) That the contractor has advertised with a license number when only registered.

(14) That the registrant has failed to complete a project(s) for construction or willfully failed to comply with the terms of a contract or written warranty.

(15) That the registrant has misrepresented his or her registration status as valid when the registration was suspended, revoked, invalidated, inactive, or unregistered as required by the board.

(b) Subject to providing notice and an opportunity for a hearing, in addition to all other remedies, when the board or office has reason to believe that a person has engaged in, or is engaging in, any act, practice, or transaction that violates the provisions of this chapter or the regulations promulgated thereunder, the board or office may order such person to cease and desist from the violation or request the attorney general to apply to the court for an injunction restraining the person from violating the provisions of this chapter. ***

(c) Subject to providing notice and an opportunity for a hearing:

(1) For each first violation of a particular section of this chapter or any rule or regulation promulgated by the board, a fine not to exceed five thousand dollars (\$5,000) may be imposed. *** Fines for violations may be imposed against registered contractors, as well as those persons required to be registered, by the board.

R.I. Gen. Laws § 5-65-3 provides in part as follows:

*** Duties of contractors ***

(o) All work performed, including labor and materials, in excess of one thousand dollars (\$1,000) shall be accompanied by a contract in writing. Contracts required pursuant to this subsection shall include consumer disclosures and information required pursuant to regulations promulgated by the board and the following notice by the contractor to the homeowner:

NOTICE OF POSSIBLE MECHANIC'S LIEN
[the required notice is then set forth in the statute]

(p) Contracts entered into must contain notice of right of rescission as stipulated in all pertinent Rhode Island consumer protection laws and/or § 5-65-27, if applicable.

R.I. Gen. Laws § 5-65-27 provides in part as follows:

Elderly person⁵ in-home solicitation — Right to cancel.

(b) In addition to all other methods of consumer protection provided by federal or state law, any contract that originates from an in-home solicitation of an elderly person for the purposes of performing work as a contractor pursuant to this chapter, as well as other disciplines governed by the board pursuant to statutory law, shall provide that any consumer who is an elderly person shall, in the absence of an emergency as defined herein, have three (3) days within which to cancel the in-home solicitation contract for contractor services.

(c) The contractor shall, at the time of the agreement in accordance with § 5-65-3, give notice to the elderly person of all the rights that substantially comply with this section. The notice must:

[statute then sets forth required language]

⁵ R.I. Gen. Laws § 5-65-27(a) refers to the definition of elderly person in R.I. Gen. Laws § 42-66-4.1 which is 60 years of age or older.

D. Whether the Respondent violated R.I. Gen. Laws § 5-65-10

It was undisputed that the Respondent did not perform the work for which he entered in a contract with said homeowner and did not return the homeowner's deposit. It is undisputed the Respondent is not registered as a contractor in Rhode Island. It is undisputed the Respondent failed to start or complete the project and misrepresented his registration status to the homeowner. It was undisputed that the Respondent referred to his license number on the contract and did not include the mechanic's lien and right of rescission on the contract as required by statute. Therefore, the Respondent violated R.I. Gen. Laws § 5-65-10(a)(10) (failed to return deposit); (13) (referred to a license); (14) (failed to complete project); and (15) (misrepresented registration status). The Respondent also violated R.I. Gen. Laws § 5-65-3(o) (failure to include mechanic's lien) and R.I. Gen. Laws § 5-65-27 and R.I. Gen. Laws § 5-65-10(p) (failure to include right of rescission)

E. Sanctions

The Board requested that a cease and desist order be entered against the Respondent and that he be ordered to return the homeowner's deposit. R.I. Gen. Laws § 5-65-10(c) provides for penalties up to \$5,000 for first offences. The Board requested that any administrative penalty imposed on the Respondent be left to the undersigned's discretion.

Pursuant to R.I. Gen. Laws § 5-65-10(a)(10), the Respondent is ordered to return the homeowner's deposit of \$3,000. Pursuant to R.I. Gen. Laws § 5-65-10(b), the Respondent is ordered to cease and desist from violating R.I. Gen. Laws § 5-65-1 *et seq.* so that he shall not engage in work that requires registration under said statute. The evidence before the undersigned is this is the Respondent's first offense. Thus, the Respondent is ordered to pay administrative penalties of \$3,000 for failing to complete the project and misrepresenting his registration status

(\$1,500 for each violation) and \$750 for failing to include the right of rescission and the mechanic's lien and referring to a license rather than a registration (\$250 for each violation).

