

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
PALM BEACH COUNTY HEALTH)
DEPARTMENT,)
)
Petitioner,)
)
vs.) Case No. 00-2435
)
NOEL SANFIEL,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 28, 2000, in West Palm Beach, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Victoria Coleman-Miller, Esquire
Department of Health
Palm Beach County Health Department
826 Evernia Street
West Palm Beach, Florida 33401

For Respondent: Garry M. Glickman, Esquire
Glickman, Witters, Marell & Jamieson
1601 Forum Place, Suite 1101
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

Whether Respondent committed the violations as set forth in the Citation for Violation, Onsite Sewage Program/Sanitary Nuisance dated April 28, 2000.

PRELIMINARY STATEMENT

On April 28, 2000, the Department of Health, Palm Beach County Health Department (Petitioner) issued a Citation for Violation, Onsite Sewage Program/Sanitary Nuisance against Noel Sanfiel (Respondent). Petitioner charged Respondent with violating Section 381.0065, Florida Statutes, and Rule 64E-6.015(6), Florida Administrative Code, by failing to remove an old drainfield prior to installation of a new drainfield; and Rule 64E-6.022(1)(1)1, Florida Administrative Code, by gross negligence, incompetence, or misconduct not causing monetary damages. Respondent disputed the allegations of material fact and requested a hearing. On June 12, 2000, this matter was referred to the Division of Administrative Hearings.

At hearing, Petitioner presented the testimony of three witnesses and entered 11 exhibits (Petitioner's Exhibits numbered 1-8, 9A, 9B, and 10) into evidence. Petitioner was permitted to late-file one exhibit (Petitioner's Exhibit numbered 11), which was deposition testimony. Respondent testified in his own behalf and entered one exhibit (Respondent's Exhibit numbered 1) into

evidence. The parties entered one joint exhibit (Joint Exhibit numbered 1) into evidence, which was deposition testimony.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of two volumes, was filed on October 23, 2000. The parties timely filed their post-hearing submissions, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is authorized and given the jurisdiction to regulate the construction, installation, modification, abandonment, or repair of onsite sewage treatment and disposal systems, including drainfields, by septic tank contractors.

2. At all times material hereto, Respondent was a registered septic tank contractor and, as such, he was authorized to provide septic tank contracting services, including the installation and repair of drainfields.

3. On or about November 2, 1995, Petitioner issued a permit (Permit No. RP648-95) to Wilmar Rodriguez for the repair of a septic tank system at 417-421 Perry Avenue, Greenacres, Florida. The property was a triplex, which was purchased by Mr. Rodriguez in 1981. Mr. Rodriguez has no knowledge as to whether any

drainfields were installed or replaced on the property, prior to 1981.

4. The Permit included the installation of a new multi-chambered septic tank, a dosing tank, a lift station, and a new drainfield. The Permit was also for a filled system and called for the drainfield to be 700 square feet.

5. Respondent was indicated as the "agent" on the Permit. Respondent and/or his employees performed the work under the Permit.

6. Respondent was the septic tank contractor for the repair of the septic tank system under the Permit.

7. On November 9, 1995, the construction of the septic tank system was approved by one of Petitioner's inspectors, who was an Environmental Specialist I.

8. Petitioner's inspectors are not present during the entire construction or repair of a septic tank system or drainfield. Usually, inspections are made after the completion of the construction or repair of the septic tank system. Additionally, the inspection of a drainfield is usually performed after the rock has been placed on top of the drainfield.

9. On February 2, 1996, the same inspector performed the inspection after the completion of the construction of the septic tank system, including after the placing of the rock on top of the drainfield. Even though the Permit reflects a filled system,

the filled/mound system section on the inspection sheet was crossed out. The inspector considered the system to be a standard system, not a filled or mound system, and, therefore, inspected it as a standard system.

10. In inspecting a drainfield, the inspection by an inspector includes checking to ensure that a drainfield has 42 inches of clean soil below the drainfield. An inspector uses an instrument that bores down through the rock and brings up a sample of the soil, which is referred to as augering. Augering is randomly performed at two locations.

