

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
)
 Petitioner,)
)
 vs.) Case No. 09-1130
)
 JASON SIMMONS, d/b/a TWINS)
 SEPTIC SERVICES, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to appropriate notice this manner came on for formal proceeding and hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings in Jacksonville, Florida, on October 14, 2009. The appearances were as follows:

APPEARANCES

For Petitioner: Catherine R. Berry, Esquire
Department of Health
900 North University Boulevard, Suite 710
Jacksonville, Florida 32211

For Respondent: No Appearance

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Respondent committed the alleged offenses set forth in the citation issued on September 25, 2008, involving

unauthorized work on an on-site sewage disposal system (OSTDS), and, if so, what, if any, penalty is warranted.

PRELIMINARY STATEMENT

This case arose when the Department of Health (Petitioner) issued a citation to the Respondent seeking an administrative fine in the amount of \$5,000, for violations of Florida Administrative Code Chapter 64E-6. The citation was issued on September 25, 2008, and informed the Respondent of his right to a hearing, pursuant to Chapter 120, Florida Statutes. The Respondent availed himself of the right to a formal proceeding and hearing and in due course, the matter was transmitted to the Division of Administrative Hearings and the undersigned Administrative Law Judge.

The matter was scheduled for hearing, but upon a showing of good cause, a continuance was granted. The matter was again set for hearing on October 14, 2009. The case came on for hearing on that day, as noticed. The Petitioner Department called four witnesses at the hearing and had eighteen Exhibits admitted into evidence. The Respondent failed to appear at the hearing. The Notice of Hearing was served on the Respondent, by mail, at his last known address of record. That notice was not returned as undeliverable for any reason. Counsel for the Petitioner represented that she spoke with the Respondent on October 9, 2009, the Friday before the hearing, and the Respondent

acknowledged that he had received the Notice of Hearing and was planning to attend.

The hearing was scheduled to begin at 10:30 a.m. on October 14, 2009. The Administrative Law Judge, Petitioner's counsel, its party representative and witnesses were all in attendance at that time, but the Respondent was not present. The Administrative Law Judge waited for some thirty minutes until 11:00 a.m. to begin the hearing in order to give the Respondent an opportunity to arrive. The Petitioner's counsel attempted to contact the Respondent twice during this period of time, to no avail. Finally, the hearing was commenced at 11:00 a.m. The Respondent never appeared during the course of the hearing.

It was established at hearing that there is a mistake in the name of the Respondent in the style of this case. It is shown as James E. Simmons and it should be Jason Simmons. The style will be corrected accordingly.

Upon conclusion of the proceeding, the Petitioner elected to submit a proposed recommended order. The Proposed Recommended Order was timely-submitted on October 20, 2009, and has been considered in the rendition of this recommended order.

FINDINGS OF FACT

1. The Petitioner, the Department of Health, Duval County Health Department, is the State agency charged with enforcing

the statutory and regulatory provisions regarding the manner, method, and practice of installation of septic tank systems (OSTDS) and the manner of maintaining and repairing such systems, pursuant to Section 381.0065, Florida Statutes (2008), and Florida Administrative Code Rule Chapter 64E-6.

2. During the months of February or March 2008, employees of the Twins Septic Tank Service, Inc., performed a system repair at 5210 Potomac Avenue, without obtaining a repair permit from the Duval County Health Department. They did not call the Department for the required inspections.

3. The homebuilder at that address, Chad Davis, provided the homeowner with the name and contact information of Jason Simmons, the owner of Twins Septic Service, Inc., in order to obtain repair of a non-functioning OSTDS system at that address.

4. Jason Simmons is a licensed septic tank contractor in the state of Florida, and was so at times pertinent to this proceeding. He was also the qualifying contractor for Twins Septic Tank Service, Inc. He has been issued registration number SR0081591.

5. On April 22, 2008, two of the Petitioner's employees, Davis Helwig and James Squire, arrived at the address and site to investigate a complaint that they had received. They met Mr. Joe McEachin, of Earthtek Systems of Florida, Inc., the maker of the original performance-based treatment system

installed on the property. Mr. McEachin had never been paid for the original performance-based system installed at the property, so he removed the control box for the system, which rendered it non-functional.

