

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
DIVISION OF ENVIRONMENTAL HEALTH, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 02-1020  
 )  
LARRY C. GARNER, d/b/a A. CARVER )  
SEPTIC TANK, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On April 26, 2002, a final administrative hearing was held in this case in Green Cove Springs, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: John D. Lacko, Esquire  
Department of Health  
420 Fentress Boulevard  
Daytona Beach, Florida 32114

For Respondent: Larry C. Garner, pro se  
13950 Normandy Boulevard  
Jacksonville, Florida 32221

STATEMENT OF THE ISSUES

The issue in this case is whether Respondent, Larry C. Garner, should be fined \$500 for misstating the size of a septic tank and drain field.

PRELIMINARY STATEMENT

On January 15, 2002, the Department of Health, Division of Environmental Health (the Department), issued a Citation for Violation alleging that Respondent violated Section 489.553(3), Florida Statutes, and Florida Administrative Code Rule 64E-6.022(1)(k) by "practicing fraud or deceit [or] making misleading or untrue representation" on Department of Health Form 4015. Respondent timely disputed the charges and requested an administrative hearing. The matter was referred to DOAH on March 1, 2002, and final hearing was scheduled for April 26, 2002.

At final hearing, the Department called two witnesses and had Petitioner's Exhibits 1 and 2 admitted in evidence. Respondent testified in his own behalf but offered no exhibits in evidence. Neither party ordered a transcript, and the parties were given until May 6, 2002, to file proposed recommended orders. Only the Department filed a proposed recommended order, which has been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, Larry C. Garner, is the licensed septic tank contractor who owns and operates A. Carver Septic Tank. (The Citation for Violation erroneously referred to the company as "E. Carver Septic Tank," but the error was

corrected without objection at final hearing. There was no evidence to support Respondent's suggestion that the Department may have taken disciplinary action against him because it erroneously thought Respondent was another licensee.)

2. On December 6, 2001, an employee of Respondent pumped out a septic tank and measured a drain field located at 847 Matthews Road, Maxville, Florida. The resident there wanted to enlarge her residence and needed Respondent's services in order to obtain Department approval of the existing septic tank system for the enlarged residence.

3. After services were provided, Respondent's office gave the resident a receipt stating that Respondent's company had pumped out a 900 gallon septic tank and that the drain field measured 360 square feet. (Respondent's office actually dealt with the resident's adult daughter.) Respondent's office staff also prepared Form 4015 (a Department form entitled "Onsite Sewage Treatment and Disposal System Existing System and System Repair Evaluation") and gave it to the resident for use in getting approval of the system for the enlarged residence. The form stated that the septic tank was 900 gallons and that the drain field was 360 square feet.

4. When the resident applied for approval of her septic tank system for her enlarged residence, the Department

inspected the system and found that the septic tank actually was 750 gallons and the drain field actually was only approximately 110 square feet. The Department issued the Citation for Violation based on the magnitude of the discrepancy.

5. Respondent denied that he personally had any contemporaneous knowledge of the services provided by his employee or the receipt of Form 4015 prepared by his office, and there was no evidence that he did. Respondent personally investigated after issuance of the Citation for Violation.

6. At final hearing, Respondent questioned whether the Form 4015 actually stated that the septic tank was 900 gallons. From the handwriting on the form itself, it appears possible that the number could read 700, not 900. But based on the written receipt, which either was prepared contemporaneously with the Form 4015 or was the basis for preparation of the Form 4015 by Respondent's office staff, the greater weight of the evidence was that the Form 4015 stated and was intended to state 900 gallons as the size of the septic tank.

7. As further support for this finding, Respondent himself testified to a conversation he had with his employee during which the employee explained that he sized the septic tank at 700 gallons based on its apparent depth and Respondent

admonished him that the employee knew better--i.e., knew it was necessary to measure height, width, and depth to accurately measure the size of a septic tank.

8. Respondent also attempted to explain how his employee may have made a forgivable error in measuring the drain field. According to the Form 4015, the employee measured the drain field as a rectangular bed, 12 feet by 30 feet. Actually, the drain field consists of two trenches (one 26 feet long and the other 29 feet long), which the Department's inspector measured as being two feet wide. Respondent testified that the drain field began at a distribution box and was approximately ten feet wide within a few feet of the distribution box. Respondent testified that it would be easy to incorrectly assume that the approximate ten-foot width continued as a bed for the entire length of the drain field, as his employee apparently did. However, the greater weight of the evidence was that the employee's error was not reasonable; to the contrary, to determine the configuration and size of a drain field, it is necessary to probe the ground at more than just one distance close to the distribution box.

9. When Respondent himself went to the site to investigate the allegations against him, he probed both near the distribution box and further away southeast of the distribution box. He testified that he found solid rock ten

feet in width near the distribution box; to the southeast, his probing revealed a trench which Respondent measured at between three and a half and four feet in width. Based on those measurements, Respondent assumed two trenches approximately 30 feet long and four feet in width each, for a total of approximately 240 square feet.

