

**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 Placer
(County File No. 019-ACP-PLA-12/13)

Administrative Docket No. 193

DECISION

**Vasquez Yard Service
356 Main Street
Yuba City, California 95991**

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 April 11, 2013, the Placer County Agricultural Commissioner (Commissioner) found that the appellant, Marcos Vasquez of Vasquez Yard Service, violated FAC section 11701 by operating without a pest control license, and five regulations related to pesticide use: 3 CCR sections 6602, 6678, 6726, 6724, and 6738. Appellant Vasquez stipulated to all the violations except for the violation of section 6724 concerning required pesticide handler training. The Commissioner classified the violations as Class B and C violations and levied a fine for each violation at the lowest level for its class, for a total fine of \$1,300.

Appellant Marcos Vasquez (appellant) appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction to review the appeal under FAC section 12999.5.¹

¹ An individual "represented" Mr. Vasquez at the hearing and on this appeal. It is DPR policy to limit representation in county agricultural commission proceedings to pro se representation, attorneys, and employees or relatives of the respondent. Appellant's representative currently has "inactive" status with the California State Bar. Although this representation is inconsistent with DPR policy, it is recognized for purposes of this appeal because the issue was not raised at the hearing.

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.

Relevant Laws and Regulations

FAC section 11701 states that it is unlawful to operate a pest control business without a valid pest control business license issued by the director.

3 CCR section 6602 requires that a copy of the registered pesticide label be present at each use site.

3 CCR section 6678 provides labeling requirements for service containers.

3 CCR section 6724 requires employees who handle pesticides to be properly trained.

3 CCR section 6726 requires the planning and posting of medical care plans for employees handling pesticides.

3 CCR section 6738 requires employers to assure that employees wear specified personal protective equipment including protective eyewear and gloves when applying pesticide.

The Commissioner may "levy a civil penalty against a person violating Division 6 (commencing with Section 11401), Article 10 (commencing with Section 12971), or Article 10.5 (commencing with Section 12980) of this chapter . . . or a regulation adopted pursuant to any of these provisions." (Food & Agr. Code § 12999.5, subd. (a).)

When levying a penalty, the Commissioner must follow the guidelines provided in 3 CCR section 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. Violations of a law or regulation that mitigates the risk of an adverse health, property, or environmental effect is a Class B violation with a fine range of \$250 to \$1,000. Violations of a law or regulation that does not mitigate the risk of an adverse health, property, or environmental effect is a Class C violation with a fine range of \$50 to \$400. (Cal. Code Regs., tit. 3, § 6130)

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

Factual Background

On December 13, 2012, Placer County Agricultural Inspector Kimberley Johnson (Inspector Johnson) conducted a pesticide use monitoring inspection of Vasquez Yard Service during a landscaping job at 1844 Hidden Hollow Lane in Lincoln, California. Inspector Johnson stated in her report that she observed an employee, Jose Luis (Mr. Luis), applying pesticide with a backpack sprayer.

The inspection report includes multiple observed incidents of noncompliance at the use site. Specifically, the report notes that Vasquez Yard Service is not licensed or registered with Placer County and that Mr. Luis was not properly trained to handle pesticides and was not wearing personal protective equipment. No emergency medical procedures were posted at the site, there was no labeling on the backpack sprayers or tip-and-pour container, and no copies of pesticide labels were present at the use site.

During the inspection, appellant identified the pesticide as Round-Up. On December 26, 2012, Inspector Johnson followed-up with appellant by phone call. Appellant had the container at his home and corrected the name of the pesticide used on December 13, 2012 as Pronto Big N' Tuf Herbicide (Pronto). Pronto is a registered pesticide (EPA reg. No. 42750-61-2217).

On February 11, 2013, appellant wrote a letter to the county apologizing for using the herbicide in an unauthorized manner and stating that he stopped using the product.

Arguments on Appeal

Appellant appeals the Commissioner's civil penalty decisions on the grounds that:

- The fines levied by the Commissioner were unreasonable and excessive, and failed to properly consider mitigating factors.
- Appellant did not harm the environment, pollute surface or groundwater, or harm in any way his employees or customers.
- Appellant did not fail to provide required training to an "employee" because Mr. Luis was not employed by Vasquez Yard Service.
- The hearing violated the Due Process Clause because appellant is not fluent in English and no translator was present.
- The inspector did not see Mr. Luis apply pesticide and "prejudged what she was going to find."²

Director's Analysis

Appellant stipulated to all of the violations except for the violation of 3 CCR section 6724 concerning required pesticide handler training. The only issues that need to be considered on appeal are the violation of section 6724, the level of the fines, and the constitutional due process claim. These are discussed below.

a. The fines levied were at the lowest level for each violation and were not excessive

Appellant appeals the fine on the ground that the penalty was unreasonable and excessive. FAC section 12999.5(a) authorizes the Commissioner to levy fines for violations of pesticide laws and regulations. 3 CCR section 6130 provides the Commissioner with discretion to determine the fine amount for violations and requires consideration of relevant facts including the severity of the actual or potential effects and respondent's compliance history.

