

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE )  
AND CONSUMER SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 04-3053  
 )  
ATLAS TERMITE AND PEST )  
CONTROL OF CANTONMENT, INC., )  
AND JOYCE BEARD, Certified )  
Operator in Charge, )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A hearing was held pursuant to notice on January 13 and 14, 2005, and March 23, 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  
Department of Agriculture and  
Consumer Services  
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Mayo Building, Room 520  
Tallahassee, Florida 32399-0800

For Respondents: Robert O. Beasley, Esquire  
Litvak & Beasley, LLP  
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Pensacola, Florida 32591-3503

STATEMENT OF THE ISSUES

Whether Respondents 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 issued an Administrative Complaint consisting of four 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 Ms. Joyce Beard, certified operator-in-charge (COIC) of Atlas Termite and Pest Control of Cantonment.

Respondents disputed the allegations in the Administrative Complaint and, through counsel, 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 add additional allegations to the Complaint. The motion was granted. However, the new allegations of the Amended Administrative Complaint were not be

addressed until a continuation of the hearing which took place on March 23, 2005.

Including the allegations in the Amended Administrative Complaint, the Department alleged violations of Sections 482.071(1) and (2)(a), 482.121(1), and 482.151, Florida Statutes,<sup>1/</sup> and Florida Administrative Code Rule 5E-14.142(3)(a) and (b).

At the commencement of the second day of 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. 04-3052 and 04-3054. At hearing, Petitioner withdrew Count 3 of the Administrative Complaint. Petitioner presented the testimony of Clinton Killingsworth, Clifford Killingsworth, Joe Parker, and Steven Dwinell. Petitioner's Exhibits A-1 through A-4 were admitted into evidence. The Respondents presented the testimony of Joyce Beard.

A transcript consisting of four 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, Joyce Beard was the Certified Operator in Charge (COIC) of Atlas Termite and Pest Control Of Cantonment, Inc.

Counts 1 and 2

3. Counts 1 and 2 of the Administrative Complaint allege as follows:

Count 1 During an inspection on July 11, 2003, the Department found that Atlas Termite and Pest Control of Cantonment 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 2 During an inspection on July 11, 2003 the Department found that Atlas Termite and Pest Control of Cantonment phone numbers terminated in an unlicensed location as 9100 Hamman Avenue. This is a violation of Chapter 5E-14.142(3)(b).

4. Atlas Termite and Pest Control of Cantonment, (hereinafter Atlas) 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 Killingsworth Environmental, Inc., a/k/a KEFL, 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<sup>2/</sup> are the managers of Home Services.

6. The record is unclear as to whether Atlas ever entered into any written agreement with Home Services. However, Home Services did perform certain services for Atlas.

7. 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. Home Services also answers calls for Environmental Security of Okaloosa, Inc. and Killingsworth Environmental, Inc.

8. Home Services employees do not make "cold calls" to new 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, including Atlas when appropriate.

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

12. After the July 11, 2003, inspection of Home Services, Clinton Killingsworth, a manager of Home Services, took steps to get Home Services licensed as a pest control company. He 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 4

13. Count 4 of the Administrative Complaint reads as follows:

During inspections conducted on July 11, 2003 and July 16, 2003, the Department found that service vehicles are marked with unregistered fictitious name-Atlas Environmental Pest and Termite Control. This is a violation of Chapter 5E-14.142(3)(a), Florida Administrative Code.

14. During inspections, Department investigators saw trucks with the logo, "Atlas Environmental Pest and Termite Control" on the side of the trucks. When shown a photograph of those trucks, Ms. Beard believed the trucks to be Alabama trucks, not Florida trucks. Ms. Beard is also licensed in Alabama although the name of the company in Alabama is not clear from the record. The word "Environmental" is not in the name of the company, Atlas Termite and Pest Control of Cantonment, licensed to do business in Florida.

15. Many of the trucks used by Atlas at the time of the inspection had defective brakes and transmission problems. Both Florida trucks and Alabama trucks had these problems. Many of the trucks were recalled and were taken off the road. According to Ms. Beard, the trucks shown parked in one of the photographs were parked waiting until they would be repaired. Alabama trucks were parked in the same area as the Florida trucks that were being recalled. However, when asked why a truck with Atlas Environmental Pest and Termite Control was parked at 1830 Galvez Road in Gulf Breeze, she responded that it was being used to transport chemicals to a man in that area. One photograph taken by an investigator clearly shows a man inside one of the trucks standing next to a large barrel inside the truck. The word "Environmental" is clearly written on the truck as part of the company logo.

