

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Petitioner,

Case No. 20-1367PL

vs.

*AMENDED AS TO APPEARANCES
ONLY

WILLIE KING,

Respondent.

_____ /

AMENDED RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019), on July 14, 2020, by video teleconference at sites in Tallahassee and Saint Petersburg, Florida.

APPEARANCES

For Petitioner: Lee Damessous, Esquire
Department of Agriculture and Consumer Services
407 South Calhoun Street, Suite 520
Tallahassee, Florida 32399-0800

For Respondent: Willie King, pro se
2334 Quincy Street South
St. Petersburg, Florida 33711

STATEMENT OF THE ISSUES

Whether Respondent, Willie King (Mr. King or Respondent), violated Florida Administrative Code Rule 5E-14.112(2)(b), by failing to affix warning

signs on a structure when the structure was under fumigation; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On February 4, 2020, the Department of Agriculture and Consumer Services (Department or Petitioner) filed a one-count Administrative Complaint against Mr. King, in which it alleged that Mr. King violated rule 5E-14.112(2)(b), by failing to affix warning signs on all external walls of a structure when the structure was under fumigation. For the alleged violation, the Department sought to impose discipline against Mr. King pursuant to section 482.161, Florida Statutes.

In an Election of Rights form and an Answer to Administrative Complaint and Request for Formal Hearing Before the Division, Respondent timely disputed the allegations and requested a disputed-fact hearing. The Department transmitted the matter to DOAH on March 17, 2020, for the assignment of an administrative law judge to conduct a chapter 120 hearing.

The final hearing was held on July 14, 2020, with both parties present. Petitioner presented the testimony of Paul Rockhill (Mr. Rockhill), an Environmental Specialist III for the Department's Bureau of Inspection and Incident Response. Petitioner's Exhibits P-1 through P-4¹ were admitted into evidence, without objection. Respondent testified on his own behalf and did not offer any exhibits.

¹ Petitioner's Exhibit P1 (Chloropicrin (CP) Test, December 3, 2019) was previously marked and referenced on Petitioner's Proposed Exhibits List as Exhibit 6; Exhibit P2 (Map of Condos) was previously marked and referenced on Petitioner's Proposed Exhibits List as Exhibit 9; Exhibit P3 (Sign at 216 Henry) was previously marked and referenced on Petitioner's Proposed Exhibits List as Exhibit 10; and Exhibit P4 (Absence of Sign at 220 Henry) was previously marked and referenced on Petitioner's Proposed Exhibits List as Exhibit 11.

At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the hearing transcript to file proposed recommended orders. A one-volume Transcript of the final hearing was filed with DOAH on July 24, 2020. The Department submitted an untimely proposed recommended order on August 5, 2020, and Mr. King did not file a proposed recommended order. The Department's Proposed Recommended Order was reviewed in preparation of this Recommended Order.

All references to the Florida Statutes and the Florida Administrative Code are to the 2019 versions.

FINDINGS OF FACT

1. Respondent is a special identification cardholder. A special identification cardholder is a person to whom an identification card has been issued by the Department showing that the holder is authorized to perform fumigation. § 482.021(26), Fla. Stat.

2. The Department is the state agency charged with the regulation of special identification cardholders. §§ 482.151 and 482.161, Fla. Stat.

3. On December 3, 2019, Mr. King was the special identification cardholder responsible for the fumigation of 216 and 220 Henry Street, Punta Gorda, Florida.

4. 216 and 220 Henry Street are the addresses given to a rectangle-like building with two units, commonly known as a duplex. The units are side-by-side, sharing a common wall, with two separate entrances.

5. Mr. King conducted a tent fumigation of the entire building. In preparation to do so, he placed mandatory warning signs on all of the building's operative doors and windows, including sliding glass doors, for both duplex units. The Department did not dispute Mr. King's credible testimony on this point.

6. After placing warning signs on all doors and windows, Mr. King placed a tent over the entire building which includes both 216 and 220 Henry Street. After tenting the building, he placed one warning sign on all four sides of the tented building: one on the front of the tent, one on the back of the tent, one on the left side of the tent, and one on the right side of the tent.

7. After affixing warning signs to the tented building, Mr. King left. He did not participate in the removal of the signs or tent.

8. On December 3, 2019, several hours after Mr. King affixed the warning signs, Mr. Rockhill conducted an inspection of the tented duplex building. As part of his inspection, he conducted a chloropicrin test. Chloropicrin testing is used to determine the presence of chloropicrin, which is a warning agent emitted into the air during a structural fumigation.

