STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TELISA S. GOMEZ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-1713
	)	
DEPARTMENT OF HEALTH, DIVISION OF ENVIRONMENTAL HEALTH,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a Section 120.57(1) formal hearing was held in this case on September 19, 2000, in Fort Lauderdale, Florida, before Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES:

For Petitioner: Judith C. Elfont, Esquire
Department of Health
2421-A Southwest Sixth Avenue
Fort Lauderdale, Florida 33315-2613

For Respondent: William E. Stacey, Jr., Esquire
320 Southeast 9th Street
Post Office Box 460053
Fort Lauderdale, Florida 33346

STATEMENT OF THE ISSUE

Is Petitioner guilty of violations of Rule 64E-6.022(1)(p), Florida Administrative Code, improper installation or repair of on-site sewage disposal system, and Rule 64E-6.022(1)(l), Florida

Administrative Code, gross negligence and incompetence which causes monetary harm to a customer as charged in the Citation for Violation dated April 4, 2000, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On April 4, 2000, the Department of Health ("Department"), issued a Citation for Violation against Petitioner, a Florida-registered septic tank contractor, alleging that Petitioner had improperly installed or repaired an on-site sewage treatment and disposal system in violation of Section 381.0065, Florida Statutes, and Rule 64E-6.022(1)(p), Florida Administrative Code, and that Petitioner's gross negligence, incompetence, or misconduct caused her customer monetary harm in violation of Rule 64E-6.022(1)(l), Florida Administrative Code. Petitioner contends that she performed her contract for installation of a drainage system pursuant to appropriate Department permits and inspections, and any failure of her work was entirely the fault of her customer. Upon a timely request by Petitioner, the Department referred the matter to the Division of Administrative Hearings ("Division") for the assignment of a Division Administrative Law Judge to conduct a Section 120.57(1) hearing.

At the commencement of the final hearing, the undersigned granted the unopposed ore tenus motions of the Department to declare Telisa Gomez and Jack Dunn adverse witnesses and to take compulsory judicial notice of all law cited in the Citation for

Violation and in the Respondent's Unilateral Response to Prehearing Order.

In addition, the Department moved, ore tenus, in limine to preclude introduction of testimony not directly pertinent to the matters alleged in the Administrative Complaint. The motion was denied without prejudice to the Department to make specific objections to irrelevant evidence and testimony at such time(s) as Petitioner sought to introduce such evidence or testimony.

The Department also sought and received a stipulation from the Petitioner that the Composite (photographic) Exhibit 7 accurately represented that a drainfield ("the preexisting drainfield") already existed directly underneath the drainfield installed by Petitioner which is the subject of this action. Based upon that stipulation, the Department moved ore tenus for summary judgment, which motion was denied.

Petitioner also moved ore tenus for summary judgment, contending that Rule 64E-6.015(7), Florida Administrative Code, requires entry of judgment for Petitioner. This motion was also denied, and the hearing proceeded.

By agreement of the parties, the Department, which bears the burden of proof by clear and convincing evidence, presented its case-in-chief first.

The Department presented the testimony of the Petitioner Telisa Gomez, Cheryl Sadar, Clifford Iacino, Sandy Pagel, Kelly Sadar, Gerald F. Timmons, Ewa Leczynski, and Anthony Johnson. In

addition, the Department tendered Jay Morgenstern, Douglas Gary Everson, and John Charles Heber as expert witnesses, and they were accepted as such, without objection.

In addition to Petitioner, Clyde Ray Fultz and John M. "Jack" Dunn (qualified as an expert without objection) testified on behalf of Petitioner.

The Department tendered Exhibits 1-11, 13, 15, and 17, which were received in evidence without objection. Exhibit 8 was received as a joint exhibit. The Petitioner offered Composite Exhibit 18 which was received in evidence without objection.

At the conclusion of the evidentiary portion of the hearing, the undersigned, on the record, inquired as to whether the parties wished to make closing statements. Counsel for both sides indicated that they would reserve closing argument for inclusion or contemporaneous submission with their proposed recommended orders, and further advised that they had elected not to furnish a transcript of the proceedings.

At the request of counsel for Petitioner, the undersigned agreed to extend the deadline for the filing of proposed recommended orders to 15 days from the date of the hearing (October 4, 2000).

Both parties made timely post-hearing submissions, and these have been carefully considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the evidence adduced at hearing and the record as a whole, the following findings of fact are made:

1. Pursuant to Section 381.0065, Florida Statutes, the Department has the authority and jurisdiction to regulate the construction, installation, modification, abandonment or repair of on-site sewage treatment and disposal systems (used interchangeably with "septic tank" or "drainfield" throughout this Recommended Order).

2. Septic tank repairs may be made only by individuals who have qualified with and are licensed by the Department and subject to the standards of ethics and competence established by Department rules. See, Section 489.553(3), Florida Statutes (1999).