11. For the instant case, the inspector performed the augering in two random locations of the drainfield, which were in the area of the middle top and the middle bottom. The samples failed to reveal anything suspect; they were clean.

12. On February 2, 1996, the inspector issued a final approval for the septic tank system. Final approval included the disposal of "spoil" and the covering of the septic tank system with "acceptable soil".

13. The inspector mistakenly inspected the system as a standard system. He should have inspected the system as a filled system.¹

14. After the repair and installation of the septic tank system by Respondent, Mr. Rodriguez continued to have problems with the septic tank system. He contacted Respondent three or

four times regarding problems with the system, but the problems persisted. Each time, Respondent was paid by Mr. Rodriguez. Sewage water was flowing into the street where the property was located and backing-up into the inside of the triplex.

15. Having gotten no relief from Respondent, Mr. Rodriguez decided to contact someone else to correct the problem. Mr. Rodriguez contacted Richard Gillikin, who was a registered septic tank contractor.

16. On October 14, 1999, a construction permit was issued to Mr. Rodriguez for the repair of the septic tank system. Mr. Gillikin was indicated as the agent.

17. Mr. Gillikin visited the property site of the triplex and reviewed the problem. He determined that the drainfield was not properly functioning, but he did not know the cause of the malfunctioning.

18. With the assistance of Petitioner's inspectors, Mr. Gillikin and Mr. Rodriguez attempted to determine the best method to deal with the problem. After eliminating options, Mr. Rodriguez decided to replace the drainfield.

19. To replace the drainfield, Mr. Gillikin began excavating. He began removing the soil cover and the rock layer of the drainfield.

20. Mr. Gillikin also wanted to know how deep he had to dig to find good soil. After digging for that purpose and for 10 to

12 inches, he discovered a drainfield below Respondent's drainfield. The drainfield that Mr. Gillikin discovered was a rock bed 12 inches thick in which pipes were located and, as indicated, 10 to 12 inches below Respondent's drainfield. Mr. Gillikin also dug a hole two to three feet deep, pumped the water out of the hole, and saw the old drainfield. Mr. Gillikin determined that the old drainfield extended the full length of Respondent's drainfield.

21. As a result of Mr. Gillikin's determining that the old drainfield was below Respondent's drainfield, both drainfields had to be removed and the expense of a new drainfield increased.

22. Leon Barnes, an Environmental Specialist II for Petitioner, who was also certified in the septic tank program, viewed the drainfield site. He determined that the old drainfield was below Respondent's drainfield and that, therefore, Respondent had not removed the old drainfield.

23. On or about November 6, 1999, Mr. Barnes' supervisor, Jim Carter, and co-worker, Russell Weaver, who is an Engineer, also visited the drainfield site. Mr. Weaver determined that the old drainfield covered a little more than 50 percent of the area under Respondent's drainfield.

24. On November 8, 1999, a construction inspection and a final inspection of the system installed by Mr. Gillikin were performed. The system was approved.

25. Respondent admits that a new drainfield is prohibited from being installed over an old drainfield. However, Respondent denies that he installed a new drainfield over the old drainfield on Mr. Rodriguez's property.

26. In 1995, Respondent failed to completely remove the old drainfield before he installed the new drainfield.

27. The soil and rocks from the old drainfield, which was not functioning, were contaminated spoil material. Because the old drainfield was not completely removed, the contaminated spoil material remained in the drainfield and was used as part of the material in the installation of the new drainfield.

28. Leaving the contaminated spoil material in the new drainfield, prevented the sewage water from being able to percolate through the ground, which is a method of cleansing the sewage water. Without being able to percolate through the ground, the sewage water remained on the surface of the drainfield, creating a serious sanitary nuisance and health hazard. The sewage water spilled onto the street and backed-up into the triplex.

