

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
)  
    Petitioner, )  
)  
vs. )     Case No. 05-3245  
)  
JAMES L. SMITH, )  
)  
    Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was conducted in this case on November 22, 2005, by video teleconference between Tallahassee, Florida, and Jacksonville, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Catherine Berry, Esquire  
Department of Health  
515 West Sixth Street, MC33  
Jacksonville, Florida 32206

For Respondent: James Smith, pro se  
All Florida Septic Tank Service, Inc.  
8300 West Beaver Street  
Jacksonville, Florida 32220

STATEMENT OF THE ISSUES

The issues are whether Respondent violated Florida Administrative Code Rules 64E-6.022(1)(b)2., 64E-6.022(1)(d), and 64E-6.022(1)(p) by repairing an onsite sewage disposal

system without a permit, resulting in missed inspections, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On March 10, 2004, Petitioner Department of Health (Petitioner) issued a Citation for Violation against Respondent James L. Smith (Respondent). The citation alleged that Respondent had violated the standards for an onsite sewage disposal system by completing contract work without a permit, resulting in missed inspections. On March 30, 2004, Respondent requested an administrative hearing to dispute material facts alleged in the citation.

On June 22, 2004, Petitioner referred the case to the Division of Administrative Hearings (DOAH). The case was assigned to Administrative Law Judge Charles A. Stampelos as DOAH Case No. 04-2226.

DOAH issued an Initial Order on June 23, 2004. Because the parties did not file a written response to the Initial Order, Judge Stampelos issued an Order dated July 16, 2004. Said order directed the parties to respond to the Initial Order on or before July 23, 2004.

Respondent and Petitioner filed unilateral responses to Judge Stampelos's Order on July 22, 2004, and July 23, 2004, respectively. Subsequently, DOAH transferred the case to the undersigned.

A Notice of Hearing dated July 30, 2004, scheduled the case for hearing on October 5, 2004. Thereafter, it became obvious that DOAH Case No. 04-2226 was factually related to DOAH Case No. 04-2020, which was scheduled for hearing on November 16, 2004. Accordingly, an Order dated September 27, 2004, rescheduled DOAH Case No. 04-2226 for hearing on November 16, 2004.

On November 12, 2004, Petitioner filed a Notice of Settlement and Request for Dismissal. Pursuant to Petitioner's request, the undersigned issued an Order Closing File on November 16, 2004.

On September 8, 2005, Petitioner issued a Re-Notice, stating that the case had not settled as expected and requesting DOAH to re-assign the matter to an Administrative Law Judge. DOAH assigned the case to the undersigned as DOAH Case No. 05-3245.

On September 14, 2005, the undersigned issued an Order Re-Opening Case and Requiring Status Report. Said order required a written response from the parties on or before September 28, 2005.

On October 10, 2005, the undersigned issued a Notice of Hearing by Video Teleconference. The notice scheduled the hearing for November 22, 2005.

During the hearing, Petitioner presented the testimony of one witness and offered four exhibits, which were accepted as evidence. Respondent testified on his own behalf, but offered no exhibits as evidence. On November 22, 2005, Petitioner filed copies of its exhibits.

The parties did not file a transcript of the proceeding. Petitioner filed a Proposed Recommended Order on December 2, 2005. As of the date that this Recommended Order was issued, Respondent had not filed proposed findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. Petitioner is the state agency charged with enforcing the statutory and regulatory provisions pertaining to the practice of septic tank installations and repairs in Florida. See § 381.0065(3), Fla. Stat. (2003).

2. Repair of onsite sewage treatment and disposal systems must be performed under the supervision and control of a registered septic tank contractor. Respondent is the qualifying registered septic tank contractor for All Florida Septic Tank Service, Inc., having been issued the registration number SR00011389. Respondent has 15 years of experience in the field of septic system construction and repair.

