

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE)
AND CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) Case No. 04-3052
)
KILLINGSWORTH ENVIRONMENTAL,)
INC., a/k/a KEFL, INC., AND)
CLIFFORD KILLINGSWORTH,)
Certified Operator in Charge,)
)
Respondents.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice on January 13 and 14, 2005, before Barbara J. Staros, duly-designated Administrative Law Judge of the Division of Administrative Hearings, via video teleconferencing in Pensacola and Tallahassee, Florida.

APPEARANCES

For Petitioner: David W. Young, Esquire
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For Respondents: Robert O. Beasley, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent committed the violations set forth in the Administrative Complaint, as amended, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On July 7, 2004, the Department of Agriculture and Consumer Services (the Department) issued an Administrative Complaint consisting of 16 counts. The Administrative Complaint charged Respondents with violations of pertinent provisions of Chapter 482, Florida Statutes, and Florida Administrative Code Chapter 5E-14.

The Administrative Complaint was addressed to Mr. Clifford Killingsworth, certified operator-in-charge of Killingsworth Environmental, Inc.

Respondents disputed the allegations in the Administrative Complaint and requested a formal administrative hearing. The case was referred to the Division of Administrative Hearings on or about August 30, 2004. A formal hearing was set for November 3, 2004. Respondents filed a Motion for Continuance of the hearing, which was granted. The hearing was rescheduled for January 13 and 14, 2005.

On January 10, 2005, Petitioner filed a Motion to Amend Administrative Complaint seeking to amend Count 10. The motion was granted.

Prior to hearing, the parties resolved the issues in several of the counts of the Administrative Complaint leaving four counts remaining which alleged violations of Subsections 482.071(1) and (2)(a), Florida Statutes,^{1/} and Florida Administrative Code Rules 5E-14.142(3)(b), (5)(f) and (g) and 5E-14.106(4).

At the commencement of the second day of the hearing, Petitioner made a second motion to amend the Administrative Complaint. The motion was denied.

This case was consolidated for purposes of hearing only with case Nos. 04-3053 and 04-3054. At hearing, Petitioner presented the testimony of Charles Wood, Clinton Killingsworth, Clifford Killingsworth, Joe Parker, Gary Stanford, Bruce Nicely, Michael Page, and Steven Dwinell. Petitioner's Exhibits K-1 through K-9 were admitted into evidence. Respondents presented the testimony of Steven Dwinell and Clifford Killingsworth. Joint Exhibit 1 was admitted into evidence.

A transcript consisting of three volumes was filed on April 20, 2005. The parties timely submitted Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an agency of the State of Florida charged with regulating the operation of the pest control industry pursuant to Section 482.032, Florida Statutes.

2. At all times material to this case, Clifford Killingsworth was the owner and Certified Operator in Charge (COIC) of Killingsworth Environmental, Inc., d/b/a Environmental Security, a/k/a KEFL, Inc., a licensed pest control company in Cantonment, Florida.

Counts 9 and 11

3. Counts 9 and 11 of the Administrative Complaint allege as follows:

Count 9 During an inspection on July 11, 2003, the Department found that Killingsworth Environmental, Incorporated operated an unlicensed business location at 9100 Hamman Avenue, Pensacola, at which sales solicitations were made and remuneration received. This is a violation of Chapters 482.071(1) and (2), Florida Statutes.

Count 11 During an inspection on July 11, 2003 the Department found that Killingsworth Environmental, Incorporated phone numbers terminated in an unlicensed location at 9100 Hamman Avenue. This is a violation of Chapter 5E-14.142(3)(b).

4. Killingsworth Environmental, Inc., d/b/a Environmental Security, a/k/a KEFL (hereinafter KEFL), is physically located at 4141 Pine Forest Road in Cantonment, Florida, and is listed

at this address on its application for business license filed with the Department. Cantonment is located in Escambia County near Pensacola, Florida. Two other pest control companies, Environmental Security of Okaloosa, Inc., and Atlas Termite and Pest Control of Cantonment, Inc., are located at the same address.

