STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 99-0655
	)	
ROBERT J. GORMAN,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 26, 1999, in Fort Pierce, Florida, before Patricia Hart Malono, a duly-designated administrative law judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Donna L. Korora
Chief Legal Counsel
Department of Health
620 South Dixie Highway
Stuart, Florida 34994

For Respondent: Robert J. Gorman
1209 Delaware Avenue
Fort Pierce, Florida 34950

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Administrative Complaint dated January 8, 1999, and, if so, the penalty which should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated January 8, 1999, the Department of Health ("Department") charged that Robert Gorman violated Section 381.0062, Florida Statutes, and Chapter 64E-8, Florida Administrative Code, by operating three limited use community public water systems without the required permits. The charge was based on Mr. Gorman's failure to apply for operating permits for the three wells which provide water to three duplexes Mr. Gorman owns and rents. Mr. Gorman timely filed a request for a formal hearing in which he asserted that the Department had exceeded its authority in requiring the permits and the information requested to be submitted with the application for the permits. 1/ The Department transmitted this matter to the Division of Administrative Hearings for assignment of an administrative law judge.

At the final hearing, the Department presented the testimony of Bruce J. McLeod, an environmental supervisor with the St. Lucie County Health Department. Petitioner's Exhibits A through F were offered and received into evidence. Mr. Gorman testified in his own behalf, and Respondent's Exhibits 1 and 2 were offered and received into evidence. At the Department's request and without objection from Mr. Gorman, Sections 381.0061 and .0062, Florida Statutes, and Chapter 64E-8, Florida Administrative Code, were officially recognized. At the request of Mr. Gorman and without objection from the Department, the complaint for

declaratory relief filed by Mr. Gorman in the Circuit Court for the Nineteenth Judicial Circuit in and for St. Lucie County, Florida, on April 19, 1999, was officially recognized. The gravamen of this complaint is the unconstitutionality of the statute and rules underlying the administrative complaint filed against Mr. Gorman by the Department.

No transcript of the proceeding was filed, but the parties timely submitted proposed recommended orders, 2/ which have been duly considered.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department of Health, including the county health departments such as the St. Lucie County Health Department ("County Health Department"), are responsible for supervising and controlling limited use public water systems. Section 381.0062(3), Florida Statutes (1997).

2. Mr. Gorman is the owner of three duplexes located at 120 and 122 Laidback Way, Fort Pierce, Florida; 140 and 142 Laidback Way, Fort Pierce, Florida; and 160 and 162 Laidback Way, Fort Pierce, Florida. The duplexes were built in 1982 and 1983 and each contains two units which are available for rent. Water is piped into each duplex from a well located on the property.

3. The wells providing water to 120 and 122 Laidback Way and to 140 and 142 Laidback Way were inspected by the Department of Health and Rehabilitative Services in May 1994 and found to be satisfactory pending results of water tests. Two-day bacteriological analyses were conducted on May 2 and 3, 1994, on the wells serving these two properties, and the results were satisfactory. 3/

4. The 1994 inspection report for the well serving the property at 120 and 122 Laidback Way reflects that it had the following equipment: a one-half horsepower pump; a 30-gallon "p tank"; a 20-gallon water softener filter; and a 30-gallon brine tank. The 1994 inspection report for the well serving the property at 140 and 142 Laidback Way reflects that it had the following equipment: a one-half horsepower pump; a 20-gallon "p. tank"; a 25-gallon water softener filter; and a 40-gallon brine tank.

5. In a letter dated August 21, 1998, the County Health Department notified Mr. Gorman that he needed to submit the application enclosed with the letter and a $140.00 fee to bring the "permit" to current status for the property located at 140 and 142 Laidback Way. The letter was inartfully composed and conveyed incomplete information regarding the nature of the permit. The letter did, however, contain reference to "Chapter" 381.0062, Florida Statutes, and Chapter 64E-8, Florida Administrative Code, and it also provided notification that

Chapter 64E-8 required quarterly sampling of limited use public water systems for bacteria and a lead and nitrate test every three years.

