

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
BUILDING CODES DIVISION**

IN THE MATTER OF:

SCOTT MCNAMARA

) **PROPOSED ORDER**

)

) OAH Case Nos.: 1303270 & 1303271

) Agency Case Nos.: 2013-0065 & 2013-0083

HISTORY OF THE CASE

On April 8, 2013, the Building Codes Division (BCD) issued a Notice of Application Denial and Notice of Proposed License Suspension to Scott McNamara. On April 24, 2013, Mr. McNamara requested a hearing. On May 10, 2013, the BCD referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Christopher Dorr was assigned to preside at hearing. ALJ Dorr convened a prehearing conference on August 5, 2013, to discuss the issues for hearing and explain the hearing process and procedures. The BCD appeared for the prehearing conference. Mr. McNamara did not appear for the prehearing conference. A hearing was scheduled for September 13, 2013. On September 5, 2013, BCD requested the hearing be postponed. ALJ Dorr granted the postponement. The hearing was reset for December 17, 2013.

ALJ Dorr convened a telephone hearing on December 17, 2013. Mr. McNamara appeared without counsel and testified. Katharine Lozano, Assistant Attorney General, appeared as representative for the BCD. Andrea Simmons testified for the BCD. Aeron Teverbaugh appeared only as an observer for the BCD, and did not testify. The record closed at the conclusion of the hearing.

ISSUES

1. Whether the BCD may deny Mr. McNamara's application for a limited residential electrician license. Oregon Revised Statute (ORS) 455.129.
2. Whether the BCD may suspend Mr. McNamara's limited residential electrician license. ORS 455.129.

EVIDENTIARY RULINGS

BCD Exhibits A1 through A6 were admitted into evidence without objection.

FINDINGS OF FACT

1. On April 24, 2009, the BCD issued a Notice of Proposed Assessment of Civil Penalty and Notice of Intent to Suspend Mr. McNamara's limited residential electrician license. On July 24, 2009, Mr. McNamara failed to appear for a hearing to challenge the notices in OAH Case No. 90165 (BCD Case No. 2008-0271). On September 15, 2009, the BCD issued a Final Order upon Default, assessing civil penalties against Mr. McNamara totaling \$22,500, and suspending his limited residential electrician license (Lic. No. 706LR) for four years, commencing on that same date. (Ex. A2; test. of Simmons.)

2. On March 28, 2013, Mr. McNamara submitted an application to the BCD seeking a limited residential electrician license with a letter requesting that he be allowed to sit for the residential journeyman electrician test prior to the end of his license suspension (September 15, 2013). (Ex. A3.)

3. Between September 15, 2009 and March 3, 2010, Mr. McNamara made no payments on his civil penalty. On March 3, 2010, the BCD turned over Mr. McNamara's unpaid civil penalty account totaling \$22,500 to the Department of Consumer and Business Services (DCBS) collections department. Between March 3, 2010 and April 1, 2012, Mr. McNamara's account accrued interest of \$4,388.48 on the unpaid balance of \$22,500. On April 1, 2012, Mr. McNamara's delinquent account was turned over to outside collection agency CTI, which assessed a fee of \$6,573.68, pursuant to its contract with DCBS. Between April 2, 2012 and August 27, 2013, interest totaling \$3,059.97 accrued on Mr. McNamara's delinquent account. As of August 27, 2013, the total outstanding balance was \$36,522.13. As of the date of this hearing, Mr. McNamara has made no payment on his delinquent account. (Ex. A5 at 1-2; test. of Simmons, McNamara.)

CONCLUSIONS OF LAW

1. The BCD may deny Mr. McNamara's application for a limited residential electrician license.
2. The BCD may suspend Mr. McNamara's limited residential electrician license.

OPINION

Mr. McNamara challenges the BCD's denial of his application for a limited residential electrician license while his current license was suspended. Mr. McNamara also challenges the BCD's decision proposing an additional suspension of his license, the current suspension of which was due to end on September 15, 2013. Mr. McNamara does not dispute that he has paid nothing towards his outstanding civil penalty. Mr. McNamara requested this hearing only to have his account returned to the BCD where he would like to make arrangements to pay his outstanding penalty.

At the hearing, Mr. McNamara acknowledged his previous wrongdoing and expressed his desire to resolve the outstanding civil penalty. Mr. McNamara estimated he would be able to pay the outstanding penalty in four years, if he were allowed to return to work as an electrician.

Whether such an arrangement is allowed or can be made is not an issue before the ALJ in this hearing. The only issues before the ALJ are whether the Department may deny Mr. McNamara's license application and whether it may suspend Mr. McNamara's license for non-payment of a civil penalty.

ORS 183.450(2) provides "[t]he burden of presenting evidence to support a fact or position in a contested case resets on the proponent of the factor or position." In *Harris v. SAIF*, 292 Or 683 (1982) the court held that burden of proof generally falls on the proponent of a fact or position. In *Metcalfe v. AFSD*, 65 Or App 761, 765(1983), the court held that in the absence of legislation specifying a different standard, the standard of proof in administrative hearings is preponderance of the evidence. Mr. McNamara bears the burden of establishing by a preponderance of the evidence that he is eligible for the license he applied for. The BCD bears the burden of establishing by a preponderance of the evidence that it may suspend Mr. McNamara's license. BCD met its burden; Mr. McNamara did not.

ORS 411.129(1) provides in relevant part:

Subject to ORS chapter 183, except as provided in subsection (4) of this section, a regulatory body listed in subsection (2) of this section may deny a license, certificate, registration or application or may suspend, revoke, condition or refuse to renew a license, certificate or registration if the regulatory body finds that the licensee, certificate holder, registrant or applicant:

* * * * *

(b) Has failed to comply with an order of the regulatory body or the Director of the Department of Consumer and Business Services, including but not limited to the failure to pay a civil penalty.

Mr. McNamara concedes that he has paid nothing on the \$22,500 civil penalty imposed in September 2009, which, as of August 27, 2013, had grown with interest and fees to \$36,522.13. ORS 455.129 provides authority to deny Mr. McNamara's license application and suspend his license for failure to pay a civil penalty.

ORDER

I propose the Building Codes Division issue the following order:

The April 28, 2013 Notice of Application Denial and Notice of Proposed License Suspension are **AFFIRMED**.

Christopher Dorr

Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

This is the Administrative Law Judge's Proposed Order. You have the right to file written exceptions and argument to be considered per OAR 137-003-0650. Your exceptions and argument must be received within 20 calendar days after the service date of this Proposed Order. Send them to:

Building Codes Division
Manager, Policy and Technical Services
PO Box 14470
Salem, OR 97309-0404

CERTIFICATE OF MAILING

On December 23, 2013, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 1303270 and 1303271.

By: First Class Mail

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