6. Upon their visit and inspection, they discovered that the drainfield originally installed had been removed and replaced without proper permits or inspections. They determined that the original performance-based system was removed and replaced with a standard OSTDS system, without proper permits or inspections. Many violations of the standards of practice for installation and repair of OSTDS systems were found upon this inspection.

7. A number of photos were taken by Mr. Helwig which showed numerous violations, including use of a standard septic system pump, the fact that the riser of the tank lid was broken to accommodate the newly installed effluent transmission line from a float-activated pump. There were also pink and purple pipes from the original system which had been cut and pipe from the new system and an electrical box installed in the middle of the yard for the dosing pump for the new system. There was insufficient separation between the shoulder of the fill and the nearest absorption bed sidewall and insufficient taper to the toe of the slope. There was an insufficient soil cap over the drainfield and shoulder area of the mounded system. Based upon

the estimated sewage flows and the quality of the fill material used in the mound system, the mound drainfield was of insufficient size. Additionally, the required audio and visual high-water alarm had not been installed and the "header pipe" was improper, in that it was not "smooth-walled" and watertight. All of these activities had been performed without the proper permit.

8. A tenant at that address, Carla McKenzie, told Scott Turner, James Squire, and David Helwig, all Department employees, that during one day in February and March, 2008, two men who looked exactly alike, arrived in two trucks. They dug up the yard where the drainfield was and worked for some forty-five minutes, to one and one-half hours, took some parts out, and installed some more "things" in the ground at the site. The Respondent and his brother are identical twins, which is how the Respondent's company came to be named.

9. The owner of the property, Gerri Hubbard, said that Jason Simmons had been paid \$900 to repair the system. She found that the system still wasn't operating correctly, or at all, because it needed the control box or "brains" of the system, referring to the control box of the original performance-based system. On April 26, 2008, she sent an e-mail to David Helwig of the Department, outlining the difficulties she had encountered with regard to the non-functioning system.

10. Ms. Hubbard originally had the house built to use as rental property. Due to the non-functioning system and difficulty alleviating that problem, she had been unable to lease the property and therefore could not carry the mortgage on it. The property then went into foreclosure, resulting in her experiencing a loss of approximately \$100,000 invested dollars.

11. On September 25, 2008, the Petitioner issued a citation to the Respondent, seeking a fine in the amount of \$5,000 for violations of Florida Administrative Code Chapter 64E-6. The Respondent refused to sign the citation, which itself is a second-degree misdemeanor under Florida Law.

12. The Respondent, in an undated letter to the Petitioner, denied any responsibility for the violations at the above address and stated that he had never set foot on the property, that he had never met Gerri Hubbard, nor the tenant, Carla McKenzy. The Respondent contended that the only employees who ever worked for Twins Septic Service, Inc., were he, his brother, and his late father, Joey Wayne Simmons. He then requested an administrative hearing and formal proceeding to contest the matter.

13. Joey Wayne Simmons, who was a licensed septic tank contractor for the Respondent at the time, signed a "Declaration of Restrictions" for the property, apparently forging the owner's signature, which was then filed with the clerk's office

in Duval County, Florida. The application for the OSTDS Operating Permit for the original performance-based treatment system listed the Respondent as the authorized maintenance company.

14. A service agreement between the Respondent and the owner was signed by Joey Wayne Simmons on August 10, 2007. This also contained an allegedly forged signature of the owner of the property. The application for the performance-based treatment system Maintenance Service Permit listed the Respondent as the provider, Jason Simmons as the owner, and was signed by Joey Wayne Simmons on June 15, 2007.

15. Both Joey Wayne Simmons and the Respondent, Jason Simmons, signed a hand-written letter submitted to the Petitioner as part of the service agreement permit application, indicating that they had the parts and training necessary to service such systems. Mr. McEachin, of Earthtek Systems of Florida, sent a letter to the Respondent, dated April 23, 2007, verifying that the Respondent met the requirements to install and perform service on the performance-based system originally installed at the property.

CONCLUSIONS OF LAW

16. 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. (2009).

17. Section 381.0065, Florida Statutes (2008), gives the Petitioner authority to issue permits, inspect sites, issue citations and impose necessary fines for violations of rules governing OSTDS systems, as well as the installation, repair and operation.

