

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) CASE NO. 94-5486
)
DAVID W. BROWN, d/b/a)
A-QUALITY TERMINATORS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the above-styled matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Daniel M. Kilbride, on February 3, 1995 in Tallahassee, Florida, with the Petitioner and its attorney also present in Tallahassee, and the Respondent, his attorney and all witnesses present in Orlando, in a video conference. The following appearances were entered:

APPEARANCES

For Petitioner: Robert G. Worley, Esquire
Richard Tritschler, Esquire
Department of Agriculture
& Consumer Services
Mayo Building, Room 515
Tallahassee, Florida 32399-0800

For Respondent: Robert W. Genzman, Esquire
Akerman, Senterfitt & Eidson, P.A.
255 South Orange Avenue
Post Office Box 231
Orlando, Florida 32802-0231

STATEMENT OF THE ISSUES

Whether Respondent, doing business as A-Quality Terminators, violated Chapter 482, Florida Statutes, and Chapter 5E-14, Florida Administrative Code, as alleged in the Notice of Intent to Impose Fine for failing to report visible and accessible evidence of and damage caused by wood destroying organisms following an inspection of a residence in the Orlando area on April 20, 1994.

PRELIMINARY STATEMENT

On August 22, 1994, Petitioner issued Notice of Intent to Impose Fine directed to the Respondent. On September 16, 1995, Respondent denied the allegations and filed a Petition for a Formal Hearing. This matter was referred to the Division of Administrative Hearings on October 4, 1994 and this matter was set for hearing.

At the hearing, which was conducted by videoconference, Petitioner called three witnesses, including Respondent as an adverse witness and an expert. Six exhibits were received in evidence without objection. Petitioner's exhibit no. 1, an edited video report prepared by Orlando TV station, WFTV Channel 9, was reviewed for the sole purpose of use as a demonstrative aide in visualizing the residence in question. All statements made by anyone on the tape have been disregarded as hearsay and have not been relied upon to support a finding of fact in this case. Respondent testified in his own behalf and offered one exhibit in evidence. A transcript of the hearing was not prepared. On March 6, 1995, Respondent filed a Motion to Dismiss or to Reopen Hearing alleging he had obtained newly discovered evidence. Petitioner filed a Response to Respondent's Motion and a hearing on the motion was held on April 5, 1995. By Order, dated April 5, 1995, Respondent's Motion to Dismiss was denied. Respondent's Motion to Reopen was granted for the limited purpose of deposing one witness and continue the cross-examination of the Petitioner's expert witness who testified at the hearing. The deposition testimony of the two witnesses was filed on May 8, 1995. Petitioner filed its proposed recommended order on February 10, 1995 and a supplement to the proposal on May 4, 1995. Respondent filed his proposed recommended order on February 15, 1995 and a revised proposal on May 15, 1995. Each of the parties' proposed recommended orders has been given careful consideration and adopted when supported by clear and convincing evidence.

My specific rulings on the Parties' proposed findings of fact are set forth in the Appendix attached hereto.

Based upon all of the evidence, the following findings of fact are determined:

FINDINGS OF FACT

1. Respondent, David W. Brown, is the sole proprietor of an unincorporated business known as A-Quality Terminators which operates in the Orlando area.
2. Respondent is licensed to operate a pest control business by the Petitioner. Respondent is also the holder of an identification card issued by the Petitioner which authorizes him to perform inspections of structures for wood-destroying organisms. Results of a wood-destroying organism inspection are required to be evidenced by completion of the Respondent's approved Form 1145, Wood Destroying Organism Report.
3. Prior to April 20, 1984, Respondent was asked to perform a wood-destroying organism inspection at a residence located at 2913 Risser Avenue, Orlando, Florida.
4. The inspection was requested by the purported owner, a woman using the name of "Laura Taylor," for the alleged purpose of enabling the owner to obtain refinancing of the mortgage on the residence.

5. The advance arrangements made with "Ms. Taylor" were that the residence would be unoccupied during the inspection to be made on April 20, 1994, that a residence key would be left for Respondent under the door mat, that a check would be left for Respondent on the table inside, and that Respondent would leave a Form 1145 Wood-Destroying Organisms Inspection Report on the table inside.

6. The person purporting to be the owner of the subject property was actually Laura Douglas, an employee of a local television station. She was using the fictitious name "Laura Taylor", as a part of the sting operation the station was conducting. The real owner was Dawn Angert.

