

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
)
 Petitioner,)
)
 vs.) Case Nos. 04-4333
) 05-0695
 MATT BEEBE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, these consolidated proceedings came on for formal hearing before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on April 1, 2005, in Naples, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Susan Mastin Scott, Esquire
Department of Health
2295 Victoria Avenue, Room 206
Fort Myers, Florida 33901

For Respondent: Michael F. Kayusa, Esquire
Post Office Box 6096
Fort Myers, Florida 33911

STATEMENT OF THE ISSUES

At issue in DOAH Case No. 04-4333 is whether Respondent committed the two violations of Florida Administrative Code Rule 64E-6.022 alleged in the citation issued on September 29, 2004,

and, if so, whether the imposition of a \$1,000.00 fine was properly imposed.

At issue in DOAH Case No. 05-0695 is whether Respondent committed the three violations alleged in the Amended Administrative Complaint issued on February 21, 2005, and, if so, whether his septic tank contractor registration should be revoked or some lesser penalty imposed.

PRELIMINARY STATEMENT

On September 29, 2004, the Department of Health ("Department") issued a citation of violation against Respondent, Matt Beebe, a registered septic tank contractor, alleging that he violated Florida Administrative Code Rule 64E-6.022(1)(n), the failure to properly treat or dispose of septage, and Florida Administrative Code Rule 64E-6.022(1)(q), the creation or maintenance of a sanitary nuisance. The citation directed Mr. Beebe to pay a fine of \$500.00 for each of the two violations. The citation provided that Mr. Beebe could request a reduction or waiver of the fine by demonstrating good faith in correcting the violations. Mr. Beebe apparently requested such a reduction or waiver, which was denied on October 20, 2004. On November 19, 2004, Mr. Beebe filed a petition for a formal administrative hearing. On December 3, 2004, the Department forwarded the Petition to the Division of Administrative Hearings ("DOAH") for the assignment of an

Administrative Law Judge and the conduct of a formal hearing. The case was assigned DOAH Case No. 04-4333 and scheduled for hearing on February 2, 2005.

On January 20, 2005, the Department filed a motion for continuance. The motion noted that the Department was investigating additional violations against Mr. Beebe and requested a continuance to permit any subsequent administrative complaint against Mr. Beebe to be consolidated with DOAH Case No. 04-4333. By Order dated January 21, 2005, the Department's motion for continuance was granted.

On January 27, 2005, the Department served an Administrative Complaint on Mr. Beebe. On February 23, 2005, the Department forwarded to DOAH an Amended Administrative Complaint alleging that Mr. Beebe installed a holding tank at a residence without a permit in violation of Florida Administrative Code Rule 64E-6.0101, that Mr. Beebe improperly disposed of septage pumped from this holding tank in violation of Florida Administrative Code Rule 64E-6.010, and that Mr. Beebe failed to maintain adequate septage and hauling logs in violation of Florida Administrative Code Rule 64E-6.010(7)(e). This matter was assigned DOAH Case No. 05-0695 and, pursuant to the parties' joint motion, was consolidated for hearing with DOAH Case No. 04-4333. The consolidated cases were

scheduled for hearing on April 1, 2005, and the hearing was held, as scheduled.

At the outset of the hearing, argument was heard on the Department's Motion in Limine, which sought to prevent Mr. Beebe from arguing the merits of a 2001 citation of violation for which a Final Order had been entered. The undersigned granted the motion insofar as it sought to avoid re-litigating Mr. Beebe's prior violation. However, the undersigned also made it clear that Mr. Beebe would be allowed to introduce evidence regarding the history of his relations with the Department, including the prior violation, in order to support his contention that he was being singled out for discipline by the Department.

At the hearing, the Department presented the testimony of: Dr. Philip Amuso, director of the Department's Tampa laboratory and assistant director for the Department's laboratories statewide; Dale Waller, plant manager for a Collier County wastewater reclamation facility; and Kenneth Rech, director of the Department's environmental health and engineering division for Collier County. The Department's Exhibits 1 through 22 were admitted into evidence. Respondent testified on his own behalf and presented the testimony of Edward Ehlen, owner of the property on which Mr. Beebe installed the disputed holding tank. Respondent offered no exhibits.