5. On July 11, 2003, the Department conducted an inspection of a company called Home Services Marketing and Management, LLC (hereinafter Home Services), which is located at 9100 Hamman Avenue in Pensacola. Clifford Killingsworth and Clinton Killingsworth^{2/} are the managers of Home Services.

6. On March 26, 2002, KEFL entered into a Management and Marketing Agreement with Home Services, executed by Clifford Killingsworth on behalf of KEFL and by Clinton Killingsworth on behalf of Home Services.

7. Since that agreement was signed, the telephone number for KEFL listed in the local telephone directory terminated at Home Services. Home Services also answers calls for Environmental Security of Okaloosa and Atlas Termite and Pest Control of Cantonment, Inc. Through their computer system and caller ID, the Home Services employee knows which company is being called and answers accordingly.

8. Home Services employees do not make "cold calls" to new customers. They receive calls from existing customers. They contact customers with active accounts to set up renewals. They also contact homeowners whose homes were treated during construction and whose initial accounts were with the builder of the home. If a new customer calls, a Home Services employee answers the call, gets the contact information from the potential new client, and then calls the appropriate technician who would then call or visit the potential customer. The appropriate technician is generally determined by the geographic location of the caller.

9. While a Home Services employee might send a preprinted contract to the technician to take to the job site or mail a contract to a customer, Home Services does not enter into any contract to perform pest control services. No pest control trucks or chemicals are stored at Home Services.

10. Home Services also has a payment processing component. Home Services sends bills to pest control customers which instruct customers to make out the check to the appropriate pest control company, not to Home Services. Payments from customers for pest control services are deposited into the account of the appropriate pest control company.

11. No evidence was presented that 9100 Hamman Avenue is an advertised permanent location of KEFL from which business was solicited, accepted, or conducted.

12. After the July 11, 2003, inspection of Home Services, Clinton Killingsworth, Clifford Killingsworth's brother, took steps to get Home Services licensed as a pest control company. Clifford Killingsworth did this because it was his understanding that the Department took the position that Home Services was in the business of practicing pest control services. He employed his brother, Daniel Killingsworth, to be the required licensed person in charge, and contacted several insurance companies to obtain the required insurance. He had difficulty in obtaining the required insurance since Home Services does not offer pest control services. Despite these difficulties, Home Services was issued a license in December 2003.

Count 10

13. Count 10 of the Administrative Complaint, as amended, reads as follows:

During an inspection on July 16, 2003, the Department found that Killingsworth Environmental, Incorporated stored pesticides at an unlicensed business location at 1830 Galvez Road, Gulf Breeze, Florida, which is a violation of Chapter 5E-14.142(5)(f) and (g), Florida Administrative Code. That in addition, the Respondent, Killingsworth Environmental, Inc., regularly parked trucks containing pesticide at that location during nighttime hours, published

in the 2002-2003 Bell South Telephone Directory under Pest Control Services in the yellow pages of the telephone directory, a listing for "Environmental Security", a name under which it did business, and its employees received by facsimile daily work assignments that were sent to them at that location. That the Respondent, Killingsworth Environmental, Inc operated an unlicensed business location at 1830 Galvez Road, Gulf Breeze, Florida, in violation of Section 482.071(2)(a), Florida Statutes.^[3/]

14. The property located at 1830 Galvez Drive is surrounded by a locked fence and contains a structure. The structure is not enclosed. Both KEFL and Environmental Security of Okaloosa park trucks there overnight.

15. The Department conducted an inspection of 1830 Galvez Drive on July 16, 2003. When the inspectors arrived, the gate to the property was locked and the trucks were locked. They entered the property when pest control employees arrived. On the day of the inspection, the Department's inspectors found unmixed chemicals in the trucks.

16. Clifford Killingsworth acknowledges that at the time of the inspection, company trucks parked at the Galvez Drive location overnight and pesticides were in the locked trucks.

17. Company records or contracts are not stored at the Galvez Drive location. No customer contact takes place at or from the Galvez Drive location.

