

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
)
 Petitioner,)
)
 vs.) Case No. 09-6439
)
 JOHN E. MCDANIEL, d/b/a)
 SUPERIOR SEPTIC AND SEWER,)
 INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for final hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings (Division), on January 28, 2010, in Panama City, Florida.

APPEARANCES

For Petitioner: Rodney Marcum Johnson, Esquire
Department of Health
1295 West Fairfield Drive
Pensacola, Florida 32501

For Respondent: John E. McDaniel, pro se
Superior Septic and Sewer, Inc.
7315 Highway 231 North
Panama City, Florida 32404

STATEMENT OF THE ISSUES

The issues, as framed by the Administrative Complaint, are twofold:

1) Whether Respondent committed gross negligence, incompetence, or misconduct which caused monetary harm to a customer, in violation of Florida Administrative Code Rule 64E-6.022(1)(l)2; and

2) Whether Respondent practiced fraud or deceit by making a misleading or untrue representation to a home purchaser, or the home purchaser's agents, incident to a loan application, in violation of Florida Administrative Code Rule 64E-6.022(1)(k).

PRELIMINARY STATEMENT

Petitioner issued a two-count Administrative Complaint against Respondent on August 1, 2009. Following a Motion to Amend, the Administrative Complaint was amended due to a scrivener's error on September 22, 2009. Respondent timely filed a request for a formal administrative hearing with Petitioner. The matter was referred to the Division for assignment of an administrative law judge on November 23, 2009. Following another Motion to Amend, the Administrative Complaint was amended a second time on December 14, 2009. The matter proceeded to hearing on January 28, 2010, before the undersigned.

At the hearing, Petitioner presented the testimony of Lisa McDaniel, David Hammonds, Mike Granger, Glenn Salyer, Bonnie Milstead, Ben Harrell, John Harrell, Timothy Billings, Scott Butcher, and Bob Glenn, and offered Exhibits A through U, all of

which were admitted into evidence. Respondent testified on his own behalf, and presented the testimony of Debbie Bass, Phillip Fetner, Patrick Cantley, and Lyle Ake, and offered Exhibits 1 through 14 and 16 through 22, all of which were admitted into evidence.

Neither party ordered a transcript. After the hearing, Petitioner and Respondent filed their Proposed Findings of Fact and Conclusions of Law on February 22, 2010.

References to statutes are to Florida Statutes (2008) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Department of Health, is an agency of the State of Florida as defined in Section 120.52, Florida Statutes. Petitioner's actions in this matter are governed in part by Chapters 381 and 489, Florida Statutes, as well as Florida Administrative Code Chapter 64E-6.

2. Respondent, at all times material to this matter, was licensed by Petitioner under Part III of Chapter 489, Florida Statutes, entitled, "Septic Tank Contracting."

3. Respondent is subject to the regulatory jurisdiction of Petitioner, having been issued Registration Number SR0931141 to engage in septic tank contracting, and Certificate of Authorization Number SA0890161 to do business as Superior Septic and Sewer, Inc.

4. Petitioner seeks to impose revocation of Respondent's License and Certificate of Authorization for violations of Florida Administrative Code Rule 64E-6.022(1)(1)2. and (1)(k), with aggravation pursuant to Rule 64E-6.022(2).

5. Air Force Captain Timothy Billings made an offer that was accepted to purchase a home located at 1938 Quail Run, Lynn Haven, Florida, prior to September 12, 2008.

6. Captain Billings worked with a realtor, Bonnie Milstead, and arranged the various steps required to secure a Veterans Administration loan with the seller's realtors, Ben and John Harrell. A septic tank inspection and certification was one of the loan requirements.

7. On behalf of Captain Billings, Ms. Milstead arranged to have Respondent's company inspect and certify the septic tank at 1938 Quail Run at a price of \$250. The price included the pumping of the tank for \$225 and a \$25 charge for the certification. Captain Billing paid the \$250 charge at the closing on the purchase of the home.

