

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RADON SCIENCE GROUP, INC.,

Petitioner,

vs.

Case No. 20-4768

DEPARTMENT OF HEALTH,

Respondent.

RECOMMENDED ORDER

On May 18, 2021, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (DOAH), conducted an evidentiary hearing pursuant to section 120.57(1), Florida Statutes (2020), in Tallahassee, Florida, via the Zoom web-conference platform.

APPEARANCES

For Petitioner: Paul A. Donnelly, Esquire
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For Respondent: Katelyn Rose Boswell, Esquire
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Prosecution Services Unit
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STATEMENT OF THE ISSUE

Whether Respondent Florida Department of Health's (Department) denial of Petitioner Radon Science Group, Inc.'s (RSG) Application for Certification as a Radon Mitigation Business was incorrect, as alleged in the Petition for Formal Administrative Hearing (Petition).

PRELIMINARY STATEMENT

In a letter dated September 11, 2020, the Department denied RSG's Application for Certification as a Radon Mitigation Business because RSG "performed radon mitigation services for a fee while not certified, in violation of section 404.056(2)(b), Florida Statutes, and Rule 64E-5.1203(1), Florida Administrative Code."

RSG timely filed a Petition for Formal Administrative Hearing on October 2, 2020. On October 26, 2020, the Department referred this matter to DOAH, which assigned the undersigned administrative law judge (ALJ).

The undersigned originally noticed this matter for final hearing on December 18, 2020. On December 11, 2020, the Department filed a Motion to Compel Production and Answer on Deposition, which sought production of certain documents requested in a Request to Produce, and to compel RSG's Corporate Representative, Dawn Oggier Howell (Ms. Howell), to answer certain questions that she refused at deposition. On December 17, 2020, the undersigned issued an Order Granting Respondent's Motion to Compel, which cancelled the final hearing on December 18, 2020; ordered RSG to produce all responsive documents referenced in the Motion to Compel; and ordered the parties to attend a telephonic case management conference on January 15, 2021. After RSG filed a Consent Motion to Reschedule Case Management Conference, the undersigned conducted a telephonic case management conference on January 19, 2021, and, on January 20, 2021, entered an Order Rescheduling Hearing by Zoom Conference, which set the final hearing for March 3, 2021.

On February 15, 2021, RSG filed a Consent Motion to Reschedule Hearing Date, which the undersigned granted. The undersigned, thereafter, issued an Amended Notice of Hearing by Zoom Conference, which set the final hearing

in this matter for May 4, 2021. On May 3, 2021, RSG filed a Consent Motion to Reschedule Final Hearing, and the undersigned issued an Amended Notice of Hearing by Zoom Conference, which set the final hearing in this matter for May 18, 2021.

The final hearing in this matter occurred on May 18, 2021, via the Zoom web-conference format. RSG called Ms. Howell, the owner of RSG, as its lone witness, and the undersigned admitted Petitioner's Exhibits P2 and P4 into evidence. The Department called Joseph Kidder, an Environment Specialist III with the Department's Radon and Indoor Air Program, as its lone witness. The undersigned also admitted Joint Exhibits 1 through 30 into evidence.

At the conclusion of the final hearing, the undersigned provided the parties 10 days from the date of the filing of the transcript with DOAH to file proposed recommended orders. The final hearing Transcript was filed with DOAH on June 21, 2021. On June 29, 2021, the Department filed an Unopposed Motion for Extension of Time for Filing Proposed Recommended Orders, which the undersigned granted on June 30, 2021. The parties, thereafter, timely filed their proposed recommended orders on July 9, 2021, which the undersigned has considered in the preparation of this Recommended Order.

All statutory references are to the 2020 codification of the Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

1. The Department is charged with regulating Environmental Radiation Standards and Certifications pursuant to section 404.056, Florida Statutes, and Florida Administrative Code Chapter 64E-5.