7. The contrivance to have Respondent inspect the subject property was part of arrangements made by the TV station to have inspections conducted by several pest control companies of the subject property. An investigative report would then be produced and broadcast by the station.

8. Respondent had previously performed several wood-destroying organisms inspections in the subdivision where the subject residence is located, and he was familiar with the common types of construction throughout the subdivision and the common types of wood-destroying organism problems throughout the subdivision.

9. On April 20, 1994, Respondent arrived at the subject property and remained for approximately eight minutes. He noticed termite damage inside the front door. He also observed the drill holes, indicating prior termite treatment, outside the front door, even though the drill holes had been obstructed by the door mat and potted plants.

10. Respondent did not complete his inspection at that time. He did not leave a Form 1145, nor did he leave a notice of inspection. However, he took the check on the table inside, and left a note on his business card indicating that there were problems requiring further inspection.

11. Portions of Respondent's activities at the subject property on April 20, 1994, were videotaped by three hidden cameras of the TV station.

12. A day or so after the subject inspection of April 20, 1994, the purported owner of the subject property, "Laura Taylor," telephoned Respondent's office to advise that she urgently needed a "clean" Form 1145 because interest rates were going higher and she wanted to complete the purported refinancing transaction. She insisted that the Form 1145 be taped on the door of Respondent's office so that she could drive by and pick it up. Respondent's secretary called him while he was in the field to obtain approvals for the release of the report.

13. Respondent, acting without his field notes and without a clear recollection of his inspection of the subject property, asked his office by telephone whether any notes at the office reflected a problem at the subject property. He was advised that no such notes were found. He then instructed his office to provide "Ms. Taylor" a "clean" Form 1145 pursuant to her urgent request.

14. The Form 1145 was completed showing no evidence of any damage by wood-destroying organisms or any evidence of treatment of wood-destroying organisms. The report was taped to the office door and picked up that afternoon.

15. Respondent did not follow his normal procedure of checking his field notes before issuing a Form 1145 report. The following day, while reviewing his notes, he discovered his error and attempted to communicate the mistake to "Ms. Taylor."

16. Respondent did not intend to provide an erroneous Form 1145 following the inspection of the subject property.

17. The incomplete inspection and erroneous wood-destroying organism report prepared by Respondent fell below the standard of practice in the pest control industry in the Orlando area and was negligent.

18. In mitigation, following the extensive media publicity generated by this matter, Respondent lost a substantial volume of business, has substantially reduced the number of his employees, has been forced to close his office and work out of his home, and has suffered personal embarrassment and loss of reputation.

19. In the weeks preceding the hearing in this case, Respondent was a participant in an unrelated undercover operation which led, through his efforts, to the detection and interdiction of a third party's scheme to distribute banned pest control substances unlawfully. Respondent's efforts led to an investigative report broadcast by another local television station, and further led to enforcement action against the third party by the Petitioner.

20. Respondent has never previously had any fines or warning letters imposed against him in the course of several years of pest control work and several thousand wood-destroying organisms inspections in Florida.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to subsection 120.57(1), Florida Statutes.

22. The Department of Agriculture and Consumer Services is the state agency responsible for administering and enforcing the provisions of Chapter 482, Florida Statutes, pertaining to pest control

23. Section 482.161(1), Florida Statutes, (Supp. 1994) provides:

(1) The department may issue a written warning to or impose a fine against, or deny the application for licensure or licensure renewal of, a licensee, certified operator, limited certificate holder, identification cardholder, or special identification cardholder or any other person, or may suspend, revoke, or deny the issuance or renewal of any license, certificate, limited certificate, identification card, or special identification card that is within the scope of this chapter, in accordance with chapter 120, upon any of the following grounds:

* * *

(f) Performing pest control in a negligent manner.

24. Section 482.226(1), Florida Statutes, (1993) provides:

(1) When an inspection for wood-destroying organisms is made by a licensee for purposes or a real estate transaction and either a fee is charged for the inspection or a written report is requested by the customer, a wood-destroying organism inspection report shall be provided by the licensee or its representative qualified under this chapter to perform such inspections. The inspection shall be made in accordance with good industry practice and standards as established by rule and must include inspection for all wood-destroying organisms. The inspection findings shall be reported to the person requesting the inspection. The report must be made on a form prescribed by the department and furnished by the licensee. A copy of the inspection report shall be retained by the licensee for a period of not less than 3 years.