Appellant convincingly argues that several facts weigh against large civil penalties. Appellant does not have the ability to pay large fines and does not have experience with pesticide regulation because he operates a small landscaping business. There is no indication that he has a history of noncompliance. He cooperated by immediately halting use of the pesticide and

² Appellant appealed the fine on the ground that the inspector did not see Mr. Luis apply pesticide. On appeal, the director must determine if the Commissioner's decision was based on substantial evidence in the record before the hearing officer. The argument is not part of the record because it was first raised on appeal after the hearing. Thus, the argument was waived and is not reviewable on appeal.

providing a written apology to the county. Additionally, appellant did not directly harm health, property, or the environment. As will be discussed below, the Commissioner properly classified each violation, had substantial evidence to support a finding that each the violation occurred, appropriately considered the mitigating factors, and exercised his discretion to levy the lowest possible fine for each violation class.

1. 3 CCR section 6724

3 CCR section 6724 requires employers to provide training to employees handling pesticides. The Commissioner found that appellant did not provide pesticide handler training to his employee, Mr. Luis prior to the application. Additionally, the Commissioner determined that failure to provide such training is a Class B violation because an injury to the applicator, environment, or property could occur without pesticide-specific training. The Commissioner fined appellant \$250 for violating section 6724. Because appellant did not stipulate to the violation of section 6724, the Commissioner's decision must be supported by substantial evidence.

Appellant argued at the hearing that he did not violate section 6724 because Mr. Luis was not an employee of Vasquez Yard Service. Section 6724 requires employers to provide training to "employees" handling pesticides. Specifically, appellant stated that Vasquez Yard Service is a family business and that Mr. Luis is his brother-in-law and was merely returning a favor.

However, when questioned further by the hearing officer, appellant stated that he paid Mr. Luis.³ Additionally, Inspector Johnson stated that during the inspection, Mr. Luis identified himself as the appellant's employee, although appellant noted that Mr. Luis only speaks Spanish.⁴ Appellant's admission at the hearing that he paid Mr. Luis is sufficient to support the Commissioner's determination that Mr. Luis was an employee of Vasquez Yard Service.

Inspector Johnson listed in her report that Mr. Luis did not receive handler training. She reached this conclusion because during her interview with Mr. Luis he was not wearing personal protective equipment and it did not appear that he "knew anything about spraying."⁵ There is no evidence in the record to the contrary. Further, appellant seems to concede that no training occurred. Specifically, by arguing that Mr. Luis was not his employee, appellant implies that he was not required to provide training and so, did not. Thus, the Commissioner decision is supported by substantial evidence.

³ (Placer County Agricultural Com. Hearing, File No. 019-ACP-PLA-12/13 (April 11, 2013) at 11:00.)

⁴ (Placer County Agricultural Com. Hearing, File No. 019-ACP-PLA-12/13 (April 11, 2013) at 9:02.)

⁵ (Placer County Agricultural Com. Hearing, File No. 019-ACP-PLA-12/13 (April 11, 2013) at 9:20.)

The Commissioner properly designated section 6724 as a Class B violation. Pesticide handler training provides applicators with information on the proper handling of specific pesticides including health hazards and emergency procedures that can prevent harm to health, property, or the environment. Class B violation fines range from \$250 to \$1,000. Here, the Commissioner properly fined appellant \$250-- the lowest permissible fine for Class B violation of section 6724. Thus, the Commissioner did not impose an excessive fine.

2. FAC section 11701

FAC section 11701 provides that it is unlawful to advertise, solicit, or operate as a pest control business without a valid pest control business license issued by the director. Appellant stipulated at the prehearing conference that he violated section 11701. The Commissioner noted that performing pest control for hire without a valid pest control business license is a Class C violation. The Commissioner fined appellant \$50 for violating section 11701.

There is no dispute as to the violation of section 11701 because appellant stipulated to the fact. The record shows that appellant offered pest control services as part of his landscaping business. Inspector Johnson observed Mr. Luis applying pesticide with a backpack sprayer during a landscaping job and she testified that Vasquez Yard Service performs pest control for hire.⁶

Performing pest control for hire without a valid pest control business license is considered a Class C violation. Class C violation fines range from \$50 to \$400. Here, the Commissioner properly fined appellant \$50--the lowest permissible fine for a Class C violation of section 11701. Thus, the Commissioner did not impose an excessive fine.

3. 3 CCR section 6602

3 CCR section 6602 requires that a copy of the registered pesticide label be available at each use site. Appellant stipulated at the prehearing conference that he violated section 6602. The Commissioner determined that because pesticide labels provide the applicator with information on safe and legal application of the pesticide, section 6602 is a Class B violation, intended to mitigate the risk of adverse health, property, or environmental effects. The Commissioner fined appellant \$250 for violating section 6602.

There is no dispute as to the violation of section 6602 because appellant stipulated to the fact. The record shows that Mr. Luis sprayed a registered pesticide without a registered label at the use site.

⁶ (Placer County Agricultural Com. Hearing, File No. 019-ACP-PLA-12/13 (April 11, 2013) at 9:13.)

