

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)	
)	
Petitioner,)	
)	
vs.)	Case No. 97-3144
)	(96-653PW2442B)
HABIB U. SHAIKH and SDS)	
PROPERTIES INVESTORS GROUP, INC.,)	
d/b/a BUDGET MOTEL,)	
)	
Respondents.)	
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DEPARTMENT OF HEALTH,)	
)	
Petitioner,)	
)	
vs.)	Case No. 97-3145
)	(96-653PW2442C)
HABIB U. SHAIKH and SDS)	
)	
PROPERTIES INVESTORS GROUP, INC.,)	
d/b/a BUDGET MOTEL,)	
)	
Respondents.)	
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RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on January 5, 1998, in Bartow, Florida.

APPEARANCES

For Petitioner: Roland Reis, Esquire
Department of Health
Polk County Health Department
1290 Golfview Avenue, Fourth Floor
Bartow, Florida 33830-6740

For Respondents: No appearance

STATEMENT OF THE ISSUE

Did Respondents violate the provisions of Rules 62-550.518(3), 62-555.320(4)(8), 62-560.410(2)(c), 62555.350(2), and 62-555.345, Florida Administrative Code, as alleged in the Notice of Violation and Orders for Corrective Action, Case Nos. 96-653PW2442B and 96-653PW2442C dated June 9, 1997?

PRELIMINARY MATTERS

On June 9, 1997, the Department of Health (Department), through the Polk County Health Department (Polk County), issued a 7-count Notice of Violation and Orders for Corrective Action (notice) against the Respondents alleging that Respondents had violated certain statutory and rule provisions, and providing for the remediation of those violations. The allegations in each of the notices are identical but were served separately on each party. The notice identified as Case No. 96-653PW2442B was served on Respondent SDS Properties Investors Group, Inc. d/b/a Budget Motel and the notice identified as Case No. 96-65PW2442C was served on Habib U. Shaikh. By letter dated June 23, 1997, Respondent Habib U. Shaikh (Shaikh) requested a formal hearing in both cases under Chapter 120, Florida Statutes. By Notice dated July 8, 1997, the Department referred both of these cases to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge and for the conduct of a hearing. Upon receipt of the two notices, the Division assigned Case No. 97-3144 to the notice that had been assigned Case No. 96-653PW2442B by the Department and assigned Case No. 97-3145 to the notice that had been assigned Case No. 96-653PW2442C by the Department. In the letter of referral from the Department, the Division was advised that the matter involved two parties to the same violations and requested the matters to be consolidated. By order dated August 19, 1997, the two cases were consolidated.

At the hearing, the Department presented the testimony of Henry Tagioff, Mark Fallah, George Dunham, and Lewis Taylor. Department's Exhibits 1 through 13 were received as evidence. The Respondents did not appear at the hearing and offered no testimony or documentary evidence.

Subsequent to the hearing, an Order to Show Cause was entered giving Respondents an opportunity to show cause why they had not appeared at the hearing. The Respondents did not reply to this Order to Show Cause. Thereafter, an Order was entered on February 9, 1998, deeming the formal hearing on these matters to have been concluded, and giving the parties an opportunity to file proposed findings of fact and conclusions of law.

There was no transcript of this proceeding filed with the Division. The Department timely filed its proposed findings of fact and conclusions of law. Respondents-elected not to file any proposed findings of fact and conclusions of law.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. At all times pertinent to this proceeding, the Department, through the Polk County Health Department, under the authority of an Interagency Agreement with the Department of Environmental Protection, was the agency of the State of Florida charged with the responsibility for inspecting and clearing Public Water Systems in Polk County Florida under Section 403.121, Florida Statutes.

2. SDS Properties Investors Group, Inc. (SDS) is a Florida corporation authorized to do business as Budget Motel. SDS is owned by Shaikh.

3. Sanitary surveys are conducted by the Department every three years and include the inspection of Public Water Systems (PWS) .

4. On January 26, 1996, the Department conducted a routine sanitary survey of Budget Motel (Budget) located at 1418 Highway 17 South, Lake Wales, Florida, which should have included Budget's public water system, PWS 6532442. However, Polk County's inspector, Henry Tagioff, was shown a well, by a Budget employee, that was located on the adjacent property owned by Smokey's Mobile Home Park (Smokey's) and not a part of Budget's water system. Tagioff was not aware that the well he inspected was owned by Smokey's and not on Budget's property. During the inspection, Tagioff noted several violations and advised the Budget employee that Tagioff needed to discuss these violations with Shaikh.

5. On January 29, 1996, Tagioff and Lee Forgey, another Polk County employee, met with Shaikh to discuss the violations noted by Tagioff on January 26, 1996. During this meeting, Shaikh, Tagioff, and Forgey discussed the violations previously found by Tagioff on January 26, 1996, concerning the well on Smokey's property. At no time during this meeting did Shaikh advise Tagioff or Forgey that neither he nor Budget own the well under discussion.