10. It is difficult to reconcile Respondent's testimony as to the width of the southeast trench with the testimony of the Department's inspector. The Department's inspector probed approximately ten feet and 20 feet from the septic tank and found two-foot wide trenches in four different places. The Department's inspector also testified without contradiction in response to Respondent's questions on cross-examination that backhoes used at the time this drain field was installed in 1973 generally had two-foot wide excavation buckets.

11. Based on the greater care taken by the Department's inspector in measuring the drain field, and the kind of backhoe in general use in 1973, it is found that the Department's inspector's measurements were more accurate. Even if Respondent's measurements were accurate, and the Department inspector's were inaccurate, the measurements recorded on the receipt and on Form 4015 still would have been seriously overstated.

12. While not seriously disputing the inaccuracy of the Form 4015 submitted in this case, Respondent stated "anyone can make a mistake" and that the Department should have asked Respondent to re-check the measurements instead of issuing a citation, especially in view of Respondent's disciplinary record in 29 years in the business in Clay County.

(Respondent testified that his only "issues in Tallahassee" were one incident--not fully explained--involving a cow on someone's property and another when he had someone take a re-certification examination for him at a time when his mother was ill. The Department did not controvert this testimony. As already mentioned, there was no evidence to support Respondent's initial suggestion that the Department may have taken disciplinary action against him because it erroneously thought he was another licensee.) But the Department's witness testified that issuance of the citation was appropriate and consistent with agency policy because of the magnitude of the discrepancies on the Form 4015.

13. Respondent testified that the employee involved in this case was his stepson, who has worked for Respondent for 14 years, since he was 11 years old, seven to eight years as a full-time employee. Respondent also testified that he recently fired his stepson, but the reasons for firing him were not directly related to his conduct in this case.

14. Respondent also testified that he felt compelled to insist on a hearing although he knew the Form 4015 was inaccurate because he perceived the Department to be acting in this case as if it had "absolute power" over him. He apparently viewed his request for a hearing as a necessary challenge to government's assertion of "absolute power" over him.

#### CONCLUSIONS OF LAW

15. Section 381.0065(3)(c), Florida Statutes, authorizes the Department to: "Conduct enforcement activities, including imposing fines, issuing citations, suspensions, revocations, injunctions, and emergency orders for violations of this section, part I of chapter 386, or part III of chapter 489 or for a violation of any rule adopted under this section, part I of chapter 386, or part III of chapter 489."

16. Section 489.553(3), Florida Statutes, authorizes the Department to "adopt reasonable rules, including, but not limited to, rules that establish ethical standards of practice, requirements for registering as a [septic tank] contractor, requirements for obtaining an initial or renewal certificate of registration, disciplinary guidelines, and requirements for the certification of partnerships and corporations."



17. Section 489.556, Florida Statutes, provides:

A certificate of registration may be suspended or revoked upon a showing that the registrant has:

- (1) Violated any provision of this part.
- (2) Violated any lawful order or rule rendered or adopted by the department.
- (3) Obtained his or her registration or any other order, ruling, or authorization by means of fraud, misrepresentation, or concealment of material facts.
- (4) Been found guilty of gross misconduct in the pursuit of his or her profession.

18. Florida Administrative Code Rule 64E-6.022 provides in pertinent part:

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

\* \* \*

(k) Practicing fraud or deceit, making misleading or untrue representations. First violation, \$500 fine; repeat violation, revocation.

\* \* \*

(2) Circumstances which shall be considered for the purposes of mitigation or aggravation of penalty shall include the following:

- (a) Monetary or other damage to the registrant's customer, in any way associated with the violation, which damage the registrant has not relieved, as of the time the penalty is to be assessed.
- (b) Actual job-site violations of this rule or conditions exhibiting gross negligence, incompetence or misconduct by the contractor, which have not been corrected as of the time the penalty is being assessed.

- (c) The severity of the offense.
- (d) The danger to the public.
- (e) The number of repetitions of the offense.
- (f) The number of complaints filed against the contractor.
- (g) The length of time the contractor has practiced and registration category.
- (h) The actual damage, physical or otherwise, to the customer.
- (i) The effect of the penalty upon the contractor's livelihood.
- (j) Any efforts at rehabilitation.
- (k) Any other mitigating or aggravating circumstances.

19. The statutory and rule scheme used by the Department in its Citation for Violations is unusual. See Final Order entered in Dept. of Health, etc. v. Barbara Thompson, etc., DOAH Case No. 01-3218, entered February 27, 2002, adopting in toto Recommended Order, entered by ALJ Alexander February 5, 2002, 2002 WL 185223. But as in the Thompson case, no issue has been raised in this case as to adequacy of the charges or notice to Respondent.

20. Applying the intent of Rule 64E-6.022(1)(k), the evidence is clear that Respondent, through the actions of his employee, is subject to imposition of a fine for "[p]racticing fraud or deceit, making misleading or untrue representations." (Emphasis added.) The facts found do not clearly warrant either aggravation or mitigation of the \$500 penalty guideline.

RECOMMENDATION

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

RECOMMENDED that the Department of Health enter a final order finding Respondent guilty as charged and imposing a fine in the amount of \$500.

DONE AND ENTERED this 24th day of May, 2002, in Tallahassee, Leon County, Florida.

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J. LAWRENCE JOHNSTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of May, 2002.

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.