3. At all times material to this action, Petitioner has been registered with the Department as a septic tank contractor and serves as Vice President of Sales for Allstate Septic Tank Company (Allstate).

4. Allstate is owned by Jack Dunn (Dunn).

5. Petitioner has been employed by Allstate since 1982.

6. At the time Petitioner commenced her employment with Allstate, the company was owned by an individual who sold the business to Dunn in 1995.

7. From 1982 to 1995 when Dunn acquired the business, Petitioner worked as Allstate's office manager.

8. Dunn, not Petitioner, has final authority over how Allstate's work is performed and what accommodations, if any, will be made with dissatisfied customers or with regulatory authorities.

9. At all times material to this case, Cheryl and Kelly Sadar (Owners) owned and resided in a home at 1770 SW 30th Place, Ft. Lauderdale.

10. Like the other homes in this neighborhood, Owners' property relied upon an on-site drainage and sewage system.

11. The drainfield at the Owners' property had been replaced in 1988 and had operated without problem until December 1998.

12. In December 1998, Cheryl Sadar called Allstate and asked the Company to "check out" odors coming from the grass lawn on Owners' property.

13. Pursuant to that request, Petitioner and Dunn visited the Owners' property.

14. In January, 1999, Allstate pumped the Owners' septic tank and told Mrs. Sadar that if the pumping did not work, it would be necessary to replace the existing drainfield.

15. Pumping did not work and in March 1999, the Owners authorized Allstate to replace the existing drainfield with a new drainfield system.

16. Petitioner and Dunn differ from the Owners in their testimony regarding what, if any, requirements Allstate sought to impose upon the Owners in order to assure that the drainfield to

be installed by Allstate would work properly, and what, if any, limits the Owners placed upon Allstate's ability to exercise professional judgment as to where the drainfield should be installed.

17. For example, Petitioner claims that Owners forbade Allstate the use of the eastern border of Owners' property because they wanted to store a boat there. Department witnesses deny that Owners ever sought to impose such a restriction.

18. The parties also disagree as to the significance of certain restrictions which the parties agree were in fact imposed. For instance, there is no dispute that Owners were unwilling to cut down a favorite oak tree, despite Allstate's recommendation that they do so. But the parties differ in their recollection of what, if anything, was said to Owners about the impact of that decision upon Petitioner's ability to deliver a working drainfield.

19. The factual disputes regarding limitations allegedly placed upon Petitioner by Owners are resolved in favor of the Department. Having considered the demeanor of the witnesses during their testimony, together with all of the facts and circumstances surrounding the dealings of the witnesses, the undersigned concludes that Owners placed no restrictions upon Allstate in the performance of its contract, save the requirement that the favorite oak tree be left standing. In that instance, the undersigned concludes that the Owners testified truthfully

that Allstate informed them that the new drainfield may need to be replaced as soon as a decade after its installation if the oak tree remained, and Owners accepted that particular risk. There was undisputed testimony that other homes in the Owners' neighborhood have drainfields adjacent to mature oak trees, and that proximity has never been known to cause a drainfield failure within months of installation. It is not believable that Owners allowed Allstate to install a drainfield with knowledge that Allstate expected the system to fail within months if the oak tree was not removed.

20. Similarly, there was no evidence, save for the testimony of Petitioner and Dunn, that Owners ever owned a boat, or had plans to buy one. Indeed, Gerald Timmons, who replaced the failed Allstate drainfield with a system which was operating without problems through the date of the hearing, testified that Owners made no attempt to restrict the location of the drainfield, and that he in fact installed his system over the eastern border of the property where Petitioner claimed Owners had denied access.

21. By contract dated March 1, 1999 (Composite Exhibit 17, "the contract"). Allstate undertook to provide a new drainfield to Owners for the price of $2,300.00.

22. Pursuant to the contract, Petitioner undertook to provide the Department with information required to secure necessary Department permits.

23. In the permit application, Petitioner misrepresented the condition of the ground below the drainfield as having suitable soil conditions for the proposed work.

24. In fact, the opposite was true. The presence of the pre-existing drainfield rendered the site unsuitable and indeed, doomed to fail.

25. The site evaluation provided by Petitioner represented an adequate amount of sand in the drainfield area and an observed water table depth of 48 inches below the existing grade. Unrebutted expert testimony demonstrates that these representations could not possibly have been true, due to the presence of the pre-existing drainfield which Petitioner failed to excavate prior to installing a new system directly on top of the pre-existing drainfield.

26. Petitioner testified that she personally probed five feet down the center of the area where the Allstate drainfield was to be placed but found no sign of the pre-existing drainfield which was there.

