

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Petitioner,)
)
vs.) Case No. 10-10521EF
)
DICKENS LAND CLEARING AND ROCK)
WORLD, INC., AND LESLIE)
DICKENS, INDIVIDUALLY,)
)
Respondents.)
_____)

FINAL ORDER

The final hearing in this case was held on May 17, 2011, by video teleconference at sites in Tallahassee and Panama City, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Howard Fox, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

For Respondents: Leslie Dickens, pro se
9000 Panama City Beach Parkway
Panama City, Florida 32407

STATEMENT OF THE ISSUES

The issues to be determined in this case are whether Respondents, Leslie Dickens and Dickens Land Clearing & Rock

World, Inc., violated Department of Environmental Protection ("Department") rules that require a notice to be filed with the Department and an asbestos investigation conducted before a building is demolished; and if so, whether Respondents should pay the administrative penalties that are demanded by the Department.

PRELIMINARY STATEMENT

On October 28, 2010, the Department issued a Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment ("NOV"), which included three counts against Respondents. Respondents timely filed a request for an administrative hearing to contest the NOV. The Department referred the matter to DOAH to conduct an evidentiary hearing and issue a final order.

The Department served a request for admissions on Respondents, which Respondents did not answer even though the Department advised Respondents of the consequences of failing to respond and the Department gave Respondents additional time to respond. Based on Respondents' failure to respond to the Department's request for admissions, the Department filed a Motion for Summary Final Order as to Respondent's liability as charged in the NOV.

The Motion for Summary Final Order was treated as a motion in limine, because DOAH does not have express authority to issue

partial summary orders. The motion in limine was granted, which had the effect of excluding any evidence or argument by Respondents to dispute their liability for the charges in the NOV. The case then proceeded to determine whether the penalties should be mitigated and whether the corrective actions should be imposed.

At the final hearing, the Department presented no witness testimony or exhibits. Respondents presented the testimony of Leslie Dickens. Respondents' Exhibit 1 was admitted into evidence.

A court reporter recorded the hearing, but no party ordered a transcript. The Department filed a Proposed Final Order. Respondents did not file a post-hearing submittal.

FINDINGS OF FACT

1. The Department is the state agency having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapters 373 and 403, Florida Statutes, and the rules promulgated pursuant thereto in Florida Administrative Code Title 62.

2. Respondent Leslie Dickens is an individual and President of Dickens Land Clearing & Rock World, Inc., which is an inactive, dissolved Florida corporation whose office was 9000 Panama City Beach Parkway, Panama City, Florida.

3. On or about June 4, 2010, Respondents demolished a commercial building located at 2900 West 10th Street, Panama City.

4. Respondents did not file a Notice of Demolition or Asbestos Renovation form with the Department before the building was demolished.

5. At the time of the demolition, the building had been vacant for many years. The building had already been stripped of floor tiles, sheet rock walls, and insulation.

6. Mr. Dickens testified that there was no asbestos in the building at the time of the demolition. However, Mr. Dickens did not conduct a thorough investigation to determine whether any asbestos was present. Instead, Mr. Dickens relied on an analysis that had been performed in 1996 by EnviroChem, Inc., that shows two samples from the building were analyzed for asbestos and no asbestos was detected. This analysis was admitted into evidence over the Department's relevance objection as Respondents' Exhibit 1. The document is relevant to the issue of whether the penalties assessed by the Department should be mitigated.

7. Exhibit 1 does not demonstrate that a thorough investigation was conducted to determine whether any asbestos existed in the building at the time of the demolition.

8. The Department does not know whether the building ever contained any asbestos.

CONCLUSIONS OF LAW

9. The Department may institute an administrative proceeding to establish liability, to recover damages, and to order corrective actions pursuant to section 403.121, Florida Statutes (2010), when the Department seeks administrative penalties that do not exceed \$10,000. See § 403.121(2), Fla. Stat.

10. The Department has the burden to prove by a preponderance of the evidence that Respondents violated the law as alleged in the NOV. See § 403.121(2)(d), Fla. Stat.

11. When the Department seeks administrative penalties, the Administrative Law Judge is to issue a final order on all matters. See § 403.121 (2)(d).

12. Count I of the NOV charges Respondents with violating Florida Administrative Code Rule 62-257.301(2)(b)(1) and 40 CFR 61.145(b) (Federal Code of Federal Regulations), which is adopted and incorporated by reference in rule 62-204.800. These rules require each owner or operator of a demolition activity to file a Notice of Demolition or Asbestos Renovation form with the Department at least 10 working days before demolition begins.

13. Respondents admit that they did not file this notice with the Department. Therefore, Respondents are liable under Count I.

14. Section 403.121(4) (e) provides that for a failure to submit any required notification to the Department, the Department shall assess a penalty of \$1,000. Therefore, Respondents are liable for \$1,000 for the violation charged in Count I.

15. Count II of the NOV charges Respondents with violating 40 CFR 61.145(a), which is adopted and incorporated by reference in rule 62-204.800. This rule requires that, before a facility is demolished, the owner or operator of a demolition activity shall thoroughly inspect the facility for the presence of asbestos.

16. Respondents admit that they did not comply with this requirement. Therefore, Respondents are liable under Count II.

17. Section 403.121(4) (d) provides that for a failure to conduct any required testing, the Department shall assess a penalty of \$2,000. Therefore, Respondents are liable for \$2,000 for the violation charged in Count II.

18. Section 403.121(8) states that the "direct economic benefit gained by the violator" shall be added to the scheduled administrative penalty. The Department seeks to have the penalties increased by \$1,500, which is the Department's

estimate of the cost of the asbestos investigation which Respondents avoided.

19. However, no evidence was presented by the Department regarding the cost of an asbestos investigation and there was no admission by Respondents regarding this cost. There is no basis upon which to determine Respondents' economic benefit.

20. The total administrative penalties assessed above is \$3,000. However, evidence may be received in mitigation and the Administrative Law Judge may reduce the penalties up to 50 percent for mitigating factors. See § 403.121(10).

21. It is determined that the penalties should be reduced by \$500 because Respondents had reason to believe that the building did not contain asbestos based on the environmental analysis and the fact that the building had been stripped before the demolition. The adjusted total penalty assessment is \$2,500.

22. Count III of the amended NOV charges Respondents with liability for the Department's investigative costs in an amount not less than \$500. However, at the final hearing, the Department withdrew its claim for investigative costs.

23. Section 403.1651(2)(a) provides that the Ecosystem Management and Restoration Trust Fund shall be used for the deposit of all moneys recovered by the State under chapter 403.

24. The corrective actions sought by the Department in the NOV simply require that Respondents pay the assessed penalties. Payment of the administrative penalties is ordered below.

DISPOSITION

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

Within 30 days of this Final Order, Respondents shall pay \$2,500 to the Department for the administrative penalties assessed herein. Payment shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall include thereon the OCG Case No. 10-2371 and the notation "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to the Department of Environmental Protection, 160 Government Center, Suite 308, Pensacola, Florida 32502-5794.

DONE AND ORDERED this 1st day of June, 2011, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of June, 2011.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.