STATE OF FLORIDA
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,
Petitioner,
vs.

DOAH Case No.: 15-004461

ELITE INSPECTORS, LLC, d/b/a ELITE INSPECTORS.COM; TAMER KEKEC; AND STEPHEN FRANCO,

Respondents.
_____/

FINAL ORDER

THIS CAUSE arising under the Florida Structural Pest Control Act, Chapter 482, Florida Statutes, came before the Commissioner of the Florida Department of Agriculture and Consumer Services ("the Department") for consideration and final agency action. The Commissioner of Agriculture and Consumer Services, as head of the Department, has jurisdiction over the subject matter and the parties.

BACKGROUND

This case commenced when the Department Served upon the Respondents a July 13, 2015, administrative complaint asserting: that the Respondents had violated Sections 482.071(1) and 482.165(1), Florida Statutes, by engaging in the business of pest control without a license; that Respondent, ELITE INSPECTORS, LLC, D/B/A ELITEINSPECTORS.COM violated Section 482.161(1)(h), Florida Statutes, by engaging in misleading advertising relating to pest control; and that Respondents, TAMER KEKEC and STEPHEN FRANCO, violated Section 482.091(2)(a), Florida Statutes, by conducting Wood Destroying Organism (WDO) inspections as independent contractors.

The Respondents filed with the Department a timely request for a formal hearing on July 30, 2015, and argued that the Individual Respondents were not independent contractors, but were in fact employees of Florida Quality Service, Inc d/b/a DL (DL), a licensed pest control company.

The Department referred the case to the Division of Administrative Hearings on August 12, 2015. During discovery, the Department voluntarily dismissed charges against certain other persons, and the case proceeded on a Fourth Amended Complaint filed October 20, 2015, naming the Respondents herein.

At the hearing, the Department presented the testimony of Mr. Tamer Kekec and the Respondents presented the testimony of Mr. Kekec and Mr. William Miles. The Parties' Joint Exhibit J1, the Department's Exhibits P1 through P5 and P7 through P11, and the Respondents' Exhibits R9 and R10 were admitted in evidence. The Respondents also proffered Exhibit R2 that was not admitted in evidence.

The parties requested, and were granted, leave to file proposed recommended orders 30-days from the date the transcript was filed. The record was held open for five-days following the hearing for Elite to submit late-filed Exhibits R11 and R12.

POST HEARING PROCEDURAL HISTORY

A one-volume Transcript of the proceedings was filed on January 15, 2016. On February 15, 2016, the ALJ granted the Respondents' unopposed request for a two-day extension of time to file a proposed recommended order. Both parties timely filed Proposed Recommended Orders.

The ALJ entered the Recommended Order on March 22, 2016. On April 15, 2016, the Respondents filed Exceptions to the Recommended Order. The Department did not file Exceptions to the Recommended Order or responses to the Respondents' exceptions.

The record consists of all notices, pleadings, stipulations, motions, intermediate rulings, evidence admitted and matters officially recognized, the transcript of the proceedings, proposed findings and exceptions the Recommended Order.

STANDARD OF REVIEW

Section 120.57(1)(l), Fla. Stat., dictates the applicable standard regarding "findings of fact." The Department is therefore bound to accept the ALJ's findings of fact unless, after a thorough review of the record, there exists no competent substantial evidence to support the findings. Id. See also Charlotte Cnty. v. IMC Phosphates Co., 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009); Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). Additionally, the Department cannot modify or substitute new Findings of Fact if competent substantial evidence supports the ALJ's findings. Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604, 605 (Fla. 1st DCA 2006); Gross v. Dep't of Health, 819 So. 2d 997, 1004 (Fla. 5th DCA 2002). The Florida Supreme Court described "competent substantial evidence" as follows:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as a conclusion, Becker v. Merrill, 155 Fla. 379,20 So. 2d 912 [Fla. 1943] ... We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.' Schwartz, American Administrative Law, p.88; The Substantial Evidence Rule by Malcolm Parsons, Fla. Law Review, Vol. IV, No.4, pA81; United States Casualty Co. v. Maryland Casualty Co., Fla. 1951, 55 So. 2d 741; Consolidated Edison. Co. of New York v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 [1938].

DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (citation omitted), followed by, Schrimsher v. Sch. Bd. of Palm Beach Cnty., 694 So. 2d 856 (Fla. 4th DCA 1997). "Competent substantial evidence" does not refer to the weight or probative value of the evidence but solely to the existence and admissibility of that evidence. Scholastic Book Fairs. Inc. v. Unemployment

Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); Dunn v. State, 454 So. 2d 641, 649 (Fla. 5th DCA 1984).

Findings of fact that are actually Conclusions of Law should be treated as Conclusions of Law despite any mislabeling. Battaglia Props. Ltd. v. Fla. Land and Water Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1993); Kinney v. Dep't of State, 501 So. 2d 129, 132 (Fla. 5th DCA 1987). Unlike Findings of Fact, Conclusions of Law may be modified or rejected by the Department and differing interpretations applied. Barfield v. Dep't of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001); IMC Phosphates, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009).

EXCEPTIONS TO THE RECOMMENDED ORDER

The Respondents filed twenty (20) exceptions to the Recommended Order. The Petitioner filed none. In determining how to rule on the exceptions and whether to adopt the Administrative Law Judge's (ALJ) Recommended Order in whole or in part, the Department must follow Section 120.57(1)(l), Florida Statutes, which provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action. Section 120.57(1)(l), Florida Statutes.

Section 120.57(1)(k), Florida Statutes, provides that:

> "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Section 120.57(1)(k), Florida Statutes.

In accordance with these legal standards, the Department makes the following rulings on the Respondents' exceptions:

RESPONDENTS' EXCEPTIONS

The Respondents' exceptions (in bold) are quoted in toto and the corresponding paragraphs from the Recommended Order (in italics) are quoted in toto.

Exception 1. – "Exception is taken to paragraph 9 on page 6 of the Recommended Order which asserts that Mr. Franco performed 99 WDO inspections for Elite and further that during that time frame Elite billed its customers $6,850 for WDO inspections performed by Mr. Franco. Paragraph 11 further states that "All customer payments for WDO inspections conducted by the individual Respondents were deposited into Elite's business banking account. The statement appears at paragraph 11, page 6. Exceptions is taken to both paragraphs 9 and 11 as it ignores the fact that Elite was a customer of DL and Elite paid DL a flat fee for WDO inspections and inspection reports. Additionally, customers of Elite were billed for DL's WDO inspection reports and the figure of $6,850 pertains to payments made by customers for inspection reports which expense was a line item in an overall bid or charge to the customer which included both the regular house inspection fee as well as the WDO inspection report. These expenditures clearly fall within the exception to pest control set forth in paragraph 6 of the Recommended Order which references section 482.021(22)(e) which states in pertinent part "... but does not include the solicitation of the bid from a licensee to be incorporated in an overall bid by an unlicensed primary contracted to supply services to another."'"

9. Between January 3 and April 10, 2014, Elite, through its member Mr. Franco, performed 99 WDO inspections, in addition to residential structural inspections, for its customers. During that timeframe, Elite billed its customers $6,850.00 for WDO inspections performed by Mr. Franco.

11. All customer payments for WDO inspections conducted by the Individual Respondents were deposited into Elite's business banking account with BBVA Compass Bank.

Ruling on the Exception: The Respondents argue that the ALJ's findings do not acknowledge that Elite is a customer of DL and attempt to use the ALJ's findings as proof of this conclusion. The Respondents are not contesting the ALJ's findings, but appear to be attempting to make a legal argument. The Respondents have not alleged that the findings outlined in

paragraphs are not based on competent, substantial evidence. The Department finds that there is competent, substantial evidence to support this finding. The Department overrules this exception.

Exception 2. – "Exception is taken to paragraph 20 on page 8 of the Recommended Order which erroneously alleges that Elite conducted WDO inspections for its clients."