2. RSG registered as a corporation with the State of Florida, Division of Corporations, on or about January 14, 2020. Ms. Howell is the initial officer and director of RSG. RSG's Articles of Incorporation state, as its purpose for organization:

PROVIDE TESTING SERVICES AND PRODUCTS
TO MEASURE RADON.
PROVIDE MITIGATION SERVICES AND
PRODUCTS TO REDUCE RADON.

3. In February 2020, Ms. Howell opened a bank account at Chase Bank on behalf of RSG.

4. Ms. Howell testified that she has been a Florida-certified radon measurement and radon mitigation specialist for approximately 13 years.

5. Prior to RSG's incorporation, Ms. Howell served as a co-owner and co-managing member of Land Environmental Group, LLC (LEG), which she testified was incorporated in 2008. LEG is a certified radon mitigation business in the State of Florida.

6. Ms. Howell testified that she co-owned and co-managed LEG with her husband, Kurt Howell. Although she produced no documentary evidence concerning the corporate structure of LEG, *i.e.*, operating agreements, tax returns, etc., she testified that she is the 98 percent owner of LEG, and that Mr. Howell has a two percent ownership stake in LEG.

7. Beginning in September 2016, Ms. and Mr. Howell began living apart. Thereafter, Ms. Howell testified that, after reviewing LEG bank and credit card records, she learned that Mr. Howell was using LEG funds for his personal use.

8. Starting in January 2020, Ms. Howell testified that Mr. Howell began excluding her from LEG, including LEG's bank accounts, marketing and advertising accounts, and her LEG email account. Ms. Howell testified that she has filed a civil lawsuit to regain access to LEG and its accounts, but at the time of the final hearing, remained excluded.

9. Ms. Howell testified that as a result of this exclusion, she contacted Mr. Kidder to discuss her options regarding operating a radon mitigation business, as “there was work that needed to be done and Mr. Howell was wasting the funds. So, I wanted to be able to continue doing the work that could be done.” She further testified that after a discussion with Mr. Kidder, she decided “to open up a new mitigation business that when – just allow the licensures for LEG to expire and this would take over for that business.” The “new mitigation business” was RSG.

10. Ms. Howell testified that despite her exclusion from LEG’s bank accounts, marketing and advertising accounts, and her LEG email account in early 2020, she still had the authority to direct LEG, *inter alia*, to subcontract radon measurement mitigation with another business. She stated that during 2020, she directed LEG to enter into contracts to perform radon mitigation; according to Ms. Howell, RSG “acted as the accounting or billing subcontractor for [LEG]” for these contracts.

11. On April 5, 2020, Ms. Howell entered into a contract with Edward Malloy to install a radon mitigation system at his residence in Ocala. The cover letter to Mr. Malloy contains a logo and states “RADON SCIENCE GROUP” at the top of the page. The letter then states:

Thank you for giving Land Environmental Group (LANDENV), c/o Radon Science Group, Inc., the opportunity to submit this proposal to install a Radon Mitigation System at the above referenced address.

Radon Science Group, Inc. will perform radon mitigation and post mitigation testing services.

Ms. Howell signed this cover letter, and underneath her signature, lists “Land Environmental Group, c/o Radon Science Group, Inc., Florida Certified Mitigation Business (RB2263) Dawn Howell; Florida Certified Measurement/Mitigation Specialist (R2343, R2539)[.]”

12. Attached to the April 5, 2020, cover letter is an “Agreement Between Client and Contractor,” which, like the cover letter, contains a logo and states “RADON SCIENCE GROUP” at the top of each page. The first paragraph of this document states:

THIS AGREEMENT, (the “Agreement”) is made this **5 April 2020**, by and between Land Environmental Group, c/o Radon Science Group, Inc. with its principal address at [address] (the “**Contractor**”), and Edward Malloy (the “**Client**”), whose address is [address].”

This Agreement lists the “Contractor” as LEG, c/o RSG, in two additional subsections.