8. John E. McDaniel is the licensed septic tank contractor for Superior Septic and Sewer, Inc., and is the qualifying contractor for a Certificate of Authorization to do business as Superior Septic and Sewer, Inc.

9. On September 15, 2008, one of Respondent's employees, Phillip Fetner, went to 1938 Quail Run where he was met by Ben

and John Harrell, realtors for seller of the home. Mr. Fetner was there to inspect only the septic tank, not being equipped or trained to inspect the entire system and drainfield.

10. Mr. Fetner opened the tank after cutting through roots that had grown into it. He noted a large amount of roots in the tank that was also seen by the realtor, Ben Harrell.

11. In spite of the roots, Realtor John Harrell instructed Mr. Fetner to "go ahead and pump the tank," which he did. He told John Harrell there were still a lot of roots in the tank.

12. Mr. McDaniel discussed with John Harrell an additional charge of \$400 to remove the roots from the tank. Mr. Harrell did not order the additional work.

13. Mr. McDaniel believed that enough roots had been removed from the tank by Mr. Fetner for a certification to be issued, but Mr. Fetner did not confirm this.

14. Debbie Bass, a clerical staff member of Respondent, completed the certification form prior to the inspection being complete. This was her custom so that she could stay ahead of the work load. The form was left in the inbox to be signed by Mr. McDaniel. Ms. Bass did not falsify any records nor had she ever been asked to do so in her four-and-a-half years with Respondent.

15. The certification form was signed by Mr. McDaniel without the additional root work having been done by his

company. The mortgage lender relied upon the certification to make the loan to Captain Billings.

16. Mr. McDaniel did not directly inform Captain Billings or his realtor, Ms. Milstead, that the septic tank was full of roots. He believed that the root situation had been disclosed since the seller's realtors, the Harrells, had been on-site at the time of the inspection.

17. Captain Billings testified that had he been fully aware of the root situation, he would have probably walked away from the deal because he did not want to have to deal with problems in the future.

18. Mr. McDaniel allows his wife, Lisa McDaniel, to sign his name in his capacity as a licensed septic tank contractor. Lisa McDaniel actually signed the certification on the 1938 Quail Run property.

19. Respondent's position is that the certification was sent out by mistake because the root removal work had not been performed on the tank. Mr. McDaniel does not dispute the fact that the certification form was prepared and signed.

20. Captain Billings experienced problems with the septic tank system of his newly purchased home at 1938 Quail Run. In March 2009, he discovered the septic tank and system were full of roots and not functioning when Roto-Rooter, owned and

operated by Glenn Salyer, removed the manhole access for a pump out and saw the massive roots.

21. After learning from his realtor that Respondent had been hired to inspect the septic tank, Captain Billings contacted Mr. McDaniel, who refused to do anything about the situation. Even after the filing of the Administrative Complaint, Mr. McDaniel refused to remedy the situation.

22. Glenn Salyer of Roto-Rooter, a licensed master septic tank contractor and master plumber, would not have certified the septic tank at 1938 Quail Run in its September 15, 2008, condition.

23. Lyle Ake, another licensed septic tank contractor, would not have certified the septic tank at 1938 Quail Run in its September 15, 2008, condition.

24. The septic tank should not have been certified in its September 15, 2008, condition.

25. Roots intruding into the septic tank indicate it is not watertight. However, a system having roots can perform properly without incident for many years.

26. When the entire system was inspected by Mr. Salyer, it was non-functional and needed replacement.

27. Roto-Rooter replaced the septic tank system, consisting of a new septic tank and drainfield, at 1938 Quail

Run on October 12, 2009. Captain Billings paid \$4,500 for the replacement system.

28. According to David Hammonds, an expert on the rules and functioning of septic tank systems, the system was being inspected and evaluated pursuant to Florida Administrative Code Rule 64E-6.001(5), the Procedure for Voluntary Inspection and Assessment of Existing Systems. The Rule provides specific items to be inspected unless the requesting party, in writing, states that specific items are not to be inspected. Mr. Hammonds testified that after his review of the exhibits and the site, he concluded that the septic tank system at 1938 Quail Run was "a failing system."