VI. FINDINGS OF FACT

Based on the foregoing, the undersigned makes the following findings of fact:

1. The Notice was issued on September 4, 2024 to the Respondent.
2. A hearing was scheduled for October 22, 2024 at which time the Respondent did not appear. As the Respondent was adequately notified, the hearing was held with the Board resting on the record.
3. The Respondent entered into an agreement on or about February 27, 2023 with said homeowner to perform work and took a deposit of \$3,000 and did not perform the work and has not returned the deposit to said homeowner.
4. The Respondent is not registered as a contractor, and the work for which he contracted to perform required registration as a contractor.
5. Pursuant to § 1.17 of the Regulation, the Respondent is declared to be in default for failing to appear at the hearing.
6. The facts contained in Sections I, IV, and V are incorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the foregoing, pursuant to R.I. Gen. Laws § 5-65-10(a)(10), the Respondent is ordered to return the deposit of \$3,000 to said homeowner and confirm the same with the Board within 20 days of the date of this decision.

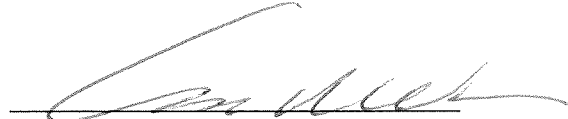
Pursuant to R.I. Gen. Laws § 5-65-10(b), the Respondent is ordered to cease and desist from violating R.I. Gen. Laws § 5-65-1 *et seq.* so that he shall not engage in work that requires registration under said statute.

Pursuant to R.I. Gen. Laws § 5-65-10(a)(c), a total administrative penalty of \$3,750.00 is imposed on the Respondent for violating R.I. Gen. Laws § 5-65-10(a)(13); (14); and (15) and R.I. Gen. Laws § 5-65-3 and R.I. Gen. Laws § 5-65-27 and R.I. Gen. Laws § 5-65-10(p).

The administrative penalty is due 20 days from the execution of this decision.⁶

Issued by R.I. Contractors' Registration and Licensing Board.

Entered: November 7, 2024


Catherine R. Warren
Hearing Officer

NOTICE OF APPELLATE RIGHTS

Pursuant to R.I. Gen. Laws § 5-65-20 and § 1.13.2 of the Regulation, this decision may be appealed to the full Board by requesting an appeal in writing to the Contractors' Registration and Licensing Board within twenty (20) days of the date of mailing or issuance of this decision.

Any appeal shall give the specific reasons why a party believes that the findings of the hearing officer are incorrect, based on testimony or evidence received at the hearing. No new testimony or evidence will be accepted. The Board does not rehear any issues but can only accept argument as to why a wrong decision may have been reached in this case. If an appeal is filed, the parties will be notified of the date, time, and location of the Board's meeting. Either party may appear before the Board to give oral argument. Failure of either party to appear before the Board may result in an adverse decision against the party. If no appeal is filed, payment of the administrative penalties is due within 20 days as stated above.

⁶ Payment should be made to Contractors' Registration and Licensing Board at the above address.

CERTIFICATION

I hereby certify on this 17th day of November, 2024 that a copy of the within Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid and certified mail, return receipt requested to:

Mr. Bert Smith
315B Church Street
Wood River Junction, R.I. 02894

ACS Construction
ATTN: Bert Smith
354 Church Street
Wood River Junction, R.I. 02894

and by electronic delivery to:

bertsmith7968@gmail.com (Respondent)
bertsmith7969@gmail.com (Respondent)
James Cambio, Building Code Commissioner (james.cambio@dbr.ri.gov)
Donna Costantino, Associate Director (donna.constantino@dbr.ri.gov)
Matthew Lambert, Principal State Building Code Officer (matthew.lambert@dbr.ri.gov)
Christina Santos, Administrator Management (christina.santos@dbr.ri.gov)
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Theresa L. Kaplan