13. On April 20, 2020, Radalink—a third-party company that produces post-mitigation testing reports for certified radon businesses and provides these reports to the Department—submitted a Certified Radon Report for the Malloy residence (Radalink Report). The Radalink Report listed, as the “Licensed Radalink Radon Inspector” connected with this residence, both LEG and Ms. Howell. The Radalink Report reflects that radon levels at the Malloy residence were below the Environmental Protection Agency’s recommended action limits. Radalink sent a copy of the Radalink Report to the Department.

14. The evidence presented at the final hearing reflects that RSG received two payments in the amount of \$1,600.00 for the work performed at the Malloy residence. The evidence further reflects that these funds were deposited into the RSG CHASE bank account.

15. The evidence presented at the final hearing further reflects that an employee of RSG—Michael Stewart—received a paycheck, dated April 23, 2020, drawn from the RSG Chase Bank account, for work done on the Malloy residence.

16. On June 2, 2020, Ms. Howell, on behalf of RSG, submitted to the Department an “Application for Certification as a Radon Business,” (Application) and specifically selected the application for a “Radon Mitigation Business[.]” On June 3, 2020, RSG sent a check in the amount of \$1,275.00 to the Department, which was the application fee.

17. A supplement to the Application included a page in which Ms. Howell, on behalf of RSG, and on RSG letterhead, listed and acknowledged certain requirements contained in rule 64E-5.1207(10) through (13). Notably, rule 64E-5.1207(10) provides:

(10) The certified radon mitigation business shall assure that radon mitigation system installations are performed under the direct supervision of a certified radon mitigation specialist or certified radon mitigation technician. A certified radon mitigation business may contract with a noncertified business to perform mitigation installation provided that work performed by non-certified persons is under the direct supervision of a certified radon mitigation specialist or certified radon mitigation technician.

18. On June 4, 2020, Mr. Kidder sent an email to Ms. Howell concerning the Application, and requested information concerning the project at the Malloy residence. Mr. Kidder’s email noted that the current occupant of the residence reported issues with the work performed, that “there has been no post-mitigation testing[.]” and that “the business listed on the receipt is Radon Science Group, not Land Environmental Group. Can you provide more information on this mitigation?”

19. Ms. Howell responded to Mr. Kidder’s email the same day, attaching the Radalink Report.

20. Ms. Howell, on June 8, 2020, sent an email to Mr. Kidder, inquiring if the Department required any additional information for the Application. In subsequent emails between Ms. Howell and Mr. Kidder, through June, July,

and August 2020, the Department requested various items of information from Ms. Howell, which she provided, but did not request any additional information concerning the project at the Malloy residence.¹

21. In a letter dated September 11, 2020, the Department denied the Application. The letter states:

Section 404.056, Florida Statutes, authorizes the Florida Department of Health (Department) to set criteria for certification, to approve or deny an application, and to adopt rules to administer and enforce the certification requirements for individuals and businesses that perform radon gas or radon progeny measurements or mitigation of buildings for radon gas or radon progeny. Chapter 64E-5, *Florida Administrative Code*, was adopted to implement these statutory duties.

Facts

Pursuant to Rule 64E-5.1207, *Florida Administrative Code*, Radon Science Group, Inc., applied on June 2, 2020 for certification as a radon mitigation business. The initial application was incomplete and was supplemented on June 19, 2020, with additional information to complete the application. However, on or about April 6, 2020—more than two months before completing the application—Radon Science Group, Inc., performed radon mitigation in exchange for a fee.

