

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Merced
(County File No. 016-ACP-MER-19/20)

Docket No. 221

**Ray's Gardening
P.O. Box 1181
Hilmar, CA 95324**

Appellant/

Procedural Background

Under California Food and Agricultural Code (FAC) section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for violations of California's pesticide laws and regulations. When levying fines, the Commissioner must follow fine guidelines established in California Code of Regulations (CCR), title 3, section 6130, and must designate each violation as Class A, Class B, or Class C. Each classification has a corresponding fine range.

After giving notice of the proposed action and providing a hearing on July 24, 2020, the Merced County Agricultural Commissioner (Commissioner) found appellant Ray's Gardening (Appellant or Ray's Gardening) violated Food and Agricultural Code (FAC) section 11701. The Commissioner classified the violation as Class A in accordance with 3 CCR section 6130. The Commissioner levied a \$1,000 fine for the violation.

Ray's Gardening appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (Director). The Director has jurisdiction to review the appeal under FAC section 12999.5.

Standard of Review

The Director decides the appeal on the record before the Hearing Officer. In reviewing the Commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision. The Director 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 requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have

been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the Commissioner's decision. If the Director finds substantial evidence in the record to support the Commissioner's decision, the Director affirms the decision.

Factual Background

On May 8, 2020, Merced County Agricultural Inspector Charizma Mendoza (Inspector Mendoza) observed Roger Rea spraying weeds with Cyonara Lawn & Garden (EPA Reg. No. 53883-197) using a five gallon backpack sprayer in the parking lot of O'Reilly Auto Parts located at 1620 Bell Lance, Atwater, California. (Testimony of Charizma Mendoza (Mendoza Testimony); Stipulation 4; County Exhibit (Ex.) 2.) Inspector Mendoza conducted a pesticide use monitoring inspection on Mr. Rea and his employer, Appellant Ray's Gardening. (Mendoza Testimony; Stipulation 1; County Ex. 2.) Mr. Rea was wearing a shirt that said "Ray's Gardening" and a truck was parked nearby that also said "Ray's Gardening." (County Ex. 2; Mendoza Testimony.) Appellant Ray's Gardening does not possess a pest control business license. (Stipulation 3.) O'Reilly Auto Parts employs Ray's Gardening to do landscaping and maintenance on its premises. (Stipulation 2; Testimony of Aurelio Gomes (Gomes Testimony).) In 2015, Appellant received a violation notice for applying pesticides without a pest control business license. (Gomes Testimony; County Ex. 2.)

Inspector Mendoza approached Mr. Rea and asked him to identify himself and what he was spraying. (County Ex. 2.) Mr. Rea said that he was killing weeds with Roundup. (*Id.*) Inspector Mendoza asked Mr. Rea for his phone number, as well as his employer's contact information. (*Id.*) Mr. Rea provided Inspector Mendoza with a phone number that he said was his, but Inspector Mendoza later discovered the phone number was invalid. (*Id.*) Mr. Rea told Inspector Mendoza that he did not have his employer's contact information and his employer did not have knowledge that he was spraying. (*Id.*) Mr. Rea said the owner of the shopping center in which O'Reilly Auto Parts is located paid him to kill the weeds. (*Id.*) Mr. Rea then said he was using Roundup and someone at Tractor Supply Co. gave him the pesticide and the backpack sprayer. (*Id.*) However, Mr. Rea later testified that he used his own money to purchase the pesticide he used on the day of the inspection. (Testimony of Roger Rea (Rea Testimony).) Mr. Rea also later testified that he used the Ray's Gardening truck to drive home to pick up the backpack sprayer, then drove to O'Reilly Auto Parts to complete the landscape maintenance work. (Rea Testimony.)

The pesticide bottle and label that Mr. Rea was using was not on site, so Mr. Rea walked Inspector Mendoza to Tractor Supply Co. to show her the pesticide he was using. (County Ex. 2; Mendoza Testimony; Rea Testimony.) As they walked, Mr. Rea said he was not using Roundup, but was using another product, and led Inspector Mendoza to a shelf with Cyonara Lawn & Garden and said it was the product he was using. (*Id.*) Cyonara Lawn & Garden is a pesticide used to control insects. (Mendoza Testimony; County Exs. 5 and 6.) Mr. Rea testified that he thought Cyonara Lawn & Garden is a product that kills weeds, and he could not read the label because he did not have his glasses with him on the day of the inspection. (Rea Testimony.)

