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**BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS' STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Citation Against:

SHAWN MICHAEL SAGE
9555 Buttercup Way
Elk Grove, California 95624

Case No. 620053266
OAH No. N2007040526

**PRECEDENTIAL
DECISION No. /**


Respondent.

PRECEDENTIAL DECISION
(Government Code section 11425.60(b))

The Contractors' State License Board hereby designates as precedential the Decision, in its entirety, in the matter of the Citation against Shawn Michael Sage, Citation No. 620053266.

This precedential designation shall be effective April 24, 2008.

DATED April 24, 2008



Stephen P. Sands
Registrar of Contractors

BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS' STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Citation
Against:

Shawn Michael Sage
9555 Buttercup Way
Elk Grove, CA. 95624

License No.

CASE MANAGEMENT
Citation No. 6 2005 3266

CAII NO. N-2007040526

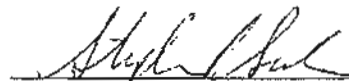
DECISION

The attached Proposed Decision of the Administrative Law judge is hereby adopted by the Registrar of Contractors as his Decision in the above-entitled matter.

Based on this Decision, the Citation as originally written shall become final effective on the 11th day of FEBRUARY, 2008.

The civil penalty assessment shall become a final order of the Registrar on the effective date of this Decision; payment of the \$2,000.00 civil penalty is due on or before 1/10, 2008.

IT IS SO ORDERED this 11th day of DECEMBER, 2008



Stephen P. Sands
Registrar of Contractors

BEFORE THE
REGISTRAR OF THE CONTRACTORS' STATE LICENSING BOARD
STATE OF CALIFORNIA

In the Matter of the Citation
Against:

SHAWN MICHAEL SAGE
Elk Grove, CA 95624

Respondent.

Case No. 620053266

OAH No. N2007040526

PROPOSED DECISION

Gary A. Geren, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 21, 2007, in Sacramento, California.

Leslie A. Burgermyer, Deputy Attorney General, represented complainant, the Registrar of the Contractors State Licensing Board, Department of Consumer Affairs, State of California (Board).

Michael W. Thomas, Attorney at Law, represented Shawn Michael Sage, respondent.

The record was held open until October 5, 2007, for the submission of closing briefs; both parties' briefs were filed on October 5, 2007. Respondent's brief was marked for identification as Exhibit J; the Board's brief was marked for identification as Exhibit 12. The matter was thereafter submitted.

FACTUAL FINDINGS

The citation

1. On June 20, 2006, the Board issued citation number 6 2005 18948 to respondent Shawn Michael Sage. On August 3, 2006, the Board changed the citation number to 6 2005 3266 and modified the issuance date for the citation from June 20, 2006, to August 2, 2006. (The Board used an erroneous citation number when it first issued the citation; it corrected its error with the modification).

The Board cited respondent for contracting without a license (Business and Professions Code section 7028.7) and illegal advertisement (Business and Professions Code section 7027.1). A civil penalty of \$1000 was imposed for each violation, for a total of \$2000. The Board ordered respondent to abate from engaging in all activities requiring a valid contractor's license until such time as he obtained one. It is undisputed that respondent has never possessed a contractor's license.

On June 26, 2006, respondent requested a hearing on the citation.

The "sting operation"

2. Respondent was cited following his involvement in a "sting operation" conducted by the Board. In June 2004 the Board, acting through its Statewide Investigative Fraud Team (SWIFT), initiated the undercover operation. The purpose of the operation is defined as follows:

Due to the rise of owner/builder permits being pulled for the installation/construction of swimming pools and individuals calling themselves swimming pool consultants/designers who coach homeowners through the process of pool construction, the Contractors' State License Board, Statewide Investigative Fraud Team conducted a two-phase undercover sting operation on June 29, 2004, and July 14, 2004. The operation took place at a residence, under construction, located at 117 Crane Meadow Court, Roseville, California. Investigators contacted various individuals acting as swimming pool consultants/designers from leads provided by confidential informants to determine if they are acting in the capacity of a C- 53, swimming pool contractor pursuant to Business and Professions Code, sections 7026, 7026.1 (b), and Contractors State License Board Rules and Regulations, Article 3, section 832.53-- Swimming Pool Contractor.

