STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,	)	
Petitioner,	)	
vs.	)	CASE NO. 93-0337
ANTHONY W. RHEA,	)	
Respondent.	)	

RECOMMENDED ORDER

On April 7, 1993, a formal administrative hearing was held in this case in Tampa, Florida, before J. Lawrence Johnston, Hearing Officer, Division of Administrative Hearings.

APPEARANCES

For Petitioner: John S. Koda, Esquire
Office of General Counsel
Department of Agriculture
and Consumer Services
Room 515, Mayo Building
Tallahassee, Florida 32399-0800

For Respondent: Joseph R. Fritz, Esquire
4204 North Nebraska Avenue
Tampa, Florida 33603

STATEMENT OF THE ISSUES

On or about November 18, 1992, the Petitioner, the Department of Agriculture and Consumer Services, filed a five-count Administrative Complaint against the Respondent, Anthony W. Rhea, Dept. of Agriculture Case No. 92-1427, alleging essentially that, on or about July 17, 1991, the Respondent made an inspection of a residential structure for wood-destroying organisms and failed to report visible and accessible evidence of wood-destroying organisms and damage caused by them, in violation of Section 482.226(1) and (2), Fla. Stat. (1991). The Administrative Complaint also alleges that the Respondent used an obsolete report form, in violation of F.A.C. Rule 10D-55.142(2)(c), 1/ and that the Respondent was negligent, in violation of Section 482.161(1)(f), Fla. Stat. (1991).

PRELIMINARY STATEMENT

Through counsel, the Respondent requested a formal administrative proceeding under Section 120.57(1), Fla. Stat. (1991), and the matter was referred to the Division of Administrative Hearings on January 25, 1993. On February 15, 1993, a Notice of Hearing was issued setting the case for final hearing on April 7, 1993.

At final hearing, the Department called two witnesses and had Petitioner's Exhibits 1 through 4 admitted in evidence. The Respondent testified in his own behalf and had Respondent's Exhibit 1 admitted in evidence.

The Department ordered the preparation of a transcript of the final hearing, and the parties were given ten days from the filing of the transcript in which to file proposed recommended orders. The transcript was filed on May 13, 1993.

Only the Department filed a proposed recommended order in the time allotted. Explicit rulings on the proposed findings of fact contained in the Department's proposed recommended order may be found in the attached Appendix to Recommended Order, Case No. 93-0337.

FINDINGS OF FACT

1. The Respondent, Anthony W. Rhea, is an employee of Ace Professional Pest Control, Inc. He is part of the company's inspections sales staff. He has been in the inspection business for 15 years and previously has not been the subject of disciplinary proceedings.

2. On or about July 17, 1991, the Respondent inspected a residence at 501 Poinsettia Road, Belleair, Florida. His report of inspection was made on the May, 1983, HRS Form 1145. 2/ His report of inspection noted that the tub trap and remote attic areas were not inspected because they were inaccessible but that inspection of the rest of the house revealed no visible evidence of wood-destroying organisms, no live wood-destroying organisms, no visible damage, and no visible evidence of previous treatment. The Respondent did not recommend treatment.

3. It is found that, at the time of the Respondent's inspection, there was no live infestation, but there was clearly visible and accessible evidence of: (1) subterranean termites, and the damage caused by them, in the garage above the master bedroom of the house and in the garage rafters; (2) drywood termites in the attic around an old chimney stack; and (3) previous treatment. 3/

4. It is found that the Respondent was negligent in the performance of the inspection and in the completion of the inspection report form.

5. In part in reliance on the Respondent's inspection and report, the current owner bought the house at 501 Poinsettia Road. It has cost him between approximately $7,000 and $8,000 to repair the damage discovered in October, 1991. Liability insurance coverage maintained by the Respondent's employer has paid for the repairs.

6. Neither the insurance company nor the Respondent's employer has agreed to pay for treating the house, or for the removal and replacement of plants and shrubs that will be killed during tent fumigation of the residence, in the event tent fumigation is required. These additional items will cost the homeowner approximately $4,000.

7. The Respondent was not aware of the additional items referred to in the preceding paragraph until hearing the homeowner's testimony at final hearing. He thought the homeowner was satisfied by the insurance benefits that were paid.

8. The HRS October, 1989, Form 1145 became effective October 25, 1990. Active enforcement began on January 1, 1991. The Respondent's company continued to use the obsolete form at least through July 17, 1991, because it incorrectly understood that, when HRS gave it permission to deplete its current stock of WDO inspection/treatment notices and contracts, it also was giving it permission to deplete its current stock of May, 1983, Form 1145s.

9. The only difference between the May, 1983, and October, 1989, Form 1145 was that the earlier form specified that WDOs included "wood-boring beetles, wood-boring wasps and carpenter bees," while the later form instead specified only "oldhouse borers."

CONCLUSIONS OF LAW

10. Section 482.161(1), Fla. Stat. (1991), provides in pertinent part:

> The department may issue a written warning to or fine the licensee, certified operator, identification cardholder, or special identification cardholder or may suspend, revoke, or stop the issuance or renewal of any certificate, special identification card, license or identification card coming within the scope of this measure, in accordance with the provisions of chapter 120, upon any one or more of the following grounds as the same may be applicable:
> (a) Violation of any rule of the department or any provision of this chapter.
> * * *
> (f) Performing pest control in a negligent manner.

