RECOMMENDED ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on August 11, 2011, in Fort Myers, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Denise Duque, Esquire
Jennifer O'Connell, Esquire
Department of Health
2295 Victoria Avenue, Room 206
Fort Myers, Florida 33901

For Respondent: Neysa Borkert, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Connie H. Sanders ("Mrs. Sanders") violated provisions of Florida Administrative Code Chapter 64E-6, and, if so, whether
revocation of her septic tank contractor's certification is warranted.

PRELIMINARY STATEMENT

On March 11, 2011, Petitioner, Department of Health (the "Department"), issued an Administrative Complaint alleging certain violations by Mrs. Sanders of statutes and rules governing septic tank contractors. Mrs. Sanders disputed the allegations and filed a Request for Hearing, which is accepted as her petition for formal administrative hearing. The petition was forwarded to the Division of Administrative Hearings to conduct a formal proceeding under section 120.57(1), Florida Statutes (2010).¹/

At the final hearing, the Department called two witnesses: Justin Sabins, Environmental Supervisor I; and Johanna Whelan, Environmental Supervisor II. Exhibits 1 through 4, 6 through 12, 16, 18, and 19, offered by the Department, were admitted into evidence. Mrs. Sanders recalled Sabins, called David Sanders (referred to herein as "Mr. Sanders"), and testified on her own behalf. No exhibits were offered into evidence by Mrs. Sanders.

No transcript of the final hearing was ordered by the parties. By rule, the parties were allowed ten days to submit proposed recommended orders. Each party timely submitted a
Proposed Recommended Order, and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the State agency responsible for, inter alia, enforcing the provisions of chapter 381 and chapter 489, Part III, Florida Statutes, and the rules contained in chapter 64E-6, as those statutes and rules relate to septic tank contractor registrations.

2. Mrs. Sanders has been a registered septic tank contractor since 1993. She has been in the septic tank business since 1982. At all times relevant to this proceeding, Mrs. Sanders operated under the name Lehigh Septic, Inc. She has since begun operating under the name AAA Lehigh Septic Tank Service.

3. Mrs. Sanders' husband is also a registered septic tank contractor. When Mrs. Sanders began operating her new business, Mr. Sanders took over Lehigh Septic, Inc. Both Mrs. Sanders' business and Mr. Sanders' business operate from the same office and share administrative staff. Mrs. Sanders generally remains in the office to handle the business aspects of the two entities. Mr. Sanders goes into the field and conducts the hands-on, practical aspects of the businesses.

4. The charges against Mrs. Sanders arose from the provision of services to a group home or assisted living
facility (the testimony at final hearing referenced it both ways) located at 413 Richmond Avenue, Lehigh Acres, Florida, and referred to herein as the "Property."

5. On January 18, 2011, George Harris called Mrs. Sanders' office seeking septic services at the Property. He said he had a problem with "smells" at the Property, which he attributed to the septic system. Mrs. Sanders, or her secretary, took the message and gave it to Mr. Sanders for follow-up. Harris called back the following day as well. On that day, a note was made on the phone log that someone was to do the work "today." A price of $350.00 was written in the margin of the note.

6. Mr. Sanders went to the Property on or around the period including January 18 through 21, 2011, and pumped out a 900-gallon septic tank. Mr. Sanders had actually done septic tank work at the Property in 2008, but he has done work on thousands of tanks and does not have a specific memory as to what he did at the Property three years earlier.

7. On January 24, 2011, Mrs. Sanders' telephone log indicated receipt of another call from Harris. This time, Harris said there was a problem with the septic tank "we [pumped out] last week." Harris said there was a defective drain field associated with the septic tank and wanted to know the "next step" and how much it would cost to repair it. On the following day, there was a note in the telephone log concerning the
Property. The note indicated the call was about a "tank certification" and that someone needed to call the County Health Department regarding the size of the tank at the Property.

8. On or about January 31, 2011, a DH Form 4015, entitled Department of Health Onsite Sewage Treatment and Disposal System Existing System and System Repair Evaluation, was completed, in part, by Mr. Sanders. Specifically, the certification section of the form was filled out by Mr. Sanders. He listed the following existing tank information:

- 1350 gallons septic tank, made of concrete and baffled; and
- An approximately 350 gallons dosing tank, made of concrete.

9. Mr. Sanders also certified that "[t]he listed tanks were pumped on 1/24/11 by Lehigh Septic, Inc., have the volumes specified as determined by [method of determination left unchecked], are free of observable defects or leaks, and have a [type of filter not checked] installed." The certification was then signed as Connie H. Sanders, Lehigh Septic, Inc., but Mr. Sanders actually wrote the signature. Under the signature were the words, "[i]nstalled in series,"^2/ and then the form is dated January 31, 2011. This form will be referred to herein as the "January 31 Certification." Mr. Sanders was authorized by
Mrs. Sanders to sign documents on her behalf, so the January 31 Certification is essentially Mrs. Sanders' certified statement.