No transcript of the hearing was ordered. At the hearing, the parties agreed to submit proposed recommended orders within 15 days of the hearing. The Department timely filed its Proposed Recommended Order on April 18, 2005, the first business day following the 15th day, which fell on a Saturday. Without objection, Respondent filed his Proposed Recommended Order on April 21, 2005. Both Proposed Recommended Orders were considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with enforcing the statutory provisions pertaining to the practice of septic tank contracting in Florida pursuant to Chapter 489, Part III, and Section 381.0065, Florida Statutes (2004).

2. At all times relevant to this proceeding, Respondent Matt Beebe, was a registered septic tank contractor, having been issued registration number SR0971283, and was the qualifying contractor for his business, Southern Sanitation, Inc. ("Southern Sanitation"), having been issued registration number SA0970864. On June 7, 2001, Mr. Beebe was cited for installing a septic system without a permit, in violation of Florida Administrative Code Rule 64E-6.022, and paid a fine of \$500.00 without contest.

3. At all times relevant to this proceeding, Mr. Beebe also operated a septage disposal service business under the

Southern Sanitation name, having been issued operating permit number 11-QN-0054.

A. Improper Septage Disposal and Sanitary Nuisance

4. On September 29, 2004, Kenneth Rech, the Department's environmental health and engineering director for Collier County, received a telephone complaint that a Southern Sanitation septage hauling truck had been seen emptying its contents onto a vacant lot at 295 Brandy Lane in Naples. Mr. Rech and his assistant, James Miller, drove out to the location to investigate the complaint.

5. When he arrived at the location, Mr. Rech first spoke to the complainant, who lived across the street from the vacant lot. The complainant estimated that the Southern Sanitation truck left the lot about 20 minutes before Mr. Rech arrived.

6. Mr. Rech and Mr. Miller investigated the site. Mr. Rech described the area containing the dumped contents of the truck as a low-lying wetland. The property was about ten acres in size. The owner kept horses on the lot. Mr. Rech testified that there was a strong smell of septage, though the dumped contents were light gray in color. Raw septage is generally black. Based on the smell, Mr. Rech concluded that the dumped contents included septage mixed with some other material.

7. Mr. Rech telephoned Erin Kurbec to meet him at the dump site. Ms. Kurbec is a Department employee responsible for oversight of septage hauling and disposal businesses. Ms. Kurbec in turn phoned Mr. Beebe and asked him to come to the site.

8. Mr. Rech testified that Mr. Beebe was "very agitated" when he arrived at the dump site, calling Ms. Kurbec a "liar," and protesting that the Department did not have the right to ask for his company's hauling logs. Because of Mr. Beebe's aggressive behavior, Mr. Rech phoned to request a Sheriff's deputy to come to the site.

9. Mr. Beebe conceded that he was somewhat agitated because Ms. Kubec asked him to come to the site, but would not tell him why she wanted to see his truck. She would only say that it was a "spot check," which Mr. Beebe did not believe. By the time the Sheriff's deputy arrived, the situation had calmed down.

10. Mr. Beebe told Mr. Rech that he had dumped approximately 3,000 gallons of "drillers' mud" on the site. Drillers' mud, or bentonite clay, is a colloidal clay sold under various trade names that forms a slick slurry, or gel, when water is added. The appearance of the material dumped at the site was consistent with that of drillers' mud.

11. Mr. Beebe testified that the owner of the vacant lot asked him to dump the drillers' mud to fill in a low-lying, hard to reach area of the property. The liquid-like consistency of the drillers' mud made it ideal for filling this difficult portion of the property. Mr. Beebe's testimony as to having permission to dump materials on the property is credited.

12. Mr. Rech took two samples of the dumped material from a pooled area about six inches deep. He used sterile sample equipment and containers. Because Mr. Beebe had alerted him to the possibility that there could be horse manure under the dumped material, Mr. Rech was careful to scoop the contents from the top of the dumped material.

