

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
)
 Petitioner,)
)
 vs.) Case No. 09-4644
)
 SCOTT WOMBLE, d/b/a WOMBLE'S)
 SEPTIC TANK SERVICE, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On October 15, 2009, a duly-noticed hearing was held in Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jennifer A. Tschetter, Esquire
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1703

For Respondent: Scott Womble, pro se
2970 Lake Bradford Road South
Tallahassee, Florida 32310

STATEMENT OF THE ISSUES

The issues to be resolved are whether Respondent performed repairs to septic tank systems without obtaining the required permits in three different instances, in violation of Florida Administrative Code Rule 64E-6.022, and if so, what penalty should be imposed for the violations proven.

PRELIMINARY STATEMENT

On July 16, 2009, the Department of Health (Department or DOH) filed a three-count Administrative Complaint alleging that Respondent failed to obtain the necessary permits before performing repairs to three septic tank systems, in violation of Florida Administrative Code Rule 64E-6.022. Respondent disputed the allegations in the Administrative Complaint and requested a hearing pursuant to Section 120.57(1), Florida Statutes. On August 25, 2009, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was assigned to the undersigned and on September 10, 2009, noticed for hearing to be conducted on October 15, 2009. The case proceeded as scheduled. The Petitioner filed a Pre-Hearing Statement on October 13, 2009, which represented that the parties stipulated to the truth of certain facts included, where relevant, in the findings of fact stated below. At the commencement of hearing, Respondent confirmed that he stipulated to those facts.

At hearing, Petitioner presented the testimony of Kathy Davis and Alex Mahon, and Petitioner's Exhibits 1-12 were admitted into evidence. Respondent testified on his own behalf and Respondent's Exhibits 1-3 were admitted. Although the proceedings were recorded, no transcript was ordered. The parties were given until Monday, October 26, 2009, to file

proposed recommended orders. The Department's submission was filed October 27 and Respondent's was filed October 28, 2009. Both have been carefully considered in the preparation of this Recommended Order. All references to Florida Statutes are to the 2008 codification, unless otherwise indicated.^{1/}

FINDINGS OF FACT

1. The Department, an agency of the State of Florida, has responsibility for the regulation of septic tank contractors pursuant to Chapters 381, 386 and 489, part III, Florida Statutes.

2. The Respondent, Scott Womble, is a resident of the State of Florida and has been authorized by the Department to provide septic tank contracting services.

5168 Pimlico Drive

3. In 2003, Respondent replaced the drainfield on the real property located at 5168 Pimlico Drive, Tallahassee, Florida.

4. A permit for the repair of the drainfield was issued in 2003, which listed Respondent as the agent for the permit applicant.

5. In 2006, Respondent pumped out the septic tank at the Pimlico Drive location. Pumping out the septic tank does not require a permit.

6. In 2006, Respondent also installed new "old style" chambers and end caps. Chambers are used to repair the drainfield. Repair of the drainfield requires a permit.

7. A review of the records for the Leon County Health Department REHOST database revealed that no permits had been applied for or obtained for any work in 2006, 2007 or 2008 at the Pimlico address.

1351 Cochise Trail

8. On or about December 19, 2008, Alex Mahon and Kathy Davis from the Leon County Health Department, Environmental Health Division, went to real property located at 1351 Cochise Trail in Tallahassee. Mahon and Davis went to the property in response to a phone call received from Respondent requesting the verification of a site evaluation. Site evaluations are required to be completed as part of the application process for a permit for septic tank installation.

9. When Mahon and Davis arrived at the property, no one from Respondent's company was present. However, upon their arrival they observed that the septic tank and drainfield had been installed.

10. A permit application had been submitted for the work at 1351 Cochise Trail. However, the application was incomplete and the permitting fee had not been included with the application. Accordingly, no permit had been issued for the work that was already completed at the time Mahon and Davis visited the site.

11. Later that day, Respondent provided the missing documentation required for the issuance of the permit, and paid

the permitting fee. At that time, a permit for the work was issued.

2207 Bannerman

12. In January 2009, Kathy Davis from the Leon County Health Department received a call that work was being performed at 2207 Bannerman Road, which was the location for the La Hacienda Restaurant. She visited the site to see what work was being performed.

13. At the time of Ms. Davis' visit, there was no work being performed at the site. There was, however, equipment present at the location and excavation of the drainfield had been performed. Used drainfield chambers had been dug up and were present on the site as well.