Section 404.056(2)(b), Florida Statutes, states that a person[] may not perform radon mitigation and charge a fee or receive remuneration for the mitigation unless the business is certified by the Department. Rule 64E-5.1203(1), *Florida Administrative Code*, states that an uncertified

¹ For example, the Department and Mr. Kidder inquired how Ms. Howell wished to move her individual radon mitigation and measurement specialist certificate to be associated with RSG; asked Ms. Howell to provide additional information concerning RSG's worker health and safety plan; asked Ms. Howell to provide attachments of RSG's advertisements; and asked Ms. Howell to provide acknowledgment, on RSG letterhead, of the requirements of rule 64E-5.1207(10) through (12), which is described in paragraph 17 above.

business may not mitigate the presence of radon in Florida for a fee or other remuneration. Radon Science Group, Inc., violated these provisions by mitigating radon for a fee on at least one occasion on or about April 6, 2020, while not certified.

Conclusion

Pursuant to section 404.056(2)(g), Florida Statutes, the Application for Certification as a Radon Mitigation Business submitted by Radon Science Group, Inc., is **denied** because Radon Science Group, Inc., performed radon mitigation services for a fee while not certified, in violation of section 404.056(2)(b), Florida Statutes, and Rule 64E-5.1203(1), *Florida Administrative Code*.

22. At the final hearing and in its proposed recommended order, the Department contends that LEG's failure to submit a DH Form 1753—which is a monthly report that certified mitigation businesses submit to the Department for all work performed—that included work on the Malloy residence is evidence that RSG, rather than LEG, performed that work. The Department further contends that RSG performed radon mitigation services in exchange for a fee on several other occasions, and that the Department never received any DH Form 1753 reflecting that work. However, the undersigned finds that the September 11, 2020, denial of the Application makes no reference to these contentions, but instead denies the Application for performing radon mitigation services “on at least one occasion on or about April 6, 2020, while not certified[,]” which was the work on the Malloy residence.

23. RSG contends in its Proposed Recommended Order, and Ms. Howell testified, that she and LEG oversaw radon work for the Malloy residence, designed and installed the radon mitigation system, and performed the required post-radon mitigation testing, and that RSG served as the accounting and billing subcontractor. However, the contract between

Mr. Malloy and “Land Environmental Group ... c/o Radon Science Group, Inc.,” states that RSG “will perform radon mitigation and post mitigation testing.” According to the contract with Malloy, RSG’s duties appear to include all of the components of radon mitigation, which are more than simply serving as the accounting and billing subcontractor of LEG.

24. Ms. Howell and RSG also contend that Ms. Howell, as co-owner and co-manager of LEG, and sole owner of RSG, could subcontract radon mitigation work to RSG, a noncertified business, pursuant to rule 64E-5.1207(10), so long as LEG or Ms. Howell directly supervised RSG’s work. Ms. Howell and RSG further contend that this is exactly what happened with the radon mitigation work on the Malloy residence.

25. Rule 64E-5.1207(10) explicitly states, in part, that:

A certified radon mitigation business may contract with a non-certified business to perform mitigation installation provided that work performed by non-certified persons is under the direct supervision of a certified radon mitigation specialist or certified radon mitigation technician.

While a plain reading of this provision states that a radon mitigation business may contract with a noncertified business to perform mitigation installation, it does not explicitly require a written contract. Further, a strict reading of this provision would suggest that Ms. Howell, as co-manager of LEG, should enter into a written contract with herself, as owner of RSG, which under the facts of this case was unnecessary.

26. Based on the testimony of Ms. Howell, and a review of the contract for the radon mitigation work on the Malloy residence, the undersigned finds that a contractual relationship between LEG and RSG existed that is consistent with the requirements of rule 64E-5.1207(10). LEG and RSG are signatories to this contract, along with Ms. Howell, and Ms. Howell and LEG provided direct supervision over the project at the Malloy residence.

27. The undersigned finds that RSG performed radon mitigation services for a fee on or about April 6, 2020, on the Malloy residence, as stated in the Department's September 11, 2020, letter.

28. The undersigned further finds, however, that RSG has established, by a preponderance of the evidence, its performance of radon mitigation installation at the Malloy residence on or about April 6, 2020, was done in accordance with a contractual relationship with LEG, a certified radon mitigation business, and under the direct supervision of LEG and Ms. Howell, a certified radon mitigation specialist, which is consistent with rule 64E-5.1207(10).