11. Section 482.226, Fla. Stat. (1991), provides in pertinent part:

> (1) When an inspection for wood-destroying organisms is made for purposes of a real estate transaction, a fee is charged for the inspection or a written report is requested by the customer, a termite or other wood-destroying organism inspection report shall be provided by a licensee or its representative qualified under this measure to perform such inspections. The inspection shall be made in accordance with good industry practice and standards and shall include inspection for all wood-destroying organisms.

> . . . The report shall be made on a form prescribed by the department and furnished by the licensee. . . .
> (2) The inspection report form prescribed pursuant to this section shall include the following information:
> * * *
> (d) Any visible accessible areas not inspected and the reason for not inspecting.
> (e) Areas of the structure which were inaccessible.
> (f) Any visible evidence of previous treatments for or infestations of wood-destroying organisms.
> (g) The identity of any wood-destroying organisms present and any visible damage caused.

12. F.A.C. Rule 5E-14.142(2)(c), adopted October 25, 1990, requires the use of the October, 1989, Form 1145 for wood-destroying organism inspection reports. (The rule was renumbered from 10D-55.142(2)(c) when it was amended to require the October, 1989, Form 1145.)

13. Under Section 120.58(1)(a), Fla. Stat. (1991), hearsay is admissible in administrative proceedings "for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." The hearsay evidence of Form 1145 inspection reports dated July 27, 1989, and October 31, 1991, supplements or explains the direct evidence in the case. The direct evidence is sufficient, in itself, to support the Findings of Fact.

14. As found, the evidence proved violations of Section 482.226(1) and (2), Fla. Stat. (1991), and F.A.C. Rule 5E-14.142(2)(c), and therefore Section 482.161(1)(a), Fla. Stat. (1991), as well as a violation of Section 482.161(1)(f), Fla. Stat. (1991).

15. Section 482.161, Fla. Stat. (1991), also provides in pertinent part:

> (5) If, after appropriate hearing in accordance with the provisions of chapter 120, the department finds that an identification cardholder, special identification cardholder, certified operator, or licensee has committed any act set forth in subsection (1), but further finds that such violation is of such nature or under such circumstances that revocation or suspension of a license, identification card, special identification card, or certificate would either be detrimental to the public or be unnecessarily harsh under the circumstances, it may in its discretion, and in lieu of executing the order of suspension or revocation, either:
> (a) Reprimand the party publicly or privately; or

(b) Place the party on probation for a period of not more than 2 years.

* * *

(7) The department, pursuant to chapter 120, in addition to or in lieu of any other remedy provided by state or local law, may impose an administrative fine not exceeding $1,000 for the violation of any of the provisions of this measure. . . . In determining the amount of fine to be levied for a violation, the following factors shall be considered:
(a) The severity of the violation, including the probability that death or serious harm to the health or safety of any person will result or has resulted; the severity of the actual or potential harm; and the extent to which the provisions of this measure were violated;
(b) Actions taken by the licensee or certified operator in charge to correct the violation or remedy complaints; and
(c) Any previous violations of this measure.
(8) A hearing officer may, in lieu of or in addition to a fine, recommend probation or public or private reprimand. Public reprimand shall be in a newspaper of general circulation in the county of the licensee.
. . .
(9) Any licensee disciplined for any violation of s. 482.226 may be required by the department to submit to the department reports for wood-destroying organism inspections and treatments performed. These reports shall be submitted on a timely basis as required by the department but in no case more frequently than once a week.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Commissioner of Agriculture enter a final order (1) finding the Respondent guilty of violating Section 482.226(1) and (2), Fla. Stat. (1991), and F.A.C. Rule 5E-14.142(2)(c), and therefore Section 482.161(1)(a), Fla. Stat. (1991), and also guilty of violating Section 482.161(1)(f), Fla. Stat. (1991); and (2) imposing a $500 administrative fine on the Respondent.

RECOMMENDED this 26th day of May, 1993, in Tallahassee, Florida.

J. LAWRENCE JOHNSTON
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of May, 1993.

ENDNOTES

1/ This citation is incorrect. On or about October 25, 1990, the rule was renumbered as F.A.C. Rule 5E-14.142(2)(c).

2/ The Department of Health and Rehabilitative Services (HRS) administered Chapter 482 until the enactment of Chapter 92-203, Laws of Florida (1992), which transferred those responsibilities to the Department of Agriculture and Consumer Services.

3/ These findings are based on the direct testimony of the owner of the house as to what was clearly visible and accessible in October, 1991, coupled with the evidence that there was no treatment but also no live infestation after July 17, 1991. If a live infestation was underway at the time of the Respondent's inspection, or if one began after the Respondent's inspection, it is highly probable that, without treatment, a live infestation still would have been ongoing in and after October, 1991. The hearsay evidence of Form 1145 inspection reports dated July 27, 1989, and October 31, 1991, supplements or explains the direct evidence in the case.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-0377

To comply with the requirements of Section 120.59(2), Fla. Stat. (1991), the following rulings are made on the Department's proposed findings of fact (the Respondent not having filed any in the time allotted):

1.-6. Accepted and incorporated.

7.-10. Accepted but largely subordinate to facts found, and unnecessary.

11. a) As to the dry rot fungi, rejected as not supported by evidence on which a finding can be made. The rest is accepted but is subordinate to facts found, and is unnecessary.

12. Accepted and incorporated.

13.-14. Accepted but subordinate to facts found, and unnecessary.

15. Accepted. Last sentence, incorporated; the rest, subordinate to facts found, and unnecessary.

16.-18. Accepted but subordinate to facts found, and unnecessary.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the Commissioner of Agriculture written exceptions to this Recommended Order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the Department of Agriculture and Consumer Services concerning its rules on the deadline for filing exceptions to this Recommended Order.