10. Mr. Sanders delivered the January 31 Certification to Harris, assuming the certification was needed as part of Harris' licensure application for his assisted living facility or group home. Mr. Sanders believed he had provided such a certification for the Property in the past, and he often provided certifications to other group home type facilities. Mr. Sanders avers that he was not hired to do any additional work on the septic system at the property.

11. Harris then apparently had some repair work done on his septic system by another company, Southwest Environmental, LLC. A permit application was filed at the Department on or about February 4, 2011, by Trinity Property, Inc. (apparently the entity which owns the Property), which sought approval to replace the drain field at the Property. Attached to the application was the January 31 Certification completed by Mr. Sanders. Neither Mr. Sanders, nor Mrs. Sanders, had knowledge the permit application was going to be filed at the Department as part of a repair permit application.

12. Upon receipt of the permit application by the Department, it was quickly ascertained that the January 31 Certification was in error concerning the septic tank information. The 1350-gallon septic tank identified by
Mr. Sanders did not exist. In fact, the Property had a 900-gallon septic tank, a 450-gallon septic tank, and a 400-gallon dosing tank.

13. On February 10, 2011, Sabins contacted Mr. Sanders to let him know about the discrepancies on his DH Form 4015 related to the Property. Mr. Sanders indicated he would go out and pump the other two tanks, then submit a corrected certification form. Mr. Sanders pumped the remaining tanks the very next day. Mr. Sanders also called the Department and spoke to Whelan. It was at that time that Mr. Sanders was advised that he could use the tank certifications he had done in 2008, because the certifications are good for up to three years.

14. Mr. Sanders then submitted two more certifications to the Department. He submitted the certification from his 2008 visit (the "2008 Certification") and a revised certification dated February 11, 2011 (the "February 11 Certification").

15. The 2008 Certification identifies the two septic tanks and one dosing tank that existed on the Property. Mr. Sanders had pumped out at least one of those tanks on October 6, 2008. Invoices for that work indicated that Mr. Sanders had pumped the 900-gallon tank, but had not pumped the other two tanks. He went back on October 8, 2008, and pumped the remaining tanks. The invoice for the additional work says, "Pump dosing tank & cleaned sludge [no charge] per David/Driver. Didn't know other
tanks were there." Under the quantity column on the invoice, however, 500 gallons is listed for the October 8, 2010, visit, even though there was a 450-gallon septic tank and a 400-gallon dosing tank that were allegedly pumped. The 2008 Certification is then signed and dated as of February 11, 2011, the same day as the other corrected certification.

16. The February 11 Certification indicated that the Property had a 900-gallon septic tank, a 450-gallon septic tank, and a 400-gallon dosing tank. The certification said that all three tanks were pumped on February 11, 2011; however, Mr. Sanders actually pumped out the 900-gallon tank earlier (in the January 18 through 21, 2011, time period) and pumped the other two tanks on February 11, 2011. Neither the February 11 Certification, nor the 2008 Certification, is completely accurate in all respects, but they are sufficiently accurate to provide the Department the information it required.

17. The purpose of a septic tank certification is to ensure that the tank is free from observable defects or leaks. As of October 6 through 8, 2008, Mr. Sanders believed the three tanks at the Property were in good condition. He did not have any knowledge whether they were in good condition as of the date he provided the January 31 Certification to the owner of the Property. However, Mr. Sanders could have relied upon his 2008
Certification at that time, thus, no further inspection was absolutely necessary.

18. There is no evidence that Mrs. Sanders was personally aware of the errors made by Mr. Sanders concerning the activities at the Property; nor is there evidence that Mrs. Sanders had any knowledge that Mr. Sanders had prepared a certification (or three of them) containing her signature. However, Mrs. Sanders authorized Mr. Sanders to act on her behalf and must be held accountable for his actions in that regard.

19. There were three prior disciplinary actions taken against Mrs. Sanders by the Department: In July 2003, the Department entered a Final Order imposing a fine of $1,000.00 for failing to properly abandon a septic tank and creating a sanitary nuisance; in May 2009, a Final Order was entered fining Mrs. Sanders $1,000.00 for failing to remove the entire contents of an onsite septic sewage treatment and disposal system and for doing business under an unauthorized name; and in June 2007, a Final Order imposed a fine of $1,000.00 for failing to remove the entire contents of an onsite septic treatment and disposal system.

