FILED
TULARE COUNTY
SUPERIOR COURT
MAY 04 2004
LARAYNE CLEEK, CLERK
BY:

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TULARE

Mark Twinkle, dba Twinkle Ag Plaintiff, vs. California Department of Pesticide Regulation Respondent, The People of the State of California and Does 1 to 25, Real Parties in Interest.	Case No.: VCL04-100206 Decision Granting Writ

Plaintiff seeks a Writ of Mandate under California Code of Civil Procedure section 1094.5, directed to Respondent, State of California, Department of Pesticide Regulations (herein after the "Agency"), to vacate its finding that he was in violation of Food and Agricultural Code Section 12972, and the fine imposed thereon.

At the hearing on this matter, the parties agreed that the court had received the full administrative record of the proceedings. The court may only look to the administrative record when making a determinations as to whether to issue or deny the writ. (CCP § 1094.5)

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STANDARD OF REVIEW

Plaintiff alleges three separate issues: 1) the agency acted without and in excess of its jurisdiction, 2) the agency did not grant him a fair appeal, and 3) the agency's decision and penalty were not supported by the findings and thus represented an abuse of discretion. The parties disagreed as to the court's standard of review.

Each issue has a different standard of review. The standard of review for jurisdictional issues depends on whether there is a question of law or fact. A legal question is reviewed de novo. (California Administrative Mandamus, (Cont. Ed. Bar 2003) § 6.29, p. 171.) When the jurisdictional question is a question of fact the standard could be either substantial evidence or independent judgment. (California Administrative Mandamus, (Cont. Ed. Bar 2003) § 6.31, p. 172.) Where the issue is whether a fair administrative hearing was conducted, the petitioner is entitled to an independent judicial determination of the issue. (City of Fairfied v. Superior Court (1975) 14 Cal.3d 768, 776. This independent evaluation is "not a trial de novo." (California Administrative Mandamus, (Cont. Ed. Bar 2003) § 6.48, p. 187.) Finally, if the court determines that the Agency had jurisdiction, and Petitioner had a fair hearing, this court must determine whether the administrative findings are supported by "substantial evidence in light of the whole record." (Code of Civ. Proc., §1094.5, subd. (b); " (California Administrative Mandamus, (Cont. Ed. Bar 2003) § 6.142, p. 261.)

Petitioner frames his argument as a jurisdictional issue, however, the alleged injury is instead an alleged failure by the administrative body to entertain Petitioner's arguments, or a disagreement with the agency's outcome. This argument is not a matter of whether the administrative body had the authority to hear the matter in the first instance, and thus, the court finds it is not a jurisdictional issue.

Petitioner argued that since he could in the future lose his ability to pursue his livelihood because of this negative on his record, a fundamentally vested right is involved and the court's review should be the independent judgment test. However, Plaintiff did not provide any authority for his argument. The Agency submits that "it has been repeatedly held that the preservation of purely economic interests does not affect the fundamental vested rights of petitioner." (Automotive Management Group, Inc. V. New Motor Vehicle Bd. (1993) 20 Cal.App.4th 1002, 1009.) The court

finds that the imposition of a fine is purely economic, and thus it does not affect a fundamental vested right.

The court therefore applies the independent judgment test as to whether or not Petitioner received a fair hearing, and the substantial evidence test in light of the whole record, to determine whether or not the findings are supported by the evidence to determine whether or not the Agency abused its discretion. CCP § 1094.5(b).

DISCUSSION

Petitioner claims that he was not granted a fair appeal in that "the Director made findings and prejudicial conclusions based on information that was not presented at the hearing or found to be true based on admissible credible evidence." However, the court finds that this does not go to the fundamental due process rights that are guaranteed in the Administrative Adjudication Bill of Rights, Government Code § 11425.10, nor does Petitioner cite any cases where a similar complaint was found to constitute an unfair trial. Therefore, the court finds that the hearing was fair.

However, the court grants the writ because the findings were not supported by substantial evidence in light of the whole record. Gary Minnite, who works for Castemagna Farms, called and complained about Blair Air spraying directly north of the onion field. Mr. Minnite observed the application while he parked in between the alfalfa field being sprayed and the onion field where damage occurred. He stated that he got a little drift on his vehicle, so he knew it was drifting in the direction of the onion field. Mr. Minnite submitted a report of loss to the Agency, based upon his observations. Supervisor Clifford Francone conducted a search of other reported pesticide applications. There is no evidence of any other type of search by the Agency as to other potential pesticide applications. The only other reported spraying was by Mark Trinkle. Trinkle was spraying paraquat, but a half a mile away from the onion field. The onion field in question was tested in a laboratory for both pesticides. The plants tested positive for paraquat, but not pursuit, the pesticide being applied by Blair Air adjacent to the onion field.

The hearing officer came to the conclusion that since paraquat was found on the onions, and the only reported pesticide application of paraquat was by Mark Trinkle, Trinkle had to be the cause of the damage to the onions. The hearing officer continued to reason that Trinkle thus allowed a "substantial drift" and did not use due care.

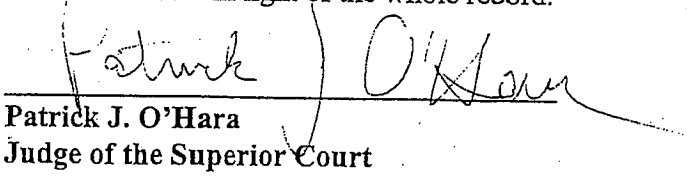
Substantial evidence does not support this conclusion. Mark Trinkle submitted evidence of the wind direction, obtained from the Naval Air Station, on the date and time that he was spraying. The Naval Air Station is within one mile of the site. These wind direction reports showed that the wind was not blowing in the direction of the onion field. This evidence was not disputed. Additionally, although hearsay to which no objection was made, Mark Trinkle testified that he had contacted the manufacturer for pursuit, and if samples of plants are not taken within 20 minutes of the application, traces of pursuit won't be found in the plant. Samples must be taken of the ground. The onion plants in question were not sampled for several days, and only the plants were sampled.

The hearing officer failed to make a finding as to how this drift of Mark Trinkle's spraying a half a mile away could have physically drifted onto the onion field considering the direction of the wind and the considerable distance. Without this causal connection between Trinkle's spraying and the ability of the spray's drift to go against the wind direction for a half mile to damage the onion field, the hearing officer's conclusion is not supported by substantial evidence in light of the whole record. Additionally, the evidence of pursuit not causing the damage is inconclusive because samples of plants only were taken almost a week after the alleged spray. Pursuit was sprayed adjacent to the onion field, and was observed to have drifted onto the onion field by the owner. The claim of loss was against Blair, not Trinkle. The onions were not damaged in the final outcome, as the evidence showed that the onions had outgrown any alleged damage and were being harvested. Therefore, there is no substantial evidence on which to draw the conclusion that damage was caused to the onion field by Mark Trinkle allowing a substantial drift and not using due care.

The court finds the Agency abused its discretion, because the findings are not supported by substantial evidence in light of the whole record, and grants the writ.

The court issues the Writ of Mandate to Respondent, to vacate its finding that Petitioner was in violation of Food and Agricultural Code Section 12972, and the fine imposed thereon, finding that the findings are not supported by substantial evidence in light of the whole record.

Dated: May 4, 2004



Patrick J. O'Hara
Judge of the Superior Court