STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH
IN HERNANDO COUNTY,

Petitioner,

vs. Case No. 15-0664

ANTHONY CRESCENZO AND
JOHNS BY JOHN II, INC.,

Respondent.
_____/

RECOMMENDED ORDER

On April 24, 2015, Administrative Law Judge Lisa Shearer Nelson conducted an evidentiary hearing pursuant to section 120.57(1), Florida Statutes (2014), in Brooksville, Florida.

APPEARANCES

For Petitioner: Roland Reis, Esquire
Florida Department of Health
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For Respondent: Samuel Travis Lea, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether Respondents, Anthony Crescenzo and Johns by John II, Inc. (collectively, Respondents), violated Florida Administrative Code Rule 64E-6.022(1)(g), (k), (l)2., and (p), and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On January 5, 2015, Petitioner, Department of Health in Hernando County (the Department or DOH), filed an Administrative Complaint for Imposition of Administrative Fines against Respondents, charging them with violating rule 64E-6.022(1)(g), (k), (l)2., and (p), with respect to repair work performed at the home of Winston and Dianne Wescott. On February 2, 2015, Respondents executed an Answer to Administrative Complaint and Request for Hearing, in which they disputed the allegations in the Administrative Complaint and requested a hearing pursuant to section 120.57(1). The case was transmitted to the Division of Administrative Hearings on February 10, 2015, for the assignment of an administrative law judge.

The case was noticed for hearing to commence on April 24, 2015, and proceeded as scheduled. Petitioner presented the testimony of Winston Wescott, Dianne Wescott, Albert Gray, Steven Kataro, and Bart Hariss, and Petitioner's Exhibits A and C-K were admitted into evidence. Respondents presented the testimony of Anthony Crescenzo and Jeremiah Blake. The proceedings were recorded but no transcript was ordered. Accordingly, pursuant to Florida Administrative Code Rule 28-106.216(2), the parties were accorded 10 days from the date of the hearing to submit proposed recommended orders. Both parties timely filed post-hearing submissions, which were considered in the preparation of this

Recommended Order. All references are to the 2014 codification of the Florida Statutes unless otherwise specified.

FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of the standards for onsite sewage treatment and disposal systems (OSTDS), pursuant to chapters 381 and 489, Florida Statutes, and Florida Administrative Code Chapter 64E-6.

2. Respondent Anthony Crescenzo is a resident of the State of Florida and holds DOH registration number SR0061541, to provide septic tank contracting services in Florida.

3. Mr. Crescenzo owns and operates Johns by John II, Inc. (Johns by John), a Florida corporation located at 6252 Commercial Way, Weeki Wachee, Hernando County, Florida. Johns by John is authorized by the Department to provide septic tank services under Business Authorization number SA0041171.

4. Johns by John provides OSTDS services pursuant to rules adopted by the Department and under the license, registration, and direction of Anthony Crescenzo.

5. Winston and Dianne Wescott reside at 2245 Ring Road in Spring Hill, Florida, and have done so for approximately 19 years. Sometime in April 2014, Mr. Wescott noticed a depression and some saturated soil in his yard, near his septic tank. Mr. Wescott was concerned because of prior sink hole activity.

After some telephone calls and an inspection by the insurance adjuster, Mr. Winston called Johns by John. On or about Saturday, June 7, 2014, a worker from Johns by John came to the residence and pumped out the drainfield. At that time, waste was coming out of the ground but was not backing up into the home. After the pump-out was complete, Mr. Wescott showed the technician the depressed area, and an exposed area that revealed that the outlet pipe to the septic system's distribution box (D-box) was defective. The area had been exposed by either the insurance adjuster or the homeowner before the technician arrived. The technician telephoned Mr. Crescenzo, who advised that he would come out the following Monday or Tuesday to inspect the system and see what additional repairs were necessary. Mr. Wescott paid $205.72 for the pump-out of the drainfield.

6. On Wednesday, June 11, 2014, Mr. Crescenzo met with Mr. Wescott to assess what repairs were necessary. When he arrived, the homeowner had already dug around the area, leaving the tank and the D-box at least partially exposed. Mr. Crescenzo advised that a new drainfield might be necessary, but did not state that it was absolutely required. He also explained that the repair would require a permit, and that they would do what they could to repair, as opposed to replace, the existing system. Mr. Crescenzo also explained that because of the need to obtain a

permit, it might be four to six weeks before the job was completed.

7. Mr. Crescenzo prepared, and Mr. Wescott signed, a Work Order/Proposed Drainfield Estimate form. Under "Job Description," the following handwritten notation was provided:

> D-box collapsed down [illegible] point may have to replace entire system $2,500-$3,500. System will need to go in the front due to site conditions 4 bedroom house deposit required $1,000.

