

**BEFORE THE DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Los Angeles
(County File No. 2431516)

Docket No. S-033

Mega Fume, Inc.
438 West Meats Avenue
Orange, California 92865

DECISION

Appellant/

Procedural Background

Under section 8617 of the Business and Professions Code (BPC) and section 15202 of the Food and Agricultural Code (FAC), a County Agricultural Commissioner may levy a penalty up to \$5,000 for a violation of California's structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Los Angeles County Agricultural Commissioner (CAC) found that Mega Fume, Inc. (Appellant) failed to meet the current California Aeration Plan (CAP) procedures, and therefore failed to perform pest control in a careful manner, as required by California Code of Regulations, title 3, section 6600 subdivision (b). The CAC then levied a \$250 fine.

Appellant appealed the CAC's decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of this appeal under BPC section 8662. Members serving on the Committee were Mr. John Tengan for the structural pest control industry, Ms. Susan Saylor for the Structural Pest Control Board (SPCB), and Ms. Marta Barlow for the Department of Pesticide Regulation (DPR). No party requested oral argument and the Committee determined oral argument was not necessary.

Standard of Review

The Committee decides this appeal on the record before the hearing officer. The Committee decides matters of law using its independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Committee determines whether there was substantial evidence, contradicted or uncontradicted, before the hearing officer to support the hearing officer's findings and the CAC's decision. The Committee notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the hearing officer.

The substantial evidence test only requires there be enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In applying the substantial evidence test, the Committee draws all reasonable inferences from the information in the record to support the hearing officer's findings and reviews the record in the light most favorable to the CAC's decision. If the Committee finds substantial evidence in the record to support the CAC's decision, the Committee affirms the CAC's decision.

Factual Background

The CAP is an industry created Fumigation Safety Program for employers and employees to follow that meet the requirements of Title 3 California Code of Regulations Section 6780. (Albert Rodriguez testimony.) Employers may use this Program in lieu of requiring air-supplied respirator equipment or continuous monitoring when aerating tarp-contained structural fumigations with sulfuryl fluoride. (3 CCR 6780(b).)

On February 7, 2017, Mega Fume, Inc. fumigated a structure using the pesticide Master Fume (EPA Reg. No. 19713-596) at 124 St. Joseph Avenue, Long Beach. (Stipulated Facts 2, 3.) Kaiser T. Asuega on behalf of Mega Fume was the licensee responsible for the aeration phase of the fumigation. (Stipulated Fact 4.) On February 8, 2017, Albert Rodriguez, an Agricultural/Weights and Measures Inspector II with the County of Los Angeles Department of Agricultural Commissioner/Weights and Measures, arrived at the location and conducted an inspection. (Exhibit C.)

The fumigation crew was not present, the tarps were still on the structure, and the property was undergoing the aeration process. During the perimeter inspection, Inspector Rodriguez observed that only one of the two inlets were opened. The opened inlet measured approximately 272.25 square inches in total area.

(Exhibit C.)

On May 30, 2017, the CAC mailed Appellant the Notice of Proposed Action charging Appellant with violating 3 CCR 6780(c) for failing to meet the general standards of care when performing pest control based on Appellant's failure to follow the CAP correctly. Hearing Officer Robert G. Atkins heard the matter on behalf of the CAC on October 25, 2017.

Relevant Authorities

3 CCR 6600 General Standards of Care.

Each person performing pest control shall:

(a) Use only pest control equipment which is in good repair and safe to operate.

- (b) Perform all pest control in a careful and effective manner.
- (c) Use only methods and equipment suitable to insure proper application of pesticides.
- (d) Perform all pest control under climatic conditions suitable to insure proper application of pesticides.
- (e) Exercise reasonable precautions to avoid contamination of the environment.

3 CCR 6780 General Fumigation Safe-Use Requirements.

(a) When fumigant concentrations cannot be controlled and an employee's exposure exceeds the Permissible Exposure Limit (PEL) as specified in Title 8, California Code of Regulations, Section 5155, Airborne Contaminants, or more stringent requirements by product labeling, the employer shall provide and require the employee to wear approved respiratory protective equipment.

(b) Whenever an employee may be exposed above an exposure standard to methyl bromide, sulfuryl fluoride, or any other fumigant for which only air-supplied respirator equipment is approved, the employer shall either:

- (1) Require the use of air-supplied respirator equipment,
- (2) Employ continuous monitoring to warn employees before the PEL is reached, or
- (3) Operate under the provisions of (c) below.