13. Mr. Rech provided one of the samples to Mr. Beebe to allow Mr. Beebe to have a laboratory of his choice analyze the material. Mr. Rech sent the other sample to the Department's Tampa laboratory, which found the sample to contain a fecal coliform count of 4,800 colonies per gram. The laboratory's report was stamped with the disclosure stating, "Sample does not meet the following NELAC requirements: 1) exceeds 6 hr. hold time; 2) this matrix is not certified under NELAC."

14. NELAC is the National Environmental Laboratory Accreditation Conference, a voluntary association of state and federal agencies, the purpose of which is to establish and promote mutually acceptable performance standards for the

operation of environmental laboratories. NELAC certifies environmental laboratories such as the Department's Tampa facility, which was not certified for solid matrices such as the sample provided by Mr. Rech.

15. Dr. Philip Amuso is the director of the Department's Tampa laboratory. Dr. Amuso testified as to the testing procedures and the disclosure statement included on the laboratory report. He concluded that neither of the disclosures affected the validity of the fecal coliform count found in the sample.

16. Dr. Amuso testified that the applicable testing standard calls for a sample to be analyzed for fecal coliform within six hours of the sample collection time. The sample in question was not tested within six hours. However, Dr. Amuso testified that the longer a sample is held, the lower the fecal coliform count will be, because the fecal coliform colonies tend to die off over time. Thus, Dr. Amuso testified that the fecal coliform count in the sample was likely understated, due to the failure to analyze the sample within six hours.

17. Dr. Amuso testified that his laboratory chose to classify the sample as solid. The Tampa laboratory was required to note on its report that it is not NELAC-certified for solid matrices. However, Dr. Amuso testified that the classification of the sample had no impact on the analysis performed or the

validity of the result. He explained that the laboratory could have classified the sample as a non-potable liquid, a matrix for which the Tampa laboratory is NELAC-certified, and the same analysis would have been performed and would have yielded the same result.

18. Mr. Beebe forwarded his sample of the dumped material to Sanders Laboratories, Inc. ("Sanders"), a private environmental testing service. The Sanders laboratory classified the sample as a non-potable liquid and performed its analysis within six hours of the sample's collection. The Sanders laboratory report dated September 30, 2004, found the fecal coliform count to be 1,600,000 colonies per 100 milliliters. Placed in comparable terms to the Tampa laboratory's report, this sample showed a fecal coliform count of 16,000 colonies per gram, or about three times higher than the Tampa laboratory's sample. Dr. Amuso attributed this higher reading to the fact that Sanders ran its test within six hours of collection.

19. Dr. Amuso testified that the fecal coliform count of 4,800 colonies per gram found in the Tampa laboratory's sample constituted "pretty significant" contamination. Mr. Rech testified that a count of 4,800 colonies per gram is about one-half of the count found in raw, untreated septage from a septic tank, and that such a count is "bad" in terms of public

health significance. Mr. Rech testified that the fecal coliform count in the Sanders sample was "in the range" for raw untreated septage.

20. Mr. Rech stated that the laboratory analyses led to the conclusion that there was a substantial amount of untreated septage mixed with the drillers' mud in the dumped materials. He concluded there was more septage than could reasonably be attributed to residue from a previous dump of septage in Mr. Beebe's truck. He added that it would be impossible to clean the tank of a septage disposal truck sufficiently to prevent fecal contamination of a subsequent non-septage load. Mr. Beebe conceded that Mr. Rech told him that he should not use a septage hauling truck for any other kind of load, especially where that load would be dumped on the ground.

21. Before leaving the dump site on September 29, 2004, Mr. Rech and Ms. Kurbec handed Mr. Beebe the citation for failure to properly treat or dispose of septage and the creation or maintenance of a sanitary nuisance. The citation directed Mr. Beebe to pay a fine of \$500.00 for each of the two violations.

22. Mr. Rech testified that he and Ms. Kurbec were able to conclude from their on-site observations that Mr. Beebe had improperly disposed of septage and had created a sanitary

nuisance. Mr. Rech stated that the subsequent laboratory analysis served to confirm those conclusions.