20. Following issuance of employee-identification cards to the Individual Respondents, Elite continued to conduct WDO inspections, as well as residential inspections, for its clients, and bill those clients for WDO inspections. All payments received by Elite from its customers for whom it conducted WDO inspections were deposited into Elite's business bank account.

Ruling on the Exception: The Respondents argue that the individuals for whom Elite conducted WDO inspections were not clients of Elite. The ALJ found, after review of the evidence presented, that the individuals for whom Elite conducted WDO inspections were clients of Elite. The Department finds that there is competent, substantial evidence to support this finding and overrules this exception.

Exception 3. – "Exception is taken to paragraph 22 on page 8 of the Recommended Order is it references billing to "customers" of Elite for WDO inspections rather than reports. Inspections themselves were billed by Elite to DL. There is no evidence of record to show that the customers of Elite paid for anything other than a written WDO inspection report."

22. Elite continued to conduct WDO inspections for its customers, bill its customers for those WDO inspections, and accept payment for those WDO inspections, in 2015 as it had in 2014.

Ruling on the Exception: The Respondents argue that the individuals for whom Elite conducted WDO inspections were not customers of Elite. After reviewing the evidence presented, the ALJ found that the individuals for whom Elite conducted WDO inspections were customers of Elite. The Department finds that there is competent, substantial evidence to support this finding and overrules this exception.

Exception 4. – "Exception is taken to paragraph 23 which indicates that Elite rather than Kekec or Franco set the price per inspection in their capacity as identification card holders of DL. Exception is also taken to paragraph 23 as it extends to page 9 indicating that "Elite provided the ladders, flashlight, screwdrivers, probes etc. to the extent that this finding is to be taken more than literally. This finding ignores testimony to the effect that these items

were physically provided by Elite to the individual Respondents but were provided as a contractual obligation with DL as testified to by Respondents."

23. Elite obtained customers through its website, and through referrals from both previous customers and real estate agents. Elite's customers scheduled their home and WDO inspections directly with Elite through Mr. Kekec or Mr. Franco. Elite set the price per inspection based upon the size, age, and the type of construction of the customer's property. Elite provided the ladders, flashlights, screwdrivers, extension probes, and, with the exception of a short period in 2015, the vehicle, used by the Individual Respondents to conduct WDO inspections. When Elite did not provide the vehicle for a brief period in 2015, Elite used a vehicle personally owned by Mr. Kekec.

Ruling on the Exception: The Respondents argue that the individual Respondents set the prices for their WDO inspection prices rather than their company Elite. The ALJ found, after review of the evidence presented, that Elite set the price of the inspection. The Department finds that there is competent, substantial evidence to support this finding and overrules this exception.

The Respondents also argue that the ALJ's finding ignores testimony that Elite provided the inspection equipment to the individual Respondents as part of a contractual obligation with DL. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondents have failed to do so in support of their argument. The Department's review of the record did not find evidence to support the Respondents' claim. The Department finds that there is competent, substantial evidence to support this finding and overrules this exception.

Exception 5. – "Exception is taken to paragraph 30 appearing on page 10 of the Recommended Order. Although there was an issue as to "supervision" the issue of ongoing training, did not become apparent until at or after the hearing. Parenthetically, evidence i.e. testimony of the Respondents specifically indicates that the individual Respondents received the continuing education course work required of all identification cardholders under Florida Statute 482."

30. Whether DL provided ongoing training in WDO inspections to the Individual Respondents was a contested issue at hearing. Respondents attempted to introduce a composite exhibit consisting of two manuals, two posters of termites, and a "flip-book" produced by University of Florida.

Ruling on the Exception: Paragraph 30 is a summation of events from the proceeding. Section 120.57(1)(k), Florida Statutes, requires exceptions to "state the legal basis for the exception" and "appropriate and specific citations to the record" and the Respondents have failed to do so in support of their argument. The Department finds that there is competent, substantial evidence to support this finding and overrules this exception.