3. Respondent was contacted by undercover investigators by telephone. Various telephone messages were left between respondent and the SWIFT undercover investigators. The investigators, J.J. Miller and Linda Rodriguez, posed as a husband and wife who lived in the Bay Area. They informed respondent that they were interested in having a swimming pool and spa constructed at a new home that they purchased in Roseville.

On July 14, 2004, at approximately 10:00 a.m., respondent met the SWIFT investigators at the location described in Finding 2.

4. Respondent arrived at the site of the operation with a pool design prepared. Respondent explained to the investigators the details of the design drawing, the square footage of the pool, the location of the pool's "swim out" and spa, the site where the pool was to be placed, as well as the location of the pool equipment. Respondent told the investigators that changes to the initial design could be made later. The investigators told

respondent that because they lived in the Bay Area, they did not know how much time they could spend on overseeing the construction of the pool.

5. Respondent provided the investigators with his business card which states:

**SAGE POOL BUILDERS
"THE WISE CHOICE"**

**SHAWN SAGE
OWNER**

**9555 BUTTERCUP WAY
ELK GROVE, CA 95624**

PHONE: (916) 479-3988

FAX: (916) 686-5226

WWW.SAGEPOOLBUILDERS.COM

Respondent's business card did not include the admonition "not a licensed contractor;" the Board contends this omission was a violation of Business and Professions Code, section 7027.2.

The transcript of the "sting operation"

6. The "sting operation" was surreptitiously recorded by the SWIFT investigators. A transcript of the recording was made and introduced into the record.¹ The relevant parts of the transcript are summarized below:

Respondent provided the contractors

7. Respondent told the investigators that he would:

"...finish all this designing, all this inspecting, get it all engineered...I'm going to quote out the contract as to each stage of the process, the same guys I use for every pool...I'm going to get you all the quotes and everything for them."

Respondent agreed to schedule the work and oversee the project

8. Respondent agreed to provide the "homeowners" with a schedule for the sequencing of the various phases of the pool's construction, and a list of contractors who could do the work. Respondent was to provide the "homeowners" Release of Lien Forms,

¹ Several sections of the transcript indicate that portions were "inaudible." There was conflicting testimony at hearing regarding about what was actually said during the conversation that the transcript noted as "inaudible." Where necessary, findings as to what more than likely was said have been made. Generally, the authenticity and accuracy of the transcript are not in dispute.

following each contractor's completion of their phase of the project. Respondent would instruct the "homeowners" how to complete the forms.

Respondent stated:

"The other packet I give you is going to have like a blueprint, kind of a step-by-step of who comes in at what time, how much you wait and I'll show you how to schedule those guys...you'll call them and schedule them in. I'm going to put the whole package together, do all the grunt work, and you're going to make the phone calls. They're all gonna have your plans, they're all gonna know what to do, where they're going, all the measurements, everything. They are just going, all you say is okay, okay. start with the [dig] guy, he'll come in, dig a hole, finishes up, he comes and tells you 'I'm done,' I have you get him to sign a contract saying he's been paid, he releases everything, and then the next guy comes in, and I set out a schedule of guys in about three at a time."

Respondent described his services as follows:

"You're paying me for getting all of the designing, all the specs and all the engineering done, getting all your quotes from the contractors" and "basically putting you through the whole process, putting all this together...I quote it out to everyone...I am getting them [the quotes]...for you. When I, when I bring it to you, you'll have everybody's exact quote with their license numbers...I'll come back and give you that packet along with two or three quotes from these contractors...so you'll have their quotes. It's like I mean I passed on the fact that I have a relationship with these guys, I mean if you call somebody to [inaudible] your pool and they might charge, uh, \$7,000...when you go through me you get it for \$6,000. You get the benefit of [respondent's on-going relationship with the contractors]."

Respondent told the investigators:

"I have 16 pools right now on the go, our goal is to do 42 pools this year and we will probably get 60..."

