

**STATE OF FLORIDA, DEPARTMENT OF
AGRICULTURE AND CONSUMER SERVICES**

**FLORIDA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,**

Petitioner,

**v.
ATLAS TERMITE AND PEST CONTROL,
OF CANTONMENT, INC. and JOYCE BEARD,
Certified Operator in Charge,**

Respondents.

BJS
a/osecl
04-3053

**AT
CASE NO. A 32177**

FINAL ORDER

THIS CAUSE arising under the Structural Fumigation Act, Chapter 482, Florida Statutes, came before the Commissioner of Agriculture of the State of Florida for consideration and final agency action. The Commissioner of Agriculture, as head of the Department of Agriculture and Consumer Services, has jurisdiction over the subject matter and the parties thereto.

I. BACKGROUND

The State of Florida, Department of Agriculture and Consumer Services ("Department") served an Administrative Complaint and Proposed Settlement ("Complaint") dated July 7, 2004, upon the Respondents which informed the Respondents of their violations of Chapter 482, Florida Statutes and Section 5E-14, Florida Administrative Code. Respondents requested a formal hearing in this matter. The case was referred to the Division of Administrative Hearings and a hearing was held before Barbara Staros, the Administrative Law Judge on January 13 and 14, 2005 and March 23, 2005. Administrative law Judge Staros issued a recommended order to the Commissioner of Agriculture on May 25, 2005, copy of which is attached hereto and

incorporated by reference herein. The Respondents filed exceptions to the Recommended Order. The record consists of the pleadings, motions, discovery requests, discovery responses, depositions, and orders filed in the Division of Administrative Hearings, the exhibits admitted into evidence by the administrative law judge the transcripts of the January 13 and 14 and March 23, 2005 formal hearing before the administrative law judge and the exceptions to the Recommended Order filed by the Respondents.

II. FINDINGS OF FACT

The Commissioner of Agriculture adopts the findings of fact set forth in the attached Recommended Order of the Administrative Law Judge (ALJ)

III. CONCLUSIONS OF LAW

The Respondents filed several exceptions to the ALJ's Recommended Order. Respondents assert that the ALJ failed to give proper weight to several items of evidence in determining that the Department met its burden of proving that a violation of Rule 5E-14.142 (3) (b) occurred "in that the telephone number used in the acceptance of pest control business does not terminate in the licensed business location of Atlas." Included among these items of evidence were: the fact that no solicitation of new customers occurred at Home Services site, where only some of Atlas calls terminated; no cold customer calls were made from that site and no bids for pest control services are provided; there is no performance of pest control services or remuneration for pest control services by the Respondents from that location; there were no chemicals, records or contracts of Respondent Atlas located or stored at that location; and Home Services was strictly a call center where information was received and assignments given, not unlike call centers used by larger pest control companies.

Rule 5E-14.142 (3) (b), Florida Administrative Code states:

"(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."

In paragraph 33 under Conclusions of Law of the recommended order submitted by the

ALJ, it states:

"As to Count 2, the Department has met its burden proving that a violation of Florida Administrative Code Rule 5E-14.142 (3) (b) occurred in that the telephone number used in the acceptance of pest control business does not terminate in the licensed business location of Atlas. It does, however, terminate in a licensed business location, i.e., that of Home Services."

In paragraph 7 and 8 under Findings of Fact, The ALJ stated in her recommended order:

"Atlas has a full-time employee, Angie Foster, who answers the phones and performs administrative tasks at 4141 Pine Forest Road. When Ms. Foster has to leave the office, the calls to Atlas may be forwarded to Home Services. When the phone call is forwarded, the telephone number for Atlas listed in the local telephone directory terminates at Home Services."

The ALJ's conclusion in her Recommended Order that there was a violation of Rule 5E-14.142 (3) (b), F.A.C. is supported by competent, substantial evidence and complies with the essential requirements of the law.

The Respondents also assert that the ALJ incorrectly determined that the Department met its burden of proving that Atlas included on its service vehicle an unregistered fictitious name, i.e. Atlas Environmental Pest and Termite Control. The Respondents further assert that there was no competent evidence presented proving that the truck was a Florida Atlas truck and not, as

Respondents contend, an Alabama Atlas truck and none of the evidence relied on by the ALJ proved that the truck located at the 1830 Galvez Road, Gulf Breeze, Florida site was a truck owned by Respondent, Atlas.

Rule 5E-14.142 (3) (a) states:

"Pest control advertising on service vehicles . . . shall in all cases be factual and shall set forth only under the licensee's name or trade name registered with the Department. Unregistered fictitious names are prohibited."

Paragraph 34 under Conclusions of Law of the recommended order submitted by the ALJ states:

"As to Count 4, the Department has met its burden that Atlas included on its service vehicle parked at 1830 Galvez Drive, an unregistered, fictitious name, i.e. Atlas Environmental Pest and Termite Control."

This conclusion of the ALJ in her Recommended Order that the Respondent violated Rule 5E-14.142 (3) (a), Florida Administrative Code is supported by competent, substantial evidence and complies with the essential requirements of the law.