23. Mr. Rech testified that untreated septage consists of human waste containing high levels of fecal coliform and viruses, bacteria, and parasites that cause a wide range of gastrointestinal and neurological conditions in humans.

Mr. Rech stated that untreated septage dumped anywhere other than at a properly regulated disposal site constitutes a public health nuisance. He noted that the materials were dumped by Mr. Beebe within roughly 100 feet of residential drinking water wells.

24. Mr. Beebe admitted that he dumped the contents of his disposal truck on the vacant lot, though he denied that it contained septage. He theorized that the high fecal coliform counts in the laboratory analyses were caused by animal manure beneath the drillers' mud that he dumped on the property.

Dr. Amuso conceded that no testing had been performed to establish the ambient level of coliform on the property, and further conceded that the laboratory tests do not distinguish human from animal feces in measuring the coliform count.

25. However, as noted above, Mr. Rech knew that there were animals on the property and carefully took his sample from the top of the dumped material. Mr. Rech testified that the strong smell of septage, and the high coliform count found by the

subsequent laboratory analyses left no doubt that untreated human waste had been dumped on the property by Mr. Beebe.

26. The Department established, by clear and convincing evidence, that Mr. Beebe dumped a mixture of drillers' mud and untreated septage on the lot at 295 Brandy Lane in Naples.

B. Holding Tank

27. On or before January 6, 2005, Mr. Beebe placed a 900-gallon domestic wastewater holding tank into a pre-dug hole at the newly built residence of Edward Ehlen at 616 Crescent Street on Marco Island. Mr. Beebe did not dig the hole, nor did he connect the holding tank to Mr. Ehlen's house.

28. Mr. Ehlen testified that he contracted with the City of Marco Island in July 2004 to connect his new residence, an \$800,000 house, to the city sewer system. The connection was to be completed no later than November 2004, when Mr. Ehlen and his family expected to take occupancy of the house. The city did not complete the connection and, therefore, allowed Mr. Ehlen to install a holding tank to be used until the sewer connection was completed. After the holding tank was installed, the city inspected the tank and gave Mr. Ehlen a temporary certificate of occupancy.

29. On January 6, 2005, after Mr. Ehlen and his family had moved into their house, the Department discovered that the Ehlen home was using a holding tank to collect its wastewater. On

January 7, 2005, the Department issued to Mr. Ehlen an "Official Notice to Correct and Abate a Sanitary Nuisance," finding that Mr. Ehlen was in violation of "Florida Statutes Chapters 381 and 386" because "plumbing discharge from your home is connected to a sewage holding tank which has not been permitted or inspected by this department." The Notice also provided, in relevant part:

You are hereby directed to correct this condition by complying with all the conditions listed below.

- Apply for a "temporary" Holding Tank permit by close of business on Monday, January 10, 2005. [This permit will be valid for a maximum of 120 days, Permit fee is \$185.00]
- Apply for an abandonment permit for the temporary holding tank by close of business Monday, January 10, 2005. [This permit will be valid for a maximum of 120 days. Complete tank removal will be required within 10 days of hook up to public sewer. Permit fee is \$40.00]
- Have a licensed septic contractor excavate the holding tank for inspection of all connections and seals by this department by Wednesday, January 12, 2005.
- Sign and maintain a pump-out agreement with a licensed septage hauler until the temporary holding tank is properly abandoned and inspected by this department. Provide a copy of this agreement to the department by Wednesday, January 12, 2005. [Minimum required pump-out frequency to be every other day].

- Complete hookup to Marco Island Utilities sewer system within 120 days of receipt of this notice.

Failure to comply may result in administrative and/or civil enforcement action, including administrative fines of up to \$500 per day per violation of law.

30. On January 12, 2005, the Department issued a 120-day temporary permit to Mr. Ehlen for his holding tank. Also on January 12, 2005, Mr. Ehlen signed a contract with Southern Sanitation pursuant to which Mr. Beebe's company agreed to pump out the holding tank three times per week.

31. Mr. Beebe conceded that he did not obtain a permit from the Health Department before he placed the holding tank in the hole on Mr. Ehlen's property. Mr. Beebe relied on Mr. Ehlen's statement that the City of Marco Island had approved the installation of the holding tank.