29. Mr. Hammonds concluded that the pump-out procedure could have been completed once enough roots were removed to get the pump into the tank.

30. Mr. Hammonds noted that the roots had been in the tank for a very long time, maybe years. Roots in the tank can lead to many problems. Roots affect capacity; they damage the tank itself, leading to cracks and leaks; and can lead to the leaking of sewage around the tank cover and seams.

31. Mr. Hammonds noted that the high fluid level in the tank, almost up to the lid, is an indication of the entire system not working properly.

32. The reporting requirements in the Voluntary Assessment Rule do not require the use of a particular inspection form. The Rule does specify what must be inspected and reported.

33. Respondent accurately listed the features of the tank on the certification form: the tank was 1,050 gallons; the tank had neither a baffle nor a filter; and the tank was structurally sound.

34. Mr. McDaniel believes this matter is all the result of an office error and that he should not be held responsible.

35. Mr. McDaniel has a history of disciplinary matters with Petitioner. He has been cited for 18 violations in six cases as well as a non-disciplinary letter of concern.

36. On September 13, 1996, he was fined \$50 for inspecting a system without a permit.

37. On September 13, 1996, he was fined \$100 for two repairs to a system without a permit and for violating water table separation and setback from a potable well.

38. DOAH Case No. 99-2474 resulted in a Final Order imposing an administrative fine of \$3,300 for the removal of tank filters after final inspection by department personnel. Judge P. Michael Ruff found in that case that Respondent's actions "show a clear intent to mislead regulatory authorities."

39. DOAH Case No. 04-1636 was settled by stipulation and resulted in a letter of warning with amelioration of a new

drainfield installed by Respondent for an original drainfield that was improperly installed.

40. On December 2, 2005, Respondent was issued a Letter of Warning for improper disposal of sewage.

41. DOAH Case No. 07-1651 resulted in jurisdiction in the matter being relinquished to Petitioner based upon Respondent's non-appearance at the final hearing. The result was a fine of \$500 for submitting a repair permit application with an incorrect site plan not showing a shed and a fence positioned over and in an existing drainfield.

42. A Letter of Concern was issued July 23, 2007, to Respondent for improperly reporting a larger than actual capacity of a septic tank. A Letter of Concern is not a formal discipline under Florida Administrative Code Rule 64E-6.022, but demonstrates substandard performance by a licensee.

43. Mr. McDaniel believes that other septic tank contractors have received lighter treatment for their offenses than he has. Bob Glenn, Petitioner's Environmental Manager for the Bureau of Onsite Management Program, gave some credence to Respondent's perception.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

45. This prosecution arose under Chapter 489, Part III, Subsection 389.0065(3)(h), Florida Statutes, and Florida Administrative Code Chapter 64E-6.

46. Petitioner is charged with administering a program for the registration of septic tank contractors, including the adoption of rules that establish ethical standards of practice, disciplinary guidelines, and requirements for the certification of partnerships and corporations. See §§ 489.553 and 381.0065(3)(h), Fla. Stat. The pertinent provisions of Petitioner's disciplinary guidelines set forth in Florida Administrative Code Rule 64E-6.022 are as follows:

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.

* * *

(k) Practicing fraud or deceit, making misleading or untrue representations. First violation, letter of warning or fine up to \$500; repeat violation, 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.

* * *

(t) The absence of any violation from this section shall be viewed as an oversight, and shall not be construed as an indication that no penalty is to be assessed.

(2) Circumstances which shall be considered for the purposes of mitigation or aggravation of penalty shall include the following:

(a) Monetary or other damage to the registrant's customer, in any way associated with the violation, which damage the registrant has not relieved, as of the time the penalty is to be assessed.

(b) Actual job-site violations of this rule or conditions exhibiting gross negligence, incompetence or misconduct by the contractor, which have not been corrected as of the time the penalty is being assessed.

(c) The severity of the offense.

(d) The danger to the public.

(e) The number of repetitions of the offense.

(f) The number of complaints filed against the contractor.

