

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

In the Matter of the Decision of
the Agricultural Commissioner of
the County of San Bernardino
(County File No. 36-15-115S)

Docket No. S-029

Mega Fume, Inc.
P.O. Box 17716
Anaheim, CA 92817

DECISION

Appellant/

Procedural Background

Under Business and Professions Code (BPC) section 8617, and Food and Agricultural Code (FAC) section 15202, the County Agricultural Commissioner 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 San Bernardino County Agricultural Commissioner (CAC) found that Mega Fume, Inc. (appellant or Mega Fume) violated Food and Agricultural Code (FAC) section 12973 (section 12973) when a Mega Fume employee used the registered pesticide Vikane (Reg. No. 62719-4) in conflict with the label by failing to properly store food during a structural fumigation. The CAC classified the violation as "moderate" and levied a \$1,000 fine.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee). The Committee has appellate jurisdiction 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.

Factual Background

On August 3, 2015, Mega Fume performed a structural fumigation of a private residence located at 7160 Oliver Street in Highland, California (fumigation site) using Vikane (Reg. No. 62719-4), a DPR-registered pesticide. (County Exhibits C4; C5.) A. Zermeno was the Mega Fume field representative present at the fumigation. At the time of the fumigation, A. Zermeno was licensed by the California Structural Pest Control Board (License No. FR30933). Prior to the fumigation, A. Zermeno completed several pesticide safety training courses. (Respondent Exhibit RB.)

After the fumigation was complete, C. Clark, Agricultural Standards Officer with San Bernardino County (inspector), performed a routine structural fumigation use monitoring inspection of the fumigation site. During the inspection, the inspector observed and documented a bag of noodles in the interior of the residence that was stored in a single re-sealable plastic bag. (County Exhibits C2; C5.)

On July 29, 2016, the CAC issued a Notice of Proposed Action (NOPA), charging Mega Fume with violating section 12973 for using Vikane in conflict with the label by failing to properly store food during the structural fumigation. Mega Fume requested a hearing. On October 6, 2016, a hearing was held before Renee Reid, the hearing officer appointed by the CAC.

Applicable Statutes and Regulations

FAC section 12973 states:

“The use of any pesticide shall not conflict with the 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 commissioner.”

The “Preparation for Fumigation” section of the registered Vikane (Reg. No. 62719-4) label states:

“Food... not in plastic, glass, or metal bottles, cans, or jars with the original manufacturer’s air-tight seal intact need to be removed from the fumigation site, or double bagged in Nylofume* bags...”

BPC section 8617, subdivision (a) states:

“The board or county agricultural commissioners, when acting pursuant to Section 8616.4, may suspend the right of a structural pest control licensee or registered company to work in a county for up to three working days or, for a licensee, registered company, or an unlicensed individual acting as a licensee, may levy an administrative fine up to one thousand dollars (\$1,000) or direct

the licensee to attend and pass a board-approved course of instruction at a cost not to exceed the administrative fine, or both, for each violation of this chapter or Chapter 14.5... or any regulations adopted pursuant to these chapters.”

CCR title 16, section 1922 states:

“(B) ‘Moderate’: Violations that are repeat violations... or violations which pose a reasonable possibility of creating a health of environmental effect. The fine range for moderate violations is \$250-\$1,000.”

Appellant’s Contention

Appellant does not challenge the violation itself, fine classification, or fine amount. Instead, appellant argues that because A. Zermeno is a trained and licensed field representative, the CAC should have charged the licensee—not the company—with the violation. Appellant also argues that the CAC should have provided Mega Fume with the opportunity to informally discuss the violation prior to issuing the NOPA, and that the CAC improperly delivered the notice of violation to A. Zermeno.

The CAC Decision

In the NOPA, the CAC classified the violation as a “moderate” violation of section 12973 and proposed a fine of \$1,000. Under the “Preparation for Fumigation” section of the Vikane label, food that is not packaged in the original sealed manufacturer’s container must be either removed from the fumigation site or double bagged in Nylofume bags. The hearing officer found that Mega Fume violated section 12973 because the inspector discovered a food item that was not in manufacturer-sealed packaging or double-bagged in Nylofume bags. (Hearing Officer’s Decision, pg. 3.) The hearing officer upheld the CAC’s proposed fine classification because the bagging requirements are intended to protect residents from the potential health effects of contaminated food. *Id.* Finally, the hearing officer upheld the fine amount—which is at the upper limit of the allowable range—based on Mega Fume’s history of recent violations committed in San Bernardino County. *Id.* The CAC adopted the hearing officer’s decision in its entirety.

Analysis

As stated above, appellant does not challenge the CAC decision that Mega Fume violated section 12973, the classification of the violation as “moderate,” or the penalty amount. Instead, appellant argues that the CAC improperly charged the company with the violation and should have instead charged the licensee, A. Zermeno. In the appeal, Mega Fume argues that it is “[a licensee’s] responsibility to verify all label requirements before they... release the fumigant.” Appellant notes that A. Zermeno was or should have been aware of Vikane label requirements because A. Zermeno had recently completed master fume stewardship training and the Vikane caretakers program.

BPC section 8617 expressly provides the CAC with authority to levy administrative penalties against licensees *or* companies. In this case, A. Zermeno was a Mega Fume employee and the company field representative at the fumigation. There is no question that the violation was unintentional and committed within the scope of employment. As appellant concedes, A. Zermeno "simply made a mistake" when he failed to properly store food during the fumigation. Mega Fume is liable for these actions. And although the CAC had authority to charge the licensee instead of the company, there was no legal requirement to do so. The decision was squarely within the CAC's discretion, and the CAC properly decided to levy a penalty against Mega Fume.

Appellant also argues that the CAC should have provided an opportunity for informal discussion of the violation prior to issuing the NOPA. There is no requirement that the CAC provide such an opportunity. The CAC may do so as a courtesy, but is under no legal obligation.

Finally, appellant argues that the CAC should have delivered the notice of violation directly to Mega Fume, not to A. Zermeno. At the time of the violation, A. Zermeno was an employee of Mega Fume and Mega Fume's licensed field representative at the fumigation site. As such, A. Zermeno was a proper recipient of the notice of violation. Mega Fume was not deprived of any required notice.

Conclusion

The record demonstrates no cause to reverse or modify the decision.

Disposition

The San Bernardino 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 \$1,000 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:

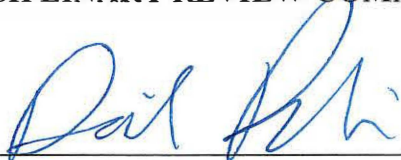
Structural Pest Control Board
2005 Evergreen Street, Ste. 1500
Sacramento, CA 95815

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: JAN 30 2017

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