

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA DEPARTMENT OF HEALTH,)
)
 Petitioner,)
)
vs.) Case No. 12-3368
)
CARLOS M. CASANOVA AND)
BUSY BEE SEPTIC, INC.,)
)
 Respondents.)

)

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division) heard this case by video conference on December 11, 2012, at locations in Fort Myers and Tallahassee, Florida.

APPEARANCES

For Petitioner: Denise Duque, Esquire
Department of Health
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For Respondent: H. Richard Bisbee, Esquire
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STATEMENT OF THE ISSUES

A. Did Respondents violate Florida Administrative Code Rules 64E-6.010(5) and (7) by dumping untreated septage

(untreated septic tank waste) onto the ground, instead of transporting it to an approved treatment facility?

B. Did Respondents commit gross negligence, incompetence, and/or misconduct by dumping untreated septage onto the ground in violation of rule 64E-6.022(1)(n)?

C. Did Respondents create a sanitary nuisance, exposing human and animal life to untreated human waste and endangering the public's health and safety by dumping untreated septage onto the ground in violation of rule 64E-6.022(1)(q)?

D. If Respondents committed any of the offenses described above, what penalties should be imposed?

PRELIMINARY STATEMENT

On July 27, 2012, Petitioner, Department of Health (Department), filed an Administrative Complaint seeking to revoke the septic contractor's registration of Respondent, Carlos M. Casanova, and the septage collection and disposal permits of Mr. Casanova and Busy Bee Septic, Inc. (Mr. Casanova and/or Busy Bee). On August 15, 2012, Mr. Casanova disputed the Department's proposed action and requested a formal administrative hearing. The Department referred the matter to the Division to conduct the requested hearing.

On November 1, 2012, the Division scheduled the hearing to begin December 11, 2012. The undersigned conducted the hearing as noticed. The parties appeared and were represented by

counsel. The Department presented testimony from Taylor Brown, John Hendrick, Laurie Hendrick, Richard Orth, and Barlow Smith. Department Exhibits 1 through 3, 6, 7, 9 through 11, 13, and 15 through 17 were entered into evidence. Mr. Casanova testified on his own behalf and offered no exhibits.

The parties ordered a Transcript, which was filed January 15, 2013. The parties timely filed proposed recommended orders. They have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Casanova is a registered septic tank contractor, registration no. SR0041469. Mr. Casanova is the qualifying registered septic tank contractor for Busy Bee Septic, Inc.

2. Mr. Casanova is authorized to provide septic tank contracting services through Busy Bee Septic, Inc., authorization no. SA0041225.

3. Permit no. 36-QA-29343, issued by Lee County Health Department, authorizes Busy Bee to provide septage collection and disposal services. The permit authorizes Busy Bee to pump out septic tanks and transport septage collected from the tanks to an authorized disposal site. The permit does not authorize treatment of septage. It also requires Busy Bee to dispose of the septage at a permitted wastewater treatment facility.

4. Carlos Casanova and Busy Bee are authorized to, and have provided, septic tank contractor services in Lee, Charlotte, and Collier Counties. The business operates 24 hours a day, seven days a week.

5. Mr. Casanova and Busy Bee own and operate three 4,000-gallon septage collection trucks. Each truck has a passenger cab with a large tank behind it.

6. Mr. Casanova delegates most field work to four male Busy Bee employees. Field work includes pumping septic tank contents into the trucks' tanks and transporting the septage to proper storage and disposal sites. Busy Bee is authorized to dispose of septage at Crews Environmental and Charlotte County Utility.

7. On June 15, 2012, at approximately 10:45 p.m., a Busy Bee truck parked pointing east on the north side of Jacaranda Boulevard in Cape Coral, Lee County, Florida. Individuals with the truck ran a hose from the truck's tank into the wooded area beside Jacaranda Boulevard and discharged untreated septage into the wooded area through the hose.

8. This is an area of palmetto and pine woods, with sandy soil. The water table lies about two feet below the surface.

9. The next day the area where the contents of the Busy Bee truck had been discharged smelled strongly of sewage. Sewage sludge and bits of toilet paper were visible on the ground and

palmetto fronds, along with marks in the dirt where the hose discharging the septage from the tanks had lain.

10. Four days later, the 20-by-30-foot wooded area where the Busy Bee truck pumped out septage was still saturated with sewage and sludge. Traces of toilet paper remained, and the area still smelled of sewage. The hose marks remained also.

11. The Busy Bee truck had discharged approximately 3000 gallons of septage into the area.

12. The septage was soaking down through the sandy, porous soil to the groundwater. Septage discharged like this is a sanitary nuisance dangerous to human and animal life. It exposes animals and humans to pathogenic viruses.

13. Eye witness testimony and photographs clearly and convincingly establish the presence of septage in the area alongside Jacaranda Boulevard. The same is true of the marks showing hoses had been run from the edge of the road to the area where the truck discharged the septage.

14. The fact that a Busy Bee truck discharged septage onto the ground beside Jacaranda Boulevard the night of June 15, 2012, is also established by clear and convincing evidence.