(c) Upon written application by an employer, the Director¹ will review, and may accept, a Fumigation Safety Program that describes methods, work practices, devices, or processes which the Director determines will ensure that employees will not be exposed to concentrations of fumigants in excess of the PEL.

(d) The employer shall have an accident response plan at the worksite. The plan shall provide instructions to protect employees during situations such as spills, fire, and leaks. Employees shall be trained in accident management procedures based on the plan.

The California Aeration Plan (CAP), approved by the Director pursuant to 3 CCR 6780(c) (Exhibit 3) states:

INLET DEVICES

The objective of inlet devices is to draw in fresh air to create negative air pressure and promote cross-ventilation of the structure....

¹ All references to "director" are to the Director of the California Department of Pesticide Regulation.

Inlet devices must: (1) maintain the integrity of the required opening, (2) have an opening of at least 240 square inches up to a maximum opening of 381 square inches, (3) have the opening covered with material allowing ventilation, such as wire, plastic netting or mesh, (4) be located where the opening is not blocked and will draw in fresh air to create negative air pressure and promote cross-ventilation of the structure, (5) have the entire inlet opening be at least 4 feet above exterior grade and (6) be sealed in a way that allows external opening during aeration....

All of the following steps, 1-6 must be completed in sequence. (Tasks in steps may be accomplished in either order.) A licensed Operator or Field representative must be present for, and assure completion of, Steps 1 through 6.

Step 1:

To initiate aeration, remove the seal or duct cover from each previously installed aeration duct and activate the aeration fan(s). If the duct cover cannot be opened remotely due to malfunction, a Self-Contained Breathing Apparatus (SCBA) must be used when opening the duct cover.

Step 2:

After all aeration fans are activated, remove the inlet cover from each previously installed inlet device.

TABLE 1

Determining the Number of Ducted Aeration Fans and Inlet Devices

Fumigated Structure Size (cubic feet)	Number of Ducted Aeration Fans	Number of Inlet Devices	Total Inlet Size Range: (minimum of 240 sq. maximum of 381 sq. each Inlet Device)
60,000 or less	1	2-3	480 sq. inches to 762 sq.
60,001 to	2	3-4	720 sq. inches to 1,143 sq.
120,001 to	3	4-5	960 sq. inches to 1,524 sq.
180,001 to	4	5-6	1,200 sq. inches to 1,905 sq.
F	1 additional ducted aeration fan unit AND	1-2 additional inlet device(s)*	adding a minimum of 240 sq. inches up to a maximum of 381 sq. inches per additional

California Code of Regulations, title 16, section 1922(a)(1)(B) (16 CCR 1922(a)(1)(C)) classifies a "moderate" violation as repeat violations that did not create an actual health or environmental effect or violations that pose reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is \$250-\$1,000.

Appellant's Contentions

Appellant argues the following:

- (1) I opened two vents to assure that the California Aeration plan was adhered to during structural pest control fumigation aeration in Long Beach.
- (2) This subsection authorizes the Director of DPR to review and accept a Fumigation Safety Program if the employer makes a written application and if the Fumigation Safety Program will ensure the employees will not be exposed to excessive concentrations of fumigants. It does not set forth any requirement that employers follow all the steps of a Fumigation Safety program nor does it provide any guidance on how to interpret such a plan. Therefore, it does not require compliance with or place any obligation upon the employer.

The CAC Decision

The hearing officer found by a preponderance of the evidence that Appellant violated 3 CCR 6600(b) on February 8, 2017, when he failed to follow the CAP by not having at least two inlet devices with a minimum of 480 square inches of opening. Appellant only had one inlet device with only 272 square inches open. During the hearing, Appellant did not deny that one of the inlet devices was closed. Instead, he testified that it must have been tampered with because when he began the aeration portion, he opened it. The hearing officer found the County's argument, that the CAP minimums were not met by the Appellant, more credible than Appellant's argument that someone must have closed the inlet device based on all of the evidence. He reasoned that there was no evidence in the record showing "who or why someone might have tightly resealed the second inlet opening."

Appellant also argued, as he does here, that the CAP is not a requirement that the employer must follow. The Hearing Officer rejected this argument and explained, "when the Director of the California Department of Pesticide Regulations accepted the Structural Pesticide Industry's CAP procedures, such adoption included the requirements that are contained therein."

Appellant also argued that "the property was cleared to 0 PPM," suggesting that because Appellant went into the structure and took a reading of the fumigant levels, and those levels read 0, that he performed the fumigation carefully. The Hearing Officer rejected this argument as well, explaining that the "fumigant tester cannot be relied on ... and even if it were truly zero, that does not invalidate the need to follow the required procedures."