3. The qualifying registered septic tank contractor for Simmons Septic and Tractor Service, Inc., is Joey Wayne Simmons.

The qualifying registered septic tank contractor for AA Septic Tank Service, Inc., is Billy Wayne Joyner. However, Mr. Simmons, Mr. Joyner, and Respondent work closely together, sometimes working together on a job and/or acting as the qualifying registered septic tank contractor on each other's behalf.

4. On September 2, 2003, the septic disposal system at the residence of Jack Young was not functioning properly. Mr. Young contracted with one of the above-referenced septic tank services to repair the system.

5. On September 2, 2003, Respondent and another employee of All Florida Septic Tank Service, Inc., along with two employees from AA Septic Tank Service, Inc., went to Mr. Young's residence to repair Mr. Young's onsite sewage disposal system. No one applied for a permit to make any repairs to Mr. Young's system.

6. With Respondent acting as the registered septic tank contractor, the men used a backhoe to dig up the septic tank, which was buried three feet in the ground. Respondent then repaired the pump and ran a new one and one-quarter force main line to the existing header because the old line had been compromised by roots. Respondent also cleaned roots from inside the distribution box. Respondent then sealed the tank and directed the men to cover it up. No one called Petitioner's

local office, the Duval County Health Department, to request an inspection of the repair before covering the tank.

7. The work on Mr. Young's septic system involved the replacement of an effluent transmission line. It required a permit because it constituted more than a minor repair to the pump and distribution box. Respondent should not have performed the work without a permit from the Duval County Health Department. Because there was no permit, there was no request for inspection by the Duval County Health Department.

8. When the work was completed, Mr. Young gave Respondent a check in the amount of \$1,000, payable to Mr. Simmons. The check reflected payment for repair to the filter bed, otherwise known as the drainfield. Respondent indicated his receipt of the check by signing the AA Septic Tank Service, Inc.'s Daily Truck Log and Maintenance Report.

9. In February 2004, Mr. Young's septic system began to fail once again due to root blockage in the lines. Respondent advised Mr. Young that a permit would be required in order to make any further repairs. Mr. Young refused to pull a permit or to pay for any additional costs.

10. On February 17, 2004, Mr. Young contacted Petitioner to report the failure of his system's drainfield. On February 18, 2004, Petitioner's inspector confirmed that

Mr. Young's drainfield had failed and was causing a sanitary nuisance.

11. During the hearing, Respondent admitted that there are no disputed issues of material facts in this case. He stated that he agreed with everything. However, he did not agree that the work he performed for Mr. Young required a permit from and inspections by Petitioner's Duval County Health Department.

#### CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2005).

13. Petitioner has the burden of proving by clear and convincing evidence that Respondent violated Florida Administrative Code Rules 64E-6.022(1)(b)2., 64E-6.022(1)(d), and 64E-6.022(1)(p). See Ferris V. Turlington, 510 So. 2d 292 (Fla. 1987).

14. Section 381.0065(4), Florida Statutes (2003), states as follows in pertinent part:

(4) PERMITS; INSTALLATION; AND CONDITIONS.--A person may not construct, repair, modify, abandon, or operate an onsite sewage treatment and disposal system without first obtaining a permit approved by the department. . . . A person may not contract to construct, modify, alter, repair, service, abandon, or maintain any portion of an onsite sewage treatment and disposal system without being registered under part III of chapter 489.

15. Florida Administrative Code Rule 64E6.002 states as follows in relevant part:

(18) Drainfield--a system of open-jointed or perforated piping, approved alternative distribution units, or other treatment facilities designed to distribute effluent for filtration, oxidation and absorption by the soil within the zone of aeration.

\* \* \*

(47) Repair--replacement of or modifications or additions to a failing system which are necessary to allow the system to function in accordance with its design or must be made to eliminate a public health or pollution hazard. Servicing or replacing with like kind mechanical or electrical parts of an approved onsite sewage treatment and disposal system; or making minor structural corrections to a tank, or distribution box, does not constitute a repair. The use of any treatment method that is intended to improve the functioning of any part of the system, or to prolong or sustain the length of time the system functions, shall be considered a repair. The use of any non-prohibited additive by the system owner, through the building plumbing, shall not be considered a repair. Removal of the contents of any tank or the installation of an approved outlet filter device, where the drainfield is not disturbed, shall not be considered a repair. Replacement of a broken lid to any tank shall not be considered a repair.

