STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-0258
	)	
STEVE DELUCA,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard on May 18, 2000, in Deland, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charlene J. Petersen, Esquire
Department of Health
400 Fentress Boulevard
Daytona Beach, Florida 32114

For Respondent: Christopher R. Ditslear, Esquire
Post Office Box 41
Deland, Florida 32721-0041

STATEMENT OF THE ISSUE

The issue is whether Respondent should correct a health violation and have a $500.00 fine imposed for violating an agency rule and statute, as alleged in the Citation for Violation issued by Petitioner on December 22, 1999.

PRELIMINARY STATEMENT

This matter began on December 22, 1998, when Petitioner, Department of Health, on behalf of the Volusia County Health Department, issued a Citation for Violation charging that during an inspection in October 1999, it discovered that Respondent, Steve DeLuca, had violated Rule 64E-6.015, Florida Administrative Code, by making repairs to his drainfield without the required permits from the Volusia County Health Department. For this violation, Petitioner proposes to impose a fine of $500.00 and require Respondent to correct the violation.

Respondent denied the allegation and requested a formal hearing under Section 120.569, Florida Statutes, to contest the charges. The matter was referred by Petitioner to the Division of Administrative Hearings on January 10, 2000, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated February 18, 2000, a final hearing was scheduled on May 18, 2000, in Deland, Florida. On May 16, 2000, the case was transferred from Administrative Law Judge Stephen F. Dean to the undersigned.

At the final hearing, Petitioner presented the testimony of William N. VanderLugt, an environmental specialist II with the Volusia County Health Department. Also, it offered Petitioner's Exhibits 1-6. All exhibits were received in evidence. Respondent presented the testimony of Jim Ferullo, general manager of Delco Oil Company, and offered Respondent's Exhibits 1

and 2, which were received in evidence. Finally, the undersigned took official recognition of Rules 64E-6.003(1) and 64E-6.015, Florida Administrative Code, and Sections 381.006(7) and 381.0065(4) and (5), Florida Statutes (1999).

There is no transcript of the hearing. Proposed Findings of Fact and Conclusions of Law were filed by the parties on June 2, 2000, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

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

1. This case involves an allegation that Respondent, Steve DeLuca, violated an agency regulation and statute by making repairs to a drainfield on property located at 1444 East New York Avenue, Deland, Florida, without obtaining the necessary permits from the Volusia County Department of Health (Health Department). That department is under the direction and control of Petitioner, Department of Health (Department). Respondent denies the charge and, as clarified for the first time at hearing, contends that the repairs were minor in nature and thus did not require a permit, no authorization was given to the excavation firm which performed the repairs, and the Citation was not issued to the actual owner of the property.

2. On October 29, 1999, William N. VanderLugt (Vanderlugt), a Health Department environmental specialist, received a

complaint regarding a septic tank repair being undertaken at 1430 East New York Avenue, Deland, Florida. During the course of inspecting that property, Vanderlugt observed excavation activities on the drainfield located next door at 1444 East New York Avenue.

3. More specifically, Vanderlugt observed an area in the back yard approximately 6 feet by 20 feet in size which had been recently excavated and a large pile of sand nearby. In the excavated site, he saw a rock bed of the size commonly used in drainfields, "clean" and "newly installed" rocks, and a "black paper" covering a part of the rocks. Therefore, he concluded that the excavating firm had just installed a new rock drainfield. This type of activity constitutes a repair to an existing drainfield and requires that such work be performed by a licensed septic tank contractor. It also requires that appropriate permits be obtained from the Health Department. Although Respondent contended that the work was merely to correct a "minor structural flaw" which would not require a permit, Vanderlugt's testimony is more persuasive on this issue, and it is found that a more substantial repair to the drainfield was made.

4. Further inquiry by Vanderlugt revealed that no permits had been obtained for the repair of a drainfield from the Health Department by the excavating company, Collier Enterprises. After a brief conversation with a Collier Enterprises employee, the

substance of which is hearsay in nature and cannot be used, Vanderlugt visited the offices of Delco Oil Company and spoke with Respondent, who is employed by that firm. In doing so, Vanderlugt was under the impression that Respondent owned the property in question.

5. During his brief conversation with Repondent, Vanderlugt pointed out that he had to issue a citation because no permit had been obtained for the work at the property in question. DeLuca responded with words to the effect that "they [Collier Enterprises] broke a pipe and they fixed what they broke." Apparently, there was no discussion as to whether Respondent or someone else actually owned the property.

6. Vanderlugt returned to the property in question and performed a second inspection on November 3, 1999. Because no permits had been obtained by that date, and the drainfield site had been covered, a recommendation for a citation was prepared by Vanderlugt. A Citation for Violation was later issued by the Department on December 22, 1999, alleging that Respondent had failed to obtain permits before making a drainfield repair. The Citation was delivered to Respondent at Delco Oil Company. Because Collier Enterprises was not licensed to perform the work, it was given a first violation "warning" letter by the Health Department, as required by a Department rule.

7. During later meetings with Respondent and others, Vanderlugt learned that the actual owner of the property in

question was Deluca Properties, Inc., and not Steve DeLuca. For some reason, however, the Department declined to amend its citation and charge the actual owner with the alleged violation. Although Petitioner asserted at hearing and in its Proposed Recommended Order that Respondent is the owner's registered agent, there is no competent evidence of record to support this assertion.

8. According to the general manager of Delco Oil Company, which is apparently owned by Steve Deluca and others, no permission was given to the excavating company to make any repairs. Indeed, Deluca Properties, Inc. has a licensed septic tank contractor who makes all septic tank repairs, when needed.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

10. As the party which issued the charging document, Petitioner bears the burden of proving by the preponderance of the evidence that the allegation in the Citation for Violation is true.

11. The Citation for Violation alleges that Respondent violated Section 381.0065(4), Florida Statutes (1999), by repairing "an onsite sewage treatment and disposal system without first obtaining a permit approved by the department." The Citation further alleges that Respondent's conduct also violates

Rule 64E-6.015, Florida Administrative Code, which reads in relevant part as follows:

> All repairs made to a failing onsite sewage treatment and disposal system shall be made only with prior knowledge and written approval from the DOH county health department having jurisdiction over the system.
>
> Any property owner . . . who has an onsite sewage treatment and disposal system which is improperly constructed or maintained, or which fails to function in a safe or sanitary manner shall request from the DOH county health department . . . a permit to repair the system prior to initiating the repair of the system.

12. The evidence shows clearly that a repair to an onsite sewage treatment and disposal system was made within the meaning of the foregoing rule, and that such work required a permit from the Health Department. However, the owner of the property was never served with a copy of the Administrative Complaint or formally named as a party in the complaint itself. Under these circumstances, the Department had no jurisdiction to proceed. Arthritis Medical Center, Inc. v. Dep't of Health and Rehab. Srvcs., 543 So. 2d 1304, 1305 (Fla. 4th DCA 1989)("a defendant is entitled to personal service of original process before an administrative board acquires personal jurisdiction"). While Petitioner contends that Respondent was the registered agent of the property owner, there was no competent evidence at hearing to establish this critical fact. Accordingly, the complaint should be dismissed for lack of jurisdiction.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Health enter a final order dismissing the Administrative Complaint for lack of jurisdiction.

DONE AND ENTERED this 14th day of June, 2000, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of June, 2000.

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 enter the final order in this case.