

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) Case No. 04-3054
)
ENVIRONMENTAL SECURITY OF)
OKALOOSA, INC., AND CLINTON)
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
Department of Agriculture and
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Tallahassee, Florida 32399-0800

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 11 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 sent to Mr. Clinton Killingsworth, certified operator-in-charge (COIC) of Environmental Security of Okaloosa, Inc., d/b/a Environmental Security of Okaloosa.

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 amend Count 5. The motion was granted.

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

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 with Case Nos. 04-3052 and 04-3053. 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 E-1 through E-8 were admitted into evidence. The Respondents presented the testimony of Steven Dwinell.

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, Clinton Killingsworth was the owner and Certified Operator in Charge (COIC) of Environmental Security of Okaloosa, Inc., a licensed pest control company in Cantonment, Florida.

Counts 4 and 6

2. Counts 4 and 6 of the Administrative Complaint allege as follows:

Count 4 During an inspection on July 11, 2003, the Department found that Environmental Security of Okaloosa 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 6 During an inspection on July 11, 2003 the Department found that Environmental Security of Okaloosa phone numbers terminated in an unlicensed location as 9100 Hamman Avenue. This is a violation of Chapter 5E-14.142(3)(b).

4. Environmental Security of Okaloosa, Inc., d/b/a Environmental Security, 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, Killingsworth Environmental, 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, entered into a Management and Marketing Agreement with Home Services, executed by Clinton Killingsworth on behalf of Environmental Security of Okaloosa and by Clifford Killingsworth on behalf of Home Services.

7. Since that agreement was signed, the telephone number for Environmental Security of Okaloosa listed in the local telephone directory terminated at Home Services. Home Services also answers calls for Killingsworth Environmental, Inc. and Atlas Exterminating.

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 Environmental Security of Okaloosa from which business was solicited, accepted, or conducted.

12. After the July 11, 2003, inspection of Home Services, Clinton Killingsworth took steps to get Home Services licensed as a pest control company. Mr. 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 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 5

13. Count 5 of the Administrative Complaint, as amended, reads as follows:

During an inspection on July 16, 2003, the Department found that Environmental Security of Okaloosa, 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, Environmental Security of Okaloosa, 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, Environmental Security of Okaloosa, 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 fence and contains a structure. The structure is not enclosed. Both Environmental Security of Okaloosa and Killingsworth Environmental park trucks there overnight. They entered the property when the pest control employees arrived.

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

16. Clinton 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 licenses business location."

19. The applications for business license for Environmental Security of Okaloosa do not reference 1830 Galvez Road as a location where storage of chemicals occurs.

Environmental Security of Okaloosa 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. Clinton Killingsworth brother, 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. Clinton 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 to remove the erroneous listing a number of times.

CONCLUSIONS OF LAW

22. 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.

23. 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).

24. 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;

25. 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.

26. 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.

27. Florida Administrative Code Rule 5E-14.142(3)(b), (5)(f) and (g) reads as follows:

(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.

28. As to Count 4, there was no evidence presented that 9100 Hamman Avenue was an advertised permanent location of Environmental Security of Okaloosa, Inc., 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.

29. As to Count 6, the Department has met its burden proving that a violation of Florida Administrative Code Rule 5E-14.142(3)(b) occurred in that Environmental Security's telephone number used in the acceptance of pest control business does not terminate in the licensed business location of Environmental Security of Okaloosa. It does, however, terminate in a licensed business location, i.e., that of Home Services.

30. As to Count 5, 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 Environmental Security of Okaloosa, Inc., routinely parked trucks with chemicals inside at 1830 Galvez Drive, which address was not referenced on Environmental Security of Okaloosa's application for license.

31. However, 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 Environmental Security of Okaloosa 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.

32. 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 Environmental Security of Okaloosa terminating at a location other than the licensed business location.

33. 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 application of Respondent Environmental Security that 1830 Galvez Drive is an address where pest control chemicals were stored.

34. 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.

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

36. However, in calculating the suggested fine for the telephone number terminating in the licensed business location, the actions taken by the licensee and the COIC to correct the

violation were not considered by the Department as required by Section 482.161(7)(b), Florida Statutes. Mr. Killingsworth went to great lengths to get Home Services licensed. As there is virtually no risk of harm to the public's health or safety, see Section 482.161(7)(a), Florida Statutes, and Respondent made great effort to remedy the violation, this amounts to a technical violation and a de minimus penalty of \$100 is more appropriate.

RECOMMENDATION

Having considered the foregoing Findings of Fact and Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and pleadings and arguments of the parties, it is, therefore,

RECOMMENDED:

That a final order be entered assessing a fine against Respondent Environmental Security of Okaloosa, Inc., in the amount of \$2,600.00.

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 reference to Florida Statutes are to 2004 unless otherwise indicated.
- 2/ Clifford Killingsworth is the owner and COIC of Killingsworth Environmental, Inc., Respondents in Case No. 04-3052 heard simultaneously with the instant case. Clifford and Clinton Killingsworth are brothers.
- 3/ The correct address is 1830 Galvez Drive.
- 4/ Both Environmental Security of Okaloosa and Killingsworth Environmental, Inc., do business under the name "Environmental Security."

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.