9. The chloropicrin test returned positive, which indicated that the duplex building at 216 and 220 Henry Street was being fumigated on that day.

10. Mr. Rockhill testified that as part of his inspection, he walked around the perimeter of the tented structure to ensure that it was secure, that there was no apparent reason for a gas leak, and that all warning signs were affixed to each exterior wall of the structure.

11. Mr. Rockhill testified that during his inspection he saw one sign on the back of the tented structure, one sign on the left side of the tented structure, one sign on the right side of the tented structure, and one sign on the front of the tented structure. The sign on the front of the tented structure was located on the part of the tent that covered the front of the unit designated as 216 Henry Street. There was not a second sign present on the front of the part of the tent covering the front of the unit designated as 220 Henry Street.

12. Mr. Rockhill testified that he expected, pursuant to rule 5E-14.112(2)(b), that there would be one sign on each wall of the exterior wall of the structure. Mr. Rockhill expected two signs to be affixed on the front of the tented structure, with one sign in front of the duplex unit designated as 216

Henry Street and another in front of the duplex unit designated as 220 Henry Street.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569 and 120.57(1), Florida Statutes.

14. The Administrative Complaint sets forth allegations regarding the inspection described above, for which the Department charges Respondent with a violation of rule 5E-14.112(2)(b), and seeks to impose discipline against Respondent's license.

15. A proceeding to suspend, revoke, or impose other discipline upon a license is penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973). Petitioner therefore bears the burden of proving the charges against Respondent by clear and convincing evidence. *Fox v. Dep't of Health*, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) (citing *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996)).

16. The clear and convincing standard of proof has been described by the Florida Supreme Court as follows:

Clear and convincing evidence requires that 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 *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); *see also In re Henson*, 913 So. 2d 579, 590 (Fla. 2005). "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.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

17. Disciplinary statutes and rules “must be construed strictly, in favor of the one against whom the penalty would be imposed.” *Griffis v. Fish & Wildlife Conser. Comm’n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); *Munch v. Dep’t of Prof’l Reg., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); *McClung v. Crim. Just. Stds. & Training Comm’n*, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) (“No conduct is to be regarded as included within a penal statute that is not reasonably prescribed by it; if there are any ambiguities included, they must be construed in favor of the licensee.”) (citing *State v. Pattishall*, 126 So. 147 (Fla. 1930)).

18. The grounds proven in support of the Department’s assertion that disciplinary action should be taken against Mr. King must be those specifically alleged in the Administrative Complaint. *See, e.g., Trevisani v. Dep’t of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005); *Cottrill v. Dep’t of Ins.*, 685 So. 2d 1371 (Fla. 1st DCA 1996); *Kinney v. Dep’t of State*, 501 So. 2d 129 (Fla. 5th DCA 1987). Disciplinary action must be predicated solely on violations both pleaded in the Administrative Complaint and proven at hearing. Due process prohibits the Department from taking disciplinary action based on matters not specifically alleged or charges not specifically made in the Administrative Complaint. *Cottrill*, 685 So. 2d at 1372.

19. The factual allegations in the Administrative Complaint, giving rise to the one-count charge, were as follows:

The department inspector observed that all the external walls of the structure located at 220 W Henry St., were missing warning signs; while the structure at 216 W Henry St.’s external walls were all posted with warning signs.

20. The single charged violation, in Count 1 of the Administrative Complaint, is set forth in its entirety as follows:

Mr. Willie King, JD100146 is in violation of Section 5E-14.112(2)(b), F.A.C., when on December 3, 2019 a multi-residential property located at 216-220 W Henry St., Punta Gorda, FL under fumigation by Brantley Termite and Pest Control Services, JB5563, all the external walls of the structure located at 220 W Henry St., were missing warning signs; while the structure at 216 W Henry St.'s external walls were all posted with warning signs.

21. For the charged violation, the Department seeks to impose discipline against Mr. King pursuant to section 482.161(1), which authorizes the Department to impose discipline against a special identification cardholder for violating any provision of chapter 482 or any rule of the Department adopted pursuant to chapter 482.