(g) The length of time the contractor has practiced and registration category.

(h) The actual damage, physical or otherwise, to the customer.

(i) The effect of the penalty upon the contractor's livelihood.

(j) Any efforts at rehabilitation.

(k) Any other mitigating or aggravating circumstances.

(3) As used in this rule, 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. This definition applies regardless of the chronological relationship of the violations and regardless of whether the violations are of the same or different subsections of this rule. The penalty given in the above list for repeat violations is intended to apply only to situations where the repeat violation is of a different subsection of this rule than the first violation. Where the repeat violation is the very same type of violation as the first violation, the penalty set out above will generally be increased over what is shown for repeat violations.

47. The performance standard setting rule in question provides:

(5) The department Procedure for Voluntary Inspection and Assessment of Existing Systems, May, 2000, herein incorporated by reference, shall be applied except in situations pertaining to an increase in sewage flow or change in sewage characteristics, or failure of the system. The inspection is designed to assess the condition of a system at a particular moment in time. The inspection will identify obviously substandard systems, for example systems without drainfields. The inspection is not designed to determine precise code compliance, nor provide information to demonstrate that the system will adequately serve the use to be placed upon it by this or any subsequent owner. Nothing in this section shall be construed to limit the amount of detail an inspector may provide at

their professional discretion. Persons allowed to perform work under this section shall be master septic tank contractors, registered septic tank contractors, state-licensed plumbers, and persons certified under Section 381.0101, F.S. Department employees are excluded from performing these evaluations. Aerobic treatment units and performance-based treatment systems shall not be evaluated using this criteria, but shall be evaluated by the approved maintenance entity which maintains the unit or system. Nothing in this section restricts the person having ownership of, control of, or use of an onsite sewage treatment and disposal system from requesting a partial inspection. The inspector shall provide the person requesting the inspection a copy of the department Procedure for Voluntary Inspection and Assessment of Existing Systems and written notice of their right to request an inspection based on part or all of the standards.

Fla. Admin. Code R. 64E-6.001(5).

48. The referenced procedure provides, in relevant part:

These inspection procedures are intended to be used as a minimum standard when these types of inspections are performed. This procedure shall be used if a person having ownership of, control of, or use of an onsite sewage treatment and disposal system requests to have the system inspected due to a reason that is not related to an increase in sewage flow or change in sewage characteristics, or failure of the system.

(1) Inspection Procedures: All inspection procedures used by the inspector shall be documented. Unless the person requesting the inspection specifies in writing that parts of the inspection be omitted, the inspection shall include a tank inspection,

a drainfield inspection, and a written assessment of the condition of the system. At any time where an inspector finds that the system is in failure, or has been in failure, the inspector may choose to terminate the inspection and inform the owner of the findings.

(2) Tank Inspection: (when not omitted at the written instruction of the person requesting the inspection):

The tank must be pumped to determine its capacity.

* * *

Visual inspection of the tank must be made when the tank is empty to detect cracks, leaks, or other defects. Check baffles or tees to ensure they are intact and secure. Note the presence and condition of outlet device, effluent filters and compartment walls. Note any structural defects in the tank. Note the condition and fit of the tank lid, including manholes.

* * *

(3) Drainfield Inspection: (when not omitted in the written instruction of the person requesting the inspection): The drainfield area should be probed to determine its location and approximate size. Note whether the drainfield is a trench or bed configuration and whether it is made of mineral aggregate, non-mineral aggregate, or plastic chambers. In addition, note any indications of previous failure, the condition of surface vegetation, for example, is there any seepage visible or excessively lush vegetation? If so, the inspector should note if there is ponding water within the drainfield and if there is even distribution of effluent in the field. The inspection should note any downspouts or drains that encroach or drain into the drainfield area. Auger and examine the

soils to estimate the seasonal high water table in the area of the drainfield.

* * *

(5) Assessment: The inspector shall provide a copy of a written signed inspection report to the person requesting the assessment and the owner of the system.

* * *

(b) The report will indicate any maintenance that needs to be performed on the system.