8. The preprinted text on the form provided the following statements in bold-faced type:

> *** NOT RESPONSIBLE FOR SPRINKLERS, WIRES, BROKEN PIPES, YARD, SOD OR DRIVEWAY DAMAGE**
> **Deposits are non-refundable.**

9. The form also provided for a 10-year warranty of any work performed. Although the language of the form is not clear, Mr. Crescenzo testified credibly that the warranty was applicable to repairs of the existing system as well as to replacement of the system. While the maximum the homeowner might have to pay is clearly indicated on the form, the costs of a repair short of replacement is not listed. Mr. Crescenzo testified that a $1,000 deposit is required for any job requiring a permit, as the permit itself is $300, and that he told the homeowner that he would not know the extent of the repair needed until he started the work.

10. Mr. Wescott signed the estimate. Despite the language on the estimate that a new drainfield may be needed, Mr. Wescott

understood that his drainfield would be replaced. While he admits signing it, he did not recall seeing the statement that deposits are non-refundable, notwithstanding that it is printed in bold type. His understanding appears to be based, in part, on a discussion between Mr. Wescott and Mr. Crescenzo about the continued vitality of the D-box. Mr. Wescott understood Mr. Crescenzo to say that the life of the septic system was approximately 19 years (the age of his home), and that if the drainfield was not replaced, the Wescotts would in all likelihood be calling him back in a matter of months to replace it because it was nearing the end of its expected life-span. He also understood Mr. Crescenzo to say that the D-box was obsolete and would not be replaced when the drainfield was replaced.

11. Mr. Crescenzo, on the other hand, testified that he always maintained that they would try to repair the existing drainfield but may have to replace it. In the event that the system was replaced, D-boxes are no longer used and the existing one would not be replaced. Mr. Crescenzo denied stating that the life of a drainfield is 19 years, stating that drainfields do not have a standard life expectancy.[1/] Mr. Crescenzo also emphasized that the work performed, whether a repair to the existing drainfield or a replacement, was subject to a 10-year warranty, thus making any statement that the company would just have to come

back in a few months nonsensical. Mr. Crescenzo's testimony is credited.

12. Mr. Crescenzo applied for a permit on June 18, 2014, which costs $300. The permit application was to repair or replace the distribution box, not to replace the drainfield, and noted that the D-Box had collapsed. Mr. Crescenzo stated on the application that it may be possible to fix the D-Box and remove roots.

13. The permit was issued for OSTDS repair on June 20, 2014. According to Stephen Kataro, an engineer for the septic tank program for Hernando County who approved the application and inspected the repair, the permit gave the option to replace the drainfield if necessary, based upon what was found during the repair. This approval is consistent with Department policy.

14. On approximately July 3, 2014, Jeremiah Blake, a technician for Johns by John, went to the Wescott home to work on the septic system. Mr. Blake drove a Johns by John truck equipped with the standard equipment to install a drainfield. When he arrived at the home, the system was already uncovered. Mr. Blake discussed the repairs with Mr. Wescott, stating that he could do the drainfield or fix the D-Box. He determined that replacement of the outlet pipe leading to the D-Box addressed the problem, and that there was no need to replace the drainfield, as all drains were taking water. Mr. Blake completed the repair and used

Mr. Wescott's garden hose with a jet-spray nozzle to spray inside the D-Box and clean out the lines.

15. There is an alternative repair method referred to as "jetting" that requires a separate permit that Respondents did not obtain. Jetting requires specialized equipment that Respondents do not own. The unrebutted testimony of both Mr. Wescott and Mr. Blake is that Mr. Blake used a simple garden hose to clear the lines. He is familiar with what the Department refers to as jetting, but has never operated jetting equipment. He uses the term "jetting" because it is an easier way to describe what he does with a simple garden hose to clear the D-Box of sand.

16. When Mr. Blake replaced the pipe leading to the D-Box, he broke sprinkler lines in the area. Sprinkler lines are often, if not always, damaged in OSTDS repairs.

17. Respondents had arranged the day before for a timed inspection, for which they paid an additional fee. The purpose of a timed inspection is to be able to complete the job and have it inspected as soon as it is finished. Mr. Kataro came out to the property at approximately 9:00 a.m., inspected the work performed, determined that it met permit requirements to restore function, and approved it.[2/] Mr. Kataro left the site before Mr. Blake covered the system, consistent with standard practice. While Mr. Wescott was present when Mr. Kataro arrived to inspect the

work, there was no testimony to indicate Mr. Wescott advised the inspector that he was unhappy with the scope of work performed.

