

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES L. SMITH, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 05-4354  
 )  
 DEPARTMENT OF HEALTH, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This cause came on for formal hearing before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings, on March 14, 2006, by video-teleconferencing with the parties appearing in Jacksonville and the Administrative Law Judge appearing in Tallahassee, Florida.

APPEARANCES

For Petitioner: James L. Smith, pro se  
All Florida Septic Tank Service, Inc.  
8300 West Beaver Street  
Jacksonville, Florida 32206-4311

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner created a sanitary nuisance in violation of Florida Administrative Code Rule 64E-6.022(1)(d)(l) and (q) and, if so, the proper penalty.

PRELIMINARY STATEMENT

Petitioner James L. Smith, who is employed by All Florida Septic Tank Services, Inc., was served a "Citation for Violation Onsite Sewage Program/Sanitary Nuisance" at a job site in Jacksonville, Florida, on April 15, 2004. Mr. Smith contested the citation and requested an administrative hearing. On November 29, 2005, more than a year and a-half later, the matter was transmitted by the Department of Health to the Division of Administrative Hearings.

At hearing, Mr. Smith testified on his own behalf. Respondent presented the testimony of Scott Turner and Colleen Bierbach and offered Respondent's Exhibits numbered 1 through 3, which were admitted into evidence. Respondent's counsel stated at the hearing that its exhibits had been sent by overnight delivery to the Division. However, the exhibits were not received or filed until April 24, 2006.

No transcript was filed. The parties were given the opportunity to file proposed recommended orders within 10 days of the hearing. Neither party filed any written post-hearing submission.

References to statutes are to Florida Statutes (2005) unless otherwise noted.

FINDINGS OF FACT

1. The Department of Health, Duval County Health Department (Department), is the agency charged with enforcing the statutory and regulatory provisions pertaining to septic tank installations and repairs in Florida, pursuant to Section 381.0065, Florida Statutes, and Florida Administrative Code Chapter 64E-6.

2. Mr. Smith is a qualified contractor employed by All Florida Septic Tank Service, Inc. (All Florida). The citation issued on April 15, 2004, identifies Mr. Smith's registration number as SR0011389 and All Florida's registration number as SA0000956.

3. The citation describes the alleged violations as follows:

On March 8, 2004, a repair application was submitted to the Duval County Health Department (DCHD) for 8817 & 8821 Bellrose Avenue, Jacksonville, FL 32244. All Florida Septic Tank Service, Inc. was indicated as the agent for the applicant/property owner, Ben Lewis. On April 8, 2004, Robert Hoag, qualifying contractor for Plumbing and Contracting by Hoag, disconnected the stub out line running from the house to the existing septic tank prior to installation of new septic tanks thus creating a sanitary nuisance. The existing septic tanks were abandoned at said property by All Florida Septic Tank Service, Inc.; DCHD was not notified of tank abandonment as required for inspection. Water supply was not turned off during the time of construction. On April 9, 2004, Colleen Bierbach, DCHD inspector,

observed and photographed prima facie evidence of untreated human waste discharge onto ground surface at 8817 & 8821 Bellrose Avenue.

4. Mr. Smith accepted the citation on April 15, 2004. On the same date, Mr. Smith wrote a letter to Scott Turner of the Department of Health, in response to the citation. His letter reads as follows:

Mr Scott Turner,

On April 8, 2004 All Florida Septic Tank Service Inc. started a job at 8817 and 8821 Bellrose Avenue in which new tanks and drainfields were required. In order for the new drainfield to be installed the existing tank had to be abandon [sic] prior to any work being done. The two existing referenced tanks were properly pumped out an abandoned on April 8, 2004.

The new septic tanks were scheduled to be installed that same day. Due to mechanical problems with the crane truck, the tanks were unable to be set that day, causing the contracted plumber, Robert Hoag, to be unable to tie in the new sewer line. On the following day April 9, 2004 tanks (1500 gallon septic tank) and (750 gallon dosing tank) were installed with a different truck. At that time the contracted plumber was onsite to immediately tie in the sewer line. In the mean time the Duval County Health Department came to do the required inspection of the new system, at which time Colleen Bierback of the Health Department observed a small amount of sewage on the ground and photographed the site. Mr. Hoag immediately tied the sewer in at the same time, fixing the sanitary nuisance within one hour after inspection.

5. According to Mr. Smith, sanitary problems existed at this work site for months. That is, raw sewage had been coming out of the old septic system for a long time. In Mr. Smith's words, "I was there to fix the sanitary nuisance, not create it."

6. The owner of the property in question engaged Mr. Hoag, of Plumbing and Contracting by Hoag, to accomplish the plumbing portion of the operation.

7. While Mr. Smith's letter stated that the new septic tanks were actually installed on April 9, 2004, Mr. Smith testified at hearing that he performed excavation services, installed a new drainfield and set the new septic tanks on April 8, 2004. The sand and new drainfield had to be put in first and the new tanks installed last. The plumber, Mr. Hoag, would be responsible to make the necessary pipe connection on the new tanks. However, Mr. Hoag did not make the necessary pipe connection and the occupants of the residences used the facilities between April 8, 2004, and April 9, 2004.

8. Mr. Smith did not call anyone to inspect the old septic tank upon abandonment. According to Mr. Smith, it is common practice in the Jacksonville area to not call for an "abandonment" inspection when the contractor has a permit to install a new tank.

9. The Department's inspector, Colleen Bierbach, acknowledged that All Florida called for an installation inspection of newly installed tanks on April 8, 2004.

10. On the morning of April 9, 2004, after the new tanks had been installed, Ms. Bierbach went to 8817 and 8821 Bellrose Avenue. She observed raw sewage on the ground flowing toward the septic tanks. She took photographs of what she observed, but the copies of the photographs received in evidence are too blurry to show the extent of what she saw.

