

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES L. SMITH,)
)
 Petitioner,)
)
 vs.)
) Case No. 05-4131
 DEPARTMENT OF HEALTH,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The formal hearing was conducted in Jacksonville, Florida, on January 25, 2006. The appearances were as follows:

APPEARANCES

For Petitioner: James L. Smith, pro se
8300 West Beaver Street
Jacksonville, Florida 32220

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

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Petitioner violated Florida Administrative Code Rules 64E-6.022(1)(b)2, 64E-6.022(1)(d), and 64E-6.022(1)(p) by

making repairs to an on-site sewage disposal system without a permit, and by missing required inspections of the system, as outlined in the citation issued by the Respondent Agency dated August 29, 2005.

PRELIMINARY STATEMENT

This cause arose when the Respondent Department of Health issued a citation to Petitioner on August 29, 2005, seeking to impose an administrative fine up to \$2,500.00 for violation of the above-cited rules. The citation informed the Petitioner of his right to a formal proceeding in accordance with Chapter 120, Florida Statutes, and the Petitioner requested a formal proceeding and hearing. The proceeding was forwarded to the Division of Administrative Hearings and ultimately to the undersigned Administrative Law Judge.

In essence the dispute concerns whether the Petitioner, as the qualifying registered septic tank contractor for All Florida Septic Tank Service, Inc., performed repairs to an on-site sewage treatment system (septic tank and drain field) without a permit, and without obtaining the required inspections.

The cause came on for hearing as noticed. At the hearing the Department presented the testimony of three witnesses and offered one composite exhibit, which was admitted into evidence without objection. The Petitioner testified on his own behalf and offered one exhibit, which was admitted into evidence

without objection. Upon conclusion of the hearing the parties were accorded the opportunity to file proposed recommended orders. The Respondent Agency filed a Proposed Recommended Order, which has been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The State of Florida, Department of Health and Duval County Health Department (Department) is an Agency of the State of Florida, charged with enforcing the statutory and regulatory provisions regarding septic tank and drain field installations and repairs, in Florida, in accordance with Section 381.0065, Florida Statutes, and Florida Administrative Code Rule Chapter 64E-6.

2. The Petitioner is the qualifying registered septic tank contractor for All Florida Septic Tank Service, Inc. (All Florida). He holds registration number SR00011389. He has 15 years of experience in the field of septic tank system construction and repair. All repairs of on-site sewage treatment and disposal systems (septic systems), are required to be performed under the supervision and control of a registered septic tank contractor.

3. Mr. David Adeeb is president of United Properties of North Florida, Inc. He owned property (a residence) at 375 North Cahoon Road, in Duval County Florida. He was informed by

his tenants at that residence that the septic tank and drain field were malfunctioning and needed to be repaired or replaced, sometime in April 2004. He therefore contacted All Florida, asking them to inspect the septic system at that residence and advise what repairs might be needed. He was advised by some representative of All Florida that the drain field needed to be replaced and was quoted a price of \$2,000.00. All Florida requested that payment be made before the work was performed. Since Mr. Adeeb was out-of-town at the time he asked his tenant to temporarily pay All Florida for the cost of the repairs and/or installation, which they agreed to do.

4. All Florida then issued a contract/proposal to United Properties on April 12, 2004. It was signed by a representative of All Florida, Michael Carver. Mr. Carver was an employee of All Florida. The contract/proposal indicated that a 360 square foot drain field would be installed at 375 Cahoon Road, for a price of \$2,000.00, to be paid in cash. The contract/proposal was on All Florida letterhead and included a warranty. Mr. Adeeb was told by his tenant that the Petitioner, who is personally known to that tenant, was on the property while the work was being performed. No one applied for a permit to make any repairs to the septic system and the work was completed without a permit being obtained.

5. Some five months later the system began leaking sewage from the new drain field. It had malfunctioned. Mr. Adeeb therefore again called All Florida to demand that they repair any malfunctions pursuant to the warranty. All Florida informed Mr. Adeeb that a new drain field with a mounded system and pump was needed. When Mr. Adeeb told a representative of All Florida that they had just replaced the drain field in April of that year, he was told that another \$2,000.00 would be required to correct the drain field problem.

6. Mr. Adeeb had just recently entered into a contract to sell the property at 375 Cahoon Road so, time being of the essence in closing the sale of the property, he felt he had no choice but to ask All Florida to go ahead with the repair work on the system which All Florida had been asked by him to repair five months previously in April of 2004. After the new system was installed Mr. Adeeb found that a permit had never been obtained for the first drain field work which he had requested from All Florida and that All Florida had done the work incorrectly.

7. Mr. Adeeb objected to paying another \$2,000.00 for the second repair job, performed in approximately September of 2004 and after much discussion with All Florida's representatives agreed to pay \$1,000.00 dollars for the second stint of repair work. He made the payment and he received a warranty from All

Florida for one year, good through September 22, 2005. The warranty was signed by Mr. Wayne Joyner, operations manager for All Florida. Mr. Joyner is also the qualifying registered septic tank contractor for AA Septic Tank Service, Inc., apparently a second corporation domiciled at the same facility and address as All Florida Septic Service, Inc.

8. In May of 2005 Mr. Adeeb was again contacted by the now former tenant who had purchased the property from Mr. Adeeb. He was thus informed that the system had failed again and sewage was leaking onto the surface of the property from the drain field. Mr. Adeeb again contacted All Florida on May 23, 2005. A representative of All Florida informed him that he should fax a copy of the paid receipt and the warranty to them and that they would take care of the problem.