18. Mr. Blake had a backhoe on the premises for use in covering the area. He testified that he covered the system, including the broken sprinkler pipes, and that he always does so and then notifies the homeowner about the need to fix the sprinkler pipes. Both Mr. Blake and Mr. Wescott testified that Mr. Wescott asked Mr. Blake to remove some sod for him nearby, and paid him cash for doing so. According to Mr. Blake, Mr. Wescott seemed satisfied at this point. It seems inconceivable that Mr. Wescott would be willing to pay additional funds for Mr. Blake to remove sod if he had not covered the system he was supposed to cover and if he was unhappy with the work (or lack of work) performed, and yet not say anything to Mr. Blake about covering the completed repair.

19. Mr. Wescott expected that since the drainfield was not replaced, he would receive some portion of the $1,000 he paid back. Had he realized that the repair would cost that much, he would have gotten estimates from other contractors. He viewed replacing the drainfield as preventative maintenance. Based on this belief, after Mr. Blake left the premises, Mr. Wescott called Mr. Crescenzo and asked about a refund. He did not complain, however, about the system not being covered. Mr. Crescenzo

informed him that there would be no refund, as the work order clearly indicates that deposits are non-refundable.

20. The Wescotts called the Johns by John office to get an itemized receipt for insurance purposes. There was some delay in receiving a receipt, so they went to the office to obtain it in person. Initially, they were given a receipt stating that the D-box had been replaced. When they questioned this and told the person working in the office that the D-box had not been replaced, she made some phone calls to verify the work performed. The office worker prepared a new receipt while speaking to someone, presumably Jeremiah Blake, on the phone. The new receipt stated, "connected tank to distribution box. Leveled D-Box to drainfield. Jetted drainfield lines." The change in the description appears to have occurred more because the person working in the office misunderstood the scope of work performed, rather than any nefarious intent to defraud. Further, the reference to jetting was consistent with both Mr. Blake and Mr. Crescenzo's shorthand notation for cleaning the line with the garden hose, as opposed to the alternative repair method requiring additional permitting.

21. As noted in paragraph 16, the sprinkler lines were broken during the repairs. Mr. Wescott replaced the broken pipes, and placed bricks underneath them to hold them in place. He was still unhappy about not having a new drainfield in place, and felt that he had been defrauded. On August 4, 2014, Mr. Wescott filed

a complaint with Albert Gray, the Environmental Manager at the Department. At the very end of his two-page letter, Mr. Wescott stated that the broken irrigation pipes have been repaired and the hole is still wide open with the tank cover exposed.

22. The Department does not regulate the prices to be charged for repairs or installation of new systems: that is between the contractor and the homeowner. There is more involved to complete the job than the time that the workman is on the premises actually performing the repair. For example, in addition to the cost of the permit application, additional time is necessary to perform a site evaluation and soil test. Whether or not the drainfield must be replaced, the materials must be available to install should it be necessary, as well as the skilled workman and equipment (truck, backhoe, etc.). Further, it is clear that, had Respondents installed a new drainfield, the cost would have been much higher than what the Wescotts actually paid, not only to pay for the drainfield, but also to replace a large section of sod and a larger portion of the sprinkler system.

23. Regardless of whether a new drainfield is installed, contractors are required to cover the OSTDS when they work on it.

24. As a result of the Wescott's complaint, Inspector Kataro went back out to the Wescott home to inspect the site. He found that the D-Box was lying open and exposed, with no earth covering

the system. He took pictures of the area, which were admitted into evidence as Petitioner's Exhibits J and K.

25. The pictures show two exposed sprinkler pipes, supported at one end by bricks. One picture shows a bucket positioned over the distribution box, while the other shows the box sealed but not covered.

26. Mr. Kataro testified that the pictures look similar to what he saw when he inspected the property after the repair was completed in July 2014. However, he could not say whether the sprinkler system pipes were broken before, or whether the bricks supporting the pipes were there previously. The testimony is clear that, after the job was inspected, Mr. Wescott made repairs to the sprinkler system that would require the area to be uncovered and Mr. Wescott acknowledged that he placed the bricks under the sprinkler pipes. Mr. Kataro recalled that Mr. Blake had a backhoe on the premises at the time of repair, but Mr. Kataro left the site before the area would have been covered.