The Commissioner properly designated section 6602 as a Class B violation. Pesticide registration labels provide important information regarding safe and proper application of the pesticide. Failure to have such a label at the use site could result in misuse that leads to health, property, or environmental effects. Class B violation fines range from \$250 to \$1,000. Here, the Commissioner properly fined appellant \$250--the lowest permissible fine for a Class B violation of section 6602. Thus, the Commissioner did not impose an excessive fine.

4. 3 CCR section 6678

3 CCR section 6678 provides labeling requirements for service containers. Appellant stipulated at the prehearing conference that he violated section 6678. The Commissioner found that section 6678 is a Class B violation because, in the event of an accident, emergency response measures would be hampered by the presence of an unknown chemical in an unlabeled container and possibly create a health risk. The Commissioner fined appellant \$250 for violating section 6678.

There is no dispute as to the violation of section 6678 because appellant stipulated to the fact. There was no labeled service container at the use site.

The Commissioner properly designated section 6678 as a Class B violation because unlabeled service containers may risk adverse health effects by leading to misuse or slowing an appropriate emergency response. Class B violation fines range from \$250 to \$1,000. Here, the Commissioner properly fined appellant \$250--the lowest permissible fine for a Class B violation of section 6678. Thus, the Commissioner did not impose an excessive fine.

5. 3 CCR section 6726

3 CCR section 6726 requires employers to develop an emergency medical care plan for employees handling pesticides and post the plan at the work site. Appellant stipulated at the prehearing conference that he violated section 6726. The Commissioner determined that failure to provide emergency medical care posting for employees handling pesticides is a Class B violation because it may result in adverse health effects. The Commissioner fined appellant \$250 for violating section 6726.

There is no dispute as to the violation of section 6726 because appellant stipulated to the fact. The inspector found no employee emergency medical plan at the application site and appellant admitted that he did not develop a plan.

The Commissioner properly designated section 6726 as a Class B violation. The emergency medical care plan is intended to direct quick and effective medical attention. Failure to develop or post the plan involves an adverse health risk. Class B violation fines range from

\$250 to \$1,000. Here, the Commissioner properly fined appellant \$250--the lowest permissible fine for a Class B violation of section 6726. Thus, the Commissioner did not impose an excessive fine.

6. 3 CCR section 6738

3 CCR section 6738(b)(1)(C) and 6738 (c)(1)(C) require employers to assure that employees wear protective eyewear and gloves when applying pesticides with handheld equipment. Appellant stipulated at the prehearing conference that he violated section 6738. The Commissioner determined that failure to wear personal protective equipment is a Class B violation because section 6738 is intended to mitigate adverse health effects. The Commissioner fined appellant \$250 for violating section 6738.

There is no dispute as to the violation of sections 6738 because appellant stipulated to the fact. Inspector Johnson observed Mr. Luis spraying pesticide without personal protective equipment.

The Commissioner properly designated section 6738 as a Class B violation. Failure to wear protective eyewear and gloves while applying pesticide involves a health risk by exposing eyes and skin to contact with pesticide. Class B violation fines range from \$250 to \$1,000. Here, the Commissioner properly fined appellant \$250--the lowest permissible fine for a Class B violation of Section 6738. Thus, the Commissioner did not impose an excessive fine.

b. Failure to provide a translator after the appellant declined the offer did not violate due process

Appellant argues that he was denied due process during the hearing because he has difficulty speaking and understanding English and no translator was present. The federal and state constitutions guarantee that the state may not deprive individuals of life, liberty, or property without due process of law.⁷ Due process requires the opportunity to be heard at a meaningful time and in a meaningful manner.⁸ Questions of law involving application of the due process clause are reviewed de novo.⁹

The record shows that at the request of the appellant's representative, the county offered to provide a translator for the hearing, but that the appellant declined. Appellant argues that a

⁷ (U.S. Const., 5th & 14th Amends.; Cal. Const., art. 1, § 7, subd. (a).)

⁸ (*Matthews v. Eldridge* (1975) 424 U.S. 319, 333.)

⁹ (*Spanner v. Rancho Santiago Community College Dist.* (2004) 119 Cal.App.4th 584.)

translator still should have been present at the hearing. The fundamental requirement of due process is the opportunity for a fair and meaningful hearing. Here, the county offered appellant the opportunity to use a translator at the hearing, but he declined. Providing the opportunity to use a translator is sufficient to satisfy the due process requirement that an individual receive the opportunity for a fair and meaningful hearing. To find otherwise would suggest that the hearing officer had a constitutional obligation to compel appellant to use a translator after he declined, which is not the case.

Conclusion

The Commissioner's decision that appellant Vasquez violated FAC section 11701 and 3 CCR sections 6602, 6678, 6726, 6724, and 6738 is affirmed. The Commissioner appropriately exercised his discretion in assessing the fines for each violation, therefore the total fine of \$1,300.00 is upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify Appellant Vasquez of how and when to pay the total fine of \$1,300.00.

Judicial Review

Under FAC 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: 8/8/13

By: Brian Leahy
Brian Leahy, Director