9. On June 20, 2005, the home owner again contacted Mr. Adeeb and told him that no one from All Florida had repaired the drain field as yet. A faxed copy of the paid receipt and warranty was requested once again by All Florida. After numerous phone calls with representatives of All Florida, Mr. Adeeb was told that the problem was not due to All Florida's repair work and that Mr. Adeeb would need to get someone else to repair the system.

10. The Petitioner, James L. Smith, the registered qualifying septic tank contractor for All Florida, testified

that Michael Carver had performed the initial repair job in April of 2004 for Mr. Adeeb without the knowledge of the Petitioner or All Florida. He claims that Michael Carver never worked for All Florida. He introduced into evidence a letter purported to be from Michael Carver which was dated September 30, 2005, but signed on October 5, 2005. That letter states that Mr. Carver performed the first drain field repair job without the knowledge of All Florida and that he had created the receipt form which was apparently given to either the tenants at the residence in question, or to Mr. Adeeb, on All Florida letterhead without the knowledge of any officer, employee, or representative of All Florida. That letter, however, was not authenticated because Mr. Carver was not present at the hearing and could not be examined concerning it, or the details of Mr. Carver's involvement with the initial repair project. Moreover, the Petitioner was unable to explain how Mr. Carver would have known about the job at all if he had never worked for All Florida. This is because Mr. Adeeb established that in obtaining all of the repair work during 2004-2005 he had only contacted representatives of All Florida. He had never had contact with Mr. Carver.

11. The Petitioner denied ever telling counsel for the Department in a telephone conversation that Michael Carver had worked for him during the week (i.e. All Florida) but that he

let Mr. Carver do "side jobs" on his own on weekends. He claimed that Mr. Carver did the job in question in April of 2004 because the tenants knew him personally and arranged for him to do the work.

12. The testimony of Mr. Adeeb and the Department's evidence in the form of its composite exhibit, is accepted as more credible than the self-serving testimony of the Petitioner, and it is found that All Florida and the Petitioner were responsible for the repair jobs at issue in this case because Mr. Adeeb contracted with All Florida for the work in question. Even if the initial job was performed by Mr. Carver, it is determined that he did so as employee or agent of All Florida and the Petitioner. Under the authority cited herein the Petitioner was responsible, as the qualifying, registered septic system contractor for All Florida, with performance and supervision of the work in question.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

14. The Department of Health has authority pursuant to Section 381.0065, Florida Statutes, to issue permits, inspect sites, issue citations and impose fines for violation of Rules

which govern repair and installation of on-site sewage treatment and disposal systems.

15. Section 381.0065(3)(c), Florida Statutes, authorizes the Department to:

. . . conduct enforcement activities, including imposing fines, issuing citations, suspensions, revocations, injunctions, and emergency orders for violation of this Section, Part I of Chapter 386, or Part III of Chapter 489 or for a violation of any rule adopted under this Section, Part I of Chapter 386, or Part IV of Chapter 489.

16. Section 381.0065(4), Florida Statutes (2005), provides in pertinent part, as follows:

(4) Permit; installation; and conditions. - A person may not construct, repair, modify, abandon, or operate an on-site sewage treatment and disposal system without first obtaining a permit approved by the Department. . . .

17. The violations charged are set forth in the August 29, 2005, citation issued by the Department. The first one is for violation of Florida Administrative Code Rule 64E-6.022(1)(b)(2), which provides that it is a violation of that provision for contracted work being completed without a permit having been applied for or issued which results in missed inspection or inspections. A fine of \$1,000.00 dollars is provided for for a first violation of that provision. Florida Administrative Rule 64E-6.022(1)(d) makes it a violation for failing to request required inspections. It provides that a

fine of \$500.00 dollars is required for a first violation of that provision. The Petitioner failed to request any of the required inspections. The third violation charged is for Florida Administrative Code Rule 64E-6.022(1)(p), which violation concerns the installation, modification, or repair of an on-site sewage treatment and disposal system in violation of the standards in Section 381.0065 or 381.00655, Florida Statutes, or in Florida Administrative Code Chapter of 64E-6. A \$500.00 dollar fine is provided for the first violation of that provision for each specific standard violated.

18. The repair of on-site sewage treatment and disposal systems must be performed under the supervision and control of a registered septic tank contractor. Fla. Admin. Code R. 64E-6.022(1)(a). The Petitioner is the qualifying registered septic tank contractor for All Florida. Through Mr. Adeeb's testimony it was established that the Petitioner, personally known to the tenant of the residence in question, was on the property while the work was being performed in April of 2004. Not only was the work performed improperly, but the Petitioner failed to obtain the required permit and failed to obtain the required inspections.

19. Persuasive, clear and convincing evidence has established, as shown by the above findings of fact, that the repair work at issue was performed improperly and below relevant

standards; that no permit was applied for or obtained for the work; and that the required inspections were never requested or obtained. The Petitioner is thus responsible for the violations which have been proven.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Respondent Department finding that the violations charged have been established and that a fine of \$2,500.00 dollars be imposed for the violations.

DONE AND ENTERED this 30th day of March, 2006, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
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 Clerk of the
Division of Administrative Hearings
this 30th day of March, 2006.

COPIES FURNISHED:

James L. Smith
8300 West Beaver Street
Jacksonville, Florida 32220

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

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

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.