DISCLOSURE STATEMENTS:

The following conditions, when determined during the course of an inspection, shall be disclosed using the appropriate disclosure statement below. When the person requesting the inspection has made written specification that portions of the inspection be omitted, the inspector's written report shall indicate any of the conditions that could not be properly assessed because of the limited scope of the inspection.

1. When the inspector detects cracks, leaks, improper fit or other defects in the tank, manholes or lid, the report shall state that the damaged or defective item or tank be properly corrected.
2. When the inspector detects any missing or damaged component of the system, the report shall state that the missing or damaged component be replaced or an approvable replacement be installed in the system.
3. When the inspector detects previous failure indicators, these should be documented in the report.

* * *

Visual inspection of the tank must be made when the tank is empty to detect cracks, leaks, or other defects. Check baffles or

tees to ensure they are intact and secure. Note the presence and condition of outlet device, effluent filters and compartment walls. Note any structural defects in the tank and note the condition and fit of the tank lid, including manholes.

* * *

When the inspector detects cracks, leaks, improper fit or other defects in the tank, manholes or lid, the report shall state that the damaged or defective item or tank be properly corrected.

When the inspector detects any missing or damaged component of the system, the report shall state that the missing or damaged component be replaced or an approvable replacement installed in the system.

Procedure for Voluntary Inspection and Assessment of Existing Systems, May, 2000.

49. Septic tank failure is defined as:

Failure—a condition existing within an on site sewage treatment and disposal system which prohibits the system from functioning in a sanitary manner and which results in the discharge of untreated or partially treated wastewater onto ground surface, into surface water, into ground water, or which results in the failure of building plumbing to discharge properly.

Fla. Admin. Code R. 64E-6.002(23).

50. To determine what discipline, if any, should be assessed against Respondent, the inquiry must begin with what services were requested of Respondent. Captain Billings' realtor, Bonnie Milstead, faxed to Respondent a "Request for Pump and Certification of Septic Tank." The request stated that

Respondent should contact the listing agent, Ben Harrell, for access to the house. Respondent sent his employee, Mr. Fetner, to the house at 1938 Quail Run where he met Mr. Harrell. The tank was pumped and inspected, and Mr. Fetner noted that the tank was precast; 1,050 gallons in capacity; the lid, walls, and bottom of the tank were intact; the tank was sealed; and that the tank had no baffles or filters. He also noted that the "tank has a lot of roots." Relying upon the report of his employee, Mr. McDaniel informed the realtor for the seller, Mr. Harrell, that he would remove the roots for an additional \$400. Apparently, such work was not ordered. Whether by mistake or intentionally, Respondent issued the invoice for the pumping of the tank and the certification that the tank had been pumped and that it was structurally sound. The section of Petitioner's approved certification form related to inspection of the system was left blank and unsigned. Anyone looking at the form would see that only the tank had been inspected, not the entire system and drainfield.

51. The question next turns on who had a duty to inspect the system and drainfield. By the strict wording of the letter from Ms. Milstead, Respondent performed the pump out and inspection of the tank. The letter required nothing more. Additionally, Respondent told the seller's realtor that the roots should be removed and quoted a price for their removal.

No evidence was produced at hearing that anyone asked Respondent to inspect the entire system and drainfield and to render an opinion as to their condition and quality.

52. Captain Billings testified that he would have walked away from the deal had he known he was buying into a system that would need \$4,500 of repair in his first year of occupancy. What the evidence did not explain is why neither Captain Billings' realtor, Ms. Milstead, who ordered the pump out and certification, or the seller's realtor, Mr. Harrell, who was present at the time of the inspection and understood that the roots could be removed for \$400, did not make this information known to Captain Billings. Moreover, either or both of the realtors could have requested that the system and drainfield be inspected based upon the fact that extensive roots were found in the septic tank.

53. Based upon the credible expert testimony, Respondent should have inquired further and at least mentioned to Ms. Milstead or Mr. Harrell that the existence of extensive roots in the tank might lead one to inspect and test further to be sure the roots had not damaged the entire system. However, Respondent would not have been the one to perform such an inspection since he testified that he only inspects septic tanks, not entire systems and drainfields.