16. Atlas has sold some of their trucks. When asked at her deposition taken on December 9, 2004, whether Atlas still owned any trucks, Ms. Beard responded, "I believe we have a couple of smaller ones. I don't know that we have any of the larger ones left that are not up for sale."

Unnumbered Count of Amended Administrative Complaint

17. The Amended Administrative Complaint contains one additional count which reads in pertinent part as follows:



Joyce Beard does not perform the duties of a certified operator as set forth in Section 482.152, Florida Statutes. There is only one other employee of Atlas and her duties are limited to clerical duties in the office. Virtually all of the actual pest control treatments done in the name of Atlas are performed by the company by which they are employed, not Ms. Beard. Atlas is in fact a shell company consisting of Ms. Beard who does not work full time and a clerical employee. She is not in charge of the pest control activities of the licensee, Atlas in the categories covered by her certificate. This constitutes a misuse of her certificate by Ms. Beard and also by Atlas, which is a violation [sic] Section 482.121, Florida Statutes.

The Amended Administrative Complaint also references Section 482.152, Florida Statutes.

18. Atlas has only two employees: Joyce Beard and Angie Foster. In addition to being Atlas' COIC, she is Atlas' only corporate officer, serving as president, secretary, and treasurer. Ms. Beard has been in the pest control business for over 30 years.

19. Atlas does not employ any pest control technicians. Atlas subcontracts with Killingsworth Environmental, Inc., a/k/a KEFL, to perform the actual pest control services. The employees of KEFL actually go out into the field to perform the jobs that are subcontracted by Atlas to KEFL.

20. The last time Ms. Beard performed pest control treatment was approximately 1999 or early 2000. However, she "goes behind them a lot" to check to see that the work has been done. Ms. Beard has a physical disability that interferes with or prevents her from doing pest control work. Her disability impedes her ability to climb stairs, work all day without a nap, and maintain her equilibrium. She acknowledges that she is "not as sharp as she used to be."

21. Subcontractors for Atlas primarily provide treatment for residential customers, and some commercial customers. Atlas presently does not accept new customers, but services current customers under contract.

22. Ms. Beard lives across the street from the business location of 4141 Pine Forest Road. She has the ability to keep in communication with technicians out in the field through a computer, fax machine, and by using mobile phones which are equipped with radios and cameras. Technicians of the subcontracting company carry radios and phones with cameras on them on which a picture can be transmitted to her on her mobile phone or via the Internet.

23. Ms. Beard's level of participation and supervision can best be described in her words:

Q: Are you currently in charge of all of the business activities of Atlas Termite and Pest Control of Cantonment, Inc.?

A: Yes.

Q: Are you currently a full-time employee of Atlas Termite and Pest Control of Cantonment, Inc.?

A: Yes.

Q: Have you been a full-time employee of Atlas since you've become a CPO?

A: Yes.

Q: Is your employment with Atlas your primary occupation?

A: Yes, absolutely.

Q: Since your certification of Atlas CPO, has your employment with Atlas always been your primary occupation?

A: Yes, absolutely.

Q: Have you always or do you now personally supervise and participate in the pest control activities of Atlas regarding the selection of the proper chemicals for particular pest control work performed?

A: I did do all of that when there was nobody doing the work except strictly Atlas employees. Now that it is subcontracted out, I supervise, but I'm not always the primary one to make that determination. I can do it, but I have no need to do it.

Q: If Atlas had subcontracted the job to another company, who is the CPO then that would be in charge of the chemical side of the whole thing?

A: Whoever is the CPO with that company. And I might add that, you know, I don't deal with anybody that's---except CPO's with expertise in a lot of different fields

including building construction and biology and chemistry. And they're not just simply CPO's. They are degreed professionals with the expertise to do it.

Q: Let me ask you: Have you always and do you now personally supervise and participate in the pest control activities of Atlas regarding the safe and proper use of pesticides?

A: Well, there again, I have in the past entirely. I could in the future, but I do not presently do that because that is passed on to the subcontractor.

Q: Atlas has employees, doesn't it?

A: Yes.

Q: But presently it doesn't have any employees that apply pesticide?

A: No.

Q: During the time that Atlas had employees that applied pesticide, did you supervise and participate in the training regarding the correct concentration in the formulation of those pesticides?

