

**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. 36-15-106S)

Docket No. S-030

Mega Fume, Inc.
438 West Meats Avenue
Orange, California 92865

DECISION

Appellant/

Procedural Background

Under section 8617 of the Business and Professions Code (BPC) and section 15202 of the Food and Agricultural Code (FAC), a County Agricultural Commissioner may levy a penalty up to \$5,000 for violating California's structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, held on October 6, 2016, the San Bernardino County Agricultural Commissioner (CAC) found that Mega Fume, Inc. (Appellant) violated California Code of Regulations, title 3, section 6780(c) (3 CCR 6780(c)). The CAC found that the aeration duct cover obstructed the aeration duct during active aeration on July 20, 2015 at 12378 13th Street, Yucaipa, California, which is a violation of the California Aeration Plan (CAP). The CAC classified the violation as moderate/Class B and levied a \$900 fine.

Appellant appealed the CAC's decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of this appeal under BPC section 8662. Members serving on the Committee were Mr. John Tengan for the structural pest control industry, Ms. Susan Saylor for the Structural Pest Control Board (SPCB), and Ms. Drew Saruwatari 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 this appeal on the record before the hearing officer. The Committee decides matters of law using its independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Committee determines whether there was substantial evidence, contradicted or uncontradicted, before the hearing officer to support the hearing officer's findings and the CAC'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 only requires there be enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In applying the substantial evidence test, the Committee draws all reasonable inferences from the information in the record to support the hearing officer's findings and reviews the record in the light most favorable to the CAC's decision. If the Committee finds substantial evidence in the record to support the CAC's decision, the Committee affirms the CAC's decision.

Factual Background

On July 20, 2015 at 9:55 a.m. Mr. Cordell D. Clark, Agricultural Standards Officer IV for the San Bernardino County, conducted a routine aeration inspection at 12378 13th Street, Yucaipa, California. (Exhibit C5.) Mr. Clark observed the aeration duct cover partially covering the aeration duct while the residence was under active aeration (aeration fans blowing and vents open). (Testimony of Mr. Clark; Exhibit C2.) Mr. Clark determined that Appellant, a licensed structural pest control business (License # 3679), performed the fumigation. (Exhibit C2.)

Mr. Clark sent a Notice of Violation on July 21, 2015 notifying Appellant that it violated 3 CCR 6780(c) at 12378 13th Street, Yucaipa, California. (Exhibit C5.) The Notice of Violation states that under the CAP, "[t]he duct cover shall not restrict or block the aeration duct opening after the duct cover is removed" and that Appellant violated the CAP by allowing the duct cover to drop inside and obstruct the aeration duct during aeration. (Exhibit C5.)

On July 29, 2016, the CAC issued a Notice of Proposed Action (NOPA) charging Appellant with violating 3 CCR 6780(c) on July 21, 2015. Appellant requested a hearing on August 10, 2016. (Exhibit C7.) On September 27, 2016, the CAC issued an amended NOPA charging Appellant with violating 3 CCR 6780(c) on July 20, 2015. (Exhibit C6.) On October 6, 2016, a hearing was held before Ms. Renee Reid, the hearing officer appointed by the CAC.

Relevant Authorities

3 CCR 6780 General Fumigation Safe-Use Requirements.

(a) When fumigant concentrations cannot be controlled and an employee's exposure exceeds the Permissible Exposure Limit (PEL) as specified in Title 8, California Code of Regulations, Section 5155, Airborne Contaminants, or more stringent requirements by product labeling, the employer shall provide and require the employee to wear approved respiratory protective equipment.

(b) Whenever an employee may be exposed above an exposure standard to methyl bromide, sulfuryl fluoride, or any other fumigant for which only air-supplied respirator equipment is approved, the employer shall either:

- (1) Require the use of air-supplied respirator equipment,
- (2) Employ continuous monitoring to warn employees before the PEL is reached, or
- (3) Operate under the provisions of (c) below.

(c) Upon written application by an employer, the director will review, and may accept, a Fumigation Safety Program that describes methods, work practices, devices, or processes which the director determines will ensure that employees will not be exposed to concentrations of fumigants in excess of the PEL.

(d) The employer shall have an accident response plan at the worksite. The plan shall provide instructions to protect employees during situations such as spills, fire, and leaks. Employees shall be trained in accident management procedures based on the plan.