11. Mr. Smith arrived at the work site just after Ms. Bierbach arrived on April 9, 2004.

12. The description of the violation in the citation states that Mr. Hoag, the plumber, "disconnected the stub out line running from the house to the existing septic tank prior to the installation of the new septic tanks thus creating a sanitary nuisance." The evidence is insufficient to prove that Mr. Smith's actions, as opposed to the actions of Mr. Hoag, caused the unsanitary conditions.

#### CONCLUSIONS OF LAW

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

14. The Department has the burden of proving by clear and convincing evidence that Mr. Smith violated the provisions of Section 386.041(1)(a), Florida Statutes, and Florida Administrative Code Rule 64E-6.022(1)(d)(1) and (q) because the Department proposes the assessment of a fine in the amount of \$1,250. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). The Department has not met its burden.

15. Florida Administrative Code Rule 64E-6.022, Standards of Practice and Disciplinary Guidelines, provides in pertinent part, as follows:

Rule 64E-6.022 Standards of Practice and Disciplinary Guidelines.

(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.

\* \* \*

(d) Failure to call for required inspections. 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.

\* \* \*

(1) Gross negligence, incompetence, or misconduct which:

1. Causes no monetary or other harm to a customer, or physical harm to any person. First violation, letter of warning or fine up to \$500; repeat violation, \$500 fine and 90 day suspension or revocation.

2. Causes monetary or other harm to a customer, or physical harm to any person. First violation, letter of warning or fine up to \$500 and 90 day suspension; repeat violation, \$500 fine and revocation.

\* \* \*

(q) Creation or maintenance of a sanitary nuisance as defined by Section 386.041, F.S. violation, letter of warning or fine up to \$500; repeat violation, 90 day suspension or revocation.

16. Section 386.041(1)(a), Florida Statutes, provides as follows:

386.041. Nuisances injurious to health.

(1) The following conditions existing, permitted, maintained, kept, or caused by any individual, municipal organization, or corporation, governmental or private, shall constitute prima facie evidence of maintaining a nuisance injurious to health:



(a) Untreated or improperly treated human waste, garbage, offal, dead animals, or dangerous waste materials from manufacturing processes harmful to human or animal life and air pollutants, gases, and noisome odors which are harmful to human or animal life.

17. Section 386.03, Florida Statutes, provides as follows:

386.03. Notice to remove nuisances;  
authority of Department of Health and local health authorities.

(1) The Department of Health, upon determining the existence of anything or things herein declared to be nuisances by law, shall notify the person or persons committing, creating, keeping, or maintaining the same, to remove or cause to be removed, the same within 24 hours, or such other reasonable time as may be determined by the department, after such notice be duly given.

(2) If the sanitary nuisance condition is not removed by such person or persons within the time prescribed in said notice, the department, its agents or deputies or local health authorities, may within the county where the nuisance exists, remove, cause to remove, or prevent the continuing sanitary nuisance condition in the following manner:

(a) Undertake required correctional procedures, including the removal of same if necessary; the cost or expense of such removal or correctional procedures shall be paid by the person or persons committing, creating, keeping, or maintaining such nuisances; and if the said cost and expense thus accruing shall not be paid within 10 days after such removal, the same shall be collected from the person or persons committing, creating, keeping, or maintaining such nuisances, by suit at law; but this paragraph shall not authorize the department to alter, change, demolish, or

remove any machinery, equipment, or facility designed or used for the processing or disposing of liquid or smoke effluent of a manufacturing plant.

(b) Institute criminal proceedings in the county court in the jurisdiction of which the condition exists against all persons failing to comply with notices to correct sanitary nuisance conditions as provided in this chapter.

(c) Institute legal proceedings authorized by the department as set forth in s. 381.0012.

(d) Institute administrative proceedings authorized by the department as set forth in s. 381.0061. (emphasis supplied)

18. Section 381.0061, Florida Statutes, referenced above, authorizes the imposition of administrative fines for a violation of any provision of Chapter 386, Florida Statutes.

19. The Department did not prove by clear and convincing evidence that Mr. Smith's actions caused the creation and maintenance of a sanitary nuisance. See Robert J. Hoag v. Department of Health, Case. No. 05-4355 (the Department of Health issued a sanitary nuisance citation to Mr. Hoag for the same incident, Recommended Order issued February 15, 2006). It follows that the Department did not prove that Mr. Smith exhibited gross negligence, incompetence, or misconduct which causes no monetary harm to the customer.

20. Moreover, Section 386.03 requires that a person be provided notice and must be provided 24 hours, or "such other reasonable time as may be determined by the department" to abate the nuisance. This is a condition which must be satisfied if one of the actions listed in Section 386.03(2)(a)-(d), including the imposition of administrative fines, is to be instituted. The Department did not prove that 24 hours passed prior to the issuance of the citation or the abatement of the nuisance nor did the Department prove that it gave Respondent some alternate time period.

21. Finally, the Department of Health did not prove that Mr. Smith failed to call for a necessary inspection as required by Florida Administrative Code Rule 64E-6.002(1)(d). The evidence showed that he called for an inspection of the new tanks. The Department cites to no statute or rule that requires two inspection requests, i.e., one for an abandonment inspection and one for the inspection of newly installed tanks, from the contractor who removes old tanks and installs new tanks at the same site.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Health, Duval County Health Department, dismiss the citation issued to Mr. Smith on April 15, 2004.

DONE AND ENTERED this 26th day of April, 2006, in Tallahassee, Leon County, Florida.



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BARBARA J. STAROS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of April, 2006.

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.