6. The record is not clear, but sometime between January and May 1996, Budget's well had collapsed and was not useable. Subsequent to Budget's well collapsing, Shaikh contracted with George Dunham, after obtaining Smokey's permission, to connect Budget's water system (PWS6532442) to Smokey's well. At the time of connecting Budget's water system to Smokey's well, Dunham advised Shaikh that this was only a temporary solution and gave Shaikh a proposal for a new well since Budget's old well could not be repaired.

7. On May 2, 1996, Tagioff made a reinspection of Budget's water system and found that Budget's well had collapsed and was inoperable, and that Budget had connected to Smokey's well to furnish water to the motel and its guests. Tagioff advised Shaikh that Budget would need a new well since its old well was inoperable and the connection to Smokey's well was only temporary.

8. On May 21, 1996, Mark Fallah, a Polk County employee, conducted a site inspection and prepared a report for use in connection with Budget's application with Southwest Florida Water Management District (SWFWMD) for a new well permit.

9. In connection with Fallah's site inspection and report, the Department advised Shaikh by letter dated May 21, 1996, of certain things concerning the new well that had to be completed prior to placing the well into public use. The letter provides in pertinent part as follows:

Upon completion of the drilling and the verification of the grouting procedure by the Water Management District, the following items, as required by Chapters 62-555 and 62550 of the Florida Administrative Code, are to be completed prior to this water system being placed into public use.

* * *

2. A continuous chlorination unit that is electrically interlocked with the well pump circuit.

* * *

5. A flow measuring device is required on all Non-Community Water Systems.

6. A copy of the well completion report must be furnished to this office by the well driller within thirty (30) days after the well installation.

7. Bacteriological clearance of the well must be performed by submitting twenty (20) consecutive water samples for analysis to an HRS certified laboratory. A maximum of two (2) samples per day taken at least six hours apart may be collected. Additional samples may be required until twenty (20) consecutive satisfactory samples are received.

* * *

After the well and plant construction is completed, contact our office for an inspection so that written clearance can be issued. It is prohibited for any Public water system to be placed into use without clearance being issued from this department. (Emphasis Furnished).

10. SWFWMD approved Budget's new well application and issued Budget Permit No. 579811.01 for drilling a new well. However, upon completion of the new well, there were certain conditions that had to be met as indicated in the letter from the Department dated May 21, 1996.

11. On May 31, 1996, and July 10, 1996, Fallah inspected Budget's new water system for compliance and, on both occasions, found that Budget had failed to install the chlorination unit, the flow meter, and had not submitted a well completion report or bacteriological samples.

12. On July 15, 1996, the Department issued a Warning Notice to Shaikh advising him that the system could not be used until approved by the Department.

13. For enforcement purposes, the file was transferred to Lewis Taylor, enforcement officer for drinking water systems for Polk County.

14. On November 14, 1996, Taylor conducted an inspection of Budget's water system and reported that: (1) Budget's well had been placed into service without approval from the Department; (2) there was no chlorinator in operation; (3) there was no flow meter; (4) the Department had not received any bacteriological samples since November 1995; (5) there was no certified operator servicing the motel's water system; and (6) Budget had not provided public notice to its customers of its failure to monitor its drinking water.

15. A second Warning Notice was issued by the Department and furnished to Shaikh on November 22, 19-96, which in substance advised Shaikh that Budget was in violation of Rules 62-550 and 62-555, Florida Administrative Code, for its: (1) failure to obtain the Department's clearance before placing its new well in service; (2) failure to provide quarterly bacteriological samples; (3) failure to maintain proper chlorine residual in the water system; (4) failure to provide a flow meter in the water system; (5) failure to provide public notification to its customers that its water system had failed to comply with Rule 62-550, Florida Administrative Code; and (6) failure to provide the Department with

verification of Budget retaining a certified operator to oversee the operation and maintenance of its water system.

16. On March 3, 1997, Tagioff and John GoPaul, US Environmental Agency, inspected Budget's water system and found that: (1) there was no chlorine residual in the system; (2) the chlorination unit located at the motel was not in use; (3) there was no flow meter within the system; (4) no quarterly bacteriological samples had been furnished to the Department; and (5) the well had not been cleared for use by the Department.

17. Based on the testimony of Lewis Taylor which I find credible, the Department has expended the following in the inspection of Budget's water system: (1) 20.25 hours of professional time at a rate of \$30.00 per hour for a total of \$607.50; (2) three hours of clerical time at a rate of \$15.00 per hour for a total of \$45.00; and (3) \$27.00 in travel costs and postage. The total amount expended in the inspection of this water system by the Department was \$679.50.

CONCLUSIONS OF LAW

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

19. Sections 403.852(2),(3),(4),(5),(8), and (16), Florida Statutes, provide in pertinent part as follows:

(2) "Public water system" means a community, nontransient noncommunity, or noncommunity system for the provision to the public of piped water for human consumption. . . .