6. The County Health Department sent Mr. Gorman an identical notice, dated August 21, 1998, regarding the property located at 160 and 162 Laidback Way.

7. The County Health Department sent Mr. Gorman a somewhat different letter, dated August 31, 1998, regarding the "Limited Use Public Water Systems" for the property located at 120 and 122 Laidback Way. The letter notified Mr. Gorman that his permit to operate the "referenced water system has expired as of September 30, 1998." The letter reiterated the information contained in the August 21 letter and requested in addition that Mr. Gorman submit "a minimum 8.5 x 11 inch site plan of the system, drawn to scale, that accurately identifies the location of the source of water in relation to property boundaries and contaminant sources, i.e., well must be 75 feet from septic system, etc." and an "[e]quipment list: pump, tank, softener, automatic chlorinate, etc., manufacturer, model #, and capacity." Finally, Mr. Gorman was notified of the permitting and testing fees and told that the "[a]pplication with required site and equipment information must be submitted with necessary fees within 30 days receipt of this notification."

8. Mr. Gorman responded with a letter dated October 16, 1998, in which he posed several questions to the County Health Department:

> Do you understand that these are duplexes? Are all rental properties including single family subject to these regulations? Can you give me a valid reason why rental units of two units or more should be subject to quarterly bacterial testing (I believe the statute only authorizes it annually) and not all other residential properties, public facilities or otherwise that might use well water?

Mr. Gorman requested a response to his questions but did not provide the information, applications, and permit fees requested in the letters dated August 21 and August 31.

9. In a letter dated December 14, 1998, sent certified mail with return receipt requested and referenced as a Notice of Violation, the County Health Department notified Mr. Gorman that he was operating limited use community public water systems without a permit at 120 and 122, 140 and 142, and 160 and 162 Laidback Way and that he had not provided

> the following required information:
>
> - Signed, dated application form.
> - An operation permit fee of $75.00 for the initial permit.
> - A site plan of the property that accurately identifies the location of the well in relation to property, boundaries and contaminant sources such as septic tank systems.
> - Capacity/size, model and brand information on system components.
> - Well completion report if available or year well was installed if known.

- Required chemical analysis results (lead and nitrate).
- Initial satisfactory two-day source (well) water and system water bacteriological tests results.

Mr. Gorman was told to contact Bruce McLeod within five days of receipt of the notice. Although Mr. Gorman received the notice on December 16, 1998, he did not respond.

10. The County Health Department had not, as of the final hearing, received any reports of illness attributable to the water from the wells at the subject properties, and it does not have any reason to believe that the wells are contaminated.

11. Mr. Gorman had not, as of the final hearing, submitted the applications, permit fees, or information requested by the County Health Department, and he had no operating permits for the wells providing water to the subject properties.

12. The evidence presented in this case is sufficient to establish that the wells providing water to the three duplexes owned and rented by Mr. Gorman each contains two rental units and are limited use community public water systems. Mr. Gorman must have operating permits for the wells providing water to these properties.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Sections 120.569 and .57(1), Florida Statutes (1997).

14. In its administrative complaint, the Department seeks to impose on Mr. Gorman an administrative penalty consisting of the assessment of an administrative fine. Therefore, the Department has the burden of proving by clear and convincing evidence that Mr. Gorman committed the violations alleged in the complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

15. Section 381.0062, Florida Statutes (1997), provides in pertinent part:

> 381.0062 Supervision; private and certain public water systems.
> (1) LEGISLATIVE INTENT. It is the intent of the Legislature to protect the public's health by establishing standards for the construction, modification, and operation of public and private water systems to assure consumers that the water provided by those systems is potable.
> (2) DEFINITIONS. As used in this section:
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> * * *
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> (b) "Department" means the Department of Health, including the county health departments.
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> * * *
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> (f) "Limited use community public water system" means a public water system not covered or included in the Florida Safe Drinking Water Act, 4/ which serves five or more private residences or two or more rental residences, and provides piped water.
>
> * * *

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

* * *

(j) "Private water system" means a water system that provides piped water for no more than four nonrental residences.