29. Respondent was issued a Citation for Violation, Onsite Sewage Program/Sanitary Nuisance by Petitioner.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the

parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

31. License revocation proceedings are penal in nature. The burden of proof is on the Petitioner to establish by clear and convincing evidence the truthfulness of the allegations in the Citation for Violation, Onsite Sewage Program/Sanitary Nuisance. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

32. A licensee is charged with knowing the practice act that governs his/her license. Wallen v. Florida Department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

33. Section 381.0065, Florida Statutes (1995), provides in pertinent part:

(1) LEGISLATIVE INTENT.-It is the intent of the Legislature that where a publicly owned or investor-owned sewerage system is not available, the department shall issue permits for the construction, installation, modification, abandonment, or repair of onsite sewage treatment and disposal systems under conditions as described in this section and rules adopted under this section. It is further the intent of the Legislature that the installation and use of onsite sewage treatment and disposal systems not adversely affect the public health or significantly degrade the groundwater or surface water.

* * *

(3) DUTIES AND POWERS OF THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES.²-The department shall:

(a) Adopt rules to administer ss. 381.0065-381.0067.

(b) Perform application reviews and site evaluations, issue permits, and conduct inspections and complaint investigations associated with the construction, installation, maintenance, modification, abandonment, or repair of an onsite sewage treatment and disposal system for a residence or establishment . . .

* * *

(h) Conduct enforcement activities, including imposing fines, . . . for violations of this section, part III of chapter 489, or chapter 386, or for a violation of any rule adopted under this section, part III of chapter 489, or chapter 386.

* * *

(4) PERMITS; INSTALLATION; AND CONDITIONS.-
. . . A person may not contract to construct, modify, alter, repair, service, abandon, or maintain any portion of an onsite sewage treatment and disposal system without being registered under part III of chapter 489. . . .

(5) ENFORCEMENT; RIGHT OF ENTRY; CITATIONS.-

* * *

(b)1. The department may issue citations that may contain . . . an order to pay a fine, . . . for violations of ss. 381.0065-381.0067 or chapter 386 or part III of chapter 489 or the rules adopted by the

department, when a violation of these sections or rules is enforceable by an administrative or civil remedy . . . A citation issued under ss. 381.0065-381.0067 or chapter 386 or part III of chapter 489 constitutes a notice of proposed agency action.

34. Respondent is charged with violating Rule 64E-6.015(6), Florida Administrative Code, which provided, at the time that the alleged violation was discovered, in pertinent part:

(6) Construction materials used in system repairs shall be of the same quality as those required for new system construction. Contaminated spoil from drainfield repairs shall not be used in system repair in any manner. Any contaminated spoil material shall be disposed of in a sanitary landfill or shall be limed and stockpiled for at least 30 days. The resulting material shall not be used for drainfield repair. . . .

35. Table V of Rule 64E-6.015(6), Florida Administrative Code, required a soil depth of 42 inches.

36. Rule 64E-6.015, Florida Administrative Code, is formerly Rule 10D-6.0571, Florida Administrative Code, which was in effect at the time that the violation occurred in 1995. Rule 10D-6.0571 provided in pertinent part:

(4) Construction materials used in system repairs shall be of the same quality as those required for new system construction. Contaminated spoil from drainfield repairs shall not be used in system repair in any manner. Any contaminated spoil material shall be disposed of in a sanitary landfill or shall be limed and stockpiled for at least 30 days. The resulting material shall not be used for drainfield repair. . . .

Table V of Rule 10D-6.0571(4), Florida Administrative Code, also required a soil depth of 42 inches.

37. The pertinent provisions of Rules 64E-6.015(6) and 10D-6.0571(4), Florida Administrative Code, are identical. The rule in effect at the time of the violation, Rule 10D-6.0571(4), Florida Administrative Code, should have been the rule cited as being violated. However, this error is not fatal to the charged action. The interpretation of the two said Rules is the same. Moreover, Respondent was placed on notice as to the substance of the alleged violation, which is installing a new drainfield over an old drainfield. Further, Respondent admits that to install a new drainfield over an old drainfield is prohibited.