A: Yes, I did absolutely every day.

Q: And secondly, the same question-- A similar question is: Do you now and did you then supervise and participate in the pest control activities of Atlas regarding the training of personnel in the proper and acceptable methods of pest control?

A: I did then to the extent of seeing that it was done. It was a lot of times done in a group format with other companies, so I was not always the one who was doing the presentation. Although, the presentation was done by people who were sanctioned by the Department, and then I do it entirely

for Atlas myself. Although they can't get their CPU's [sic] from me, but we held training sessions and so forth. At the present time, I do not because I'm not over those employees.

Q: What are some of the ways that an employee of yours at Atlas could get their appropriate, proper and acceptable training, I guess you would call then the CEU's?

A: If they were an employee of Atlas?

Q: Yes.

A: You can get them over the Internet easily now.

#### CONCLUSIONS OF LAW

24. 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.

25. Because the Department seeks the imposition of administrative fines and license revocation, 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).

26. 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; . . . .

27. 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.

28. Subsections 482.121(1) and (2), Florida Statutes, read as follows:

(1) A certified operator may not allow her or his certificate to be used by a licensee to secure or keep a license unless:

(a) She or he is in charge of the pest control activities of the licensee in the category or categories covered by her or his certificate;

(b) She or he is a full-time employee of the licensee; and

(c) Her or his primary occupation is with the licensee.

(2) A licensee may not use the certificate of any certified operator to secure or keep a license unless the holder of the certificate is in charge of the pest control activities in the category or categories of the licensee covered by the certificate.

29. Section 482.152, Florida Statutes, reads as follows:

Duties of certified operator in charge of pest control activities of licensee.--A certified operator in charge of the pest control activities of a licensee shall have her or his primary occupation with the licensee and shall be a full-time employee of the licensee, and her or his principal duty shall include the responsibility for the personal supervision of an participation in the pest control activities at the business location of the license as the same relate to:

(1) The selection of proper and correct chemicals for the particular pest control work performed.

(2) The safe and proper use of the pesticides used.

(3) The correct concentration and formulation of pesticides used in all pest control work performed.

(4) The training of personnel in the proper and acceptable methods of pest control.

(5) The control measures and procedures used.

(6) The notification of the department of any accidental human poisoning or death connected with pest control work performed on a job she or he is supervising, within 24 hours after she or he has knowledge of the poisoning or death.

30. 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.

31. Florida Administrative Code Rule 5E-14.142(3)(a) and (b), reads as follows:

(3) Advertising:



(a) Pest control advertising on service vehicles, in telephone directories or other advertising media shall in all cases be factual and shall be set forth only under the license's name or trade name registered with the Department. Unregistered fictitious names are prohibited.

(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.

32. As to Count 1, there was no evidence presented that 9100 Hamman Avenue was an advertised permanent location of Atlas 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.

33. 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.

34. 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.

35. As to the allegations in the Amended Administrative Complaint, Respondents argue that the statutes do not require a pest control company to have a certain number of employees and, further, that neither the statutes nor rules prohibit subcontracting.

36. While subcontracting is not expressly prohibited, this is not a situation wherein a COIC subcontracts out a particular job. Under the circumstances of this case, Atlas subcontracts all of its pest control work. There are no employees to supervise.

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 by her 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 certificate, or both.

40. 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 Atlas terminating at a location other than the licensed business location.

41. The Department seeks to impose a fine of \$2,000 for the violation of Florida Administrative Code Rule 5E-14.142(3)(a) for using an unregistered fictitious name in a logo on service vehicles.

42. The Department seeks revocation of Ms. Beard's COIC license and Atlas' license.

43. 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. The Department also offered testimony as to its recommendation of revocation of Respondents' licenses.

44. Based upon the express wording of Sections 482.212 and 482.152, Florida Statutes, revocation is, while harsh, an appropriate penalty.

45. Due to the disposition of Respondents' license and certificate, any further administrative fine is excessive and not necessary, in particular since there is virtually no risk of harm to the public's health or safety for the other violations.

#### RECOMMENDATION

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

RECOMMENDED:

That a final order be entered revoking the certificate of Ms. Beard and the license of Atlas.

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

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BARBARA J. STAROS  
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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.  
Clifford Killingsworth is the owner and COIC of Killingsworth  
Environmental, Inc., Respondents in Case No. 04-3052.

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.