27. There is credible testimony that Mr. Blake covered the area and credible testimony that he did not. Other evidence presented is more consistent with a finding that the area was covered, at least minimally. The equipment for covering the area was by all accounts on site, and Mr. Blake used that equipment to remove sod for Mr. Wescott. It makes little sense for him to use the equipment to remove the sod but not use it for covering the

D-Box and surrounding area. Moreover, had Mr. Blake covered the area, it would have to be uncovered to fix the sprinkler pipes. The Department did not prove by clear and convincing evidence that Mr. Blake, as an agent of Respondents, failed to cover the D-box.

28. Respondent Crescenzo happened to be at the Department on August 14, 2014, picking up permits when he learned of the complaint from Mr. Wescott. He was very upset about the complaint and immediately wrote a response while still at the Department. In his response, he denied stating that the drain field would definitely be replaced, and emphasized that by repairing the pipe leading to the D-Box the homeowner saved a substantial amount of money, including not only the cost of installing the drain field, but the re-sodding of his yard and more substantial repair of his sprinkler system. Although clearly unhappy about the complaint, Respondent Crescenzo stated, "If the homeowner wants the system just replaced they should have said that at the time of the job. Or we could still do it if they insist for the original agreed price." Mr. Wescott has not elected to accept Respondents' offer. In his response, Crescenzo also referred to "jetting," but used it in the same informal manner as Mr. Blake. His informal reference did not change the unrebutted testimony regarding the scope of work performed.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes.

30. The Department has disciplinary jurisdiction over septic tank contractors pursuant to the provisions of chapters 381 and 489, part III, Florida Statutes.

31. As the entity seeking to impose discipline, the Department bears the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Bank. & Fin. v. Osborne Stern Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

32. Clear and convincing evidence "requires 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). As stated by the Florida Supreme Court:

> Clear and convincing evidence requires 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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 Henson, 913 So. 2d 579, 590 (Fla. 2005)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elect. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1991).

33. Section 381.0065, Florida Statutes, provides the Department the following regulatory authority:

> (3) DUTIES AND POWERS OF THE DEPARTMENT OF HEALTH.--The department shall:
>
> (a) Adopt rules to administer ss. 381.0065-381.0067, including definitions that are consistent with the definitions in this section,
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> * * *
>
> (h) Conduct enforcement activities, including imposing fines, issuing citations, suspensions, revocations, injunctions, and emergency orders for violations of this section, part I of chapter 386, or part III of chapter 489 or for a violation of any rule adopted under this section, part I of chapter 386, or part III of chapter 489.
>
> * * *
>
> (5)(b)1. The department may issue citations that may contain an order of correction or an order to pay a fine, or both, for violations of ss. 381.0065-381.0067, part I of chapter 386, or part III of chapter 489 or the rules adopted by the department, when a violation of these sections or rules is enforceable by an administrative or civil remedy, or when a violation of these sections or rules is a misdemeanor of the second degree. A citation issued under ss. 381.0065-381.0067, part I of

chapter 386, or part III of chapter 489 constitutes a notice of proposed agency action.

2. A citation must be in writing and must describe the particular nature of the violation, including specific reference to the provisions of law or rule allegedly violated.

3. The fines imposed by a citation issued by the department may not exceed $500 for each violation. Each day the violation exists constitutes a separate violation for which a citation may be issued.

4. The department shall inform the recipient, by written notice pursuant to ss. 120.569 and 120.57, of the right to an administrative hearing to contest the citation within 21 days after the date the citation is received. The citation must contain a conspicuous statement that if the recipient fails to pay the fine within the time allowed, or fails to appear to contest the citation after having requested a hearing, the recipient has waived the recipient's right to contest the citation and must pay an amount up to the maximum fine.

5. The department may reduce or waive the fine imposed by the citation. In determining whether to reduce or waive the fine, the department must consider the gravity of the violation, the person's attempts at correcting the violation, and the person's history of previous violations including violations for which enforcement actions were taken under ss. 381.0065-381.0067, part I of chapter 386, part III of chapter 489, or other provisions of law or rule.

* * *

8. This section provides an alternative means of enforcing ss. 381.0065-381.0067, part I of chapter 386, and part III of chapter 489. This section does not prohibit

> the department from enforcing ss. 381.0065-381.0067, part I of chapter 386, or part III of chapter 489, or its rules, by any other means. However, the department must elect to use only a single method of enforcement for each violation.

34. The Administrative Complaint in this case alleges that the Respondents violated rule 64E-6.022(1)(g), (k), (l)2., and (p). The pertinent portions of rule 64E-6.022 provide as follows:

> (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.
>
> * * *
>
> (g) Abandoning for 30 consecutive days, without good cause, a project in which the contractor is engaged or under contractual obligation to perform. First violation, letter of warning or fine up to $500; repeat violation, revocation.
>
> * * *
>
> (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:

* * *

> 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.
>
> * * *
>
> (p) Installation, modification, or repair of an onsite sewage treatment and disposal system in violation of the standards of Section 381.0065 or 381.00655, F.S., or Chapter 64E-6, F.A.C. First violation, letter of warning or fine up to $500 per specific standard violated; repeat violation, 90 day suspension or revocation.