* * *

(l) "Public water system" means a water system that is not included or covered under the Florida Safe Drinking Water Act, provides piped water to the public, and is not a private water system. For purposes of this section, public water systems are classified as limited use community or limited use commercial.

(m) "Supplier of water" means the person, company, or corporation that owns or operates a limited use community or limited use commercial public water system, or a private water system.

* * *

(3) SUPERVISION. The department and its agents shall have general supervision and control over all private water systems, and public water systems not covered or included in the Florida Safe Drinking Water Act (part VI of chapter 403), and over those aspects of the public water supply program for which it has the duties and responsibilities provided for in part VI of chapter 403. The department shall:

(a) Administer and enforce the provisions of this section and all rules and orders adopted or issued under this section, including water quality and monitoring standards.

(b) Require any person wishing to construct, modify, or operate a limited use community or limited use commercial public

water system or a private water system to first make application to and obtain approval from the department on forms adopted by rule of the department.

(c) Review and act upon any application for the construction, modification, operation, or change of ownership of, and conduct surveillance, enforcement, and compliance investigations of, limited use community and limited use commercial public water systems, and private water systems.

(d) Require a fee from the supplier of water in an amount sufficient to cover the costs of reviewing and acting upon any application for the construction, modification, or operation of a limited use community and limited use commercial public water system, of not less than $10 or more than $90 annually.

(e) Require a fee from the supplier of water in an amount sufficient to cover the costs of reviewing and acting upon any application for the construction or change of ownership of a private water system serving more than one residence, of not less than $10 or more than $90.

(f) Require a fee from the supplier of water in an amount sufficient to cover the costs of sample collection, review of analytical results, health-risk interpretations, and coordination with other agencies when such work is not included in paragraphs (b) and (c) and is requested by the supplier of water, of not less than $10 or more than $90.

(g) Require suppliers of water to collect samples of water, to submit such samples to a department-certified drinking water laboratory for contaminant analysis, and to keep sampling records as required by rule of the department.

(h) Require all fees collected by the department in accordance with the provisions of this section to be deposited in an appropriate trust fund of the department, and used exclusively for the payment of costs incurred in the administration of this section.

(i) Prohibit any supplier of water from, intentionally or otherwise, introducing any

> contaminant which poses a health hazard into a drinking water system.
>
> (j) Require suppliers of water to give public notice of water problems and corrective measures under the conditions specified by rule of the department.
>
> (k) Require a fee to cover the cost of reinspection of any system regulated under this section, which may not be less than $25 or more than $40.

16. On the basis of the facts found herein, the St. Lucie County Health Department was acting within the authority granted to it in Section 381.0062 when it required Mr. Gorman to apply for a limited use water system operating permit for the wells providing water to his three rental duplexes.

17. Chapter 64E-8, Florida Administrative Code, was adopted by the Department to implement Section 381.0062, among other statutes governing drinking water systems. Rule 64E-8.004, Florida Administrative Code, governs limited use water system operating permits and provides in pertinent part:

> (1) Annual permits are required for all limited use systems, except those systems registered per s. 64E-8.004(6). Annual operating permits expire September 30.
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> (2) By September 1st each year, the owner of a non-registered Limited Use System shall submit the following items to the county health department:
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> (a) A completed Form DH 4092A;
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> (b) A $75 operating permit application fee the first year, and then a $70 annual operating permit fee each year thereafter; however, any initial operating permit fee for a system put into operation after March 31 is $35;
>
> * * *

(d) For the initial permit, evidence that the water meets rule 64E-8.006(1)(a) chemical MCL's and a recent, satisfactory two consecutive day source water microbiological survey;

(e) For the initial permit, a minimum size 8.5 X 11 inch site plan of sufficient clarity to be reproduced successfully onto microfilm;

(f) For the initial permit, the capacity/size, model, and brand of all system components; and

(g) A well completion report the first year, if available, and then any time a well is replaced.

