

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-5447  
 )  
BACKFLOW DIVISION OF SYSTEMS )  
GROUPS, INC. AND ROBERT H. )  
RICHEY, SR., INDIVIDUALLY AND )  
AS PRESIDENT OF BACKFLOW )  
DIVISION OF SYSTEMS GROUPS, )  
INC., )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on January 5, 2009, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert H. Richey, Sr., pro se  
Backflow Division of Systems Group, Inc.  
4803 34th Street West  
Bradenton, Florida 34210

For Respondent: Regina M. Keenan, Esquire  
Department of Financial Services  
612 Larson Building  
200 East Gaines Street  
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

The issue in this case is whether Respondents illegally or improperly conducted testing of backflow prevention devices on fire line assemblies, and, if so, whether Petitioner should issue a Cease and Desist Order.

PRELIMINARY STATEMENT

On September 17, 2009, Petitioner, Department of Financial Services ("Department"), issued a Notice of Intent to Issue Cease and Desist Order (the "Notice"). The Notice set forth various allegations of improper actions by Respondents, Backflow Division of Systems Groups, Inc., and Robert H. Richey, Sr. (hereinafter referred to jointly as "Respondents"). Respondents timely filed an Election of Rights seeking a formal administrative hearing. Respondents' request was forwarded to the Division of Administrative Hearings ("DOAH") on October 28, 2008. At the final hearing, Petitioner called two witnesses: Casia Sinco, safety program manager for the Department's Bureau of Fire Prevention; and Chuck Spall, fire protection specialist for the Bureau of Fire Prevention. Respondents called one witness, Robert H. Richey, Sr. The parties stipulated to admission of all five of the Department's exhibits (pre-marked A through E) and all five of Respondents' exhibits (also pre-marked A through E). Each of the exhibits was received into evidence.

Prior to commencement of the final hearing, the parties stipulated to certain enumerated allegations from the Notice. Those allegations will be set forth in the Findings of Fact below.

Official Recognition is taken of the following:  
Declaratory Statement issued by the insurance commissioner, as state fire marshall, on August 2, 2002, in Case No. 60893-02-SP; and Sections 633.541 and 633.021, Florida Statutes.<sup>1</sup>

The parties advised the undersigned that a transcript would be ordered of the final hearing. They were given ten days from the date the transcript was filed at DOAH to submit proposed recommended orders. The Transcript of the hearing was filed on January 26, 2009. Each party submitted a Proposed Recommended Order, and they were given due consideration in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. The Department, through its chief financial officer, who also acts as the state fire marshall, is the state agency responsible for, inter alia, the certification, licensing and monitoring of persons who engage in the business of layout, fabrication, installations, inspection, alteration, repair, or service of fire protection systems (other than pre-engineered systems).

2. Respondents<sup>2</sup> are licensed by the Florida Department of Business and Professional Regulation ("DBPR") as a certified plumbing contractor, License No. CFC054896-00012. Respondents are not certified by the Department to engage in the business of layout, fabrication, installations, inspection, alteration, repair, or service of fire protection systems (other than pre-engineered systems). As of the date of the final hearing, Respondents had not filed an application to be so certified.

3. On or about June 29, 2006, Respondents conducted the annual Backflow Prevention Assembly Test inspection and maintenance on a backflow prevention device installed on a fire sprinkler fire line located at the University Park Country Club Clubhouse, 7651 and 7671 The Park Boulevard, University Park, Florida. The University Park Country Club Clubhouse is located within the Southern Manatee Fire and Rescue District.

4. After performing the test at the University Park Country Club, Respondents issued a Backflow Prevention Assembly Test and Maintenance Report, and a copy was sent to the Manatee County Cross Connection Control Coordinator. At the conclusion of the test, Respondents determined the backflow device to be operating appropriately and placed an inspection tag on the device.

5. On or about September 4, 2006, Respondents conducted the annual test on a backflow prevention device installed on a

fire sprinkler fire line located at the Chiquita Banana Warehouse, 4610 18th Street East, Bradenton, Florida 34203. The warehouse is also located within the Southern Manatee Fire Rescue District.

6. After performing the test, Respondents issued a Backflow Prevention Assembly Test and Maintenance Report. This report was also forwarded to the Manatee County Cross Connection Control coordinator. Respondents also placed an inspection tag on the backflow prevention device.

7. On or about September 4, 2006, Respondents conducted the annual Backflow Prevention Assembly Test inspection and maintenance on a device located at the Manatee County Rural Health Services Treatment Center, 1515 26th Avenue East, Bradenton, Florida 34208. This center is also located within the Southern Manatee Fire Rescue District.