Respondent vouched for the competency of his contractors

9. Respondent stated:

"...these [contractors] are about the best of the best...other guys can do this stuff and other guys want to dig and do stuff for me. They would be cheap, I could get pools in cheaper, but they're not good. A lot of these guys are

friends, and that's how I started in, with this whole business and doing it this way "

Respondent also said:

"...my guys all been doing this about 15, 20 years so they're kind of, you know, the last thing they want to hear is somebody saying, 'I'm calling the State Board.'"

Respondent provided the "homeowners" a quote for the cost of building their pool:

10. Respondent stated:

"You'll pay me, on this pool here with everything, all your equipment, all the decking, everything, \$47,300. That's the top price it's going to cost you, all of your equipment."

Investigator Miller asked respondent:

"But do we have a quote, do we have any idea how much it's going to cost?"

Respondent replied:

"\$47,300 including all equipment, everything start to finish. The only thing you'll pay for a beyond that is for your permit...My fees are \$5,000 which are included in that price...you'll pay me once you say, 'yes, I want to go ahead' we'll sign up an agreement, you pay me half then, and then once I give you everything and get you going, you pay me the second half...and then I'm your support guy. You'll be calling, cause in the first two or three stages you will be calling [asking] 'now who, what'... and it goes that way with everyone and by the time they get the [inaudible] going in, people [inaudible] are just flying with it."

Later, Investigator Rodriguez asked:

"How does that work?"

Respondent replied:

"I give you everything. You'll walk in with this packet to the city and say 'I need a permit for a pool, I'm building my own pool.'"

Investigator Rodriguez then stated:

"We're not building our own pool."

Respondent replied,

"Well you are, you are in a way."

Investigator Miller asked:

"And, if we have a problem who do we call? Do we call you?"

Respondent answered:

"You'll call me, but you need to be able to call someone [inaudible]... Yeah. You would call me if there was a problem and I'll hook up but I mean if they, what are you saying by fault, like not showing up, or doing something wrong or...cause if they don't show up, that doesn't happen."

Respondent agreed to provide direction, control, and supervision over the construction phases of the pool project

11. Investigator Miller asked:

"Do you come out all through the process?"

Respondent answered:

"I, I come out every couple of days..."

Investigator Miller:

"Can you take a little control over supervision and make [inaudible]?"

Respondent replied:

"Yeah."

At hearing, respondent testified that he did not tell the investigators that he would provide supervision, and that the inaudible portion of the tape established that fact. However, respondent made other statements to the investigators expressing his willingness to maintain oversight of the project. For example, respondent stated:

"I'll come out and check up on things and make sure things are flowing..."

Respondent's agreement to provide oversight of the project was also made clear in the following exchange:

Investigator Miller:

"... I know I'm to line them [the contractor's] up, but you'll be out here to check'em out a little bit."

Respondent:

"...you got seven stages, every couple of stage, at minimum I'd come by cause I got (inaudible) show up (inaudible). Before we go to pre-gunnite, which shall have an inspection then, pretty easy, you'll just call a number, punch in your permit number, they show up the next morning. So before pre-gunnite which we can make changes or fix anything before we pour the cement in the walls of the pool.

Investigator Miller:

"You'll check that out?"

Respondent:

"I'll come and check it out (inaudible)."

Investigator Miller:

"And, you call us and say hey we got a fix this or whatever before you call?"

Respondent:

"I'll do that."

Respondent's contract

12. During the sting operation, respondent provided the investigators with a copy of the contract that he enters into with owner-builders. The contract is titled "Sage Pool Builders LLC Design Services Agreement."

"The Designer [respondent] shall assist owner and obtaining bids... shall provide resource material and information to Owner... *and shall provide advice, information and assistance to Owner during the construction phase...*" (Emphasis added.)

Respondent's advertising

13. As set forth in Finding 5, respondent's business card states "Sage Pool Builders." Respondent testified that he is not a "pool builder," but that he is a "designer" and a pool building "coach" or "facilitator." Respondent's business card does not contain the titles "designer," "coach," or "facilitator."