(3) Upon receipt of satisfactory items in rule 64E-8.004(2) and a satisfactory sanitary survey, the department shall issue authorization on Form DH 4093 to operate the system.

18. On the basis of the facts found herein, the St. Lucie County Health Department was acting within the authority granted to it in Rule 64E-8.004 to require Mr. Gorman to apply for a limited use water system operating permit for the wells providing water to his three rental duplexes and to submit with his application the permitting fee and the information required in the final Notice of Violation sent to Mr. Gorman in the letter dated December 14, 1998.

19. On the basis of the facts found herein, the Department has satisfied its burden of proving by clear and convincing evidence that Mr. Gorman has been operating the limited use community public water systems at 120 and 122, 140 and 142, and 160 and 162 Laidback Way without a permit in violation of Section 381.0062 and Rule 64E-8.004.

20. Section 381.0061, Florida Statutes, specifies as follows:

> (1) In addition to any administrative action authorized by chapter 120 or by other law, the department may impose a fine, which shall not exceed $500 for each violation, for a violation of s. 381.0065, s. 381.0066, s. 381.0072, or part III of chapter 489, for a violation of any rule adopted under this chapter, or for a violation of any of the provisions of chapter 386. Notice of intent to impose such fine shall be given by the department to the alleged violator. Each day that a violation continues may constitute a separate violation.
> (2) In determining the amount of fine to be imposed, if any, for a violation, the following factors shall be considered:
> (a) The gravity of the violation, including the probability that death or serious physical or emotional harm to any person will result or has resulted, the severity of the actual or potential harm, and the extent to which the provisions of the applicable statutes or rules were violated.
> (b) Actions taken by the owner or operator to correct violations.
> (c) Any previous violations.

21. The Department did not present any evidence that harm resulted from Mr. Gorman's refusal to apply for an operating permit for the wells on his three rental duplexes or that the probability of harm existed. The Department did not present evidence that Mr. Gorman had committed any previous violations of Section 381.0062 or Rule 64E-8.004. On the other hand, Mr. Gorman's failure to apply for the permits was willful. 5/ The penalty of $500.00 for each violation suggested in the Department's Proposed Recommended Order is consistent with the

penalties set forth in Section 381.0061(2), and there is no apparent reason to deviate from the Department's proposal.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health enter a final order:

1. Finding that Robert J. Gorman is guilty of three violations of Section 381.0062, Florida Statutes (1997), because he failed to obtain operating permits for the limited use community public water systems he maintains at 120 and 122, 140 and 142, and 160 and 162, Laidback Way, Fort Pierce, Florida; and

2. Imposing an administrative fine in the amount of $1500.00, or $500.00 for each of the three violations.

DONE AND ENTERED this 25th day of June, 1999, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of June, 1999.

ENDNOTES

[1] Mr. Gorman further asserted that Section 381.0062 and the rules implementing that statute are unconstitutional both facially and as applied. Neither an administrative law judge nor an agency head has the authority to declare a statute or an existing rule unconstitutional. That power resides with a district court on appeal from the final order entered in an administrative proceeding or with a circuit court in an appropriate civil action. See Department of Business Regulation, Division of Alcoholic Beverages v. Ruff, 592 So. 2d 668 (Fla. 1992); Palm Harbor Special Fire control District v. Kelly, 516 So. 2d 249 (Fla. 1987).

[2] In his Proposed Recommended Order, Mr. Gorman requested that this case be placed in abeyance prior to entry of a recommended order pending resolution of the declaratory judgment action. The request is DENIED.

[3] The record does not contain any information regarding the well serving 160 and 162 Laidback Way.

[4] The parties agree that the wells on Mr. Gorman's properties are not governed by the Florida Safe Drinking Water Act.

[5] Mr. Gorman's refusal to apply for the permits is based on his belief that the statute and rule underlying this proceeding are unconstitutional facially and as applied to him. This justification for his action does not affect the recommendation regarding the appropriate penalty which should be imposed in this case. See footnote 1, above.

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.