Exception 6. – "Exception is taken to paragraph 31 which asserts that evidence was not clear whether DL provided the manuals to the individual Respondents or were they obtained by other means. Mr. Miles the Certified Operator of DL testified that he had actually been responsible for drafting them. Exception is taken to paragraph 31 which appears on page 10 and 11 of the Recommended Order. Specific testimony Richard Miles was provided indicating that the basic continuing education requirements which the Department imposes upon all identification cardholders was in fact provided by DL. Additional training included review of WDO inspection reports also constituted an important part of training and supervision. This was acknowledged, specifically, in the deposition testimony of the Department's interim head Kelly Friend. Additionally, it would seem that the burden is upon the Department to prove by clear and convincing proof that there was no relevant training taking place. Furthermore, it is unclear what the nature of that training should look like given the fact that most of the training otherwise applicable to identification card holders who are applying pesticides and fumigants would simply not apply to the individual Respondents in this cause. This finding is inconsistent with the evidence, legally confused, and otherwise incorrect."

31. When asked whether DL provided the manuals to Mr. Kekec, he testified, "[W]ell, the last version of the manuals, I believe it was provided in 2013, but I think there was four or five different versions of it. It's been updated over the years." The evidence was not clear whether DL provided the manuals to the Individual Respondents or they were obtained by other means. Even if the manuals were provided by DL to the Individual Respondents, there is insufficient evidence to find that DL provided any ongoing relevant training to the Individual Respondents.

Ruling on the Exception: The Respondents argue that the ALJ's finding that the evidence was not clear as to whether DL provided the manuals to the Individual Respondents. The Respondents cite (without a specific citation) testimony by Mr. Miles that he drafted the documents. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondent has failed to do so in support of their argument. Even if Mr. Miles did draft the documents, the Respondents have not cited any portion of the record to contradict the ALJ's finding that it was unclear that DL provided the

manuals to the Individual Respondents. After a review of the record, it does not appear that this finding was not based on competent, substantial evidence. The Department overrules this exception.

The Respondents also argue, by referencing (without a specific citation) testimony by Mr. Miles, that DL provided all identification cardholders with the basic continuing education required by the Department as evidence that DL provided any ongoing relevant training to the Individual Respondents. In the Agreed Pre-Hearing Stipulation Section (e) Paragraph 9, the Petitioner stipulated that the Individual Respondents met the training requirements to permit a pest control identification cardholder employee of a licensed pest control company to perform a wood destroying organism (WDO) inspection. However, the Petitioner disputed that they were authorized to have an identification card and perform pest control because they were independent contractors. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondent has failed to do so in support of their argument. After a review of the record, it does not appear that this finding was not based on competent, substantial evidence. The Department overrules this exception.

Exception 7. – "Exception is taken to paragraph 33 appearing on page 11 of the Recommended Order which suggests that the only equipment issued to the Respondents was a magnifying glass. Again if the term issued is meant to describe the act of physically handing an item from one person to the next then it is correct. The more pertinent meaning and context of this finding is objected to because it ignores the fact that Elite was obligated to provide equipment based upon its contractual agreement with DL."

33. The only equipment issued to the Individual Respondents by DL for their use in conducting WDO inspections was a magnifying glass.

Ruling on the Exception: The Respondents argue that the ALJ's finding that DL only provided a magnifying glass to the individual Respondents is incorrect without a finding that the equipment was provided as a contractual obligation with DL. The Respondents are not contesting the ALJ's findings, but appear to be attempting to make a legal argument. The

Respondents have not alleged that the findings outlined in paragraph 33 are not based on competent, substantial evidence. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondent has failed to do so in support of their argument. After a review of the record, it does not appear that this finding was not based on competent, substantial evidence. The Department overrules this exception.

Exception 8. – "Exception is taken to paragraph 38 to the extent that DL was identifiable and it did indicate that DL would be responsible for performing the WDO inspections and inspection reports which in fact were provided to customers of Elite. This exception pertains to paragraph 38 at page 12 of the Recommended Order."

38. The website did not identify what DL was or its relationship with either Elite or its managers, Mr. Franco and Mr. Kekec.