32. Florida Administrative Code Rule 64E-6.0101(7) provides that a construction permit must be obtained before the placement or installation of any holding tank. The Department established, by clear and convincing evidence, that Mr. Beebe placed a 900-gallon domestic wastewater holding tank into a pre-dug hole at the Ehlen's residence without obtaining a Department permit. Mr. Beebe's good faith belief that Mr. Ehlen had obtained approval for the placement of the tank is noted as a mitigating factor, but cannot operate as a defense for a

registered septic tank contractor's admitted failure to confirm the status of any permit with the Department prior to commencing work on the project.

C. Collection and Hauling Log

33. Mr. Beebe's annual operating permit from the Department authorizes him to pump septage from septic tanks and holding tanks and haul it to an approved treatment site for disposal and treatment. Florida Administrative Code Rule 64E-6.010(7)(e) requires a septage hauler to maintain a collection and hauling log "at the treatment site or at the main business location" and to retain that log for a period of five years. The rule lists the following items for inclusion in the log:

1. Date of septage or water collection;
2. Address of collection;
3. Indicate whether the point of collection is a residence or business and if a business, the type of business;
4. Estimated volume, in gallons, of septage or water transported;
5. Receipts for lime or other materials used for treatment;
6. Location of the approved treatment facility;
7. Date and time of discharge to the treatment facility; and

8. Acknowledgement from treatment facility of receipt of septage or waste.

34. On September 29, 2004, the date on which the Department investigated Mr. Beebe's dumping of drillers' mud and sewage on the lot at 295 Brandy Lane in Naples, the Department requested that Mr. Beebe provide his septage collection and hauling log. On September 30, 2004, Mr. Beebe faxed to the Department a single-page, typed document titled, "RE: Southern Sanitation, Inc. Truck Log for Trucks 1 and 2." The document stated that on September 29, 2004, "Truck #1" transported 3,000 gallons of "Well Drillers Mud" from Southern Well Drillers Services drilling site and disposed of it at 295 Brandy Lane. The document stated that "Truck #2" did not haul materials on September 29, 2004.

35. Mr. Rech testified that this document did not satisfy the rule criteria for collection and hauling logs. He noted that this was not a log kept by the drivers of the trucks, but merely a statement from Mr. Beebe attesting to what the trucks had hauled on a single day. Mr. Rech also pointed out that the Department had inspected and authorized Mr. Beebe to haul septage in two trucks identified by their vehicle identification numbers, but that Mr. Beebe's single-page "log" provided no information specifically identifying the trucks in question.

36. On February 3, 2005, the Department sent a letter to Mr. Beebe requesting that he produce, among other documentation, "your original collection and hauling logs for all domestic sewage and food establishment sludge and/or septage you collected and disposed of from January 1, 2004 through February 2, 2005."

37. On February 11, 2005, Mr. Beebe responded to the Department's request, providing copies of "Septic Receiving Logs" maintained by the North County Water Reclamation Facility ("NCWRF"), the Collier County wastewater facility at which Mr. Beebe disposed of his loads. There were log pages for January through June 2004, and October through December 2004. The logs included the dates of disposal, the number of gallons and type of waste in the load (septic or grease), and the signature of the Southern Sanitation driver who dropped off the load.

38. On March 8, 2005, Mr. Beebe submitted to the Department supplemental information covering January 2005. It includes a typed "Pump Job List" for January 2005, prepared on March 3, 2005. The list contains dates, addresses, and approximate gallons collected, including eight entries for pumping out Mr. Ehlen's holding tank. Individual trucks were not identified on this list. The supplemental information also included an NCWRF Septic Receiving Log for January 2005.

