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. 12132151)

Docket. No. S-024

Mega Fume, Inc.
David Wadleigh, Operator
P.O. Box 17716
Anaheim, CA 92817
Appellant/

DECISION

Procedural Background

Under 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 Los Angeles County Agricultural Commissioner (CAC) found that Mega Fume, Inc. (appellant or Mega Fume) violated FAC section 12973 by using a pesticide in conflict with the label. While the CAC adopted the hearing officer decision that the violation occurred, the hearing officer decision that the fine should be reduced from $2,500 to $1,500 was not adopted, and the CAC levied a fine of $2,500 for the violation.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the Disciplinary Review Committee were John Tengan for the structural pest control industry, Susan Saylor for the Structural Pest Control Board (SPCB), and Daniel Rubin 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 November 5, 2012, appellant Mega Fume received a fumigation order for 601 North Market Street Inglewood, California (601 N. Market Street) and scheduled fumigation for November 13, 2012. 601 N. Market Street is a multi-unit-residential complex that includes fifty (50) apartments in four separate buildings. Many of the apartments use gas stoves and wall furnaces and at least one building is equipped with a gas-powered-water heater.

On November 9, 2012, appellant submitted fumigation gas shut off and restoration requests for 601 N. Market Street with the Southern California Gas Company (Gas Company) using an online request form. Appellant requested the gas shut off for November 13, 2012 and restoration for November 15, 2012. The Gas Company replied to the requests by email stating that "We have completed your fumigation request." November 9, 2012 was the Friday before the three day Veterans Day weekend.

On November 13, 2012, Mega Fume arrived at 601 N. Market Street for the scheduled fumigation. The Mega Fume technician stated that she saw an employee of the Gas Company on the premises. On this basis, she did not check if the gas was shut off or if the meter was marked with a red flag. According to a Gas Company dispatch report there is no record of a Gas Company employee at that address on that date. It is Gas Company policy to mark meters with a red flag and locking device after shut-off. It is Mega Fume policy that technicians check for a red flag before fumigating. Appellant then proceeded to fumigate 601 N. Market Street using Vikane. Vikane is an EPA and DPR registered pesticide product.

On November 15, 2012, in response to Mega Fume's restoration request, a Gas Company employee went to 601 N. Market Street to restore gas service and discovered that the gas was already on. The Gas Company then performed a fumigation-field investigation and reported that the gas service had never been shut off and that pilot lights on ranges and wall heaters remained on. As a result, the fumigation on November 13, 2012 took place with the gas on. It is unclear why the Gas Company did not shut the gas off or notify Mega Fume of a delay in the shut-off service. On November 25, 2012, the Gas Company submitted a complaint to the CAC that Mega Fume conducted the fumigation prior to the termination of gas service.

Applicable Statutes and Regulations

FAC section 12973 states that the use of any pesticide shall not conflict with the registered label.

16 CCR 1922 defines a "serious" violation as a violation which creates an actual health or environmental hazard. The fine range for a serious violation is $700-$5,000.

Appellant's Contentions

Appellant contests the violation and the fine level. Specifically, appellant argues that the Gas Company was at fault for failing to shut off the gas or notify Mega Fume of a shut-off-service delay and that the CAC fine is excessive in relation to similar fumigation/gas violations in Los Angeles County.

The CAC Decision

The CAC classified the violation as a "serious" violation of FAC section 12973 and proposed a fine of $2,500. The hearing officer found that appellant used Vikane contrary to the label by fumigating prior to the termination of gas service. However, the hearing officer reduced the fine from $2,500 to $1,500 because the County "failed to clearly establish" why the fine amount exceeded similar fumigation/gas violations in Los Angeles County and the Gas Company was "partially culpable" for failing to comply with the Gas Company's tariff rule no. 9 (PUC Rule 9).

The CAC adopted the hearing officer's finding that the violation of FAC section 12973 occurred, but decided that the County presented sufficient justification to support the original $2,500 fine. Specifically, the CAC found that the County distinguished the previous fumigation/gas cases and that appellant had the ultimate responsibility to ensure that gas service was terminated before fumigation. Appellant does not appeal the fine classification.

Analysis

a. The CAC decision that appellant used a pesticide in conflict with the label is supported by substantial evidence.

The hearing officer found that appellant used Vikane contrary to the label by fumigating prior to the termination of gas service. Specifically, by fumigating prior to the termination of gas service, appellant did not extinguish pilot lights or follow local utility procedures as required by the Vikane label. Appellant seems to argue that although Mega Fume fumigated prior to the

termination of gas service, the Gas Company was at fault for failing to shut off the gas or notify Mega Fume of a delay in the shut-off service as required by PUC Rule 9.

FAC Section 12973 states:

> "The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner."

The Vikane label states that when preparing for fumigation:

> "Extinguish all flames, including pilot lights of water heaters..."

Further, the Vikane user manual, which is part of the Vikane labeling, states:

> "Follow procedures required by the local gas company when shutting off local gas or propane service. The local gas company or other appropriate authority will need to turn on gas service after it has been turned off to determine that gas flow and pressure are normal."

PUC Rule 9 states:

"K. TERMINATION OF SERVICE FOR FUMIGATIONS

1. Every person planning to conduct any fumigation, where a fumigator places a tent over any portion of a structure served with natural gas, shall contact the Utility to request a termination of gas service at least two business days prior to commencing the tenting of a structure. In cases where the Utility is unable to terminate the service on the date requested, the Utility shall contact the fumigator to arrange another date.

...