18. The Pest Control Business License Application Form contains a space in which the licensee must respond to the following: "Designate location where pest control records and contracts will be kept and the exact location address for storage of chemicals if other than licensed business location."

19. The applications for business license for KEFL d/b/a Environmental Security do not reference 1830 Galvez Road as a location where storage of chemicals occurs. KEFL does not have a license for operating a business at this location.

20. The yellow pages for the Pensacola area contains a listing in red ink for "Environmental Security, Inc." It lists an address of 4141 Pine Forest Road with the telephone number 473-1060. There is another reference to "Environmental Security" in black ink in smaller type which lists the address 1830 Galvez Drive with the number 916-7731.^{4/}

21. Clifford Killingsworth arranged to have a phone line for a fax machine to be located in a trailer at the Galvez Drive location. The purpose of installing a fax line at Galvez Drive was for employees to receive daily schedule assignments. The 916-7731 number listed in the yellow pages is the number of the fax machine. Clifford Killingsworth did not request a listing for the number of the fax machine. However, the telephone company listed it in the phone book. Clinton Killingsworth has

requested the local telephone company remove the erroneous listing a number of times.

Count 13

22. Count 13 of the Administrative Complaint reads as follows:

During an inspection on July 11, 2003 the Department found that pesticide was kept at 4141 Pine Forest Road in a container other than application equipment and not accurately identified through the use of permanent, durable label or tag, showing the common or chemical name(s) of principal active ingredients(s), which is a violation of Chapter 5E-14.106(4), Florida Administrative Code.

23. On July 11, 2003, the Department conducted an inspection of KEFL's business location, 4141 Pine Forest Road. One of the inspectors that day was Bruce Nicely, a regional supervisor of the Department's Bureau of Entomology and Pest Control. He was accompanied by Paul Matola of the Department, who did not testify at the hearing. During the inspection, Clifford Killingsworth opened a storage trailer for inspection. Mr. Killingsworth described the trailer as a jug disposal trailer, where empty jugs and drums were stored until they could be recycled or disposed of properly.

24. At the back of the trailer, Mr. Nicely found a two-and-one-half gallon unmarked jug inside a five-gallon bucket. An unidentified substance was inside the jug.

25. Mr. Nicely took a sample of the substance inside the jug, pouring it directly into an eight-ounce sample jar. He labeled the jar "PHY number 07110346060107" and placed the sample in a sealed sample collection bag which was put in a cooler of ice. When completing the pesticide collection report, he wrote "pesticide screen" in a blank after the words, "List active ingredient(s) and/or compounds to analyze for." Mr. Nicely then gave the sample to Steven Dwinell, at 4:35 p.m. on July 11, 2003.^{5/}

26. Mr. Dwinell relinquished the sample to Mike Page at 8:03 p.m. on July 11, 2003. At the time, Mr. Page was the director of the Department's pesticide laboratory. Mr. Page has an undergraduate degree in chemistry and a graduate degree in toxicology and pharmacology with over 16 years of experience as an analytical chemist. When Mr. Page received the pesticide collection report, the word "Lindane" also appeared on the report along with the request for a pesticide screen. It is not clear who wrote the word "Lindane" on the collection report or when the word "Lindane" was written. According to Mr. Page, a pesticide screen includes testing for Lindane. He therefore concluded that whether or not the word "Lindane" was included in the request for analysis made no difference in the lab's testing.

27. An analysis of the sample was performed revealing that the sample contained a concentration of 34.2 percent Lindane and 46 parts per million of Chlorophyrifos. Mr. Page described the amount of Chlorophyrifos compared to the Lindane as a minuscule amount. Both Lindane and Chlorophyrifos are pesticides.

28. The undersigned is persuaded that the Department appropriately maintained the chain of custody of the sample regardless of whether or not the word "Lindane" appeared on the collection report. The fact that "Lindane" appeared on the collection report sometime after Mr. Nicely relinquished it and the sample is of no consequence as to the validity of the laboratory testing of the sample.