Ruling on the Exception: The Respondents argue that ALJ's finding is incorrect regarding the identification of DL and its relationship with Elite and the Individual Respondents. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondent has failed to do so in support of their argument. After a review of the record, it does not appear that this finding was not based on competent, substantial evidence. The Department overrules this exception.

Exception 9. – "Exception is taken to paragraph 45 appearing at page 14 the Recommended Order as it ignores the fact that the line item for WDO inspection reports was incorporated into a larger billing to wit: "a bid" within the meaning of the word in the applicable Statute."

45. Thus, Petitioner proved that Respondent Elite violated 482.071(1) and 482.165(1).

Ruling on the Exception: In taking exception to the above conclusion of law, the Respondents argue that the inclusion of the billing of a WDO inspection report as a line item in a larger billing report is the equivalent of a bid "within the meaning of the word in the applicable Statute." Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondent has failed to do so in support of their argument. Further, the Respondents do not explain their reference to the "applicable statute."

The Department's review of the statutes cited in Paragraph 45 do not include the term "bid" or even reference billing requirements. The Department finds that there is no basis for the rejection or modification of this conclusion of law and overrules this exception.

Exception 10. – "Exception is taken to paragraph 48 appearing at page 14 the Recommended Order. This statement is in fact contradicted by subsequent paragraph 49 which does acknowledge that the website mentions that WDO inspections are performed by DL employees."

48. At all times relevant hereto, Elite advertised on its website that it offered WDO inspection services, and that WDO inspections was an area of expertise for the company. Further, Elite advertised, "[W]e perform the WDO inspection while performing the home inspection so an additional step can be eliminated, which saves time and money."

49. While the website mentioned that WDO inspections are "performed by DL employees," the website did not identify or describe DL or its relationship with Elite.

Ruling on the Exception: The Respondents argue that Paragraph 49 contradicts Paragraph 48. The Respondents have not alleged that the findings outlined in the paragraphs are not based on competent, substantial evidence. The Department finds that there is competent, substantial evidence to support this finding and overrules the exception to this conclusion of law.

Exception 11. – "Exception is taken to paragraph 56 appearing at page 16 to the extent that it purports to allege a statutory violation against identification cardholders for "for not operating out of and for customers assigned from the licensee's license business location.""

56. Section 482.091 (2)(a) provides as follows:

> *An identification cardholder must be an employee of the licensee and work under the direction and supervision of the licensee's certified operator in charge and shall not be an independent contractor. An identification cardholder shall operate only out of, and for customers assigned from, the licensee's licensed business location. An identification cardholder shall not perform any pest control independently of and without the knowledge of the licensee and the licensee's certified operator in charge and shall perform pest control only for the licensee's customers.*

Ruling on the Exception: The Respondents argue that Paragraph 56 alleges a statutory violation. Paragraph 56 is a restatement of a statutory provision. The Respondents have not alleged that the findings outlined in paragraph 56 are not based on competent, substantial

evidence. The Department finds that there is competent, substantial evidence to support this conclusion of law, which is based upon the entire record and overrules this exception.

Exception 12. – "Respondents note their exception to paragraph 58 appearing on page 17 of the Recommended Order which describes the relationship between DL and Elite as a "sham arrangement". It is asserted that the so-called sham arrangement was in compliance with statutory requirements pertaining to employers and that the statutory definitions of employee, and employer are not reciprocal, confusing and that disciplinary action in this case cannot sustain the burden of clear and convincing proof or strict construction both of which were acknowledged to be applicable by the administrative law judge."

58. The "arrangement" between DL and Elite, by which Elite paid DL $38 for each WDO inspection performed by the Individual Respondents, was nothing more than a sham arrangement to give the appearance of a client relationship between the two entities.

Ruling on the Exception: The Respondents argue that this conclusion of law does not meet the clear and convincing proof or strict construction standard. The Respondents are not contesting the ALJ's findings, but appear to be attempting to make a legal argument. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondents have failed to do so in support of their argument. The Department finds that there is competent, substantial evidence to support this finding and overrules this exception.