Mr. Rea also testified that he initially told Inspector Mendoza that he was using Roundup because he was nervous at the time of the inspection, and also that he mixed the pesticide solution on site. (Rea Testimony.)

On May 21, 2020, the Commissioner issued a Notice of Proposed Action charging Appellant with violating Food and Agricultural Code section 11701. (County Ex. 1.) Appellant requested a hearing on May 26, 2020. (*Id.*) The Commissioner granted Appellant's request and on July 24, 2020, Hearing Officer Donald O. Cripe held a hearing on the matter in Merced, California. (*Id.*) Appellant was represented at the hearing by attorney Carmen Ramirez. (*Id.*)

Relevant California Laws and Regulations

FAC section 11701 states, "It is unlawful for a person to advertise, solicit, or operate as a pest control business, unless the person has a valid pest control business license issued by the director."

When levying fines, the Commissioner must follow the fine guidelines set forth in 3 CCR section 6130. Under 3 CCR section 6130, violations shall be designated as a Class A, Class B, or Class C. A Class A violation is "[a] violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the commissioner determines that one of the following aggravating circumstances support elevation to Class A... 1. The respondent has a history of violations." (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1).) The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(1).)

The Commissioner shall use relevant facts, including severity of actual or potential effects and respondent's compliance history when determining the fine amount within the fine range, and include those relevant facts in the Notice of Proposed Action. (Cal. Code Regs., tit. 3, § 6130, subd. (d).)

The Hearing Officer's Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Appellant had the opportunity to present evidence and question witnesses. The Hearing Officer found Appellant violated FAC section 11701 on May 8, 2020 by operating a pest control business without a license. (*See* Proposed Decision of Hearing Officer in File No. 016-ACP-MER-19/20, dated September 11, 2020. (Hearing Officer's Decision) at pp. 3-4.) The Hearing Officer found Mr. Rea operated on behalf of Appellant on May 8, 2020, because Mr. Rea "was on the clock" maintaining a client's landscape for which Appellant was being paid. (*Id.*) Additionally, the Hearing Officer found Mr. Gomes's testimony that he would have suspended Mr. Rea if Mr. Gomes had known that he had sprayed a pesticide unpersuasive, because Mr. Gomes did not submit evidence that he suspended Mr. Rea after the incident. (*Id.* at p. 4.) The Hearing Officer found the Commissioner's classification of Appellant's violation of FAC section 11701 as a Class A violation and fine of \$1,000 appropriate. (*Id.*) On September 14, 2020, the Commissioner adopted the Hearing Officer's proposed decision in its entirety. (*See* Notice of Decision, Order and Right of Appeal.)

Appellant's Contention on Appeal

Appellant Ray's Gardening appeals the Commissioner's Decision that it violated FAC section 11701. (Notice of Appeal, dated October 13, 2020 (Notice of Appeal).) Appellant contends that the accepted definition of "operating" is the "carrying out of an activity, whether for profit or gratuitously." (*See* Written Argument in Support of Appeal (Written Argument¹.) Appellant asserts that it did not "operate" as a pest control business because it "does not 'carry on an activity' of pest control operations," and that it presented sufficient evidence and witness testimony at the hearing to support its argument. (*Id.*)

The Director's Analysis

- A. Substantial evidence supports the Commissioner's decision that Appellant Ray's Gardening operated as a pest control business without a valid pest control business license in violation of Food and Agricultural Code section 11701.

On appeal, Appellant contends it did not violate section 11701 because it did not "operate" as a pest control business because it "does not 'carry on an activity' of pest control operations." (Written Argument.) After reviewing the evidence and testimony presented, the Director finds there is substantial evidence in the record to support the Commissioner's decision that Appellant Ray's Gardening violated FAC section 11701² when its employee made a pesticide application to the premises of O'Reilly Auto Parts on May 8, 2020, without a valid pest control business license.