29. Clifford Killingsworth is uncertain as to whether his company ever used Lindane but is certain that they have not used it in recent years as it has been "off the market" since approximately 1999.

30. Two other pest control companies, Environmental Security of Okaloosa, Inc. and Atlas Termite and Pest Control of Cantonment, Inc., also use the trailer from which the sample was taken, to store empty pesticide containers. Clifford Killingsworth does not know if the jug from which the sample was taken belonged to his company. Although he was aware that his company stored empty pesticide jugs in the trailer, he was unaware that a jug in the trailer contained an unidentified

substance. When asked under cross-examination what he would have done had he been aware of a jug containing an unidentified substance, he answered that he probably would have called the landfill to see when the next "roundup" would be as that is when the landfill takes "unidentifieds."

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

32. Because the Department seeks the imposition of administrative fines, the agency has the burden of proving the charged violations by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

33. Section 482.161(7), Florida Statutes, states:

(7) The department, pursuant to chapter 120, in addition to or in lieu of any other remedy provided by state or local law, may impose an administrative fine, in an amount not exceeding \$5,000, for the violation of any of the provisions of this chapter or of the rules adopted pursuant to this chapter. In determining the amount of fine to be levied for a violation, the following factors shall be considered:

(a) The severity of the violation, including the probability that the death, or serious harm to the health or safety, of any person will result or has resulted; the severity of the actual or potential harm; and the extent to which the provisions of this chapter or of the rules adopted pursuant to this chapter were violated;

(b) Any actions taken by the licensee or certified operator in charge, or limited certificateholder, to correct the violation or to remedy complaints;

34. Subsections 482.071(1) and (2)(a), Florida Statutes, read as follows:

(1) The department may issue licenses to qualified businesses to engage in the business of pest control in this state. It is unlawful for any person to operate a pest control business that is not licensed by the department.

(2)(a) Before entering business or upon transfer of business ownership, and also annually thereafter, on or before an anniversary date set by the department for each licensed business location, each person, partnership, firm, corporation, or other business entity engaged in pest control must apply to the department for a license, or a renewal thereof, for each of its business locations. Applications must be made on forms prescribed and furnished by the department.

35. Subsections 482.021(2) and (21)(e), Florida Statutes, read as follows:

(2) "Business location" means an advertised permanent location in or from which pest control business is solicited, accepted, or conducted.

* * *

(21) "Pest control" includes:

* * *

(e) The advertisement of, the solicitation of, or the acceptance of remuneration for any work described in this subsection, but does not include the solicitation of a bid from a licensee to be incorporated in an overall bid by an unlicensed primary contractor to supply services to another.

36. Florida Administrative Code Rule 5E-14.106(4)

provides:

(4) Pesticides kept in containers other than application equipment shall be accurately identified by permanent, durable label or tag, showing the common or chemical name(s) of principal active ingredient(s) and providing information required by EPA regulations or recommendations. . . .

37. Florida Administrative Code Rule 5E-14.142(3)(b),

(5)(f) and (g), provides:

(3) Advertising:

* * *

(b) All pest control telephone directory advertising, including direct-dial long distance lines shall in all cases show the licensee's name or trade name registered with the Department, complete licensed business location address and telephone numbers. Blind (unidentified) telephone numbers are prohibited. All telephone numbers used in the solicitation and acceptance of pest control shall terminate in the licensed business location.

* * *

(5) Business license application: In accordance with Section 482.071(1), F.S., the following information shall be submitted on, attached to and made a part of the Department's pest control business license application form, DACS 13605, Rev. 3/02, incorporated by reference.

* * *

(f) The exact location address where the licensee's records, including contracts, for pest control work are kept and the exact location address of storage of chemicals.

(g) A statement signed by the certified operator(s) in charge that all information given in Department business license application is true and correct and that he will promptly notify the Department in writing of any subsequent changes thereof, except change of home address and primary duty of identification card holders other than certified operators.