Respondents assert additional exceptions. Paragraphs 37, 38, 39 and 44 of the Recommended Order under Conclusions of Law submitted by the ALJ state:

"37. Section 482.152, Florida Statutes, sets forth requirements that must be met by the certified operator in charge. Ms. Beard meets the initial requirements, i.e., her primary occupation is with Atlas as a full time employee. However, while she can and does observe certain work done by employees of other companies through electronic communication, the statute clearly requires the 'personal supervision of and participation in the pest control activities at the business location of the licensee.' Ms. Beard's activities as described do not meet this fundamental statutory requirement. Accordingly, the Department met its burden that a violation of Section 482.152, Florida Statutes, occurred.

38. Similarly, the Department has met its burden that a violation of Section 482.121, Florida Statutes, has occurred, in that Atlas is

using the certificate of a certified operator to keep a license when the holder is not in charge of the pest control activities of Atlas.

39. Section 482.121 (3), Florida Statutes, further states that if a certificate is used in violation of the law, the Department may revoke the license of the pest control business or the certified operator's license or both. . . .

44. Based upon the express wording of Section 482.121 and 482.152, Florida Statutes, revocation is, while harsh, an appropriate penalty."

Respondents, asserting exceptions to these conclusions, make the following arguments: that the ALJ failed to give adequate consideration to the fact that Respondent Beard consistently performed her responsibilities as COIC through 1999 or early 2000, and that she could do so in the future; personal health issues had recently prevented her from personally supervising pest control activities at Atlas and for that reason she had not accepted any new business and had subcontracted current business to Killingsworth Environmental, Inc; Florida law did not prohibit subcontracting pest control services and in essence the Respondents were being penalized for failing to supervise employees they did not have; the ALJ acknowledged that revocation of the Respondents' licenses is a harsh result but regardless, no consideration was given to the physical disability of Ms. Beard and whether revocation based upon disability was appropriate; even accepting the ALJ's findings, suspension until such time as Ms. Beard resumes her responsibilities as COIC would be more appropriate and less harsh; and it is not uncommon for individuals to maintain an active COIC certificate even when they are out of state or not active in the pest control industry.

Respondents' assertion that it is not uncommon for individuals to maintain an active COIC certificate even when they are out of state or not active in the pest control industry is not correct. An individual may have a pest control operator's certificate pursuant to the provisions of Section 482.111, Florida Statutes but not be a certified operator in charge (COIC) as that term

is used in Section 482.152, Florida Statutes. If a licensed pest control company (licensee) chooses to designate a certificate holder as the certified operator in charge (COIC) for the licensee, he or she must perform the duties of a certified operator in charge under Section 482.152, Florida Statutes or be in violation of the law.

The ALJ's conclusions in her Recommended Order that: the Respondent, Joyce Beard violated the provisions of Chapter 482.152, Florida Statutes; the Respondent Atlas, similarly violated the provision of Section 482.121, Florida Statutes and revocation of the pest control certificate of Respondent, Joyce Beard and the pest control license of the Respondent, Atlas Termite and Pest Control of Cantonment, Inc. while a harsh remedy is appropriate based on the express wording of Section 482,152, Florida Statutes and Section 482.121, Florida Statutes, are based upon competent, substantial evidence and meet the essential requirements of the law.

The exceptions asserted by the Respondents are without merit. Accordingly, the Commissioner of Agriculture adopts the Conclusions of Law made by the ALJ in her recommended order attached hereto.

ORDERED AND ADJUDGED:

The Commissioner of Agriculture adopts the recommendations of the ALJ set forth in her recommended order attached hereto:

The pest control certificate of the Respondent, Joyce Beard and the pest control license of the Respondent, Atlas Termite and Pest Control of Cantonment, Inc are hereby revoked.

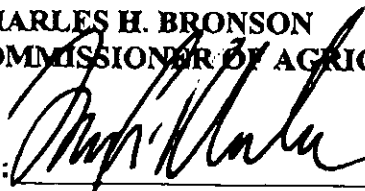
NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Final Order is entitled to seek review of this order pursuant to Section 120.68, Fla. Stat. (2002), and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be initiated by filing a petition for review or

notice of appeal with the Agency Clerk of the Florida Department of Agriculture, Room 509 Mayo Building, Tallahassee, Florida 32399-0800. A copy of the petition for review or notice of appeal, accompanied by the filing fees prescribed by law must also be filed with the appropriate District Court of Appeal within thirty (30) days of the date this Order was filed with the Agency Clerk.

DONE AND ORDERED this 14th day of July, 2005.

CHARLES H. BRONSON
COMMISSIONER OF AGRICULTURE

BY: 
Terry L. Rhodes, Assistant Commissioner
Florida Department of Agriculture
and Consumer Services

Filed with the Agency Clerk this 14th day of July, 2005.


Agency Clerk

Copies to: Respondents, Atlas Termite and Pest Control of Cantonment, Inc.,
and Joyce Beard, Certified Operator in Charge;
State of Florida, Division of Administrative Hearings