The exemption issue

14. Respondent contends in his closing brief that he was exempted from complying with Contractors' Licensing Laws, because he was to work on the project as a "supervisory employee." The scope of respondent's work, as described in the transcript of the sting operation and respondent's contract, established that he intended to do more than work as a supervisory employee. The "homeowners" represented to respondent during the "sting operation" that that they "knew nothing about pool building." The investigators made clear that they were relying on respondent's superior knowledge regarding pool building. Respondent assured the investigators that he would act as their "support guy."

Key testimony

Investigator Miller

15. Investigator Miller has worked for the Board for approximately 20 years; he has completed "a couple thousand investigations." He has completed hundreds of SWIFT investigations. Investigator Miller is knowledgeable in the laws and regulations governing unlicensed contractors and illegal advertising. Investigator Miller testified with the appropriate manner, demeanor and attitude. He answered the questions asked of him directly and in a calm, forthright manner.

Richard Reed

16. The contrary opinion offered by respondent's retained expert, Richard Reed was less persuasive. Mr. Reed lacked a firm grasp of the salient facts giving rise to this matter. His opinion that respondent did not act as a "consultant" was inconsistent with the evidence entered into the record. For example, Mr. Reed conceded that respondent told the investigators that he would act as the "support guy;" however, he failed to provide convincing testimony explaining how respondent's statement could be interpreted as something other than respondent acting as a consultant. Mr. Reid's testimony is afforded little weight when balanced against the other evidence contained in the record.

Respondent

17. Respondent presented as an intelligent and articulate witness. However, much of his testimony attempted to explain away statements he made during the "sting operation." Respondent testified that his business was to act as a "coach," to homeowner-builders, and

not as a “consultant.” Respondent likened his work to a “How to Book” for homeowners on how to build their own pool. However, did more than provide generic, “how to” information and the transcript, his business card, and his contract, established respondent that respondent organized contractors with whom he had ongoing business relationships, obtained quotes from them, vouched for their integrity and the quality of their work, scheduled the sequencing of their work, and monitored their progress throughout all construction phases. Respondent assured the “homeowners” in the sting operation that he would be their “support guy,” and identified himself as the person whom they could call if problems arose. Accordingly, respondent, at a minimum, agreed to act as a “consultant” to the “homeowners” regarding the purported construction of a swimming pool.

In all material respects, respondent acted as a swimming pool contractor. Respondent testified that he delegated the actual calling of the contractors to perform the work that he had scheduled, that he did not act as a “contractor.” Respondent’s contention is unpersuasive. Respondent’s delegation to the “homeowners” to perform ministerial tasks, such as calling individual contractors to let them know that it is time for their phase of the work to begin, filing the permits with the city, and filling-out the release of Lien Forms, did not change the fact that respondent undertook the majority of the work necessary to see that his “guys” would construct the project, including, obtaining bids from them, scheduling their work, and acting as the “support guy” to the “homeowners” through the completion of the project.

LEGAL CONCLUSIONS

The Board’s authority

1. The Contractors’ State License Law, Business and Professions Code, section 7000 et seq., is intended to “protect the public from incompetence and dishonesty in those who provide building and construction services. [Citation.] The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business.” (*Banis Restaurant Design v. Serrano* (2005) 134 Cal.App.4th 1035, 1042, citing *Hydrotech Systems, Ltd. v. Oasis Waterpark* [Hydrotech] (1991) 52 Cal.3d 988, 995.)

In exercising its licensing, regulatory, and disciplinary functions, the Contractors’ State License Board must place “protection of the public” as its highest priority. “Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.” (Bus. & Prof. Code § 7000.6.) The Legislature’s intention to protect the public from unlicensed contractors is underscored by Business and Professions Code section 7031, which, with extremely narrow exceptions, deprives unlicensed contractors the right to “bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required...” (See: *Hydrotech, supra*,

MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Company, Inc. (2005) 36 Cal. 4th 412.)

2. The Contractors' State Licensing Law requires that any work undertaken for an aggregate contract price of \$500 or more must be performed by a licensed contractor, unless otherwise specifically exempted. (Bus. & Prof. Code, § 7048.)

