

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

In the Matter of the Decision of
the Agricultural Commissioner of
the County of San Diego
(County File No. 630-SCP-SD-15/16)

Docket. No. S-027

Statewide Fumigation San Diego County, Inc.
1020 Linda Vista Drive, Suite A
San Diego, CA 92078-2656

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 Diego County Agricultural Commissioner (Commissioner) found that Statewide Fumigation San Diego County, Inc. (Statewide Fumigation or Appellant) violated Food and Agricultural Code section 12973 by using a pesticide in conflict with its labeling. The Commissioner classified the violation as "serious" and levied a \$1,700 fine.

After a hearing on the matter, 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 April H. Gatling for the Department of Pesticide Regulation (DPR). No party requested oral argument and the Committee determined oral argument was not necessary. Statewide Fumigation did not submit any argument on appeal to this Committee.

Standard of Review

The Committee decides the appeal on the record before the hearing officer. In reviewing the Commissioner'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 April 15, 2016, San Diego County Agricultural Standards Inspectors J. Aquino (Inspector Aquino) and T. Hewitt (Inspector Hewitt) conducted a Structural Fumigation Use Monitoring Inspection at a residential structure located at 14805 Priscilla Street in the City of San Diego, located in San Diego County. (Aquino Testimony.) Statewide Fumigation (Structural Registration License No. PR4355) fumigated the residence using *Vikane*. (*Id.*) *Vikane* is a United States Environmental Protection Agency and DPR-registered-pesticide product (Registration No. 62719-4-ZA) labeled with the signal word "DANGER." (County Exhibit (Ex.) 14.)

Upon his arrival, Inspector Aquino determined that Statewide Fumigation employee, Cesar Enrique Lopez Hernandez, fumigated the house. (Aquino Testimony; County Ex. 12.) Mr. William Lawson (License No. 10180) was the licensee on site for the certification phase. (*Id.*) Mr. Jim McCarthy (Mr. McCarthy) from Statewide Fumigation was also present during the inspection. (Ex. 11.) Mr. Lawson cleared the residence with an infrared clearance monitor and certified the structure for reentry. (*Id.*) During the certification phase of the fumigation, Inspectors Aquino and Hewitt observed two brown paper bags in the kitchen, one on the counter and one on the floor, with opened food packets of jerky, potato chips, candy, and a peanut butter and jelly sandwich without the original manufacturer's seal intact. (Aquino Testimony; Ex. 11.)

The directions for using *Vikane* specifically state under Preparation for Fumigation for Structural Fumigation, "Food...can remain in the structure if they are in plastic, glass, or metal bottles, cans, or jars with the original manufacture's air-tight seal intact. Food...not in plastic, glass, or metal bottles, cans, or jars with the original manufacture's air-tight seal intact need to be removed from the fumigation site, or double bagged in Nylofume[®] bags,..." (County Ex. 14 at p. 2.) Both Mr. Lawson and Mr. McCarthy confirmed that Statewide Fumigation failed to remove the two bags of food from the structure prior to fumigation. (Aquino Testimony; McCarthy Testimony; Ex. 11.)

On May 30, 2016, the Commissioner issued a Notice of Proposed Action (NOPA), charging Statewide Fumigation with violating Food and Agricultural Code section 12973 by using a pesticide in conflict with its registered labeling. (County Ex. 1.) Statewide Fumigation requested a hearing on June 17, 2016 and on July 28, 2016, a hearing was held before Daniel D. Sorenson, the hearing officer appointed by the Commissioner. (County Exs. 2-3; *see also* Notice of Decision, Order and Right of Appeal dated August 9, 2016.)

Applicable Statutes and Regulations

Food and Agricultural Code 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.

Under California Code of Regulations (CCR), title 16, section 1922, violations are designated as "serious," "moderate," or "minor." A "serious" violation are repeat violations of violations designated as "moderate" or violations which created an actual health or environmental hazard. The fine range for serious violations is \$700 to \$5,000. In determining the fine amount within the fine range, the Commissioner may use relevant facts, including severity of actual or potential effects, and appellant's compliance history.

Appellant's Contention

Statewide Fumigation submits no argument to the Committee on appeal. Statewide Fumigation's only argument at the hearing below was that the fine was not appropriate and should be reduced.