8. Upon completion of the test, Respondents placed an inspection tag on the device and forwarded a Backflow Prevention Assembly Test and Maintenance Report to the Manatee County Cross Connection Control coordinator.

9. On or about September 6, 2006, Respondents conducted the annual test on a backflow prevention device located at Sam's Warehouse Club, 5300 30th Street East, Bradenton, Florida 34203. The Sam's Warehouse Club is also located within the Southern Manatee Fire Rescue District.

10. Upon completion of the test at Sam's Warehouse Club, Respondents placed an inspection tag on the device and forwarded a Backflow Prevention Assembly Test and Maintenance Report to the Manatee County Cross Connection Control coordinator.

11. The backflow prevention devices inspected by Respondents are tied into domestic water lines which provide water to the surrounding community. It is imperative to keep the domestic water as clean and pure as possible. Backflow prevention devices serve the purpose of keeping contaminated or unclean water from re-entering the domestic water lines. It is extremely important that all backflow prevention devices be inspected and maintained on a regular basis.

12. Testing of backflow prevention devices on designated fire lines (i.e., those lines connecting the domestic water line to a sprinkler system or other fire prevention system) is done by entities which have received a certification from the Department.

13. The Department requires certified individuals to carry liability insurance coverage. The purpose of such coverage is to ensure that there will be money to correct any mistakes made by the certified inspectors. If a backflow system fails, the Department will immediately inspect to determine if the certified contractor made a mistake. If so, the contractor and his insurer will be required to pay for all damages and

corrective action needed. The Department does not have any authority over plumbing contractors who have not been certified by the Department.

14. Respondents routinely perform inspections and maintenance on backflow prevention devices. Respondents do not, in their own estimation, perform inspections on fire protection systems. Respondents maintain that fire protection systems start at a point just beyond the backflow prevention devices.

15. Respondents are not certified by the Department to perform inspections and maintenance on fire protection systems. However, based on a letter from the Office of the Attorney General to Ruth Tirado, executive director of the Florida Association of Plumbing, Heating and Cooling Contractors, Respondents believe they are authorized to inspect backflow prevention devices that exist on a fire sprinkler line. The letter, dated February 3, 2004, states in pertinent part:

Re: Your inquiry regarding back flow prevention presented to the Construction Industry Licensing Board at the meeting of January 15, 2004.

\* \* \*

After review, and based upon the documentation presented, the Construction Industry Licensing Board has determined that back flow prevention is within the scope of work of a plumbing contractor.

Please keep in mind that this opinion is based solely on the facts set forth in your

letter and is not intended to be an opinion of general applicability. Furthermore, the Board has not conducted an independent factual investigation to determine whether other relevant facts do or may exist or whether the facts set forth in your letter may be governed by laws or rules other than Chapter 489, Part I, Florida Statutes and 61G4, Florida Administrative Code.

16. It is clear the attorney general letter does seem to place backflow prevention within the "scope of work" of a plumbing contractor. However, there is no way to determine whether the opinion included any limitations, restrictions, or caveats, since the underlying letter it addresses was not placed into evidence. Nor is there any distinction in the letter concerning backflow prevention devices that are part of a fire sprinkler line.

17. In October 2006, Henry Sheffield, deputy fire chief for the East Manatee Fire Rescue District, initiated a complaint against three plumbers relating to "fire line backflow preventers." A DBPR Uniform Complaint Form addressing one of the plumbers (a Mr. Jackson) indicates an alleged violation of Subsection 489.105(3), Florida Statutes. That statutory section deals with the scope of work for various kinds of contractors. A DBPR Uniform Complaint Form alleging violation of Section 633.021, Florida Statutes, is attached to the complaint form, but the DBPR Uniform Complaint Form does not indicate whether it relates to Mr. Jackson or one of the other plumbers. Also,



admitted into evidence is a DBPR letter indicating dismissal of the complaint by one of the three plumbers (Mr. Wolf) relating to alleged violations of Chapter 489, Florida Statutes.

18. The complaints against the three plumbers in 2006 may or may not be related to the same issues facing Respondents, but there is no way to connect them based upon the evidence presented at final hearing.

19. The Department interprets Florida Administrative Code Rule 69A-46.040(2) to mean that the "point of service" for purposes of fire line backflow prevention to be the domestic water line where the fire line is tied in. That is, once there is a tie-in to the domestic water line, the Department has jurisdiction. This interpretation is reasonable and is based on the Department's experience over a number of years.

