

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT J. HOAG,)
)
Petitioner,)
)
vs.) Case No. 05-4355
)
DEPARTMENT OF HEALTH,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on January 30, 2006, by video teleconferencing with the parties appearing in Jacksonville and the Administrative Law Judge appearing in Tallahassee, Florida.

APPEARANCES

For Petitioner: Robert J. Hoag, pro se
Plumbing & Contracting by Hoag
Post Office Box 7931
Jacksonville, Florida 32238

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 Rules 64E-6.022(1)(1) and 64E-6.022(1)(q) and, if so, the proper penalty.

PRELIMINARY STATEMENT

Petitioner Robert J. Hoag (Mr. Hoag), a contractor who works on septic tanks, was served a "Citation for Violation Onsite Sewage Program/Sanitary Nuisance" at a job site in Jacksonville, Florida, on April 15, 2004. Mr. Hoag requested an administrative hearing by completing Part 9 of the Citation on April 16, 2004. On November 29, 2005, more than a year and a-half later, the matter was filed with the Division of Administrative Hearings.

At the hearing, Mr. Hoag testified on his own behalf and offered into evidence Petitioner's Exhibit No. 1, consisting of 20 photographs, which was accepted into evidence. Respondent presented the testimony of two witnesses and offered Respondent's Exhibit No. 1, photographs, which were accepted into evidence.

No transcript was filed. After the hearing, Petitioner and Respondent filed Proposed Findings of Fact and Conclusions of Law on February 8 and 9, 2006, respectively.

References to statutes are to Florida Statutes (2003) unless otherwise noted.

FINDINGS OF FACT

1. The Department of Health, Duval County Health Department (Department), is the state 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 Sub-Chapter 64E-6.

2. Mr. Hoag is registered as a Septic Tank Contractor pursuant to Florida Administrative Code Rule 64E-6.019. He was issued registration no. SR0911053.

3. It was necessary to install a new septic tank at residences located at 8817 and 8821 Bellrose Avenue, in Duval County, during March 2004. The owner of the premises, Ben Lewis, contracted with Florida Septic Tank Service, Inc., to accomplish this work. A repair application was submitted to the Department on March 8, 2004, and was approved.

4. Florida Septic Tank Service, Inc., engaged Mr. Hoag, of Plumbing and Contracting by Hoag, to accomplish the plumbing portion of the operation.

5. Sometime on April 8, 2004, the exact time not being estimated, Mr. Hoag disconnected the stub from the residences that ran to the former septic tank. This was done so that pipes could be run to a new septic tank. He neither connected the line that he disconnected to the new septic tank nor capped the pipe.

6. Mr. Hoag requested the occupants of the residences to refrain from using the sanitary facilities within the residences until he was able to continue his work on April 9, 2004.

Despite this request, the facilities were used between April 8, 2004, and April 9, 2004.

7. On April 9, 2004, sometime prior to 11:45 in the morning, Colleen Bierbach, an inspector with the Department, entered the premises of 8817 and 8821 Bellrose Avenue and observed household wastewater and human fecal matter on the ground at the terminus of the stub. Pictures were taken that memorialized the nature of the deposits.

8. Inspector Scott Turner, of the Department, issued a citation to Mr. Hoag that indicated that the offense occurred at 11:45 a.m. on April 9, 2004. The citation reflected a violation of Section 386.041(1)(a), Florida Statutes, and Florida Administrative Code Rule 64E-6.022(1)(l) and (q). With regard to Florida Administrative Code Rule 64E-6.022(1)(l), the citation charged only that he committed, "Gross negligence, incompetence, or misconduct which causes no monetary harm to a customer." The citation was accepted by Mr. Hoag on April 15, 2004.

9. Mr. Hoag's failure to either connect the line to the new septic tank or to cap the outflow line, caused an unsanitary and unsafe condition to exist at 8817 and 8821 Bellrose Avenue, Duval County, on April 9, 2004. No evidence was adduced as to the exact time that the pipe was opened on April 8, 2004, or as

to the exact time that the pipe was closed and the area decontaminated on April 9, 2004.

CONCLUSIONS OF LAW

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

11. The Department has the burden of proving by clear and convincing evidence that Mr. Hoag violated the provisions of Section 386.041(1)(a), Florida Statutes, and Florida Administrative Code Rule 64E-6.022(1)(l) and (q) because the Department proposed to assess a fine in the amount of \$1,000. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

12. 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.

* * *

(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.

13. Section 386.041(1)(a) 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.

* * *

14. Section 386.03 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.

15. The five sections of Part 1 of Chapter 386, entitled Sanitary Nuisances, must be read in para materia. Section 386.03 requires that a registrant 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), 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 him some alternate time period.

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. Hoag on April 9, 2004.

DONE AND ENTERED this 15th day of February, 2006, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
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 15th day of February, 2006.

COPIES FURNISHED:

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

Robert J. Hoag
Plumbing & Contracting by Hoag
Post Office Box 7931
Jacksonville, Florida 32238

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 O. 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.