

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

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Alameda
(County File No. 2011110)

Docket No. S-023

Mission City Fumigation
Scott R. Howell, President
1608 Copenhagen Drive
Solvang, California 93463

DECISION

Appellant/

Procedural Background

Pursuant to Business and Professions Code (BPC) section 8617, and Food and Agricultural Code (FAC) section 15202, the County Agricultural Commissioner (CAC) may levy a civil 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 Alameda CAC found that Mission City Fumigation (appellant or MCF) violated section 1970.4 of Title 16, California Code of Regulations (16CCR) by failing to have the properly signed form (Occupant's Fumigation Notice and Pesticide Disclosure Notice) in the possession of the licensed fumigator when the fumigant was released. The CAC levied a fine at the high end of the Class C/Minor category at \$400.00.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee or DRC). The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the DRC were John Tengan for the structural pest control industry, Susan Saylor for the Structural Pest Control Board (SPCB), and Jodi Clary 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 the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Committee looks to see if there was substantial evidence in the record, contradicted or uncontradicted, before the Hearing Officer to support the commissioner'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 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 Committee 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 Committee finds substantial evidence in the record to support the commissioner's decision, the Committee affirms the commissioner's decision.

If a commissioner's decision presents a matter of an interpretation of a law or regulation, the Committee decides that matter using its independent judgment.

Factual Background

On May 24, 2011, a Senior Agricultural Biologist for the CAC arrived at a Union City location where the residence was being tarped for fumigation. The licensee for MCF on site stated that he was not going to fumigate that day because he did not have the Occupant's Fumigation Notice and Pesticide Disclosure Form for the job. The Biologist left and returned to the home approximately 35 minutes later and discovered that the fumigation had taken place. The license admitted that he still did not possess the form but that the form had been faxed to the office.

Applicable Statutes and Regulations

16 CCR section 1970.4 requires that a properly signed form-Occupant's Fumigation Notice and Pesticide Disclosure Notice-be in the possession of the licensed fumigator when the fumigant is released. The form is then to be attached to and becomes a permanent part of the fumigation log.

16 CCR section 1922 defines a "minor" violation as one that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental affect. The fine range for minor violations is \$50-\$400.

Appellant's Contentions

The Appellant does not contest the violation or the classification of the violation as a Class C/Minor violation, he contests only that the fine level was set at \$400 based on the CAC's allegation that the violation was "blatant". The Appellant asserts that the violation was the result of a miscommunication between his office staff and the field representative and the failure of the office secretary to obtain a waiver of the regulation's requirements in a timely manner.

The Hearing Officer's Determination

The Hearing Officer found that the fact that a waiver system had been practiced by the CAC to accommodate the Industry does not absolve MCF from the requirements of the regulation, but MCF admitted that it failed to properly obtain the waiver and was thus in violation. The Hearing Officer did not speak to the fine level other than to say the amount of the fine was within the purview of the CAC.

Analysis

The record demonstrated that the Alameda CAC practiced a waiver system whereby, if the company calls the CAC and asks for a waiver of the requirement that the form be in the possession of the licensee on site, then faxes a copy of the form *to the CAC* prior to initiating fumigation, the CAC will waive the regulation requirement. Nowhere in law or regulation is there the authority to waive the requirements of a law or regulation. The CAC has the obligation to enforce the pesticide laws and regulations, as written, and does not have legal authority to waive any provision of law or regulation. The Structural Pest Control Board and its umbrella agency, the Department of Pesticide Regulation, do not condone any such practice of waiving the requirements of a regulation. Regulations are developed for the express reason of protecting human health and the environment and no provision has been made to allow waiver of a requirement upon substantial compliance. This practice is outside the legitimate authority of the CAC. However, even this invalid procedure was not followed by MCF.

MCF's onsite licensee told the CAC inspector that he did not have the necessary paperwork onsite and would not do the fumigation until he was in possession of the form. This testimony establishes knowledge of the regulation's requirement. The licensee then did go forward with the fumigation half an hour later without the form in hand. This is a clear violation of the regulation, and the licensee's knowledge justifies placing the fine at the upper end of the range. And, as discussed by the Hearing Officer, the fine level was well within the discretion of the CAC.

Conclusion

The record demonstrates that the Commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The Alameda CAC's decision is affirmed. The Commissioner's order is stayed until 30 days after the date of this decision to provide opportunity for the appellant to seek judicial review of the Committee's decision as set forth below.

The \$400 civil penalty levied by the commissioner against the appellant is due and payable to the "Structural Pest Control Education and Enforcement Fund" 30 days after the date of this decision. The appellant is to mail the payment along with a copy of this decision to:

Structural Pest Control Board
2005 Evergreen Street, Ste. 1500
Sacramento, California 95815

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Judicial Review

BPC section 8662 provides the appellant may seek court review of the Committee's decision pursuant to Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: April 19, 2012

By: Jodi Clary
Jodi Clary, Member
For the members of the
Review Committee