15. The evidence includes the very credible testimony of John Hendrick. The testimony of Laurie Hendrick corroborates his testimony. So, too, did photographs of the area where the septage was dumped and photographs of Busy Bee trucks.

16. On June 15, 2012, Mr. and Ms. Hendrick were taking an evening drive in the area, which is close to their home, as was their custom. They both saw the truck when they first passed it. At that time, the truck was turning around on a side street.

17. Mr. Hendrick was concerned when he saw the truck in a lightly populated residential area surrounded by wetlands. For this reason he drove past it again at the end of their drive to observe what the truck was doing and identify the name on the company's truck.

18. Mr. Hendrick focused on identifying the truck by reading the name painted on it. The name Busy Bee was prominently displayed on the truck.

19. Mr. Hendrick's testimony that Busy Bee was the name on the truck is credible, clear, and convincing for a number of reasons. He was paying close attention and concentrating on the name on the truck. Mr. Hendrick took the time needed to make sure he read the name. He slowed to 25 miles per hour to make sure that he could read the name.

20. Although it was an evening, it was a summer evening, and there was enough light, especially with the aid of the car headlights. Mr. Hendrick's memory is clear and is his own. No one suggested the name Busy Bee to him. His emails the next day, trying to draw the authorities' attention to the septage discharge, identified the truck as a Busy Bee truck.

21. Mr. Hendrick is also a trained observer. Before retiring, he worked 18-to-20 years in an emergency room where careful observation is an important skill.

22. There is no indication that Mr. Hendrick's eyesight is impaired. Mr. Casanova argues that Mr. Hendrick's eyesight is deficient, because Mr. Hendrick had not had his eyes tested in three years. No evidence establishes that a person whose eyesight has not been tested in three years presumptively has impaired vision.

23. Mr. Casanova also argues that because Mr. Hendrick expressed some uncertainty about the color scheme of the truck, his testimony about the name on the truck should be discounted. The argument is not persuasive. Mr. Hendrick focused on the name on the truck to make sure he could identify it. His memory of that focused observation is persuasive.

24. Mr. Casanova's efforts to create the impression that Mr. Hendrick may have observed a truck of a septic tank contractor in Collier County with the name Beebe Septic were not persuasive for a number of reasons. The reasons include the fact that the Beebe name is not painted on the trucks and the fact that nothing in the name Beebe Septic resembles the "Busy" in Busy Bee. Mr. Casanova's other efforts to undermine the testimony of Mr. Hendrick are equally unpersuasive.

25. Clear and convincing evidence proved that on the night of June 15, 2012, individuals operating a Busy Bee truck pumped untreated septage onto the ground adjacent to Jacaranda Boulevard in Cape Coral, Florida.

26. The odor, the presence of toilet paper, the physical characteristics of the sludge, and the fact that the Busy Bee trucks were designed and permitted for transporting untreated septage establishes by clear and convincing evidence that the septage was untreated.

27. The Department of Health has taken disciplinary action against Carlos Casanova three times in matters resolved by settlement agreements. The agreements expressly provide for consideration of them in subsequent disciplinary actions.

28. On February 13, 2012, the Department entered Final Order No. DOH-12-0251-FOI-HST against Carlos Casanova imposing an administrative fine in the amount of \$1,000.00 to resolve charges filed October 6, 2011. On February 13, 2012, the Department entered Final Order No. DOH-12-0252-FOI-HST against Carlos Casanova imposing an administrative fine in the amount of \$1,000.00 to resolve charges filed on November 18, 2011. Finally, on February 13, 2012, the Department entered Final Order No. DOH-12-0253-FOI-HST against Carlos Casanova imposing a fine in the amount of \$1,500 to resolve charges filed September 14, 2011.

CONCLUSIONS OF LAW

29. Sections 120.569 and 120.57(1), Florida Statutes (2012),^{1/} grant the Division jurisdiction over the subject matter of this proceeding and of the parties.

30. The Department seeks to impose penalties upon Mr. Casanova and Busy Bee. Therefore, the statutes and rules the Department charges were violated must be strictly construed, with ambiguities resolved in favor of Mr. Casanova and Busy Bee. Lester v. Dep't of Prof'l & Occupational Reg., 348 So. 2d 923, 925 (Fla. 1st DCA 1977). The Department must prove the charges specifically alleged in the Administrative Complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); McKinney v. Castor, 667 So. 2d 387, 388 (Fla. 1st DCA 1995); Kinney v. Dep't of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987).

31. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered,

"clear and convincing" . . . 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995) ("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

Violations Charged

32. Chapter 489, Part III, Florida Statutes, establishes regulation of septic tank contracting. Section 489.556 permits suspension or revocation of a certificate of registration upon a showing that the registrant has violated a provision of chapter 489, part III (regulating septic tank contracting), violated any lawful order or rule of the Department, or been found guilty of gross misconduct in the profession.