Exception 13. – "Exception is taken to paragraph 59 appearing at page 17 of the Recommended Order to the extent it states that Petitioner proved that the individual Respondents obtained and utilize their ID cards in a matter contrary to the statute."

59. Petitioner proved that the Individual Respondents obtained and utilized their employee-identification cards in a manner contrary to the statutory requirement of 482.091(2)(a).

Ruling on the Exception: The Respondents appear to disagree with the ALJ's finding that the Petitioner proved that the Individual Respondents obtained and utilized their employee-identification cards in a manner contrary to the statutory requirement. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondent has failed to do so in support of their argument. The Respondents did not

provide any facts or statutory support for their argument and simply appear to disagree with the conclusion of law. The Department finds that there is no basis for the rejection or modification of this conclusion of law and overrules this exception.

Exception 14. – "Exception is noted to paragraph 64 appearing at page 19 of the Recommended Order. Specifically, under subparagraph A the monies paid by the customer to Elite fall within the statutory exception to pest-control and are not illegal. Subparagraph E is not supported by the Record as the indication from the testimony of Record is that none of the Respondents had worker's compensation as an independent contractor. Additionally, the other provisions of subparagraph 13 have been complied with. Of equal significance is the fact that no effort has been made to view the definition of employee under Section 482.021 Definitions which it is asserted, have been complied with by Respondents. The statutory definitions for employee and independent contractor should be largely mutually exclusive but in fact they are not. They generate confusion and make it impossible under these circumstances for the Department to meet its burden against the individual Respondents with a strict construction of the Statute."

64. Section 482.021(13) defines "[i]ndependent contractor" as follows:

> *(13) 'Independent contractor' means an entity separate from the licensee that:*
> *(a) Receives moneys from a customer which are deposited in a bank account other than that of the licensee;*
> *(b) Owns or supplies its own service vehicle, equipment, and pesticides;*
> *(c) Maintains a business operation, office, or support staff independent of the licensee's direct control;*
> *(d) Pays its own operating expenses such as fuel, equipment, pesticides, and materials; or*
> *(e) Pays its own workers' compensation as an independent contractor.*

Ruling on the Exception: The Respondents argue that Paragraph 64 alleges a statutory violation. Paragraph 64 is a restatement of a statutory provision. The Respondents also allege that the statutory definitions of "employee" and "independent contractor" are confusing. It is beyond the Department's power to revise, amend, or expand the legislatively created statutory definition. The Respondents have not alleged that the findings outlined in paragraphs are not based on competent, substantial evidence. The Department finds that there is no basis for the rejection or modification of this conclusion of law and overrules this exception.

Exception 15. – "Exceptions is taken to paragraph 66 appearing on page 20 because it is an assumption of ill intent by the Respondents that is not adequately supported by the Record or justified by the confusing statutory scheme as described above."

66. The fact that DL supplied the Individual Respondents with a magnifying glass to perform WDO inspections does not preclude the conclusion that the Individual Respondents operated as independent contractors for DL. The facts that DL paid a meager $10 to the Individual Respondents for each WDO inspection performed, and supplied a minor piece of equipment for their use, support an inference that the Respondents attempted to circumvent the regulatory structure.

Ruling on the Exception: The Respondents allege that the ALJ's finding assumes ill intent by the Respondents in their violations of Chapter 482, Florida Statutes. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondents have failed to do so in support of their argument. The Respondents did not provide any facts or statutory support for their argument and simply appear to disagree with the finding. The Department finds that there is competent, substantial evidence to support this finding and overrules this exception.

Exception 16. – "Respondents note their exception to paragraph 67 appearing at page 20 which reiterates the notion that Elite billed customers $48,000 for inspections, which payments are asserted to be permissible under the exception to the definition of pest-control as recited in Section 482.021(22)(e)."

67. The Individual Respondents' sustaining business operation was conducting WDO inspections for Elite clients, a business for which it billed its clients over $48,000 in 2014 alone, and for which it did not have a license from the Department. The evidence supports the conclusion that the Individual Respondents were independent contractors to DL.