16. Florida Administrative Code Rule 64E-6.003 states as follows in relevant part:

(1) System Construction Permit--No portion of an onsite sewage treatment and disposal system shall be installed,



repaired, altered, modified, abandoned or replaced until an "Onsite Dewage Treatment and Disposal System Construction Permit" has been issued on Form DH 4016. . . . Servicing or replacing with like kind mechanical or electrical parts of an approved onsite sewage treatment and disposal system; pumping of septage from system; or making minor structural corrections to a tank, or distribution box, does not constitute a repair.

\* \* \*

(3) Repair Inspections--A system repair shall be inspected by the department or a master septic tank contractor to determine compliance with construction permit standards prior to final covering of the system. . . .

17. Florida Administrative Code Rule 64E-6.015 states as follows in pertinent part:

All repairs made to a failing onsite sewage treatment and disposal system shall be made only with prior knowledge and written approval for the DOH county health department having jurisdiction over the system. . . .

\* \* \*

(6) . . . Any failing system shall, at a minimum, be repaired in accordance with the following criteria:

\* \* \*

(e) Where the cause of system failure is determined to be from root clogging of the distribution box or drainfield line of a system, and where removal of the root mass and replacement of damaged drainfield material will restore the system to its original design function, upon inspection and verification of the repair work by the

health unit, permit satisfaction will be considered to be achieved.

18. Florida Administrative Code Rule 64E-6.022 states as follows in pertinent part:

(1) It shall be the responsibility of person 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 requirement 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.

\* \* \*

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 \$1,000; repeat violation, revocation.

\* \* \*

(d) Failure to call for required inspection. First violation, letter of warning or fine up to \$500; repeat violation, letter of warning or fine up to \$500 and 90 day suspension or revocation.

\* \* \*

(p) Installation, modification, or repair of an onsite sewage treatment and disposal system in violation of the standards of Section 381.0065 or 381.00655, F.S. or Chapter 64E-6, F.A.C. First violation, letter of warning or fine up to \$500 per specific standard violated;; repeat violation, 90 day suspension, revocation.

18. In this case, there is clear and convincing evidence that Respondent violated Florida Administrative Code Rules 64E-6.022(1)(b)2., 64E-6.022(1)(d), and 64E-6.022(1)(p) by repairing an onsite sewage disposal system without a permit, resulting in missed inspections. Respondent should have requested a permit and an inspection of the repair work because he replaced the main line to the header, which had been compromised by roots, and he removed roots from the distribution box.

19. In mitigation, there is no evidence that Respondent has a prior history of violating the standards of practice. The only aggravating factor is that Respondent had 15 years of experience and knew or should have known that he needed a permit to repair Mr. Young's septic system and inspections of the completed work.

#### RECOMMENDATION

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

RECOMMENDED:

That Petitioner enter a final order, finding that Respondent violated the standards of practice and imposing an administrative fine in the amount of \$1,000.

DONE AND ENTERED this 6th day of December, 2005, in Tallahassee, Leon County, Florida.



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SUZANNE F. HOOD  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of December, 2005.

COPIES FURNISHED:

Catherine R. Berry, Esquire  
Department of Health  
515 West Sixth Street  
Jacksonville, Florida 32206-4311

James L. Smith  
All Florida Septic Tank Service, Inc.  
8300 West Beaver Street  
Jacksonville, Florida 32220  
R. S. Power, Agency Clerk  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1701

Timothy M. Cerio, General Counsel  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1701

Dr. John A. Agwunobi, Secretary  
Department of Health  
4052 Bald Cypress Way, Bin A00  
Tallahassee, Florida 32399-1701

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.