The California Aeration Plan (CAP), approved by the Director pursuant to 3 CCR 6780(c) (Exhibit 3) states:

The aeration ducting shall be designed and sealed in a manner that allows it to be opened remotely from ground level when aeration is initiated. If the aeration duct cover cannot be opened remotely due to malfunction, an SCBA must be used when removing the duct cover. The duct cover shall not restrict or block the aeration duct opening after the duct cover is removed.

...

All of the following steps, 1-6 must be completed in sequence. (Tasks in steps may be accomplished in either order.) A licensed Operator or Field representative must be present for, and assure completion of, Steps 1 through 6.

Step 1:

To initiate aeration, remove the seal or duct cover from each previously installed aeration duct and activate the aeration fan(s). If the duct cover cannot be opened remotely due to malfunction, an SCBA must be used when opening the duct cover.

Step 2:

After all aeration fans are activated, remove the inlet cover from each previously installed inlet device.

Step 3:

Any time after the required hours of aeration are completed, as specified in Table 2, turn off the aeration fan(s).

Step 4:

Remove all tarpaulins and/or seals from the structure.

Step 5:

If the structure has a central air system, turn on only the fan (or blower) for each operational unit. As an alternative, a circulation fan may be placed in front of a furnace inlet to blow air into central heating and cooling ducts. Remove all chloropicrin evaporation containers from the fumigated space.

Step 6:

Measure the concentration of sulfuryl fluoride in breathing zones (where people typically stand, sit or lie down) using an approved detection device as per sulfuryl fluoride product labeling. If the concentration of sulfuryl fluoride is greater than 1 ppm or warning properties of chloropicrin are detected continue ventilation with doors and windows open until aeration is completed. Confirm sulfuryl fluoride concentrations are 1 ppm or less.

California Code of Regulations, title 16, section 1922(a)(1)(B) (16 CCR 1922(a)(1)(C)) classifies a "moderate" violation as repeat violations that did not create an actual health or environmental effect or violations that pose reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is \$250-\$1,000.

Appellant's Contentions

Appellant argues that 3 CCR 6780(c) does not require Appellant to comply with the procedures outlined in the CAP, including the requirement to keep the aeration duct cover from restricting or blocking the aeration duct during aeration.

The CAC Decision

The Hearing Officer found by a preponderance of the evidence that Appellant did not comply with the CAP and consequently violated 3 CCR 6780(c) by failing to completely remove the aeration duct cover from the aeration duct, which allowed the cover to fall inside the duct and obstruct air flow during the aeration process at 12378 13th Street, Yucaipa, California. The CAP requires Appellant to completely remove the cover from the aeration duct so the aeration duct cover should not have been present at all during the aeration process and should not be affected by wind. The Hearing Officer also determined that Appellant is required to comply with 3 CCR 6780(c), which necessarily requires Appellant to comply with the CAP.

The Hearing Officer determined that classifying Appellant's violation as moderate/Class B and imposing a fine of \$900 were appropriate because the procedures outlined in the CAP are intended to reduce employees' risk of fumigant exposure. The CAC adopted the hearing officer's proposed decision in its entirety.

Analysis

The CAC determined that Appellant violated 3 CCR 6780(c) at 12378 13th Street, Yucaipa, California because the aeration duct cover restricted or blocked the aeration duct during the aeration process, which is in violation of the CAP. However, as stated in the Disciplinary Review Committee's prior decision Mega Fume (Aug. 23, 2016) Docket No. S-026, 3 CCR 6780(c) does not require Appellant to keep the aeration duct cover from restricting or blocking the aeration duct during aeration nor does it require Appellant to follow the procedures outlined in the CAP.

Rather, 3 CCR 6780(c) authorizes the Director of DPR to review and accept a Fumigation Safety Program if the employer makes a written application and if the Fumigation Safety Program will ensure the employees will not be exposed to excessive concentrations of fumigants. It does not require employers to follow the Fumigation Safety Plan.¹ Accordingly, Appellant cannot be charged with violating 3 CCR 6780(c).

Conclusion

The CAC's decision that Appellant violated 3 CCR 6780(c) is reversed because subsection (c) authorizes the Director to approve a Fumigant Safety Plan to be used by the employer and does not require compliance with or place any obligations upon the employer.

Disposition

The CAC's decision and levy of a fine is reversed.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: 1/26/17

By: 
Drew Saruwatari, Member
For the members of the Disciplinary
Review Committee

¹ 3 CCR 6780(b)(3) requires employers to operate under the provisions of an accepted Fumigation Safety Program when an employee may be exposed to fumigants. A violation of this subsection may have been found had it been charged.