Ruling on the Exception: The Respondents argue that the performance of WDO inspections by Elite amount to a "solicitation of a bid from a licensee to be incorporated in an overall bid by an unlicensed primary contractor to supply services to another", which is an exception to the definition of "Pest Control" in Section 482.021(22)(e), Florida Statutes. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondents have failed to do so in support of their argument. The Respondents are not contesting the ALJ's findings, but appear to be attempting to make a legal argument. The Respondents have not alleged that the findings outlined in paragraphs are not

based on competent, substantial evidence. The Department finds that there is no basis for the rejection or modification of this conclusion of law and overrules this exception.

Exception 17. – "Exception is made to paragraph 67 appearing at page 20 of the Recommended Order with respect to the conclusion that individual Respondents were independent contractors."

67. The Individual Respondents' sustaining business operation was conducting WDO inspections for Elite clients, a business for which it billed its clients over $48,000 in 2014 alone, and for which it did not have a license from the Department. The evidence supports the conclusion that the Individual Respondents were independent contractors to DL.

Ruling on the Exception: The Respondents take exception to the ALJ's finding that the Individual Respondents were independent contractors to DL. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondents have failed to do so in support of their argument. The Respondents are not contesting the ALJ's findings, but appear to be attempting to make a legal argument. The Department finds that there is no basis for the rejection or modification of this conclusion of law and overrules this exception.

Exception 18. – "Respondents note their exception to paragraph 76 appearing on page 25 of the Recommended Order wherein the statement is made that the activities were deliberate and that $48,000 was unlawfully charged and collected by Respondent. It is asserted to the contrary that Respondents believed in good faith that their business and contractual relationships comported with the Statute. Parenthetically this was a practice that had been going on either under DL and predecessor corporations for many years. This was in actuality the first time the Department acted aggressively with respect to this arrangement which they had known about for many years. Additionally, customers received value for their inspection reports. There is no reason to doubt the inspections performed by the individual Respondents were every bit as good if not better than those performed by other competitive companies."

76. The estimated cost of rectifying the damage to the consumer would be over $48,000, the amount unlawfully charged and collected by Respondents from Elite customers in 2014 alone. Respondents offered no evidence of mitigation and their activities were deliberate. Petitioner presented no evidence of investigative costs.

Ruling on the Exception: The Respondents argue that their actions were not deliberate and that the $48,000 in charges to customers was lawful because they believed "in good faith"

that their actions complied with the statutory requirements. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondents have failed to do so in support of their argument. The Respondents are not contesting the ALJ's findings, but appear to be attempting to make a legal argument. The Respondents have not alleged that the findings outlined in paragraphs are not based on competent, substantial evidence. The Department finds that there is competent, substantial evidence to support this finding and overrules this exception.

Exception 19. – "Exceptions is taken to paragraph 77 appearing at page 25 of the Recommended Order as there is absolutely no evidence to show that Elite or Kekec engaged in pest-control without a license. Exception is further taken to the allegation that Elite engaged in fraudulent advertising also appearing at paragraph 77."

77. Using the rule formula, Respondents, Elite, Kekec, and Franco, should each be fined $4,500 for engaging in the business of pest control without a license, in violation of 482.065(1) and 482.071(1). Respondent Elite could additionally be fined for the separate violation of 482.161(1)(h) (fraudulent advertising), but the Petitioner did not establish the cost of rectifying damage to the consumer.

Ruling on the Exception: The Respondents argue that there is no evidence to show that the Respondents engaged in the business of pest control without a license and in fraudulent advertising on their website. Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondents have failed to do so in support of their argument. The Department finds that there is competent, substantial evidence to support this finding and overrules this exception.

Exception 20. – "Exception is taken to paragraph 79 appearing at page 26 of the Recommended Order to the effect that the Respondent's created a "appearance of supervision in the form of after the fact reviews of their work." The so-called after the fact reviews of their work were favorably commented upon by the Department' former administrative head and the Record is de void of any other kind of meaningful supervision or on the job training that this kind of identification cardholder should have received."