Section 11701 states that it "is unlawful for a person to advertise, solicit, or operate as a pest control business, unless the person has a valid pest control business license issued by the director." (Food & Agr. Code § 11701.) Appellant does not dispute its employee Mr. Rea made a pesticide application while completing maintenance for Appellant's client, and that Appellant does not possess a valid pest control business license. At the hearing, Appellant stipulated that it conducted landscape maintenance for hire for O'Reilly Auto Parts located at 1620 Bell Lance, Atwater, California. (Stipulation 2.) The Appellant also stipulated that Ray's Gardening employed Mr. Rea and that Mr. Rea made a pesticide application of Cyonara Lawn & Garden on May 8, 2020 to the landscape of O'Reilly Auto Parts. (Stipulations 1 and 4.) Lastly, Appellant stipulated it does not possess a valid pest control business license issued by the Department of Pesticide Regulation. (Stipulation 3.)

At the hearing, the County also presented evidence that Appellant operated as a pest control business, because Appellant's employee, Mr. Rea, made a pesticide application without a valid pest control business license. (*Refer to* Audio Recordings of Hearing.) The County submitted photographs of Mr. Rea making the pesticide application. (County Ex. 4; *also refer to* Audio Recordings of Hearing.) While making the application, Mr. Rea was wearing a shirt and a

¹ Appellant submitted two separate letters to assert its arguments on appeal. The letters are dated October 13, 2020 and December 9, 2020. The letters are referred to collectively as "Written Argument."

² Unless otherwise specified, all subsequent section references shall be to the Food and Agricultural Code.

truck was parked nearby that displayed Appellant's name. (County Ex. 2; *also refer to* Audio Recordings of Hearing.) The County also submitted photographs of the bottle of *Cyonara* which Mr. Rea showed to Inspector Mendoza at the Tractor Supply Co. (County Ex. 5; *also refer to* Audio Recordings of Hearing.)

On appeal, Ray's Gardening contends it demonstrated at the hearing that it did not operate a pest control business. (Written Argument.) Appellant argues Mr. Rea was a rogue employee who did not follow the rules and whose actions were unapproved by the business, so the employee's actions cannot be classified as the operation of a pest control business. (*Id.*) However, the Hearing Officer was unpersuaded by Mr. Gomes' testimony that he would have terminated Mr. Rea had Mr. Gomes known that Mr. Rea intended to spray pesticides. (Hearing Officer's Decision at p. 4.) The Hearing Officer noted that Mr. Gomes did not submit evidence or claim that he actually suspended Mr. Rea after Mr. Gomes learned that Mr. Rea had sprayed a pesticide. (Hearing Officer's Decision at p. 4; *also refer to* Audio Recordings of Hearing.)

Further, even if Appellant Ray's Gardening did not explicitly approve the use of a pesticide, Appellant is still responsible under the doctrine of *respondeat superior*. Under the doctrine of *respondeat superior*, Appellant can be held responsible for the action or negligence of an individual he hired, if acting within the scope of his employment. (*See Yamaguchi v. Harnsmut* (2003) 106 Cal.App.4th 472, 481-482.) The determining factor in establishing whether an employee's act is within the scope of employment "is not whether the act was authorized by the employer, benefited the employer, or was performed specifically for the purpose of fulfilling the employee's job responsibilities." (*Id.* at p. 481-482 (citing *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 297-299).) Instead, the inquiry is whether "the risk of such an act is typical of or broadly incidental to the employer's enterprise." (*Id.* at p. 482 (citing *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1003).) Therefore, an employer may be vicariously liable for its employee's act if the act "was an outgrowth of his employment, inherent in the working environment, typical of or broadly incidental to the employer's business, or, in a general way, foreseeable from his duties." (*Id.* at p. 482 (citing *Lisa M.*, *supra*, 12 Cal.4th at pp. 296, 298-299) (internal citations omitted).)