18. Section 381.0065(3)(c), Florida Statutes (2008), authorizes the Petitioner to conduct enforcement activities, issue citations, impose fines, suspend, revoke, or enjoin licensure and certification, and issue emergency orders for violation of that section, as well as part I of Chapter 386, or Part III of Chapter 489, or for violations of rules adopted pursuant to these statutory provisions.

19. Florida Administrative Code Rule 64E-6.022, addresses "Standards of Practice and Disciplinary Guidelines." It states at Paragraph (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.

20. The first violation charged in the September 25, 2008, citation concerns Florida Administrative Code Rule 64E-6.005(7)(c), a violation where the maximum daily sewage flow allowance has been exceeded. A \$500 fine per specific standard violated is permitted for a first violation, pursuant to Florida Administrative Code Rule 64E-6.022(p).

21. The second violation charged concerns Florida Administrative Code Rule 64E-6.003(1), which concerns contracted work completed without a permit having been issued. This resulted in missed inspections. A fine of \$1,000 is permitted for a first violation pursuant to Florida Administrative Code Rule 64E-6.022(b)(2).

22. The third violation charged concerns Florida Administrative Code Rule 64E-6.003(3), involving the failure to have a system repair performed by the Respondent inspected by the Department. That violation allows for a \$500 fine for first violation. Fla. Admin. Code R. 64E-6.022(d).

23. The fourth violation involves Florida Administrative Code Rule 64E-6.009(3)(f), concerning a violation by the Respondent where there was insufficient separation between the shoulder of the fill and the nearest absorption bed sidewall and insufficient taper to the toe of the slope. This violation also mandates a \$500 fine for the first offense. Fla. Admin. Code R. 64E-6.022(p).

24. The fifth violation, of Florida Administrative Code Rule 64E-6.009(3)(g), concerns insufficient soil cap over the drainfield and shoulder area. This also carries a \$500 fine for this specific standard for a first offense. Fla. Admin. Code R. Rule 64E-6.022(p).

25. The sixth violation of Florida Administrative Code Rule 64E-6.009(3)(d), involved a violation where there was insufficient mound drainfield size, based upon the estimated sewage flows and quality of fill material employed in the mound system. This violation carries a \$500 fine, pursuant to the Rule referenced in the paragraph above.

26. The seventh violation was of Florida Administrative Code Rule 64E-6.022(1)(1), which is a violation involving gross negligence, incompetence or misconduct. It also carries a \$500 fine for a first offense, pursuant to Florida Administrative Code Rule 64E-6.022(1).

27. The eighth violation was of Florida Administrative Code Rule 64E.6.013(9)(d)(2). This violation involves the failure to install a required audio and visual high water alarm for the system. It carries a \$500 fine for the first violation, pursuant to Florida Administrative Code Rule 64E-6.022(p).

28. The ninth and final violation was of Florida Administrative Code Rule 64E-6.014(2)(c), concerning a violation involving the header pipe which was found to be not "smooth-

walled" and watertight. Here again, the violation under the referenced Rule requires a \$500 fine for a first violation.

29. There is no question that the preponderant, persuasive evidence offered by the Petitioner is un-refuted. The Respondent did not bother to appear, after being duly-noticed of this proceeding and hearing. Although the Respondent had denied any responsibility by himself or his company for any of the referenced errors or omissions regarding the subject OSTDS system, the evidence is clear that he and his company were responsible for the maintenance of the original system since 2007. He was paid \$900 by the builder for repairs which were incorrectly done and not legally authorized in the first place.

30. The above-referenced findings of fact, including the statement by the tenant that she saw the Respondent and his twin brother working on the system, were un-refuted. They clearly establish that the Respondent committed the violations charged in the citation. The Respondent's violations and attendant delays occasioned by his performance, or non-performance, of his obligations was at least indirectly and partially responsible for a substantial loss by the homeowner, by the foreclosure of the mortgage related to the property. In summary, the clear, un-refuted evidence shows that the Respondent is responsible for the violations, as alleged and proven, regarding the subject

citation. There is no evidence to warrant mitigation of the requested penalty.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered finding that the violations charged in the citation were committed by the Respondent and that a fine of \$5,000 be imposed.

DONE AND ENTERED this 10th day of December, 2009, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of December, 2009.

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.