54. While Respondent presented some evidence that his treatment at the hands of the local inspectors may have been historically a bit more heavy-handed than others' treatment in the same county, this evidence does not rise to the level of proving significant disparate treatment by the Bay County and Florida Health Departments. Therefore, this claim by Respondent will not excuse his actions in this case.

55. The Voluntary Assessment Rule, discussed above, sets forth specific obligations of the registered septic tank contractor who undertakes a voluntary assessment of a septic tank and drainfield for purposes other than repair. The Voluntary Assessment Rule clearly states that the registered septic tank contractor is to examine the septic tank and drainfield. However, the Rule allows the requestor of the inspection to limit the scope of the inspection. In this case, Ms. Milstead's Request for Pump and Certification of Septic Tank, which she faxed to Respondent, limited the scope of the inspection to the septic tank which included a pump out of the tank. Respondent's employee pumped and inspected the tank only, not the system and drainfield. While Respondent's employee found there to be significant roots in the tank, which Mr. McDaniel proposed to remove for a fee, he also stated in his report that the septic tank appeared to be in working order. The seller's realtor, for whatever reason, chose neither to

order the removal of the roots for \$400 nor to disclose the condition of the tank regarding the roots to either Ms. Milstead or Captain Billings. Regardless of whether the certification was issued in error prior to anything being done about the roots, Respondent is not wholly to blame in this matter.

56. Count I of the Administrative Complaint raises the issue of whether Respondent committed gross negligence, incompetence, or misconduct which caused monetary harm to a customer as a violation of Florida Administrative Code Rule 64E-6.022(1)(1)2. The monetary harm here is clear: Captain Billings suffered \$4,500 in damages by having to replace his septic system. The issue, however, is whether Respondent's actions or omissions caused this damage. Respondent was hired for the limited purpose of pumping out and inspecting the septic tank at 1938 Quail Run. His employee pumped out and inspected the tank and made notes as well as personally informing (and showing) the realtor on site that extensive roots had intruded into the tank. Mr. McDaniel followed this up by informing the same realtor, Mr. Harrell, that he would remove the roots for \$400. The drainfield was not inspected at the time of the pump out because Ms. Milstead's letter had limited the scope of the inspection. Perhaps Respondent should have directly informed Ms. Milstead concerning the roots and his offer to remove them. Perhaps he should have directly informed Captain Billings of

this information. What Respondent did was inform the realtor who was on site at the time of the inspection that a problem existed with the septic tank. For whatever reason, that same realtor did not follow up on the root issue. At least some responsibility lies with the agent for the seller of the home.

57. Respondent was clearly negligent in allowing his wife, an unlicensed septic tank contractor, to sign the certification. In fact, his negligence is compounded by the fact that the certification was signed when Respondent clearly knew about the root problem and did not reference it in his report, even though he quoted a price to the seller's realtor for root removal. It is safe to assume that the lender would have taken some action to protect the value of the property had a more detailed report been issued by Respondent. The certification report issued made no mention of roots or wear to the system. It was cursory, at best, and not even signed by the licensed contractor in this case. Respondent should not have allowed his wife or any unlicensed person in the office to sign a certification whether that certification was to be used for purposes of a home purchase or for any other purpose. Moreover, he should have followed up to ensure the root problem was alleviated and should have taken personal responsibility for his office snafu which led to the certification being sent to the lender in error. Respondent's actions rise above the level of simple negligence

and, while not clearly a case of gross negligence, constitute incompetence or misconduct. Respondent's actions, while not the sole cause of Captain Billings' damages, significantly contributed to these damages and constitute a violation of Florida Administrative Code Rule 64E-6.022(1)(1)2. The penalty for violating this Rule the first time is a fine not to exceed \$500 and a 90-day suspension of the license. This level of fine and suspension would be appropriate in this case subject to whether aggravating factors exist.