(2)(a) The inspection report must include the following information and statements:

1. The licensee's name.
2. The date of the inspection.
3. The address of the structure inspected.
4. Any visible accessible areas not inspected and the reasons for not inspecting the.
5. The areas of the structure that were inaccessible.
6. Any visible evidence of previous treatments for, or infestations of, wood-destroying organisms.
7. The identity of any wood-destroying organisms present and any visible damage caused.
8. A statement that a notice of the inspection has been affixed to the property in accordance with subsection (4) or subsection (5) and a statement of the location of the notice.

25. Section 5E-14.142(2)(9)(C), Florida Administrative Code, provides:

(c) Termite or other wood-destroying organism inspection report:

Pursuant to Chapter 482.226(1), (2), (4) and (5), F.S., each licensee having a certified operator certified in the category of termite or other wood-destroying organism control and who makes and reports the findings of a wood-destroying organism inspection in writing shall provide the party requesting the inspection with the inspection findings on the Wood-Destroying Organisms Inspection Report prescribed by the department and furnished by the licensee, Form 1145 11-92, which is incorporated by reference. The licensee shall not place any disclaimers or additional language on the Wood-Destroying Organisms Inspection Report. The licensee shall inspect for all wood-destroying organisms as

defined in Chapter 482.021(27), F.S., in accordance with the following inspection standards:

(1) The inspection will include all areas accessible by normal means but does not cover those areas that are enclosed or inaccessible, areas concealed by wall coverings, floor coverings, furniture, equipment, stored articles, insulation, or any portion of the structure in which inspection would necessitate removing or defacing any part of the structure.

(2) The inspection will be visual but may include probing and sounding of structural members as deemed necessary by the inspector, based upon a preliminary finding or visual evidence of infestation or damage.

26. Based on the foregoing findings of fact, Respondent has violated the provisions of Section 482.226(1), Florida Statutes and Rule 5E-14.142(2)(e), Florida Administrative Code by failing to perform a wood-destroying organism inspection in accordance with good industry practice and standards established by the Petitioner; and Section 482.161(1)(f), Florida Statutes by negligent pest control. Even though Respondent detected the evidence of damage by termites and prior treatment for the problem, he failed to complete the inspection and the form 1145 and leave it at the house. This conduct is below the standard and is also negligent regardless of whether Respondent's subjective intent was to come back at a later time and inspect further before completing a report.

27. Subsequently, Respondent issued a clear report, when in fact there was visible and accessible evidence of wood-destroying organisms in the residence. Accepting Respondent's position that he authorized the release of the report without first checking the field notes due to pressure from the client, nevertheless, such conduct was negligent and fell below industry practice and standards, in violation of Section 482.226(1) and 482.161(1)(f), Florida Statutes.

28. In mitigation, Respondent demonstrated that he has not been subject to prior discipline by the Petitioner; that due to extensive media coverage, his business has suffered economically; and he has cooperated with Petitioner on an unrelated undercover operation which resulted in the detection and interdiction of banned pest control substances.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that a Final Order be entered which finds the Respondent guilty of violating the provisions of Section 482.226(1) and 482.161(1)(f), Florida Statutes, and Rule 5E-14.142(2)(c), Florida Administrative Code.

It is further,

Recommended that the Respondent be issued a letter of reprimand and be assessed an administrative fine of \$500.00. However, should the Petitioner determine that Respondent cooperated and played a significant role in the unrelated sting operation, said administrative fine should be suspended.

DONE and ENTERED this 23rd day of May, 1995, in Tallahassee, Florida.

DANIEL M. KILBRIDE
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 23rd day of May, 1995.

APPENDIX

The following constitutes my specific rulings, in accordance with section 120.59, Florida Statutes, on proposed findings of fact submitted by the parties.

Proposed findings of fact submitted by Petitioner.

Accepted in substance: paragraphs 1 (in part), 2, 3 (in part), 5 (in part).

Rejected as a conclusion of law: paragraph 1 (in part).

Rejected as subsumed or a comment on the evidence: paragraph 3 (in part), 4 (in part), 5 (in part), 6, 7; Supplement paragraphs 1, and 2.

Revised proposed findings of fact by Respondent.

Accepted in substance: paragraph 1, 2, 3, 4, 5, 7 (in part), 8, 9 (in part), 10, 11 (in part), 12 (in part), 13 (in part), 14 (in part), 21 (in part), 22 (in part), 23.

Rejected as irrelevant and immaterial: paragraph 6, 7 (in part), 9 (in part), 13 (in part), 15, 16, 17, 18, 19, and 20.