The hearing officer then recommended that the proposed action in the Notice of Proposed Action be adopted by the Commissioner, and the Appellant be ordered to pay a fine of \$250. The CAC adopted the hearing officer's proposed decision in its entirety.

Analysis

The CAC determined that Appellant violated 3 CCR 6600(b) by failing to perform pest control in a careful manner because Appellant failed to have the minimum number and area of inlet devices open as required by the CAP during the aeration phase of the fumigation. Appellant argues that he followed the CAP. He opened both inlet device and someone must have tampered with one. (Asuega Testimony.) He further argues that even if he didn't open the inlet device, he is not required to follow all of the requirements of the CAP. (See "Appellant's Contentions.")

As to Appellant's first argument, the Hearing Officer made a finding of fact that Appellant failed to open the second inlet device. The evidence in the record supporting this finding included the testimony of the County inspector, the County Inspector's Inspection Report (Exhibit D), the County Inspector's written statement (Exhibit E), the photographs of the open and closed inlet devices (Exhibit F), and the video recording of the open and closed inlet devices (Exhibit N). The photographs and video both show one open inlet device and a second inlet device that was tightly closed with ten clips. The County inspector testified that during his inspection, there was no evidence of tampering after the start of the aeration phase, such as clips on the ground, or any other equipment on the ground. Based on this evidence, the Hearing Officer found that Appellant had failed to open one of the inlet devices. He reasoned that there was no explanation as to who or why someone would tightly close and clip the inlet device if it was indeed open as Appellant testified. The more logical explanation, based on the photographs, video, and testimony was that Appellant failed to unclip the second inlet device that was a few inches from the open inlet device. There is substantial evidence in the record supporting this finding of fact.

Appellant's next argument is that he is not required to follow the CAP based on two previous cases against Appellant, which he quotes. (Dockets S-026, S-030; see also "Appellant's Contentions" above.) In both of those cases, Appellant was also charged with failing to follow the CAP. However, the CACs in those cases (San Bernardino and Santa Clara) charged Appellant with violating 3 CCR 6780(c), not 3 CCR 6600 (b), as is charged in this case. Appellant is correct that 3 CCR 6780(c) does not mandate any action by an employer. Instead, subdivision (c) allows the Director to approve a Fumigation Safety Program, which can be used by the employer instead of an air-supplied respirator or continuous monitoring. Employers cannot violate 3 CCR 7860(c) because this section provides for a process by which employers can have a Fumigation Safety Program reviewed by the Director. The CAP is one such Program. (See <http://www.cdpr.ca.gov/docs/county/cacltrs/penfltrs/penf2010/2010atch/attach2001.pdf>.)

However in this case, the CAC charged Appellant with failing to perform pest control in a careful manner. (3 CCR 6600 (b).) When applying a fumigant that requires the use of an air-supplied respirator (such as the one that was used in this case) the employer must perform that fumigation/aeration in only one of three ways:

- (1) Require the use of air-supplied respirator equipment,
- (2) Employ continuous monitoring to warn employees before the PEL is reached, or
- (3) In accordance with a Fumigation Safety Program approved by the Director.

(3 CCR 6780 (b), (c).) Appellant's chose to adhere to this regulation by following the CAP. (See "Appellant's Contentions" above.) However, he failed to follow all of the CAP requirements, and therefore failed to perform the fumigation "in accordance with a Fumigation Safety Program" that was approved by the Director. There is no evidence in the record that he chose to comply with 3 CCR 6780 (b) by requiring the use of an air-supplied respirator equipment, or that he used continuous monitoring. In failing to follow to the CAP, or either of the two other methods that Appellant could have used to comply with 3 CCR 6780 (b), he failed to "perform all pest control in a careful and effective manner."²

Conclusion

The CAC's decision that Appellant violated 3 CCR 6600 (b) is affirmed. Appellant failed to perform the aeration in accordance with 3 CCR 6780 (b), which constitutes failing to perform pest control in a careful and effective manner.

Disposition

The CAC's decision and levy of fine is affirmed. The CAC shall notify the Appellant of how and when to pay the \$250 fine.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: 2/7/2018

By: Marta Barlow
Marta Barlow, Member
For the members of the Disciplinary
Review Committee

² 3 CCR 6780(b) is the regulation requiring employers to operate under the provisions of an accepted Fumigation Safety Program when an employee may be exposed to fumigants. A violation of this subsection could also have been charged in lieu of 3 CCR 6600 (b).