3. Where the fumigator tents the structure without contacting the Utility to request a termination of the gas service, or where the fumigator performs the tenting prior to the Utility terminating the service, and the Utility discovers this condition, the Utility may immediately and without notice, terminate the gas service as an unsafe condition pursuant to Rule 9.D.1."

Thus, it is a violation of the California Food and Agricultural Code to use Vikane before extinguishing pilot lights or without following local utility procedures, including PUC Rule 9.

The Gas Company report prepared on November 15, 2012 shows—and appellant does not dispute—that pilot lights remained on during the fumigation. The Gas Company prepared a fumigation-field-investigation report, as required by Gas Company policy, after arriving to restore service to 601 N. Market Street and discovering that the gas was already on. The inspector reported that gas service had never been shut off and that range and wall-heater-pilot lights remained on. (County Exhibit H.) Further, appellant stipulated at the pre-hearing conference that 601 N. Market Street was fumigated prior to the termination of gas service. Because the pilot lights used in appliances at 601 N. Market Street are fueled by gas and were on at the time of the fumigation-field inspection, it is reasonable to conclude that pilot lights were not extinguished. Thus, the hearing officer's finding that that "some pilot lights remained on during fumigation" in conflict with the label is supported by substantial evidence.

Additionally, appellant did not follow local utility procedures. PUC Rule 9 requires that fumigators contact the Gas Company at least two business days prior to commencing the tenting of a structure. According to email records provided by appellant, appellant contacted the Gas Company on Friday, November 9, 2012 and requested shut off for Tuesday, November 13, 2012. (Mega Fume Exhibit 2.) Because Veterans Day fell on Monday, November 12, 2012, appellant failed to contact the Gas Company at least two business days prior to commencing fumigation as required by PUC Rule 9.

Further, appellant's action was inconsistent with the policy of PUC Rule 9. PUC Rule 9 provides that the Gas Company may terminate service without notice where a fumigator performs tenting prior to the termination of gas service. Implicit in this rule is the policy that fumigators not fumigate prior to the termination of gas service. In this case, appellant stipulated to doing so.

Appellant's argument that the Gas Company was at fault for acting inconsistent with PUC Rule 9 is irrelevant to this analysis. FAC Section 12973 regulates only the pesticide user and there is no indication that the provision is intended to allocate comparative fault. Thus, the determination that appellant used Vikane contrary to the label and did not verify that the gas was turned off, extinguish pilot lights, or follow local utility procedures is substantial evidence that supports the finding of violation.

b. The fine levied by the CAC is not excessive.

The CAC classified the violation as a "serious" violation—a violation that creates an actual health or environmental hazard. Due to the potentially deadly and destructive effects of fumigating prior to the termination of gas service, it is established that such violations create an actual health hazard even where no explosion occurs. (County Exhibits M, O.) Appellant does not dispute that the violation is properly classified as serious.

The CAC levied a fine of $2,500 after the hearing officer reduced the originally proposed $2,500 fine to $1,500. Appellant argues that the $2,500 fine is excessive because the Gas Company was found "partially culpable" and similar fumigation/gas violations in Los Angeles

County received lower fines despite involving intentional violations of Gas Company procedure. The CAC has discretion to levy fines within the prescribed statutory penalty range if the fine is reasonable in light of the facts and not excessive. Serious violations carry fines ranging from $700-$5,000.

The hearing officer determined that the Gas Company was "partially culpable" and contributed to the violation by failing to shut off the gas or notify Mega Fume of a delay in the shut-off service. Appellant argues on this basis that the fine is excessive. The CAC found that while these miscues may have influenced the perception that the gas service was terminated prior to fumigation, appellant had the ultimate responsibility to ensure that gas service was terminated. As the pesticide user, it was appellant's responsibility to use Vikane consistent with the label. Further, appellant had the opportunity to ensure that the gas service was terminated. A Mega Fume technician was on-site and knew or should have known based on both Mega Fume and Gas Company policies to check the meter for a red flag before fumigating. (Los Angeles County Agricultural Com. Hearing, File No. 12132151 (June 11, 2013) at 26:45, 46:00.) It is unclear from the record whether a Gas Company employee was present on the day of the fumigation, but the technician should have checked the meter before fumigating. Had she done so, the fumigation would not have proceeded and the health hazard would not have been created.

Appellant also argues that the fine is excessive compared with five previous fumigation/gas violations in Los Angeles County that received penalties of $1,500 or less despite involving intentional violations of Gas Company procedure. The CAC distinguished the previous cases by noting that those cases involved single family homes while this case involved three buildings, housing fifty total units. The CAC found that the failure to shut off gas to multi-residential structures creates a greater hazard to human health and also a greater opportunity to verify that the gas was shut off. The statute is intended to address violations that create health or environmental hazards. Violations that create more serious hazards should receive higher fines. A fumigation/gas violation involving fifty residences creates a greater health hazard than a violation involving a single residence because of the larger population that is impacted when the expected duty of care is lacking. Further, while appellant attempts to distinguish the previous cases on the basis that Mega Fume intended to comply with Gas Company procedures and "followed protocol," appellant did not follow Mega Fume or Gas Company policies by failing to check for a red flag before fumigating.

Finally, the $2,500 fine, while larger than previous fumigation/gas violations, is in the middle of the permissible-fine range for serious violations. Thus, the CAC fine is not excessive and well within his discretion.

Conclusion

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

Disposition

The Los Angeles CAC's decision is affirmed. The CAC's order is stayed until thirty (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 $2,500 civil penalty levied by the CAC against the appellant is due and payable to the "Structural Pest Control Education and Enforcement Fund" thirty (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, CA 95815

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: 10/29/13

By: _____
Daniel Rubin, Member
For the members of the Disciplinary Review Committee