14. No permit had been obtained for drainfield repair. Ms. Davis could not say whether any drainfield had been installed. She could only state with certainty that the area containing the drainfield had been excavated.

15. Ms. Davis was aware that Respondent had been pumping out the septic tank on the property, which did not require a permit.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2009).

17. The Department has disciplinary jurisdiction over septic tank contractors pursuant to the provisions of Chapters 381, 386 and 489, part III, Florida Statutes.

18. As the entity seeking to impose discipline, the Department bears the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence.

Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

19. Section 381.0065, Florida Statutes, provides the Department the following regulatory authority:

(3) DUTIES AND POWERS OF THE DEPARTMENT OF HEALTH.--The department shall:

(a) Adopt rules to administer ss. 381.0065-381.0067, including definitions that are consistent with the definitions in this section, . . . application and permit requirements for persons who maintain an onsite sewage treatment and disposal system, requirements for maintenance and service agreements for aerobic treatment units and performance-based treatment systems, and recommended standards, including disclosure requirements, for voluntary system inspections to be performed by individuals who are authorized by law to perform such inspections and who shall inform a person having ownership, control, or use of an onsite sewage treatment and disposal system of the inspection standards and of that person's authority to request an inspection based on all or part of the standards.

* * *

(h) Conduct enforcement activities, including imposing fines, issuing citations, suspensions, revocations, injunctions, and emergency orders for violations of this section, part I of chapter 386, or part III of chapter 489 or for a violation of any rule adopted under this section, part I of chapter 386, or part III of chapter 489.

* * *

(4) PERMITS; INSTALLATION; AND CONDITIONS.--
A person may not construct, repair, modify, abandon, or operate an onsite sewage treatment and disposal system without first obtaining a permit approved by the department. . . . A repair permit is valid for 90 days from the date of issuance. . . . A person may not contract to construct, modify, alter, repair, service, abandon, or maintain any portion of an onsite sewage treatment and disposal system without being registered under part III of chapter 489. A property owner who personally performs construction, maintenance, or repairs to a system serving his or her own owner-occupied single-family residence is exempt from registration requirements for performing such construction, maintenance, or repairs on that residence, but is subject to all permitting requirements. . . .

* * *

(5) ENFORCEMENT; RIGHT OF ENTRY; CITATIONS.
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(a) Department personnel who have reason to believe noncompliance exists, may at any reasonable time, enter the premises permitted under ss. 381.0065-381.0066, or the business premises of any septic tank contractor or master septic tank contractor registered under part III of chapter 489, or any premises that the department has reason to believe is being operated or maintained not in compliance, to determine compliance with the provisions of this section, part I of chapter 386, or part III of chapter 489 or

rules or standards adopted under ss. 381.0065-381.0067, part I of chapter 386, or part III of chapter 489. . . .

(b)1. The department may issue citations that may contain an order of correction or an order to pay a fine, or both, for violations of ss. 381.0065-381.0067, part I of chapter 386, or part III of chapter 489 or the rules adopted by the department, when a violation of these sections or rules is enforceable by an administrative or civil remedy, or when a violation of these sections or rules is a misdemeanor of the second degree. A citation issued under ss. 381.0065-381.0067, part I of chapter 386, or part III of chapter 489 constitutes a notice of proposed agency action.

2. A citation must be in writing and must describe the particular nature of the violation, including specific reference to the provisions of law or rule allegedly violated.

3. The fines imposed by a citation issued by the department may not exceed \$500 for each violation. Each day the violation exists constitutes a separate violation for which a citation may be issued.

4. The department shall inform the recipient, by written notice pursuant to ss. 120.569 and 120.57, of the right to an administrative hearing to contest the citation within 21 days after the date the citation is received. The citation must contain a conspicuous statement that if the recipient fails to pay the fine within the time allowed, or fails to appear to contest the citation after having requested a hearing, the recipient has waived the recipient's right to contest the citation and must pay an amount up to the maximum fine.

5. The department may reduce or waive the fine imposed by the citation. In determining whether to reduce or waive the fine, the department must consider the gravity of the violation, the person's attempts at correcting the violation, and the person's

history of previous violations including violations for which enforcement actions were taken under ss. 381.0065-381.0067, part I of chapter 386, part III of chapter 489, or other provisions of law or rule.

