

STATE OF FLORIDA
DEPARTMENT OF HEALTH

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Department of Health,
Petitioner,

vs.

James L. Smith,
Respondent.

Rendition no.: DOH-06-1143 - FOF-HST

Registration no.: SR0011389

Case no.: 05-4354

DIVISION OF
ADMINISTRATIVE
HEARINGS

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FILED

FINAL ORDER

A recommended order having been received, this matter is before Department of Health (Department) for disposition. At issue is the citation of the Respondent, a registered septic tank contractor,¹ for violations of Rule 64E-6.022, F.A.C., Standards of Practice and Disciplinary Guidelines. The citation charges three violations, subsections (d), (e), and (q) of the Rule; and imposes a fine of one thousand two hundred fifty dollars (\$1,250). The factual basis for the alleged violations is the Respondent's failure to take necessary precautions in replacing two septic tanks to avoid the creation of a sanitary nuisance, an open accumulation of raw sewage, and the failure to timely call the Duval County Health Department (hereinafter the DCHD) for inspection of the abandonment of the failing septic tanks.

Counsel for the Department excepts to the Administrative Law Judge's (hereinafter the ALJ) findings that the evidence was not clear and convincing as to the Respondent's responsibility for the sanitary nuisance. At this level of review the Department has no authority to reweigh the evidence and reject findings of fact supported by competent substantial evidence. Having reviewed the entire record, I conclude that there is competent substantial evidence supporting the challenged findings; therefore the exception is denied. See *Heifetz v. Department of Business Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

Counsel for the Department also excepts to the ALJ's conclusion that the Department failed to prove a violation of the inspection notification requirement applicable to the abandonment of a septic tank. The exception is granted. There

¹ Registration and regulation of septic tank contractors is placed in the Department of Health by Chapter 489, Contracting, Part III, Septic Tank Contracting, sections 489.551 through 489.558, Florida Statutes. The regulatory and disciplinary rules are located in Chapter 64E-6, Part III, sections 64E-6.019 through 64E-6.023, Florida Administrative Code.

is no factual dispute, as the ALJ found that the Respondent did not call the DCHD for inspection upon completing the abandonment of the septic tanks. See paragraph 8 of the recommended order. The ALJ noted the Respondent's testimony that when a contractor was retained to replace a failing septic tank it is customary in Duval County to call for the inspection after placing the new septic tank. This testimony was not rebutted. At issue is the inspection notification requirement found in Rule 64E-6.011. When the use of a septic tank is discontinued in the context of a repair job to replace it, the Rule specifies that the following steps must be taken in the order listed:

- (a) [The] property owner or agent shall apply for a permit from the department to abandon the onsite sewage system....
- (b) The tank shall be pumped out.
- (c) The bottom of the tank shall be opened or ruptured, or the entire tank collapsed so as to prevent the tank from retaining water, and
- (d) The tank shall be filled with clean sand or other suitable material, and completely covered with soil.
- (e) An inspection of the system abandonment shall be conducted by the department.... (emphasis added).

Rule 64E-6.011(1) & (2), Florida Administrative Code. Thus, by proceeding with the replacement before calling the department, the Respondent violated the requirement that he timely notify the Department for inspection of the abandoned tanks.

Finally, counsel for the Department excepts to the ALJ's legal conclusion stated in paragraph 20, that notice and a reasonable time to abate are conditions precedent to the discipline of a registered septic tank contractor for creating a sanitary nuisance. Failure to timely abate after notice may result in liability for the costs incurred by the Department to abate the nuisance² and possible criminal prosecution³, but section 386.03 notice is not a condition precedent to discipline of a registered contractor. The exception is granted.

The entire record of this proceeding has been reviewed pursuant to section 120.57(1)(*l*), Florida Statutes. The recommended order of April 26, 2006, as modified by this final order, is adopted and incorporated by reference. Considering the circumstances of this case, mitigation is appropriate for the inspection notification violation.


² Pursuant to section 386.03, Florida Statutes, the Department of Health notifies a person creating or maintaining a sanitary nuisance to remove or abate it within a specified time.

³ It is a misdemeanor for a person to create or maintain a sanitary nuisance. See section 386.051, Florida Statutes.

Based on the foregoing, the penalty imposed on the Respondent for failure to timely notify the Department for a required inspection, a violation of Rule 64E-6.022(d), is a letter of warning. This final order constitutes the letter of warning. The alleged violations of Rule 64E-6.022(l) and (q) are dismissed.

DONE and ORDERED this 27th day of June 2006 in Tallahassee, Leon County, Florida.

M. Rony François, M.D., M.S.P.H., Ph. D.
Secretary, Department of Health

By: 
Bonita J. Sorensen, M.D., M.B.A. ₃₅
Deputy State Health Officer

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. A REVIEW PROCEEDING IS GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. A REVIEW PROCEEDING IS INITIATED BY FILING A NOTICE OF APPEAL WITH THE CLERK OF THE DEPARTMENT OF HEALTH AND A COPY ACCOMPANIED BY THE FILING FEE WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES OR THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE FILING DATE OF THIS FINAL ORDER.

Copy furnished to each of the following:

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✓ Hon. Barbara J. Staros
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FALR

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing FINAL ORDER has been served by ordinary mail via the United States Postal Service, inter-office mail, or by hand delivery to each of the above-named persons this 27th day of June 2006.

A handwritten signature in black ink, appearing to read "R. Power", with a long horizontal line extending to the right.

R. Samuel Power, Agency Clerk
Department of Health
4052 Bald Cypress Way, bin A02
Tallahassee, Florida 32399-1703
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