CONCLUSIONS OF LAW

29. DOAH has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(1).

30. The Department is charged with regulating the Environmental Radiation Standards and Certifications in the State of Florida pursuant to section 404.056 and chapter 64E-5.

31. This proceeding involves the denial of an application for certification as a radon mitigation business. In this type of case, RSG has the ultimate burden of persuasion to prove entitlement to the certificate applied for, by a preponderance of the evidence. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

32. However, as the Department has alleged that the certification should be denied based on a violation of the operative statute, the Department must prove unfitness for the certification by a preponderance of the evidence. *See Dep't of Child. & Fams. v. Davis Fam. Day Care Home*, 160 So. 3d 854, 857 (Fla. 2015); *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932, 934 (Fla. 1996).

33. In its letter dated September 11, 2020, which denied RSG's application, the Department concluded:

Pursuant to section 404.056(2)(g), Florida Statutes, the Application for Certification as a Radon Mitigation Business submitted by [RSG] is **denied** because [RSG] performed radon mitigation services for a fee while not certified, in violation of section 404.056(2)(b), Florida Statutes, and Rule 64E-5.1203(1), *Florida Administrative Code*.

The September 11, 2020, letter references one instance of RSG performing radon mitigation services for a fee while not certified—the radon mitigation installation at the Malloy residence on or about April 6, 2020.

34. Section 404.056(2)(b), which the Department references in its September 11, 2020, letter, states:

A person may not participate in performing radon gas or radon progeny measurements, including sample collection, analysis, or interpretation of such measurements, or perform mitigation of buildings for radon gas or radon progeny, and charge a fee or obtain other remuneration as benefit for such services or devices, unless that person is certified by the department. A certification issued in accordance with this section automatically expires at the end of the certification period stated on the certificate. An uncertified business may subcontract radon measurements to a certified radon business. The uncertified commercial business must provide the complete radon report from the certified radon business to the client and direct all the client's questions about the measurements or radon report to the certified radon business.

35. Section 404.056(2)(g) provides:

The department may establish enforcement procedures; deny an application for initial or renewal certification; deny, suspend, or revoke a certification; or impose an administrative fine not to exceed \$1,000 per violation per day, for the

violation of any provision of this section or rule adopted under this section.

36. Rule 64E-5.1203(1) provides:

No person may test for or mitigate the presence of radon in Florida for a fee or other remuneration unless such person has been certified as provided by this part. These regulations in no way exempt any person from other state and local occupational licensure requirements.

37. As discussed at length above, rule 64E-5.1207(10) provides:

A certified radon mitigation business may contract with a non-certified business to perform mitigation installation provided that work performed by non-certified persons is under the direct supervision of a certified radon mitigation specialist or certified radon mitigation technician.

38. Although the Department established that RSG performed radon mitigation services for a fee on April 6, 2020, without the requisite certification, RSG presented competent substantial evidence to establish, by a preponderance of the evidence, that its performance of radon mitigation installation at the Malloy residence on or about April 6, 2020, was done in accordance with a contractual relationship with LEG, a certified radon mitigation business, and under the direct supervision of LEG and Ms. Howell, a certified radon mitigation specialist, in accordance with rule 64E-5.1207(10).

39. Based on the foregoing, the undersigned concludes that the Department's September 11, 2020, denial of RSG's Application for Certification as a Radon Mitigation Business was incorrect, and that RSG has established, by a preponderance of the evidence, that it is entitled to the certification.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the Florida Department of Health rescind its September 11, 2020, denial of Radon Science Group, Inc.'s Application for Certification as a Radon Mitigation Business, and issue a Certification as a Radon Mitigation Business to Radon Science Group, Inc.

DONE AND ENTERED this 6th day of August, 2021, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
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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.