38. As to Count 9, there was no evidence presented that 9100 Hamman Avenue was an advertised permanent location of KEFL from which business was solicited, accepted, or conducted. Accordingly, the Department has not met its burden of establishing that a violation of Section 482.071(1) and (2)(a), Florida Statutes, occurred.

39. As to Count 11, the Department has met its burden of proving that a violation of Florida Administrative Code Rule 5E-14.142(3)(b) occurred in that the KEFL's telephone number used in the acceptance of pest control business does not terminate in

the licensed business location of KEFL. It does, however, terminate in a licensed business location; i.e., that of Home Services.

40. As to Count 10, the Department met its burden of proving that a violation of Florida Administrative Code Rule 5E-14.142(3)(f) and (g) occurred in that KEFL routinely stored chemicals in trucks parked at 1830 Galvez Drive, which address was not referenced on KEFL's application for license.

41. However, as to the remaining allegations of Count 10, as amended, the undersigned is not persuaded that the failure to list the 1830 Galvez Drive location on the application also constitutes a violation of Section 482.071(1) and (2)(a), Florida Statutes, in that KEFL did not advertise the Galvez Road location as a place of business. The evidence established that the yellow pages listing was made in error, not by any action of Respondents. Further, the phone number which appears in the yellow pages is of a fax line used internally for work assignments and is not a telephone number which the public uses to call for pest control services.

42. As for Count 13, the Department has not met its burden of proving that a violation of Florida Administrative Code Rule 5E-14.106(3) occurred. While there was clear and convincing evidence that the Department's chain of custody of the chemical sample was handled appropriately, it did not prove that

Respondents herein failed to accurately identify a pesticide in an unlabeled container. Other pest control companies and other COIC's used the trailer. There was no proof that the container belonged to KEFL or Clifford Killingsworth. Therefore, the evidence does not prove that Respondents herein are responsible for the container not being appropriately labeled.

43. The Department seeks to impose a fine of \$2,500 for the violation of Florida Administrative Code Rule 5E-14.142(3)(b) for the telephone number of Respondent KEFL terminating at a location other than the licensed business location.

44. The Department also seeks to impose a fine of \$2,500 for the violation of Florida Administrative Code Rule 5E-14.142(5)(f) and (g), for failing to disclose on the business license application of Respondent KEFL that 1830 Galvez Drive is an address where pest control chemicals were stored.

45. The Department offered testimony as to how the suggested amounts of fine were determined based upon Section 482.161, Florida Statutes, and enforcement guidelines of the Bureau of Entomology and Pest Control.

46. The suggested administrative fine of \$2,500 for the failure to list 1830 Galvez Drive as a location where pesticides are stored is reasonable.

47. However, in calculating the suggested fine for the telephone number not terminating in the licensed business location, the actions taken by the licensee to correct the violation were not considered by the Department as required by Section 482.161(7)(b), Florida Statutes. As there is virtually no risk of harm to the public's health or safety, see Section 482.161(7)(a), Florida Statutes, and great efforts were made to remedy the situation, this amounts to a technical violation and a de minimus penalty of \$100 is more appropriate.

RECOMMENDATION

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

RECOMMENDED that a final order be entered assessing a fine against Respondents in the amount of \$2,600.

DONE AND ENTERED this 25th day of May, 2005, in Tallahassee, Leon County, Florida.

S

BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of May, 2005.

ENDNOTES

- 1/ All references to Florida Statutes are to 2004 unless otherwise indicated.
- 2/ Clinton Killingsworth is the owner and COIC of Environmental Services of Okaloosa, Inc., Respondents in Case No. 04-3054 heard simultaneously with the instant case. Clifford and Clinton Killingsworth are brothers.
- 3/ The correct address is 1830 Galvez Drive.
- 4/ Both KEFL and Environmental Security of Okaloosa do business under the name "Environmental Security."
- 5/ Mr. Dwinnel is Assistant Director of the Department's Division of Agriculture and Consumer Services. He Previously held the title of Chief of the Bureau of Entomology and Pest Control. The record is unclear which title he held at the time of the inspection.

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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.