

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
)
 Petitioner,)
)
 vs.) Case No. 10-10103PL
)
 DONALD R. DERBY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On January 14, 2011, a formal administrative hearing was conducted by video teleconference in Tallahassee and Ft. Myers, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Denise Duque, Esquire
Southwest Alliance of County
Health Departments
2295 Victoria Avenue, Room 206
Fort Myers, Florida 33901

For Respondent: Stephen M. Maher, Esquire
Stephen M. Maher, Attorney at Law, P.A.
2077 First Street, Suite 206
Fort Myers, Florida 33901

STATEMENT OF THE ISSUES

The issues in this case are whether the allegations set forth in the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By an Administrative Complaint dated September 30, 2010, the Department of Health (Petitioner) alleged that Donald Denby (Respondent) violated administrative rules related to septic tank contractor services. The Respondent denied the allegations and requested a formal administrative hearing. The Petitioner forwarded the dispute to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits 1 through 4 admitted into evidence. The Respondent presented the testimony of three witnesses and had Exhibits 1 and 2 admitted into evidence.

No transcript of the hearing was filed. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order. The Respondent's Proposed Recommended Order was not timely filed, and the Petitioner filed a Motion to Strike the Respondent's submission. The Motion to Strike is hereby denied.

A Prehearing Stipulation filed by the parties on January 7, 2011, included stipulated facts that have been adopted and are incorporated as necessary herein.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was a registered septic tank contractor, registration number SR0041456.

2. At all times material to this case, the Respondent was authorized to provide septic tank contracting services through the corporation "Anytime Septic Enterprise, Inc.," authorization number SA0091662.

3. The Respondent has advertised his services to the public as a septic tank contractor and has engaged in the business of providing septic tank services since at least September 2010.

4. At all times material to this case, the Respondent was permitted to provide septage disposal services via permit number 36-QA-28986 issued by the Lee County Health Department.

5. On or about September 13, 2010, the Respondent was hired to pump a septic system located at 2710 Northwest 5th Street, Cape Coral, Lee County, Florida, by another septic tank contractor. The employing contractor had been hired to service and repair the septic system, but did not have the ability to pump the tanks.

6. On September 13, 2010, the Respondent pumped out the septic tank. The Respondent did not pump out the "dosing tank," a part of the septic system connected to the septic tank.

7. After pumping out the septic tank, the Respondent completed a "DH Form 4015," signed and dated on September 13, 2010.

8. The form collected information on the evaluation and repair of the septic system, including identification of system components and tank capacities. The contractor servicing the system is required to complete the form and identify the services provided.

9. The Respondent identified the components of the referenced septic system and the capacities of both the septic and dosing tanks. The Respondent signed and dated the certification statement.

10. As completed by the Respondent, the certification statement stated as follows:

I certify that the listed tanks were pumped on 9/13/10 by Anytime Septic, have the volumes specified as determined by legend are free of observable defects or leaks, and have a [solids deflection device/outlet filter device] installed.

11. Although the Respondent certified that he pumped the dosing tank on September 13, 2010, he did not pump the dosing tank on that date.

12. The Respondent certified the dosing tank to be free of observable defects or leaks; however, the failure to pump the dosing tank prevented proper observation of the dosing tank, and

it is highly unlikely that an accurate evaluation of the condition of the dosing tank was possible under the circumstances.

13. Under the applicable rule, a pumper may perform an incomplete pumpout under certain circumstances, but the rule requires that the pumper must provide written documentation to the system owner identifying the reason for the incomplete pumpout, the gallonage pumped from the system, and the material left in the tank. The Respondent failed to provide such documentation to the system owner.

14. An inspection by an employee of the Petitioner on September 16, 2010, revealed that the dosing tank had not been pumped and that the tank lids had not been sealed after the service.

15. The Respondent was notified on September 20, 2010, that the dosing tank should have been pumped at the same time as the septic tank. On that same date, the Respondent returned to the site, pumped the dosing tank, and then completed, signed and dated a second "DH Form 4015" certifying that the dosing tank had been pumped. The Respondent recorded additional information on the form to indicate that the remaining work would be performed by the septic tank contractor who had employed the Respondent.

16. At the hearing, the Respondent asserted that upon the initial inspection of the property, the Respondent observed that the septic tank conditions were non-standard, that he communicated such information to the contractor who had hired him, and that the Respondent's services, including certification of the tanks, were provided in accordance with the requests of the contractor.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).^{1/}

18. The Petitioner is the state agency charged with enforcement of provisions of chapters 381 and 489, Part III, related to regulation of septic systems and septic tank contractors. § 381.065(3), Fla. Stat.

19. The Petitioner has the burden of establishing the truthfulness of the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met.

20. Florida Administrative Code Rule 64E-6.010(4) provides, in relevant part, as follows:

After septage or food establishment sludge

is removed from an onsite sewage treatment and disposal system, the original lid of the tank shall be put back in place, or be replaced with a new lid if the original lid is broken. The tank lid shall be completely sealed and secured as per paragraph 64E-6.013(2)(i), F.A.C., and the ground backfilled and compacted so that the site is left in a nuisance free condition.

(a) Contents of any treatment tank, including all chambers of a multichambered tank, or pump tank shall be removed in their entirety when pumped. Where in the opinion of the person pumping any onsite sewage treatment and disposal system waste receptacle or pump tank, the complete removal of all tank contents may create an unintended problem in regards to the continued use of the system, a complete pumpout is not required. The pumper must document, in writing, to the system owner the reason for the partial pumpout, the gallonage pumped from the system, and what material was left in the tank.

(b) The access to pump a tank must be through the lid of the tank, through the manhole or by moving a sectional lid. Where the tank is chambered, separate chambers must be accessed through the manholes or sectional lid for the chamber being pumped. Pumping shall not be accomplished by entering the tank through inlets or outlets. Where the lid of the tank must be broken in order to gain access for the removal of tank contents, or at anytime when the lid is broken, the lid shall be replaced.

21. Florida Administrative Code Rule 64E-6.013(2)(i) provides as follows:

Joints of receptacles, including mid-seams, risers, and lids shall be sealed using a bonding compound that meets ASTM C 990-96, Standard Specification for Joints for

Concrete Pipe, Manholes, and Precast Box Sections using Preformed Flexible Joint Sealants, herein incorporated by reference.

22. The evidence establishes that the Respondent violated rule 64E-6.010 by failing to fully pump the septic system referenced herein or to document the reasons for not completing the pumpout and by failing to properly seal the tank lids.

23. Florida Administrative Code Rule 64E-6.022 provides, in relevant part, as follows:

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.

* * *

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

(l) 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.

24. The evidence establishes that the Respondent violated rule 64E-6.022(1)(k) by falsely certifying that the dosing tank had been pumped on September 13, 2010, and by certifying that the dosing tank was free of observable defects or leaks when no proper observation had been conducted.

25. The evidence establishes that the Respondent violated rule 64E-6.022(1)(l)1. by failing to fully pump the system or to document the reasons for not doing so and by failing to properly seal the tank lids after completion of the work on September 13, 2010. The misconduct caused no harm to a customer or any other person.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health enter a final order imposing a \$1,500 fine against the Respondent for falsely certifying the work performed on September 13, 2010, and the condition of the dosing tank; for failing to fully pump the system without providing appropriate documentation; and for failing to properly seal the tank lids.

DONE AND ENTERED this 24th day of February, 2011, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of February, 2011.

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.