38. Petitioner demonstrated that Respondent violated Rule 10D-6.0571(4), Florida Administrative Code, now Rule 64E-6.015(6), Florida Administrative Code. The old drainfield was not removed. The old drainfield contained spoil material. Respondent used the spoil material from the old drainfield as part of the material for the new drainfield.

39. Respondent is also charged with violating Rule 64E-6.022(1)(1)1, Florida Administrative Code, which provided, at the time that the alleged violation was discovered, as follows:

(1) The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this section.

* * *

- (1) Gross negligence, incompetence, or misconduct which:
 - 1. Causes no monetary or other harm to a customer, or physical harm to any person. First violation, \$500 fine; repeat violation, \$500 fine and 90 day suspension or revocation.

40. Rule 64E-6.022, Florida Administrative Code, is formerly Rule 10D-6.0751, Florida Administrative Code, which was in effect at the time that the violation occurred in 1995. Rule 10D-6.0751 provided in pertinent part as follows:

- (1) The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this section.

* * *

- (1) Gross negligence, incompetence, or misconduct which:
 - 1. Causes no monetary or other harm to a customer, or physical harm to any person. First violation, \$500 fine; repeat violation, \$500 fine and 90 day suspension or revocation.

41. The pertinent provisions of Rules 64E-6.022(1)(1)1 and 10D-6.0751(1)(1)1, Florida Administrative Code, are identical. The interpretation of the two said Rules are the same. The rule in effect at the time of the violation, Rule 10D-6.0751(1)(1)1, Florida Administrative Code, should have been the rule cited as being violated. However, this error is not fatal to the charged action. The interpretation of the two Rules is the same.

Moreover, Respondent was placed on notice as to the substance of the alleged violation, which is gross negligence, incompetence, or misconduct and a fine of \$500.

42. Petitioner demonstrated that Respondent violated Rule 10D-6.0751(1)(1)1, Florida Administrative Code, now Rule 64E-6.022(1)(1)1, Florida Administrative Code. Respondent admits that a new drainfield is prohibited from being installed over an old drainfield. Yet, Respondent installed a new drainfield over an old drainfield. Respondent committed gross negligence, incompetence, or misconduct, which did not cause monetary damage.

43. As to penalty, a fine not to exceed \$500.00 may be imposed for each violation specified in a citation. Subsection 381.0065(5)(b)3, Florida Statutes (1995). Furthermore, the disciplinary guidelines provide for a fine of \$500. Rule 10D-6.0751(1)(1)1, Florida Administrative Code.

44. Petitioner suggests a fine of \$1,000. Petitioner suggests an increased fine based upon Rule 64E-6.022(1)(p), Florida Administrative Code, which provides as follows:

(p) Installation, modification, or repair of an onsite sewage treatment and disposal system in violation of the standards of s. 381.0065 or s. 381.00655, F.S., or chapter 64E-6, F.A.C. First violation, \$500 per specific standard violated; repeat violation, 90 day suspension or revocation.

However, the rule in effect at the time that the incident occurred was Rule 10D-6.0751, Florida Administrative Code, which

did not contain the same provision as Rule 64E-6.022(1)(p), Florida Administrative Code. Consequently, the additional fine of \$500 is not considered.

RECOMMENDATION

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

RECOMMENDED that the Department of Health, Palm Beach County Health Department, enter a final order:

1. Affirming the Citation for Violation, Onsite Sewage Program/Sanitary Nuisance and finding that Noel Sanfiel violated Section 381.0065, Florida Statutes (1995), and Rule 10D-6.0571(4), now Rule 64E-6.015(6), and Rule 10D-6.0751(1)(1)1, now 64E-6.022(1)(1)1, Florida Administrative Code.

2. Imposing a fine of \$500.

DONE AND ENTERED this 13th day of February, 2001, in Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of February, 2001.

ENDNOTES

^{1/} At hearing, the inspector admitted that the septic tank system may have been a filled system but that he inspected the system as a standard system.

^{2/} The Department of Health and Rehabilitative Services is now, and was at the time that the violation was discovered, the Department of Health.

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.