Contracting without a license

3. The Board is authorized to issue a citation to any person "acting in the capacity of or engaging in the business of a contractor or salesperson within this state without having a license or registration in good standing to so act or engage, and the person is not otherwise exempted from this chapter..." (Bus. & Prof. Code, § 7028.7.) The citation must be in writing and describe the reason for the citation with particularity. Each citation must also contain an order of abatement and an assessment of a civil penalty "in an amount not less than two hundred dollars (\$200) nor more than fifteen thousand dollars (\$15,000)."

4. Business and Professions Code section 7026, defines the term "contractor" very broadly:

"Contractor," is synonymous with "builder" and, within the meaning of this chapter, a contractor is any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith... "Contractor" includes subcontractor and specialty contractor."

Further, under Business and Professions Code section 7026.1, subdivision (b), the term "contractor" includes:

(b) Any person, consultant to an owner-builder, firm, association, organization, partnership, business trust, corporation, or company, who or which undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid, to construct any building or home improvement project, or part thereof.

5. Respondent submitted a bid of \$47,300 to have a swimming pool constructed. The quote was derived from bids he obtained from contractors with whom respondent had an on-going business relationship. Respondent provided the "homeowners" with a schedule for the order of the work necessary to complete the construction of a swimming pool and spa. Respondent agreed to supervise the construction of the work and to act as the "support guy"

for the “homeowners” throughout the various stages of the project. Respondent’s agreement includes provisions that he would provide “advice, information and assistance to Owner during the construction phase.”

The sting operation established that respondent acted as a “consultant” to an owner builder. Since “consultants” are deemed “contractors,” respondent acted as a “contractor,” within the meaning of Business and Professions Code sections 7026 and 7026.1, and was correctly cited by the Board pursuant to citation Business and Professions Code section 7028.7. Respondent was not exempted from complying with the Board’s licensing requirements. (Finding 9 and Conclusions 1-5.)

6. Respondent’s central contention that he merely acted as a “coach,” and not as a “consultant, is unsupported by the governing statute. It is well-established that, in construing a statute, the first task is to ascertain the intent of the Legislature. This is done by looking first to the words of the statute to “give the statute’s words their plain, commonsense meaning.” (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal. 4th 911, 919. The words of the statute are construed in context, and the provision at issue is viewed in the context of the statutory framework as a whole. (*Cummins, Inc., v. Cox* (2005) 36 Cal. 4th 478, 487.) Respondent’s attempt to define his role as a “coach,” as opposed to a “consultant,” was a misguided attempt to elevate semantics above reality.

Illegal advertising

7. Business and Professions Code section 7027.1, subdivision (a), provides that it is a violation for a person to advertise for construction or work of improvement unless he or she is licensed as a contractor. Business and Professions Code section 7027.1, subdivision (b), defines, “advertise” to mean, “the issuance of any card, sign, or device to any person” for construction or work of improvement covered by the Contractors’ State License Law. Business and Professions Code section 7027.1, subdivision (d), authorizes the Board to issue citations for such violations. By virtue of respondent’s business card, he held himself out as a “pool builder.” A “pool builder” must be licensed by the Board. Respondent was not. Accordingly, he engaged in illegal advertising.

Additionally, respondent’s business card did not state that he was not a licensed contractor as is required. This fact provides an additional basis for concluding that respondent engaged in illegal advertising.

The burden of proof

8. In administrative proceedings, as in civil actions, the party asserting the affirmative generally has the burden of proof by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051- 1052.) Once the party bearing the burden of proof has made a prima facie case, the burden shifts to respondent, who has the burden of proof of any affirmative defenses. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156.) Thus, in this case, the Board had the burden of proving that

respondent was both acting as a "contractor" within the meaning of the Contractors' State Licensing Law, and that respondent engaged in illegal advertising. The Board met its burden on each issue.

Based on Findings 1-17 and Conclusions 1-8, the citation and civil penalties were appropriately issued by the Board.

ORDER

The Board's issuance of Citation Number 6 2005 3266 and its imposition of civil penalties totaling \$2000 are AFFIRMED. Respondent shall not engage in activities that requires a State Contractors' Board license.

DATED: October 1, 2007

GARY A. GEREN
Administrative Law Judge
Office of Administrative Hearings

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DATED: October 1, 2007



GARY A. GEREN
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