27. This testimony is belied by the more credible the testimony of the Department's experts, who agreed that if Petitioner's account of her probe were accurate, the pre-existing drainfield would necessarily have been discovered.

28. Petitioner's permit application inaccurately represented the amount of available space for the installation of a drainfield as being limited to 375 square feet.

29. In fact, the owners' property would accommodate a 523 square foot drainfield.

30. The separation between the bottom of the Allstate drainfield system and the water table depth required for the competent installation of a drainfield was not met by Petitioner.

31. The parties expended a great deal of time establishing the hard feelings between Owners and Allstate and between Department officials and Allstate, particularly its owner Dunn. Witnesses aligned with both sides testified at length to various incidents of boorish behavior by Allstate employees and by the Owners.

32. Similarly, there appears to be a history of distrust between at least some Department officials and Dunn, which was exacerbated between November 1999 and March 2000, when the efforts by the Department to mediate the dispute between Allstate and Owners were unsuccessful.

33. Unquestionably, relations between Allstate and Owners deteriorated rapidly upon the failure of the drainfield, but the various exchanges of angry words and the Department's unsuccessful effort to persuade Allstate to partially compensate Owners have no relevance to the question of whether Petitioner did or did not commit the violations alleged in the Administrative Complaint, and have not been considered by the undersigned in resolving those issues.

34. In this case, Allstate did not provide Owners with a written guarantee of its work, and there is no legal requirement that it do so.

35. Neither did Allstate provide Owners with any written disclaimers or instructions for using the system or warnings that certain types of activities would cause the system to fail.

36. Allstate company policy permits the installation of drainfield systems even in cases where Allstate believes the system is not likely to work.

37. The Petitioner's installation was completed in March 1999 and Owners paid Allstate the $2,300.00 contract price.

38. Beginning in the fall of 1999, Owners began to experience problems with the Petitioner's drainfield.

39. Owners contacted Allstate, which rejected Owners' request that it take corrective action.

40. Owners also contacted the Department, which made efforts to mediate between Owners and Allstate.

41. The evidence is inconclusive as to why the Department's mediation efforts failed.

42. At one point, Allstate seemed agreeable to making a partial refund to Owners, but later Dunn changed his mind. However, Allstate and Petitioner have always asserted that the failure of the drainfield was entirely the fault of the Owners.

43. Indeed, throughout the history of Allstate's dealings with Owners, throughout the final hearing and in Petitioner's

proposed Recommended Order, Petitioner has offered a variety of theories as to why her work failed. One suggestion was that the use of a lawnmower contributed to the drainfield's failure. Petitioner also insisted that Owners used too much water, causing hydraulic overload and precipitating the failure of Petitioner's system. Petitioner asserts that Owners' water usage increased by 8.85 percent from March 1999 when Petitioner's system was installed to November 1999, when the system began to fail. And in its Proposed Recommended Order, Petitioner asks for the first time that the undersigned take judicial notice that on October 19, 1999, Hurricane Irene "swept through the Fort Lauderdale area", leaving substantial rainfall-related damage in its wake; however, no evidence was offered linking the rains of Hurricane Irene to Owners' drainfield failure.

44. The unanimous weight of expert opinion, save that of Allstate's owner Dunn, is that the various theories advanced by Petitioner as reasons for the failure of her work--singly or in combination--are insufficient to explain the sequence of events at the Owners' property as it relates to the problems they experienced with the Allstate drainfield system.

45. By March 2000, it was clear that the Allstate-installed drainfield had failed. Jerry's Septic Tank Service and its owner, Gerald Timmons, were engaged by the Owners to evaluate the situation and make necessary repairs.

46. A repair permit was issued to Jerry's by Department on March 13, 2000, and work was commenced.

47. Almost immediately it became apparent that an old drainfield was located immediately beneath the Petitioner's drainfield.

48. Jerry Timmons immediately called Owners to notify them of this finding.

49. Owners, in turn, called Department official Jay Morgenstern to advise of Timmons' discovery.

50. Allstate was also informed of the discovery of the preexisting drainfield.

51. Petitioner and Dunn each conversed with Jerry Timmons about the pre-existing drainfield adjacent to the Allstate drainfield.

52. At all times after Allstate was notified of the failure of its system, Allstate and Petitioner continued to maintain that the failure was the fault of the Owners, not Allstate, and that the preexisting drainfield either was not there in March 1999 or was not discoverable by Allstate.

53. Morgenstern personally conducted an inspection and verified Timmons' finding that old drainfield material was clearly visible.

54. Thereafter, the Department issued the Citation for Violation.

55. The services provided by Petitioner in March 1999, constitute an improper and incomplete repair and installation.

56. The improper, incomplete services provided by Petitioner in March 1999, resulted in Owners being required to expend $2,800.00 for the services of Jerry's Septic Tank to excavate the pre-existing drainfield, along with the defective Allstate system, and to provide a functioning septic tank system, in addition to the $2,300.00 previously paid to Allstate.