58. Count II of the Administrative Complaint charges Respondent with practicing fraud or deceit by making a misleading or untrue representation to the home purchaser, Captain Billings, or purchaser's agents, as part of a loan application in violation of Florida Administrative Code Rule 64E-6.022(1)(k). While Respondent's actions were negligent and constitute incompetence or misconduct which subjects him to discipline, Petitioner has not proven that Respondent practiced fraud or deceit. As set forth above, Respondent failed to follow up with the removal of the roots from the septic tank he inspected; he failed to inform anyone other than the realtor on site of the root problem, including the realtor (Ms. Milstead) who engaged his services; and he allowed his wife to sign the certification, although he has maintained the certification was issued in error. Respondent stood to make more money on this

job by following up with root removal and even possible repairs to the septic tank system had he found it in need of greater service than a mere inspection. The elements of fraud or deceit are not present in the case presented by Petitioner.

59. Respondent's disciplinary history demonstrates at best a lack of understanding of the law and rules that govern his profession, and, at worst, a disregard of these requirements. Florida Administrative Code Rule 64E-6.022(2) and (3) provides enhanced penalties for aggravating factors and offer guidance on how to assess the penalties:

(2) Circumstances which shall be considered for the purposes of mitigation or aggravation of penalty shall include the following:

(a) Monetary or other damage to the registrant's customer, in any way associated with the violation, which damage the registrant has not relieved, as of the time the penalty is to be assessed.

(b) Actual job-site violations of this rule or conditions exhibiting gross negligence, incompetence or misconduct by the contractor, which have not been corrected as of the time the penalty is being assessed.

(c) The severity of the offense.

(d) The danger to the public.

(e) The number of repetitions of the offense.

(f) The number of complaints filed against the contractor.

(g) The length of time the contractor has practiced and registration category.

(h) The actual damage, physical or otherwise, to the customer.

(i) The effect of the penalty upon the contractor's livelihood.

(j) Any efforts at rehabilitation.

(k) Any other mitigating or aggravating circumstances.

(3) As used in this rule, 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. This definition applies regardless of the chronological relationship of the violations and regardless of whether the violations are of the same or different subsections of this rule. The penalty given in the above list for repeat violations is intended to apply only to situations where the repeat violation is of a different subsection of this rule than the first violation. Where the repeat violation is the very same type of violation as the first violation, the penalty set out above will generally be increased over what is shown for repeat violations.

Most of Respondent's previous violations are minor, relating to failure to secure a permit, exceeding the scope of a permit, or removing filters after inspection. At least one is significant, the case resulting in a formal hearing before the Division, Case No. 99-2474. That case resulted in a substantial fine of \$3,300 to be paid to the Walton County Health Department (\$300) and the Bay County Health Department (\$3,000). Although the case is more than 10 years old, it was not Respondent's last infraction and demonstrates he has not fully taken to heart the seriousness of repeated violations of the septic tank contractor law. Therefore, Petitioner has proved that any penalties assessed in this case are aggravated by Respondent's prior acts.

Accordingly, the penalty imposed here should be enhanced. A doubling of the penalty and suspension described in Conclusion of Law 57 above constitutes an appropriate resolution to this matter.

60. Petitioner has sought revocation of Respondent's license to engage in septic tank contracting. Based upon the foregoing findings of fact, the undersigned cannot conclude that Respondent's license should be revoked. While he has been repeatedly disciplined over the past 15 years, he has not yet suffered a suspension of his license. A six-month suspension is appropriate in this case to send a message to Respondent that further violations will most likely result in a revocation of his license to engage in septic tank contracting.

RECOMMENDATION

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

RECOMMENDED that a final order be issued by the Department of Health suspending Respondent for six months; suspending Respondent's Septic Tank Contractor Registration Number SR0931141 and Certificate of Authorization Number SA0890161 to do business as Superior Septic and Sewer, Inc.; and imposing a fine in the amount of \$1,000.00, on Respondent.

DONE AND ENTERED this 25th day of February, 2010, in
Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of February, 2010.

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.