Rejected as a comment on the evidence or subsumed: paragraph 7 (in part), 11 (in part), 12 (in part), 14 (in part), 21 (in part), 22 (in part).

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency that will issue the final order in this case concerning their rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

=====
AGENCY FINAL ORDER
=====

STATE OF FLORIDA
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Petitioner,

vs.

DOAH CASE NO.: 94-5486
FDACS CASE NO. 94-0518

DAVID W. BROWN, d/b/a
A-QUALITY TERMINATORS,

Respondent.

_____ /

FINAL ORDER

THIS MATTER, arising under the Structural Pest Control Act, Fla. Stat. Sections 482.011- 482.242, is before the Commissioner of Agriculture as agency head of the Florida Department of Agriculture and Consumer Services (hereinafter referred to as the "Department") for final agency action.

BACKGROUND

On August 22, 1994, Petitioner Department issued a Notice of Intent to Impose Fine in which the Department alleged Respondent David W. Brown, doing business as A-Quality Terminators, had failed to report visible and accessible evidence of, and damage caused by, wood-destroying organisms on Form 1145, entitled "Wood-Destroying Organisms Inspection Report" in accordance with Fla. Stat. Section 482.226(1) and Fla. Admin. Code Ann. r. 5E-14. 142(2)(c) resulting from an inspection by Respondent for wood-destroying organisms at a residence in Orlando, Florida. The Department further alleged that failure to report such evidence of and/or damage caused by wood-destroying organisms is a violation of Fla. Stat. Section 482. 161(1)(f). By letter dated September 16, 1994, Respondent disputed the factual allegations contained in the Notice of Intent to Impose Fine. By letter dated October 3, 1994, the Department referred Petitioner's request for formal hearing to the Division of Administrative Hearings for the assignment of a Hearing Officer and conduct of a hearing.

A formal hearing was conducted on February 3, 1995, by video conference with the Hearing Officer and the Department's counsel appearing in Tallahassee, Florida and Respondent, Respondent's counsel, and all witnesses appearing in Orlando, Florida.

At formal hearing, Petitioner Department called three witnesses including Respondent as an adverse witness and Charles Gordon Witherington who testified as an expert in the field of entomology. Petitioner proffered six exhibits, including an edited video report prepared by Orlando television station WFTV channel 9. All of Petitioner's exhibits were received into evidence without objection. Respondent testified in his own behalf and offered into evidence one exhibit. Petitioner filed its Proposed Recommended Order on February 10, 1995 and Respondent filed his Proposed Recommended Order on February 15, 1995.

On March 6, 1995 Respondent filed a Motion to Dismiss or to Reopen Hearing and the Petitioner responded by filing on or about March 16, 1995, Department's Response to Respondent's Motion to Dismiss or to Re-Open Hearing. Hearing was held on Respondent's motion and Petitioner's response on April 5, 1995. By Order dated April 5, 1995, Respondent's Motion to Dismiss was denied, however, Respondent's Motion to Reopen was granted for the limited purpose of deposing one witness and continue the cross-examination of Petitioner's expert witness who testified at hearing. Petitioner filed a Supplement to Proposed Recommended Order on May 4, 1995, and Respondent filed a revised Proposed Recommended Order on May 15, 1995.

The Hearing Officer in this matter issued a Recommended Order on May 23, 1995 which recommended the Commissioner issue a final order finding Respondent guilty of violating Fla. Stat. Sections 482. 161(1)(f) and 482.226(1) along with Fla. Admin. Code Ann. r. 5E-14. 142(2)(c). The Hearing Officer further recommended that Petitioner be issued a letter of reprimand and assessed an administrative fine of \$500, however, the Hearing Officer recommended that should the Petitioner determine that Respondent cooperated and played a

significant role in the unrelated sting operation, said administrative fine should be suspended. Petitioner filed timely Exceptions to Recommended Order.

RULING ON EXCEPTIONS

Petitioner lists four (I-IV) exceptions to the Recommended Order challenging the Hearing Officer's Conclusions of Law and Findings of Fact.

Under Florida law: "Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact. . . .It is for the hearing officer to consider all the evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence," Martuccio v. Dept. of Pro. Regulation, 622 So.2d 607, 609 (Fla.App. 1 Dist. 1993)(Citations omitted) and "The agency may not reject or modify the finding of facts...unless the agency.. [determines].. .the findings of fact were not based upon competent substantial evidence...". Fla. Stat. Section 120.57(1)(b)(10), Dept. of Business & Pro. Reg. v. McCarthy, 638 So.2d. 574, 575 (Fla.App. 1 Dist. 1993).