Here, Mr. Rea's pesticide application was an "outgrowth of his employment" and was "foreseeable from his duties," so Appellant is vicariously liable for Mr. Rea's actions under the doctrine of *respondeat superior*. Mr. Rea testified that he intended to apply a pesticide that would suppress the growth of weeds on O'Reilly Auto Parts' parking lot so he would not have to spend as much time hand pulling weeds. (Rea Testimony.) Mr. Rea's pesticide application was an outgrowth of his employment because his actions were connected to his employment in landscape maintenance. The use of pesticides for landscape maintenance is so common that the Department of Pesticide Regulation has a pest control license category specifically for landscape maintenance. It was also foreseeable from Mr. Rea's duties that he may make a pesticide application, because Appellant had previously received a violation notice for making a pesticide application without a valid pest control business license. (County Ex. 9; *also refer to* Audio Recordings of Hearing.) Because Mr. Rea's acts were an "outgrowth of his employment" and were "foreseeable from his duties," Appellant is responsible for Mr. Rea's pesticide application

under the doctrine of *respondeat superior*.³ Therefore, Appellant's argument that it did not operate as a pest control business without the required license in violation of section 11701 is unpersuasive.

B. The Commissioner's decision to classify the violation as a Class A violation and fine Appellant Ray's Gardening \$1,000 was appropriate.

When levying fines, the Commissioner must follow the fine guidelines contained in 3 CCR section 6130. On appeal, Appellant does not challenge the class or fine amount set by the Commissioner; however, the Director finds there is substantial evidence to support the Commissioner's decision that this was a Class A violation and the fine of \$1,000 is appropriate. Section 11701 states it "is unlawful for a person to advertise, solicit, or operate as a pest control business, unless the person has a valid pest control business license issued by the director." (Food & Agr. Code § 11701.) The purpose of this law is to ensure that persons who operate a pest control business are trained to use pesticides in a way that mitigates the risk of adverse health, property, or environmental effects. Appellant received a violation notice for making a pesticide application without a valid pest control business license, the same violation at issue here, in 2015. (County Ex. 9; *also refer to* Audio Recordings of Hearing.) Therefore, there is substantial evidence to support the Commissioner's decision that Appellant's violation of section 11701 was a Class A violation, because it was "[a] violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects" and "[t]he respondent has a history of violations." (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1).)

The fine range for Class A violations is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(1).) The Commissioner fined Appellant \$1,000, on the lower end of the Class A fine range. The Director finds the \$1,000 fine is a reasonable exercise of the Commissioner's discretion given the violation of law that mitigates the risk of adverse health, property, or environmental effects, and Appellant received a notice in 2015 for violating the same law.

Conclusion

The Director affirms the Commissioner's decision that Appellant violated FAC section 11701 and the violation qualified as a Class A violation. The total fine is upheld.

Disposition

³ While there is ample evidence in support of the Commissioner's decision, it is also worth noting the many inconsistencies in the information that Mr. Rea gave to Inspector Mendoza on the day of the inspection. First, Mr. Rea provided Inspector Mendoza with a phone number he claimed to be his personal number, but Inspector Mendoza later discovered that the phone number was invalid. (County Ex. 2.) Second, Mr. Rea told Inspector Mendoza that he did not have his employer, Ray's Gardening's, contact information. (*Id.*) Third, Mr. Rea said the owner of the shopping center paid him to kill the weeds, but in fact O'Reilly Auto Parts was the paying client. (*Id.*) Fourth, Mr. Rea told Inspector Mendoza that someone at Tractor Supply Co. gave him the pesticide and the backpack sprayer to make the application on the day of the inspection. (*Id.*) However, Mr. Rea later testified he used his own money to purchase the pesticide and retrieved the materials from his home. (Rea Testimony.) Additionally, the Cyonara Lawn & Garden bottle was not on site, which is unusual considering Mr. Rea claimed to have mixed the solution onsite. (County Ex. 2.)

The Director affirms the Commissioner's decision and levy of fines. The Commissioner shall notify Appellant of how and when to pay the \$1,000 in total fines.

Judicial Review

Under Food and Agricultural Code section 12999.5, Appellant may seek court review of the Director's decision within 30 days of the date of the decision. Appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: **JAN 25 2021**

By: 
Val Dolcini, Director