CONCLUSIONS OF LAW

57. The Division of Administrative Hearings has jurisdiction over the subject matter and parties pursuant to Section 120.57(1), Florida Statutes. The parties were duly noticed for the formal administrative hearing.

58. The Department is statutorily empowered, pursuant to Sections 381.0065 through 381.0067, Florida Statutes, and Chapter 489, Part III, Florida Statutes, to regulate the installation of septic systems, such as Allstate's, and those persons, like Petitioner, who install such systems.

59. Pursuant to Section 381.0065(3)(a), Florida Statutes, the Department has "[a]dopt[ed] rules to administer Subsection 381.0065-381.0067." These rules include Rule 64E-6.022(1)(p), Florida Administrative Code, which provides that gross negligence, incompetence, or misconduct which causes monetary or other harm to a customer, or physical harm to any person may be punished on first violation by a $500 fine and 90-day suspension, and Rule

64E-6.022(1)(p), which provides that "installation, modification, or repair of an on-site sewage treatment and disposal system in violation of the standards of Section 381.0065 or Section 381.00655, Florida Statutes, or Chapter 64E, Florida Administrative Code, may be punished on first violation with a fine of $500.00 per specific standard violated.

60. Proof greater than a mere preponderance of the evidence must be submitted in order for the Department to impose a fine upon the contractor. Clear and convincing evidence is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Section 120.57(1)(h), Florida Statutes ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.").

61. "[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d

398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

62. The record evidence in this case clearly and convincingly establishes that, as alleged in the Administrative Complaint, Petitioner acted in violation of the law by installing, in a grossly negligent or incompetent manner, a drainfield on Owners' property which caused monetary harm to the customer, and by installing, modifying or repairing Owners' on-site sewage treatment and disposal system in violation of the basic standards set forth in Section 381.0065 or 381.00655, Florida Statutes, and Chapter 64E-6, Florida Administrative Code.

63. There is clear and convincing evidence that by reason of Petitioner's gross negligence, gross incompetence, or gross misconduct in connection with Owners' project, Owners suffered no less than $2,800.00 in direct monetary harm inasmuch as the drainfield Petitioner installed was substantially undersized and, far more significantly, was installed directly atop a pre-existing drainfield, creating a situation in which, according to unrebutted expert testimony, failure was the only possible outcome.

64. Petitioner asserts her opinion, and that of her expert, who is also her employer and the owner of Allstate, that various things the Owners did or did not do caused the system to fail. Department's experts refuted each of these self-serving opinions, and testified with certainty that none of the errors or omissions alleged by petition, even if true, would have caused the situation

experienced by the Owners. Rather, they were clear and convincing in their opinion that the installation of the Allstate drainfield directly atop the preexisting drainfield inevitably led to the failure of Petitioner's drainfield, and that Petitioner could have and should have discovered the preexisting drainfield in the competent exercise of her duties as a septic tank contractor.

64. Petitioner's lack of candor and unwillingness to take responsibility for her substandard work more than warrants the imposition of the $500.00 fine sought by the Department for each alleged Rule violation.

65. In her post-hearing submission, Petitioner renewed her prehearing ore tenus for summary judgment, based upon her contention that Rule 64E-6.015(7) requires entry of judgment for Petitioner. The undersigned has carefully considered Petitioner's legal argument on this point and finds it without merit. Petitioner cites this section for the proposition that septic tank contractors are not required to remove a preexisting drainfield. Yet the unrebutted expert testimony conclusively demonstrates that removal of a preexisting drainfield is a sine qua non of competent drainfield repair or replacement, and any licensed contractor would know it.

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order finding Petitioner guilty of the unlawful conduct alleged in the Administrative Complaint and disciplining her therefor by fining her in the total amount of $1,000.00.

DONE AND ENTERED this 19th day of October, 2000, in Tallahassee, Florida.

FLORENCE SNYDER RIVAS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of October, 2000.

COPIES FURNISHED:

Judith C. Elfont, Esquire
Department of Health
2421-A Southwest Sixth Avenue
Fort Lauderdale, Florida 33315-2613

William E. Stacey, Jr., Esquire
320 Southeast 9th Street
Post Office Box 460053
Fort Lauderdale, Florida 33346

Theodore M. Henderson, Agency Clerk
Department of Health
4052 Bald Cypress Way
Bin A-02
Tallahassee, Florida 32399-1703

William W. Large, General Counsel
Department of Health
4052 Bald Cypress Way
Bin A02
Tallahassee, Florida 32399-1701

Dr. Robert G. Brooks, Secretary
Department of Health
4052 Bald Cypress Way
Bin A00
Tallahassee, Florida 32399-1701

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.