33. The Department charges Mr. Casanova and Busy Bee with three violations. The first is dumping untreated septage onto the ground, instead of transporting it to an approved treatment facility in violation of rules 64E-6.010(5) and (7). Rule

64E-6.010(5) requires a registered septic contractor to transport untreated septage or food establishment sludge to an approved treatment facility in such a manner as to preclude leakage, spillage, or the creation of a sanitary nuisance. The clear and convincing evidence proved that Mr. Casanova and Busy Bee disposed of untreated septage in the wooded area beside Jacaranda Boulevard. It further established that dumping the untreated septage in that area created a sanitary nuisance.

34. Rule 64E-6.010(7) prohibits application of untreated domestic septage or food establishment sludge to the land. It further provides that criteria for approved stabilization methods and the subsequent land application of domestic septage or other domestic onsite wastewater sludges shall be in accordance with the specified criteria for land application and disposal of domestic septage. The only relevant prohibition is the prohibition against disposal on land. There is no claim or evidence that the ground where the Busy Bee truck discharged its septage was an acceptable location for disposal of treated or untreated septage. The clear and convincing evidence proved this violation also.

35. The second charge is committing gross negligence, being incompetent, and/or committing misconduct by dumping untreated septage onto the ground in violation of rule 64E-6.022(1)(n). The clear and convincing evidence proved that the contents of the

Busy Bee truck were dumped on the ground. Clear and convincing evidence proves this charge.

36. The third charge is creating a sanitary nuisance, exposing human and animal life to untreated human waste, and endangering the public's health and safety by dumping untreated septage onto the ground in violation of rule 64E-6.022(1)(q).

Section 386.041(1)(a) states:

(1) The following conditions existing, permitted, maintained, kept, or caused by any individual, municipal organization, or corporation, governmental or private, shall constitute prima facie evidence of maintaining a nuisance injurious to health:

(a) Untreated or improperly treated human waste, garbage, offal, dead animals, or dangerous waste materials from manufacturing processes harmful to human or animal life and air pollutants, gases, and noisome odors which are harmful to human or animal life.

37. The strength and longevity of the sewage smell, the physical characteristics of the sludge, and the presence of toilet paper prove that the septage dumped from the Busy Bee truck was untreated. The clear and convincing evidence also establishes that Mr. Casanova and Busy Bee created a sanitary nuisance as defined in rule 64E-6.022(1)(q) and section 386.041(1)(a).

38. The Department has adopted Standards of Practice and Disciplinary Guidelines in rule 64E-6.022.

39. The provisions relevant here are:

Fla. Admin. Code R. 64E-6.022(1)(n)

Failure to properly treat or properly dispose of septage, holding tank waste, portable restroom waste, or food service sludge. First violation, letter of warning or fine up to \$500 per violation of Rule 64E-6.010, F.A.C.; repeat violation, revocation.

Fla. Admin. Code R. 64E-6.022(1)(q)

Creation or maintenance of a sanitary nuisance as defined by Section 386.041, F.S. First violation, letter of warning or fine up to \$500; repeat violation, 90 day suspension or revocation.

Fla. Admin. Code R. 64E-6.022(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.

Fla. Admin. Code R. 64E-6.022(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.

40. The violations proven in this case are repeat violations subjecting Mr. Casanova and Busy Bee to the stiffest penalties. The violation of failure to properly dispose of septage is a repeat violation requiring revocation under rule 64E-6.022(1)(n). The violation of creating or maintaining a sanitary nuisance is a repeat violation of a specific subsection

requiring at least a 90-day suspension. Fla. Admin. Code R. 64E-6.022(1)(q).

41. All three of Mr. Casanova's previous violations occurred in 2011. One, the violation in Final Order No. DOH-12-0253-FOI-HST was very similar to the violations here. In that case, Busy Bee was sanctioned for pumping untreated human waste into a grocery store's grease interceptor.

42. The history and timing of Mr. Casanova's offenses demonstrate that sanctions do not modify his behavior. Mr. Casanova and Busy Bee committed the offenses in this case a scant four months after entry of three final orders imposing a total of \$3,500 in fines. Given the opportunity for rehabilitation by the sanctions in the earlier offenses, Mr. Casanova and Busy Bee did not change.

43. The Department seeks revocation of Mr. Casanova's septic contractor registration and his septage collection and disposal permit. The offenses proven in this case are severe and create a danger to the public. The sanction of revocation will terminate Mr. Casanova's ability to make a living in the sewage treatment and transportation profession. It also, however, will terminate his ability to repeatedly violate governing rules and create damages to the public health. Revocation is the required sanction.

44. The Department seeks revocation of Busy Bee's collection and disposal permits. The offenses proven in this case are severe and create a danger to the public. The sanction of revocation will terminate Busy Bee's ability to engage in the business of septage collection and disposal. It also, however, will terminate the company's ability to repeatedly violate governing rules and create damages to the public health. Revocation is the required sanction.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health enter a final order revoking the septage collection and disposal permits of Petitioners, Carlos M. Casanova and Busy Bee Septic, Inc., and revoking the septic tank contractor registration of Carlos M. Casanova.

DONE AND ENTERED this 13th day of February, 2013, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of February, 2013.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2012),
unless otherwise noted.

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.