22. The rule alleged to be violated, rule 5E-14.112(2)(b), provides, in pertinent part:

(2) Prior to the application of fumigant(s), suitable warning signs of stiff, weather-proof material must be securely affixed and conspicuously posted as follows:

* * *

(b) *In tent fumigation operations and also including commodity fumigations: at least one (1) warning sign posted at or on all doors and entrances to the structure or enclosed space and at least one (1) warning sign on all sides of the outside of the tents or sealing covers of the structure, enclosed space or commodities being fumigated[.]* (emphasis added).

23. The facts alleged, on which a violation of this rule is charged in the Administrative Complaint, were that “all the external walls of the structure located at 220 W Henry St., were missing warning signs; while the structure at 216 W Henry St.’s external walls were all posted with warning signs.”

24. The Administrative Complaint does not allege a violation of the first

part of rule 5E-14.112(2)(b), requiring at least one warning sign posted at or on all doors and entrances to the structure. The unrefuted credible evidence established that Mr. King complied with the first part of rule 5E-14.112(2)(b) by posting warning signs on all doors and entrances to both duplex units in the building.

25. The sole issue, then, is whether the facts alleged in the Administrative Complaint and proven at hearing establish a violation of the second part of rule 5E-14.112(2)(b), requiring that there be at least one warning sign on all sides of the outside of the tent covering the structure being fumigated.

26. There are two fundamental problems with the Department's charge. First, the Administrative Complaint did not allege that there was not at least one warning sign "on all sides of the outside of the tent" that covered the duplex building. The allegation in the Administrative Complaint was that warning signs were not posted on "all external walls." Contrary to the charge in the Administrative Complaint, rule 5E-14.112(2)(b) does not impose a requirement that "external walls" be posted with warning signs. There is a plain disconnect between the factual allegations and the requirements of the rule.

27. To attempt to address this pleading flaw in the Administrative Complaint, it was necessary for the Department to argue in its proposed recommended order that the external walls should be deemed equivalent to the outside sides of the tent. But external walls are not outside sides of the tent. The burden is on the Department to both specifically allege and then prove facts sufficient to show a violation of the rule charged. The Department failed to meet its burden in this regard.

28. Even if the Administrative Complaint had alleged a failure to post warning signs on all sides of the outside of the tent, the second fundamental problem with the Department's charge is that it rests on an implicit assumption that each unit of the duplex building is a separate structure. But the Department failed to note, and plainly did not consider, that the term

“structure” is defined in section 482.021(27) as follows:

“Structure” means:

- (a) Any type of edifice *or building*, together with the land thereunder, the contents thereof, and any patio or terrace thereof;
- (b) That portion of land upon which work has commenced for the erection of an edifice or building; or
- (c) A railway car, motor vehicle, trailer, barge, boat, ship, aircraft, wharf, dock, warehouse, or common carrier. (emphasis added).

29. The two units of the duplex are assigned different addresses—216 and 220 Henry Street—because they are separate residential units, but they are housed in a single building. The only fair reading of the plain language of the statute is that the duplex building was one structure. The Legislature could have defined structure to mean each separate unit in a duplex, but it did not. Most certainly, in the context of this penal action, a proper narrow interpretation of the statute that is most favorable to Respondent requires rejection of the Department’s position that each duplex unit in the same building should be considered a separate structure.

30. The narrow or plain meaning interpretation of the statutory definition of structure to mean a single building is not only required in this penal proceeding, but it also makes sense under the facts of this case. Here, the entirety of the single duplex building housing two units was covered by a tent for fumigation. Consistent with rule 5E-14.112(2)(b), Mr. King affixed a sign on all four sides of the outside of the tent that covered the structure. Mr. Rockhill confirmed this; he identified four warning signs, one on the outside of each side—front, back, left, and right—of the tent covering the building.

31. The Department’s argument that Mr. King violated rule 5E-14.112(2)(b) by failing to place two warning signs on the outside front of the

tent covering the structure, one in front of each duplex unit, is contrary to the plain language of the rule and contrary to the statutory definition of structure.

32. Two residential duplex units with a dividing wall between the two units does not create two separate buildings. The two duplex units are housed in one building—that is, one structure—and, as such, only one sign was required to be posted on the front side of the outside of the tent covering the single structure, pursuant to rule 5E-14.112(2)(b).

33. The Department failed to allege or prove a violation of rule 5E-14.112(2)(b).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services dismiss the Administrative Complaint.

DONE AND ENTERED this 21st day of August, 2020, in Tallahassee, Leon County, Florida.



JODI-ANN V. LIVINGSTONE
Administrative Law Judge
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Filed with the Clerk of the
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this 21st day of August, 2020.

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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.