39. Mr. Beebe testified that the Department had never asked him for an accounting during the eight years he has operated his business and that the Department did so in this case only after he contested the allegations in the Brandy Lane dumping case. Mr. Beebe appeared to believe that the Department was acting punitively in requesting documents that Mr. Beebe, as the owner of a permitted septage disposal business, was required to keep. Mr. Beebe did not contest the apparent fact that he did not keep collection and hauling logs for his trucks in the normal course of business. Such documentation as he provided was insufficiently detailed to meet the requirements of Florida Administrative Code Rule 64E-6.010(7)(e), and in some instances was cobbled together well after the fact in order to provide the Department with some documentation of Southern Sanitation's activities.

40. Mr. Rech testified that the Department requires accurate logs of collections and disposals to allow it to monitor compliance and investigate complaints. An accurate, detailed, and contemporaneously-created log would have allowed the Department to discover what Mr. Beebe's truck had collected and dumped prior to the Brandy Lane dumping incident and would have allowed the Department to reconcile the amounts of septage collected by Mr. Beebe from January 2004 through February 2005,

with the amounts of septage Mr. Beebe properly disposed of during the same period.

41. The Department established, by clear and convincing evidence, that Mr. Beebe did not maintain a septage collection and hauling log as required by Florida Administrative Code Rule 64E-6.010(7)(e).

D. Improper disposal of septage

42. The terms of Mr. Beebe's septage disposal service permit required him to dispose of his collected septage at the NCWRF. Dale Waller, the plant manager of the NCWRF, testified as to the procedures followed by sewage haulers at the facility. Mr. Waller testified that the facility has a computer capable of generating reports as to the quantity of disposals made by haulers, but that the computer system often does not operate correctly. Therefore, the facility's chief means of monitoring disposals is the "Septic Receiving Logs" discussed above.

43. The Septic Receiving Log requires the hauler to record the date of disposal, whether the disposal consisted of septage or grease, the amount of disposed material in gallons, and the driver's signature and printed name. The number of gallons disposed is shown on a calibrated gauge when the waste is pumped out of the truck. Mr. Waller testified that this gauge is accurate within five per cent of the actual amount pumped. The county sends invoices each month to the hauler, based on the

number of gallons and the type of waste disposed of at the facility.

44. The Septic Receiving Log is maintained in the foyer of the NCWRF building, with a monthly sheet for each hauling company that uses the facility. No NCWRF employee monitors the haulers as they make their log entries. Mr. Waller testified that it is essentially an honor system for the haulers.

45. Due to computer problems, the NCWRF had no computer records of disposals for the month of January 2005. The Septic Receiving Log for Southern Sanitation for that month showed six entries totaling 11,908 gallons of septage and grease, plus two early January 2005 entries of 3,450 gallons that were placed on the December 2004 log, for a total of 15,358 gallons.

46. Mr. Waller testified that in March 2005, Mr. Beebe submitted a revised Septic Receiving Log for Southern Sanitation for the month of January 2005. Mr. Beebe also provided this revised log to the Department as part of his March 8, 2005, supplemental information for the month of January 2005. This revised log listed three additional disposals of septage in the month of January 2005: 2,550 gallons on January 17; 2,000 gallons on January 24; and 1,700 gallons on January 28. These additional 6,250 gallons brought the reported total disposals of septage and grease for January 2005 to 21,608 gallons.

47. The NCWRF declined to accept the revised Septic Receiving Log as an official record of Southern Sanitation's disposals at the facility for the month of January 2005, because the NCWRF could not verify the additional disposals. Mr. Beebe was billed only for those disposals documented on the original Septic Receiving Log kept at the facility.

48. As part of the March 8, 2005, submission of supplemental information, Mr. Beebe provided to the Department a "pump job list" for January 1 through 28, 2005. This list indicated that Southern Sanitation collected between 21,000 and 22,600 gallons of wastewater during the period specified, a number that roughly corresponds to the total number of gallons reported by Mr. Beebe in his revised Septic Receiving Log for the month of January 2005.

49. At the hearing, the Department contended that because Mr. Beebe reported collecting between 21,000 and 22,600 gallons of waste, but could only verify the proper disposal of 15,358 gallons of waste, Mr. Beebe must have improperly disposed of at least 5,600 gallons and as much as 7,200 gallons of waste.