(3) "Community water system" means a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents.

(4) "Noncommunity water system" means a public water system for provision to the public of piped water for human consumption, which serves at least 25 individuals daily at least 60 days out of the year, but which is not a community water system; except that a water system for a wilderness educational camp is a noncommunity water system.

(5) "Person" means an individual, public or private corporation, company, association, partnership, municipality, agency of the state, district, federal agency, or any other legal entity, or its legal representative, agent, or assigns.

* * *

(8) "Supplier of water" means any person who owns or operates a public water system.

Budget's water system is a noncommunity water system and Budget is a supplier of water.

20. Rules 62-550.518(3) and (4), Florida Administrative Code, provide in pertinent part as follows:

(3) A non-community water system that serves 1,000 or fewer persons shall monitor at the rate of two samples in each calendar quarter during which the system provides water to the public. In addition, a minimum of one raw sample shall be collected per quarter.

(4) The supplier of water shall maintain free chlorine residual of 0.2 milligrams per liter or its equivalent throughout the distribution system at all times. If the supplier of water fails to maintain this level of free chlorine residual, or its equivalent, the supplier of water shall take the necessary corrective action as approved by the Department. . . .

21. Rules 62-555.320(4)(a) and (8), Florida Administrative Code, provide as follows:

(4) Disinfection.

(a) All public water systems shall continually have effective disinfection measures employed on the water which the system distributes. The necessary apparatus shall be designed, according to acceptable engineering practices, to maintain a free chlorine residual or its equivalent throughout the distribution system in accordance with Rule 62-550.518(4), FAC.

* * *

(8) Meters - All community water systems shall be equipped with a metering device that accurately indicates pumpage of finished water. Non-community and non-transient non-community systems shall be equipped with at least an elapsed time clock or other device in conjunction with filed calibration of the pump that will permit determination of flow.

22. Rule 62-555.345, Florida Administrative Code, provides as follows:

Upon completion of construction, the engineer of record or the system's professional engineer who was responsible for overseeing construction shall submit a certification of completion letter to the Department. When the letter of certification and a copy of satisfactory bacteriological results (absence of total coliform in two consecutive daily water samples) and analyses to demonstrate compliance with Chapter 62-550 and, if applicable, Chapter 62-524, FAC, are received, a letter of clearance to place the facility (ies) into service shall be issued.

23. Rule 62-555.350(2), Florida Administrative Code, provides as follows:

(2) The supplier of water shall provide responsible operation personnel in accordance with Chapters 62-602 and 62-699, FAC, and the permit.

24. Rule 62-699.310(1), Florida Administrative Code, provides as follows:

(1) All permittees and suppliers of water or wastewater treatment plants shall employ certified operators on-site as specified below.

25. Rule 62-560.410(2), Florida Administrative Code, provides in pertinent part as follows:

(2) Other violations, variances, exemptions. The owner or operator of a public water system which fails to perform monitoring required by Chapter 62-550, Part V., FAC. . . shall notify persons served by the system as follows: (a) Except as provided in paragraph . . . 2(c) of

this section, the owner or operator of a public water system shall give notice within three months of the violation or granting of a variance or exemption by publication in a daily newspaper of general circulation, other than a newspaper established primarily for the publication of legal notices, serving the area. Repeat notice shall be given every three months for as long as the violation continues or the variance or exemption remains in effect.

* * *

(c) In lieu of the requirements of paragraph (2)(a) of this section, the owner or operator of a non-conforming water system may give notice, within three months of the violation or the granting of the variance or exemption, by hand delivery or by continuous posting in conspicuous places within the area served by the system. Posting shall continue for as long as the violation exists or a variance or exemption remains in effect. Notice by hand delivery shall be repeated at least every three months for as long as the violation exists or a variance or exemption remains in effect.

26. Section 403.860(3), Florida Statutes, grants the Department authority to recover from the violator the Department's reasonable costs and expenses incurred in investigating the violation and prosecuting the administrative proceeding.

27. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 2d DCA 1981). To meet this burden, the Department must establish facts upon which its allegations are based by a preponderance of the evidence. The Department has met its burden to show that Respondents violated Rules 62-550.518(3), 62-555.320(4) and (8), 62-555.345, 62-555.350(2), and 62-560.410(2)(c), Florida Administrative Code, and the Department has equally met its burden to show that it expended \$679.50 in the investigation of this matter and prosecuting the administrative proceeding.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department enter a final order finding Respondents guilty of the violations as charged and

requiring Respondents to comply with the Orders for Corrective Action as set out in the Notice of Violation and Orders of Corrective Action in Case Nos. 96-653PW2442B and 96-653PW2442C. It is further recommended that Respondents be required to pay the costs and expenses of investigating the violations and prosecuting this matter in the amount of \$679.50.

DONE AND ENTERED this 27th day of May, 1998, in Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of May, 1998.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.