* * *

8. This section provides an alternative means of enforcing ss. 381.0065-381.0067, part I of chapter 386, and part III of chapter 489. This section does not prohibit the department from enforcing ss. 381.0065-381.0067, part I of chapter 386, or part III of chapter 489, or its rules, by any other means. However, the department must elect to use only a single method of enforcement for each violation.

20. The Department has adopted rules that govern the construction and permitting of septic tank systems. Florida Administrative Code Rule 64E-6.003(1) provides:

(1) System Construction Permit -- No portion of an onsite sewage treatment and disposal system shall be installed, repaired, altered, modified, abandoned or replaced until an "Onsite Sewage Treatment and Disposal System Construction Permit" has been issued on Form DH 4016. . . . Servicing or replacing with like kind mechanical or electrical parts of an approved onsite sewage treatment and disposal system; pumping of septage from a system; or making minor structural corrections to a tank, or distribution box, does not constitute repair.

21. The Department has proven by clear and convincing evidence the violation alleged in Count I of the Administrative Complaint. The competent, persuasive evidence at hearing indicates that Respondent had installed new "old style" chambers and end caps, which are used for the repair of a drainfield.

The invoice provided to the Department indicates that these services were billed to and paid by the homeowner. Respondent's arguments that the problems were caused by excessive water use and a difficult homeowner do not address whether a permit was required or obtained. Regardless of the reason for the system's failure, or how difficult the homeowner may have been, the work performed required a permit.

22. The Department has also proven by clear and convincing evidence that Respondent committed the violation alleged in Count II. The fact that Respondent had applied for a permit does not excuse performance of the work prior to obtaining the permit. In this case, the persuasive competent evidence indicates that the application originally submitted was not complete and did not include the permit fee, and that no permit had issued at the time the work was performed. Respondent's position that the Department took too long to issue the permit has no merit. The Department was under no obligation to issue the permit until the application was complete and the permit fee paid.

23. However, the allegations in Count III were not proven by clear and convincing evidence. No one who testified actually saw Respondent or his employees repairing the drainfield or excavating the drainfield site. Those activities that can be attributed to Respondent, i.e., pumping out the septic system and perhaps excavation at the site, are not activities that require a permit. Petitioner points to the pictures that show used

chambers that were present on the jobsite as evidence that Respondent was repairing the drainfield without a permit. The Department's witnesses acknowledged that they did not know whether any drainfield was installed. They only knew that excavation of the drainfield had taken place. Count III of the Administrative Complaint should be dismissed.

24. Florida Administrative Code Rule 64E-6.022 provides disciplinary guidelines for violations of the type at issue in this case. It provides in pertinent part:

(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.

* * *

(b) Permit violations.

1. Contractor initiates work to install, modify, or repair a system when no permit has been issued by the department. A permit is issued after construction is started but prior to completion of the contracted work. No inspections are missed. First violation, letter or warning or fine up to \$500; repeat violations, \$500 fine, or revocation.

2. Contracted work is completed without a permit having been issued, or no permit application is received until after

contracted work was completed, resulting in missed inspection or inspections. First violation, letter of warning or fine up to \$1000; repeat violation, revocation.

25. The Department has recommended that with respect to Count I, Respondent receive a fine of \$1,000; for Count II, a fine of \$500; and for Count III, a fine of \$500 and a ninety-day suspension.

26. Inasmuch as the evidence presented does not support a finding that Respondent committed the violation alleged in Count III, the proposed penalty for that count will not be considered. However, with respect to Counts I and II, the proposed penalty is at the high end allowed under Rule 64E-6.022. The Department did not present any evidence of disciplinary history for Respondent, and Rule 64E-6.022(3) specifies that "a repeat violation is any violation on which disciplinary action is being taken where the same licensee had previously had disciplinary action taken against him or received a letter of warning in a prior case." Accord, Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999)(where no finding of a previous violation, penalty cannot be imposed for "second offense."). Therefore, it would be appropriate to impose a letter of warning for one of these offenses, and a fine for the other. Any further violations by Respondent would result in more severe penalties.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law

reached, it is

RECOMMENDED:

That the Department of Health enter a Final Order finding Respondent guilty of Count I and issuing a letter of warning; finding Respondent guilty of Count II and imposing a \$750 fine; and dismissing the charges in Count III.

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



LISA SHEARER NELSON
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 November, 2009.

ENDNOTE

^{1/} The alleged violations took place sometime in late 2006, December 2008 and January 2009. While there were some amendments to Section 381.0065, Florida Statutes, during the 2008 session, they are not relevant to the allegations charged.

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.