The Commissioner's Decision

The Hearing Officer found by a preponderance of the evidence that Statewide Fumigation violated FAC 12973 by using a pesticide in conflict with its labeling by failing to remove or double bag food from a fumigation site prior to the commencement of the fumigation. The Hearing Officer determined that classifying Statewide Fumigation's violation as "serious" and imposing a fine of \$1,700 was consistent with Title 16, California Code of Regulations, section 1922, because of Statewide Fumigation's noncompliance history, specifically related to previous violations involving the failure to remove or double bag food items prior to fumigation. The Commissioner adopted the Hearing Officer's proposed decision in its entirety.

Analysis

A. Statewide Fumigation violated FAC 12973 by failing to double bag or remove food from the fumigation site prior to fumigation.

On appeal to this Committee, Statewide Fumigation failed to submit any argument. At the hearing, Statewide Fumigation did not dispute the underlying facts surrounding its violation of FAC 12973. (Audio Recording of Hearing.) Its only contention was that the fine levied by the Commissioner was excessive. (*Id.*) The Committee finds that there is substantial evidence to support the Commissioner's decision that Statewide Fumigation violated FAC 12973. Specifically, California Food and Agricultural Code section 12973 states, "The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide..." The label for *Vikane* states under Preparation for Fumigation for Structural

Fumigation, "Food...not in plastic, glass, or metal bottles, cans, or jars with the original manufacture's air-tight seal intact need to be removed from the fumigation site, or double bagged in Nylofume[®] bags,..." (County Ex. 14 at p. 2.) At the time of the inspection, Mr. Lawson confirmed that Statewide Fumigation failed to remove the two bags of food from the structure prior to fumigation. (Aquino Testimony; Ex. 11.) Accordingly, the Committee affirms the Commissioner's decision.

B. The classification and fine levied by the Commissioner was appropriate.

When levying fines, the Commissioner must follow the fine guidelines contained in California Code of Regulations, title 16, section 1922. As previously stated, Statewide Fumigation did not submit any argument to this Committee on appeal. Statewide Fumigation's only contention at the hearing below was that based on the sheer number of fumigations it conducts in San Diego County and the number of times it is inspected, a fine of \$1700 for failing to double bag or remove food from the fumigation site, was excessive and should be reduced. (Audio Recording of Hearing.) The Committee finds that there is substantial evidence in the record to support the Commissioner's classification of "serious" and fine levied, and therefore affirms.

Under California Code of Regulations, title 16, section 1922, violations are designated as "serious," "moderate," or "minor." Violations are classified as "serious" if they are repeat violations of a "moderate" violation or if the violation created an actual health or environmental hazard. (Cal. Code of Regs., tit. 16, § 1922, subd. (a)(1)(A).) The fine range for a "serious" violation is \$700-\$5000. (*Id.*) In determining the classification and actual fine, the Commissioner uses relevant facts, including the severity of actual or potential effects, and appellant's compliance history.

Here, the Commissioner classified Statewide Fumigation's violation of FAC 12973 as "serious" because of its compliance history. Specifically, the Commissioner presented evidence that in the past two years prior to this violation, Statewide Fumigation had eleven violations, four of which involved the failure to remove or double bag food items at a fumigation site prior to commencement of the fumigation. (County Ex. 16; Testimony of T. Holbrook.) The Commissioner also presented evidence that the Commissioner levied the fine towards the lower end of the fine range and that Statewide Fumigation's most recent fine for violating a pesticide law was for \$1600. (Testimony of T. Holbrook.) Based upon the facts and evidence presented in this case, the Committee finds that the violation was appropriately classified and that the \$1700 fine levied is not excessive, and is a reasonable exercise of the Commissioner's discretion.

Conclusion

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

Disposition

The Commissioner's decision is affirmed. The Commissioner's order is stayed until thirty (30) days after the date of this decision to provide opportunity for the Statewide Fumigation to seek judicial review of the Committee's decision as set forth below.

The \$1,700 civil penalty levied by the Commissioner against Statewide Fumigation is due and payable to the "Structural Pest Control Education and 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 that 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: NOV 02 2016

By: 
April H. Gatling, Member
For the members of the Disciplinary
Review Committee