20. There is no evidence in this case that consideration of the three prior offenses would be necessary in order to prove a material fact in the present action.
21. Mrs. Sanders became a septic tank contractor after marrying her husband. It has become her life's work and is the only thing she is qualified to do in order to make a living. She is responsible for operations of both her and her husband's businesses, and if she is not certified, both businesses could fail. Her husband is not in good health, and Mrs. Sanders is concerned that loss of her certification would be financially devastating for her and Mr. Sanders.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011).

23. This case involves the potential loss of a license to engage in septic tank contracting. As such, the Department has the burden of proof to prove all elements of the alleged violation by clear and convincing evidence. Dep't of Banking and Fin., Div. of Sec. and Investor Prot. v. Osborne Stern and Co., 670 So. 2d 292 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 291 (Fla. 1987).

24. Clear and convincing evidence is an intermediate standard of proof, which is more than the "preponderance of the evidence" standard used in most civil cases, but less than the "beyond a reasonable doubt" standard used in criminal cases.
See State v. Graham, 240 So. 2d 486 (Fla. 2d DCA 1970). Clear and convincing evidence has been defined as evidence which:

[R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983) (citations omitted).

25. Section 381.0065 sets forth the regulations for onsite sewage treatment and disposal systems. Subsection (3) of that statute provides the Department with authority to regulate septic tank contractors and authority to adopt rules to administer the statute.

26. Chapter 489, Part III, addresses septic tank contracting, including the application for and monitoring of certifications. The Department is authorized to regulate septic tank contracting certifications under that statutory authority.

27. The standards of practice and disciplinary guidelines for septic tank contractors are set forth in rule 64E-6.022. The subsections of that rule which the Department alleges Mrs. Sanders violated are as follows:
(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 harm 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.

28. There is no evidence in this case that Mrs. Sanders or, by extension, Mr. Sanders as her agent, practiced fraud or deceit by their actions. The representations by Mr. Sanders on the January 31 Certification were incorrect, but they were not made with the intent of defrauding or deceiving the Department. Mr. Sanders was certainly not very careful and did not pay attention to detail, but it appears from the weight of the testimony that his actions were not intentional.

29. Nor is there any evidence of gross negligence, which has been defined as the absence of the exercise of slight care and is the omission or commission of an act with a conscious indifference to consequences so far as other persons are concerned. See generally Faircloth v. Hill, 85 So. 2d 870 (Fla. 1956); Glaab v. Caudill, 236 So. 2d 180 (Fla. 2d DCA 1970). Those cases, having to do with automobile accidents, provide some definition of gross negligence in the absence of a definition in relevant statutes or rules concerning septic tank
contractors. Nothing in Mr. or Mrs. Sanders' behavior suggests an indifference to potentially harmful consequences to their customers which would rise to the level of gross negligence.

30. There is, however, clear and convincing evidence that Mrs. Sanders, or her agent, engaged in activities relative to the tank certifications that constitute misconduct on her, or his, part. Therefore, Mrs. Sanders violated a provision of rule 64E-6.022(1)(l). By failing to properly and accurately identify the tanks which are certified to be free of defects, Mrs. Sanders acted improperly.

31. Paragraph (2) of rule 64E-6.022 sets forth certain mitigating and aggravating factors that may be considered by the Department when imposing a penalty, including:

(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.

* * *

(c) The severity of the offense.

(d) The danger to the public.

(e) The number of repetitions of the offense.

* * *

(g) The length of time the contractor has practice and the registration category.
(h) The actual damage, physical or otherwise, to the customer.

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

32. There was no known monetary damage to Mrs. Sanders' customers associated with the mistakes made in the tank certifications. The nature of the errors, while serious, would not be called severe. Mrs. Sanders has been practicing for a long period of time, and it is certain that revocation of her license would be significantly detrimental to her.

33. The errors that were made warrant a penalty, but do not rise to the level of violation for which revocation is required.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Department of Health, imposing a fine against Respondent, Connie H. Sanders, in the amount of $500.00 and that a letter of warning be issued stating the potential penalty for any repeat violation.
DONE AND ENTERED this 8th day of September, 2011, in
Tallahassee, Leon County, Florida.

R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of September, 2011.

ENDNOTES

1/ Unless stated specifically otherwise herein, all references
to Florida Statutes will be to the 2010 version.

2/ Mr. Sanders said the "in series" reference indicated the
existence of more than one tank and is, thus, an attempt to
describe the totality of the tanks' volume.

3/ There was no testimony provided at final hearing as to
whether Mr. Sanders discussed with Department representatives
his surprise that his January 31 Certification had been used as
part of the permit application.

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.