79. The Individual Respondents conducted WDO inspections before they were issued identification cards as "employees of DL" and continued the activities willfully thereafter. They participated in a business "arrangement" which allowed them to be paid twice for each and

every inspection, once by the Elite customer, and once as an "employee of DL." Having each been engaged in the pest control business in some capacity since 2005, both Individual Respondents were well aware of the requirement to be supervised by the COIC, and skirted that requirement by creating an appearance of supervision in the form of after-the-fact reviews of their work.

Ruling on the Exception: The Respondents argue that the review of the inspection reports by Mr. Miles was in fact a substantive form of supervision and not an "appearance of supervision..." Section 120.57(1)(k), Florida Statutes, requires exceptions to provide "appropriate and specific citations to the record" and the Respondents have failed to do so in support of their argument. The Respondents are not contesting the ALJ's findings, but appear to be attempting to make a legal argument. The Department finds that there is competent, substantial evidence to support this finding and overrules this exception.

FINDINGS OF FACT

1. The Commissioner of Agriculture adopts the Findings of Fact set forth in the attached Recommended Order subject to the following changes.
2. Paragraph 9 states that Elite through Mr. Franco "performed 99 WDO inspections" between "January 3 and April 10, 2014", and "billed its customers $6,850.00" for those inspections. However, the record indicates that Mr. Franco performed 49 WDO inspections between January 3 and April 3, 2014.
3. Paragraph 10 states that Elite through Mr. Kekec "performed 49 WDO inspections" between "January 3 and April 10, 2014", and "billed its customers $6,290.00" for those inspections. However, the record indicates that Mr. Franco performed 50 WDO inspections during that period and Elite billed its customers $6,435.00 for those inspections.

CONCLUSIONS OF LAW

4. The Commissioner of Agriculture adopts the conclusions of law set forth in the attached Recommended Order.

THEREFORE, it is **ORDERED AND ADJUDGED:**

1. Respondents, Elite Inspectors, LLC, d/b/a EliteInspectors.com, Tamer Kekec, and Stephen Franco, violated Sections 482.071(1) and 482.165(1), Florida Statutes, by engaging in the business of pest control in 2014 and 2015 without a license from the Department, and an administrative fine of $4,500.00 is hereby imposed jointly against the Respondents;
2. Respondent, Elite Inspectors, LLC, d/b/a EliteInspectors.com violated Section 482.161(1)(h), Florida Statutes, by engaging in misleading advertising relating to pest control. This Final Order shall hereby constitute a formal Warning Letter regarding the misleading advertising; and,
3. Respondents, Tamer Kekec and Stephen Franco, violated Section 482.091(2)(a), Florida Statutes, by conducting WDO inspections in 2014 and 2015 as independent contractors to DL, and identification cards of the Individual Respondents are hereby revoked, pursuant to Section 482.161, Florida Statutes.
4. This Final Order is effective on the date filed with the Clerk of the Department.

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DONE and ORDERED at Tallahassee, Leon County, Florida, this 17th day of June, 2016.

ADAM H. PUTNAM
COMMISSIONER OF AGRICULTURE

Michael A. Joyner
Assistant Commissioner of Agriculture

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Judicial review proceedings must be instituted by filing a Notice of Appeal with the Department's Agency Clerk, 407 South Calhoun Street, Suite 509, Tallahassee, Florida, 32399-0800, within thirty (30) days of rendition of this order. A copy of the Notice of Appeal must be filed with the Clerk of the appropriate District Court of Appeal accompanied by any filing fees prescribed by law.

Filed with Agency Clerk this 17th day of June, 2016.

Agency Clerk

Copies furnished to:

Judge Suzanne Van Wyk, Administrative Law Judge, The Division of Administrative Hearings, The Desoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399

Howard J. Hochman, Esquire Law Offices of Howard J. Hochman
7695 Southwest 104th Street, Suite 210, Miami, Florida 33156

Andy Rackley, Division of Agricultural Environmental Services,
3125 Conner Blvd., Ste. E, Tallahassee, FL 32399-1650