20. Respondents maintain that the point of service begins immediately after the backflow prevention device. Therefore, they believe any work done on the backflow prevention device can be performed by a licensed plumbing contractor whether they have Department certification or not. This interpretation is not supported by the evidence presented.

21. Respondents did not intentionally violate any provision of Chapter 633, Florida Statutes. All work performed by Respondents was done under the apparent authority given them by a state agency, the Construction Industry Licensing Board.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

23. The Department, who is asserting the affirmative of the issue in this case, has the burden of proof. Ferris v Turlington, 510 So. 2d 292 (Fla. 1987).

24. Section 633.541, Florida Statutes, states in pertinent part:

(1) It is unlawful for any organization or individual to engage in the business of layout, fabrication, installation, inspection, alteration, repair, or service of a fire protection system, other than a preengineered system, act in the capacity of a fire protection contractor, or advertise itself as being a fire protection contractor without having been duly certified and holding a valid and existing certificate, except as hereinafter provided. . . .

25. Florida Administrative Code Rule 69A-46.040(2) states:

The complete system begins at the point-of-service as defined in Section 633.021(16), F.S., and ends at the most remote head inside the facility.

26. Subsection 633.021(19), Florida Statutes, defines the point of service referred to in the above-cited Florida Administrative Code Rule. The section states:

"Point of service" means the point at which the underground piping for a fire protection

system as defined in this section using water as the extinguishing agent becomes used exclusively for the fire protection system.

27. Subsection 633.021(9), Florida Statutes, defines fire protection system.

A "fire protection system" is a system individually designed to protect the interior or exterior of a specific building, structure, or other special hazard from fire. Such systems include, but are not limited to, water sprinkler systems, water spray systems, foam-water sprinkler systems, foam-water spray systems, CO2 systems, foam extinguishing systems, dry chemical systems, and Halon and other chemical systems used for fire protection use. Such systems also include any overhead and underground fire mains, fire hydrant and hydrant mains, standpipes and hoses connected to sprinkler systems, sprinkler tank heaters, air lines, thermal systems used in connection with fire sprinkler systems, and tanks and pumps connected to fire sprinkler systems.

28. The Department interprets the above-referenced statutory and rule language that any time a domestic water line is tied into for the purpose of running a water line to a fire protection system, such tie-in and any connections to it are part of the fire protection system. Thus, the backflow prevention device that ultimately leads to a sprinkler system is, by Department definition, part of the fire protection system. As such, only certified contractors are authorized to inspect, maintain, repair or otherwise alter such a system.

29. Agencies of the state have broad discretion in the interpretation of statutes and rules they administer. See, e.g., Natelson v. Department of Insurance, 454 So. 2d 31, 32 (Fla. 1st DCA 1984), citing Pan American World Airways, Inc. v. Florida Public Service Commission and Florida Power and Light Company, 427 So. 2d 716, 719 (Fla. 1983).

30. The Department's interpretation is further supported by a Declaratory Statement issued in Department of Insurance Case Number 60893-02-SP, wherein the state fire marshall opined that: "There is one point, and one point alone, at which the underground piping becomes . . . 'used exclusively for the sprinkler system'[,] That point is not necessarily the point at which the underground water supply becomes used exclusively for the sprinkler system[; and] If the underground piping becomes used exclusively for the fire sprinkler system before the point at which the backflow prevention device has been installed, then that is the point of service."

31. In effect, the fire marshall found that once a water supply pipe has been tapped into for the purpose of directing water toward a fire prevention device, the point of service had been established. This comports with the Department's interpretation.

32. That being the case, the Department correctly holds that only a certified contractor may provide maintenance and

inspection on backflow prevention devices that lead to a fire sprinkler system. The Department has met its burden of proof in this matter.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Department of Financial Services, ordering Respondents, Backflow Division of Systems Groups, Inc., and Robert H. Richey, Sr., to cease and desist from performing inspections and maintenance of backflow prevention devices on fire protection systems until such time that Respondents obtain the required certification to do so.

DONE AND ENTERED this 26th day of February, 2009, in Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of February, 2009.

ENDNOTES

1/ Unless otherwise stated herein, all references to Florida Statutes shall be to the 2007 version.

2/ Respondent Robert H. Richey, Sr. (also known as R. Shag Richey), is the president, treasurer, secretary and registered agent of Respondent Backflow Division of Systems Groups, Inc.

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.