50. In a similar fashion, the Department examined the amounts that Mr. Beebe reported pumping from Mr. Ehlen's holding tank, compared those amounts to the Ehlen household's water usage for the month of January 2005, and concluded that Mr. Beebe further underreported the amount of waste collected

that month and, therefore, must have improperly disposed of even more than 5,600 to 7,200 gallons of waste.

51. Mr. Beebe was forthright regarding the issues in these cases, even when his testimony was against his own interests. In light of his overall credibility, Mr. Beebe's denial that he made any improper disposals of waste is credited. No evidence was presented to show that Mr. Beebe actually made these improper disposals. The Department's contention was a surmise derived from discrepancies in Mr. Beebe's reports of collections and disposals.

52. Based on all the evidence, the undersigned finds that the discrepancies in the reports were more likely due to Mr. Beebe's poor record-keeping and his after-the-fact efforts to create records complying with Florida Administrative Code Rule 64E-6.010(7)(e), rather than any illegal dumping of waste.

53. The Department failed to establish by clear and convincing evidence that Mr. Beebe improperly disposed of septage during the month of January 2005.

CONCLUSIONS OF LAW

54. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004).

55. In these proceedings, the Department seeks the imposition of administrative fines and the revocation of

Mr. Beebe's septic tank contractor's registration and septage disposal operating permit. Therefore, the Department has the burden of proving by clear and convincing evidence that Mr. Beebe committed the alleged violations. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence is the proper standard in license revocation proceedings because they are penal in nature and implicate significant property rights. See Osborne Stern, 670 So. 2d at 935.

56. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court defined clear and convincing evidence as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

57. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705

So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting),
reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

58. The Department has the authority granted by Chapter 489, Part III, Florida Statutes (2004), to register and discipline septic tank contractors. Mr. Beebe is a registered septic tank contractor pursuant to Section 489.552, Florida Statutes (2004). Section 489.556, Florida Statutes (2004), 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.

59. The Department has adopted Florida Administrative Code Rule 64E-6.022, setting forth standards of practice and disciplinary guidelines for registered septic tank contractors. The Rule provides, as follows, relating to repeat violations:

(3) As used in this rule, a repeat violation is any violation on which disciplinary action is being taken where the same licensee had previously had disciplinary action taken against him or received a letter of warning in a prior case. This definition applies regardless of the chronological relationship of the violations and regardless of whether the violations are of the same or different subsections of this rule. The penalty given in the above list for repeat violations is intended to apply only to situations where the repeat violation is of a different subsection of this rule than the first violation. Where the repeat violation is the very same type of violation as the first violation, the penalty set out above will generally be increased over what is shown for repeat violations.

60. Because Mr. Beebe was cited in 2001 for installing a septic system without a permit in violation of Florida Administrative Code Rule 64E-6.022 and paid a fine of \$500.00 without contest, all of the violations alleged in the instant proceedings are repeat violations.

61. Subsection 381.0065(5), Florida Statutes (2004), authorizes the Department to issue citations that may contain an order of correction, an order to pay a fine, or both, for violations of Section 381.0065 and Chapter 386, Part I, Florida Statutes (2004), or rules adopted pursuant thereto.

62. In DOAH Case No. 04-4333, the Department issued a citation of violation against Mr. Beebe alleging that he violated Florida Administrative Code Rule 64E-6.022(1)(n), the failure to properly treat or dispose of septage, for which the repeat violation penalty is revocation; and Florida Administrative Code Rule 64E-6.022(1)(q), the creation or maintenance of a sanitary nuisance, for which the repeat penalty is a 90-day suspension or revocation.

63. The Department established by clear and convincing evidence that Mr. Beebe dumped a mixture of drillers' mud and untreated septage on the lot at 295 Brandy Lane in Naples and that in doing so, he committed the violations alleged in the citation. Despite the repeat nature of the violations, the Department seeks only the maximum penalty for a first violation of each of the cited rule provisions, a fine of \$500.00. Given the serious nature of the violations, the penalties sought by the Department are more than reasonable.