35. The evidence is not clear and convincing that Respondents abandoned the job for 30 consecutive days without good cause, in violation of rule 64E-6.022(1)(g). The evidence presented indicates that the work order was signed on June 11; a permit application was filed on June 18; the permit was obtained on June 20; and Respondents finished the repair, which passed inspection that same day, on July 3, 2014. The evidence did not demonstrate that Respondents promised to replace the drainfield, but rather informed the homeowner that it might be required. Respondents were not under an obligation to replace the drainfield if it was not necessary.

36. The evidence does not demonstrate by clear and convincing evidence that Respondents committed fraud or deceit, or made misleading or untrue representations in violation of rule 64E-6.022(1)(k). To prove this violation, the Department must

prove that Respondents acted with fraudulent intent. Morris v. Dep't of Prof'l Reg., 474 So. 841, 843 (Fla. 5th DCA 1985); see also The Florida Bar v. Brown, 978 So. 2d 107, 111 (Fla. 2008). Credible proof of intent to deceive is lacking here. The estimate clearly states, consistent with Mr. Crescenzo's testimony, that he advised the Wescotts that the drainfield might need to be replaced, not that it was required. His application for a repair permit is consistent with this representation. It appears, from the totality of the evidence, that the situation presented is more the result of a misunderstanding than a deliberate attempt to misrepresent.

37. Similarly, the confusion regarding the receipt for the work performed appeared to be more the result of confusion by the person working in the office about what work was completed, than a deliberate attempt to deceive.

38. Likewise, the evidence does not demonstrate gross negligence, incompetence, or misconduct in violation of rule 64E-6.022(1)(l)2. The Department has not demonstrated that any of the work performed was done negligently: in fact it passed inspection. Respondents contracted to repair the septic system, up to and including the replacement of the drainfield if necessary. It did not turn out to be necessary, which resulted in both less work (and less profit) for the Respondents and less cost for the homeowner. Moreover, once the Wescotts filed their

complaint, Respondents offered to install a drainfield at the original quoted price, and the homeowners declined.

39. Finally, the evidence did not indicate that Respondents installed, modified, or repaired an OSTDS in violation of the standards of chapter 64E-6. As a preliminary matter, it would have been helpful had the Administrative Complaint provided notice of just what standards were in play. While the Department's Proposed Recommended Order discusses the provisions of sections 386.01 and 386.041(1)(a) and (b) regarding the definitions of "sanitary nuisance," those provisions are not referenced in the Administrative Complaint. Further, while the Department's Proposed Recommended Order speaks in terms of contaminated groundwater and its ability to be carried or spread to nearby neighboring properties, wetlands, well sites, or other home sites, no evidence was presented regarding these possibilities. It is assumed, given the evidence presented and the wording of the Administrative Complaint, that the alleged failure is the failure to cover the system following the repair in violation of rule 64E-6.014(5)(f).

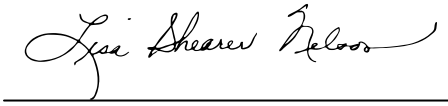
40. This charge comes down to two people telling sharply divergent stories regarding the same encounter. As noted in paragraph 18, it makes no sense that Respondents would have failed to cover the D-box, given that they brought equipment to the home for that purpose and Mr. Blake used that equipment to

perform additional work for the homeowner while he was there. Given the heightened burden of proof required of the Department, clear and convincing evidence was not presented on this issue.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health enter a Final Order dismissing the Administrative Complaint.

DONE AND ENTERED this 21st day of May, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of May, 2015.

ENDNOTES

[1/] Wescott's testimony was based on what he believed Respondent told him, and Crescenzo credibly testified that there is no standard life span for a drainfield. The Department presented no testimony to establish whether there is a standard life span for a drainfield, and if so, whether 19 years would be a reasonable time.

[2/] The Wescotts found it difficult to believe that a single person could replace a drainfield alone in such a short time, and

that the arrangement for a timed inspection at 9:00 a.m. indicated that Respondents never intended to replace the drainfield. However, the unrebutted testimony is that Mr. Blake usually worked alone, and preferred to do so. Further, Inspector Kataro confirmed that Mr. Blake usually works alone and could install a drainfield in an hour if it was an easy job. According to Mr. Kataro, "he hustles."

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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.