1. Respondent's Exception no. I. Respondent, through his Exception I challenges the Hearing Officer's Conclusion of Law found at paragraph 26 of the Recommended Order. Respondent bases his exception upon the last two sentences from paragraph 26. Paragraph 26, in its entirety, is as follows:

Based on the foregoing findings of fact, Respondent has violated the provisions of Section 482.226(1), Florida Statutes and Rule 5E-14. 142(2)(e), Florida Administrative Code by failing to perform a wood-destroying organism inspection in accordance with good industry practice and standards established by the Petitioner; and Section 482.161(1)(D), Florida Statutes by negligent pest control. Even though Respondent detected the evidence of damage by termites and prior treatment for the problem, he failed to complete the inspection and form 1145 and leave it at the house. This conduct is below the standard and is also negligent regardless of whether Respondent's subjective intent was to come back at a later time and inspect further before completing a report.

Recommended Order at 9-10.

The issue in this matter is whether or not Respondent violated Chapter 482, Florida Statutes and Chapter 5E-14, Florida Administrative Code, by failing to properly report visible and accessible evidence of and/or damage caused by wood destroying organisms, not the activities of some other pest control entity or news organization. Upon review of the entire file in this matter, it is the determination of the Commissioner of Agriculture that the Hearing Officer's paragraph 26 Conclusion of Law is supported by competent substantial evidence, therefore, Respondent's Exception I is denied.

2. Respondent's Exception no. II. Again, the issue in this matter is whether or not Petitioner failed to report visible and accessible evidence of, and/or damage caused by, wood destroying organisms on form 1145 which would make such conduct fall below industry practice and standards in violation of Fla. Stat. Sections 482.161(1)(f) and 482.226(1). It is for the hearing officer to

consider all the evidence and draw permissible inferences. (Martuccio)
Consequently, Respondent's Exception no. II is denied.

3. Respondent's Exception no. III. An agency may not reject or modify a hearing officer's finding of fact if such finding is based upon competent substantial evidence. Fla. Stat. Section 120.57(1)(b)(10). Upon review of the entire file in this matter, the hearing officer's determination that the conduct of the Respondent fell below the standard of practice within the pest control industry cannot be said to be lacking competent substantial evidence to base such a finding. Therefore, Respondents Exception III is denied.

4. Respondent's Exception no IV. Respondent's Exception number IV merely restates his position that any mistakes he made were de minimis and that no sanctions should flow therefrom. Upon review of the entire file in this matter, the conclusions of law found at Paragraph 28 of the Recommended Order are supported by competent substantial evidence, therefore, Respondent's Exception IV is denied.

For the above reasons, Respondent's Written Exceptions are denied.

WHEREFORE it is ORDERED and ADJUDGED:

1. Respondent's written exceptions are DENIED;
2. The Hearing Officer's Findings of Fact are adopted in toto as the Department's findings of fact;
3. The Hearing Officer's Conclusions of Law are adopted in toto as the Department's conclusions of law; and
4. The Hearing Officer's Recommendation--that the Commissioner of Agriculture enter a final order finding Respondent guilty of violating Fla. Stat. Sections 482. 161(1)(f) and 482.226(1) and Fla. Admin. Code Ann. r. 5E-14.142(2)(c); issue a letter of reprimand; and order Petitioner to pay an administrative fine of \$500--is APPROVED WITH MODIFICATION.
5. It is ORDERED that the Bureau of Entomology & Pest Control issue a letter of reprimand against Respondent and that such notice of reprimand be published in its quarterly list of disciplinary actions. The Commissioner further finds that due to Respondent's participation and cooperation with the Department in unrelated undercover operations, no administrative fine shall issue.

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review thereof pursuant to Fla. Stat. Section 120.68 and Rule 9. 110, Florida Rules of Appellate Procedure. Review proceedings must be initiated by filing a petition or notice of appeal with the Agency Clerk, Room 515, Mayo Building, Tallahassee, Florida 32399-0800, and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of the date this ORDER is final.

DONE AND ORDERED this 20th day of ,1995.

BOB CRAWFORD
Commissioner of Agriculture
Assistant Commissioner
Florida Department of Agriculture
and Consumer Services

FILED with the Agency Clerk this () day of ,1995.

Agency Clerk

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