64. In DOAH Case No. 05-0695, the Department issued an Amended Administrative Complaint alleging that Mr. Beebe

installed a holding tank at a residence without a permit in violation of Florida Administrative Code Rule 64E-6.0101, that Mr. Beebe improperly disposed of septage pumped from this holding tank in violation of Florida Administrative Code Rule 64E-6.010, and that Mr. Beebe failed to maintain adequate septage and hauling logs in violation of Florida Administrative Code Rule 64E-6.010(7)(e).

65. The Department established, by clear and convincing evidence, that Mr. Beebe placed a 900-gallon domestic wastewater holding tank into a pre-dug hole at the Ehlen's residence without obtaining a Department permit in violation of Florida Administrative Code Rule 64E-6.0101(7). The disciplinary guideline for this repeat violation is revocation pursuant to Florida Administrative Code Rule 64E-6.022(1)(b)2.:

(1) It shall be the responsibility of persons registered under this rule to see that work for which they have contracted and which has been performed by them or under their supervision is carried out in conformance with the requirements of all applicable Florida Statutes and Chapter 64E-6, F.A.C. The following actions by a person included under this rule shall be deemed unethical and subject to penalties as set forth in this section. The penalties listed shall be used as guidelines in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this section.

* * *

(b) Permit violations.

1. Contractor initiates work to install, modify, or repair a system when no permit has been issued by the department. A permit is issued after construction is started but prior to completion of the contracted work. No inspections are missed. First violation, letter of warning or fine up to \$500; repeat violation, \$500 fine and 90 day suspension or revocation.

2. Contracted work is completed without a permit having been issued, or no permit application is received until after contracted work was completed, resulting in missed inspection or inspections. First violation, letter of warning or fine up to \$1000; repeat violation, revocation.

66. However, as noted in relation to the penalties imposed pursuant to the citation in DOAH Case No. 04-4333, the Department has the discretion to impose a lesser penalty than revocation for repeat violations. The disciplinary guidelines provide, as follows, in Florida Administrative Code Rule 64E-6.022:

(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.

67. The circumstances under which Mr. Beebe placed the holding tank on Mr. Ehlen's property counsel a lesser penalty than revocation. The City of Marco Island failed to connect the Ehlen property to the city's sewage system when promised. Far from causing damage or costing the customer money, Mr. Beebe's action made it possible for the Ehlen family to move into the house, as scheduled. Mr. Ehlen informed Mr. Beebe that the City of Marco Island had approved placement of the temporary holding tank, though Mr. Beebe should have inquired as to whether the

Department had also approved the holding tank. No real danger to the public was demonstrated. No evidence of complaints against Mr. Beebe was presented. Finally, revocation of his permit would likely put Mr. Beebe out of business. Under all the circumstances, it is concluded that a fine of \$1,000.00 for this violation will serve the purpose of the standards of practice and disciplinary guidelines without imposing undue hardship on the permit holder.

68. The Department demonstrated by clear and convincing evidence that Mr. Beebe failed to maintain adequate septage and hauling logs in violation of Florida Administrative Code Rule 64E-6.010(7)(e). The penalty for a repeat violation of this requirement is a \$500.00 fine and a 90-day suspension, or revocation, pursuant to Florida Administrative Code Rule 64E-6.022(1)(o). Under all the circumstances, it is concluded that the Department should impose the lesser of the recommended penalties, which will impose a severe hardship on Mr. Beebe, but not put him out of business. Because the violation is related to septage and hauling logs, the suspension should be limited to Mr. Beebe's septage disposal operating permit.

69. The Department failed to prove by clear and convincing evidence that Mr. Beebe improperly disposed of septage in violation of Florida Administrative Code Rule 64E-6.010, as it

relates to septage pumped from Mr. Ehlen's temporary holding tank.

RECOMMENDATION

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

RECOMMENDED that Petitioner, the Department of Health, enter a final order imposing a \$1000.00 fine for the violations described above, relating to DOAH Case No. 04-4333, and imposing a fine of \$1,500.00 and a 90-day suspension of Respondent's septage disposal operating permit for the violations described above, relating to DOAH Case No. 05-0695.

DONE AND ENTERED this 7th day of July, 2005, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of July, 2005.

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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.