

**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. SCP-LA-15/16-207)

Docket No. S-031

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

DECISION

Appellant/

Procedural Background

Under Business and Professions Code 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 Los Angeles County Agricultural Commissioner (Commissioner) found that Mega Fume, Inc. (Appellant or Mega Fume) violated California Code of Regulations, title 3, section 6600(a) by failing to use pest control equipment which was in good repair, and California Code of Regulations, title 16, section 1974(b) by failing to have clearly visible warning signs on all accessible sides and from any direction from which the fumigation site may be approached. The Commissioner classified the violations as "serious" and "minor," respectively, and levied an \$800 fine.

The Appellant appealed the Commissioner's civil penalty decision to the Disciplinary Review Committee (Committee). The Committee has appellate jurisdiction under Business and Professions Code section 8662. Members serving on the Committee were John Tengan for the structural pest control industry, Susan Saylor for the Structural Pest Control Board, 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.

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.

Factual Background

On March 7, 2016, Mega Fume performed a structural fumigation of a house for termites located at 608 S. Park Rose Avenue in Monrovia, California (fumigation site) using Zythor (EPA Reg. No. 81824-1), a DPR-registered pesticide. (Stipulation Nos. 2-3; County Exhibit (Ex.) D.) The fumigation site is located in Los Angeles County, California. Mega Fume is a licensed and registered company with the Structural Pest Control Board and Los Angeles County Agricultural Commissioner for 2016. (Stipulation No. 4.)

On March 8, 2016, Los Angeles County Agricultural Inspectors A. Rodriguez and D. Teshome conducted an inspection of the fumigation site. (Testimony of Inspector Teshome (Teshome Testimony).) During the perimeter tarp inspection, Inspector Teshome located at least eleven tears in the tarp at various locations, measuring approximately 23 inches in total length. (Teshome Testimony; County Exs. D-F.) The inspectors also observed several additional tears, which were located on portions of the tarp which were too high on the structure for them to measure. (Teshome Testimony.) Further, Inspector Teshome observed that almost all of the fumigation warning signs, which are required to be placed on the outside surface of the tarp and clearly visible from all accessible sides, were either on the ground or folded over. (Teshome Testimony; County Exs. D-F.) The Commissioner issued a violation notice to Mega Fume. (County Ex. D.)

On July 21, 2016, the Commissioner issued a Notice of Proposed Action (NOPA), charging Mega Fume with violating California Code of Regulations, title 3, section 6600(a), for failing to use pest control equipment that was in good repair, and California Code of Regulations, title 16, section 1974(b), for failing to have warning signs that were clearly visible from all accessible sides of the fumigation site. (County Ex. C.) On August 16, 2016, Mega Fume requested a hearing. (County Ex. B.) On October 26, 2016, a hearing was held before Hearing Officer Robert G. Atkins. On November 27, 2016, the hearing officer issued a proposed decision. On February 2, 2017, the Commissioner adopted the proposed decision in its entirety.

Applicable Statutes and Regulations

California Code of Regulations, title 3, section 6600 (General Standards of Care), subdivision (a) states:

Each person performing pest control shall:

- (a) Use only pest control equipment which is in good repair and safe to operate.

California Code of Regulations, title 16, section 1974 (Fumigation Warning Signs), subdivision (b), states in relevant part:

(b) Fumigation warning signs shall also be placed on the outside surface of the tarps used to seal the structure and shall be clearly visible on all accessible sides of the space under fumigation and from any direction from which the site may be approached.

...

Additional fumigation warnings signs shall be posted at all joint seams of the tarp at the first floor level.

California Code of Regulations, title 16, section 1922 (Civil Penalty Actions by Commissioners) states in relevant part:

(a) When taking civil penalty action pursuant to Section 8617 of the Business and Professions Code, county agricultural commissioners shall use the provisional of this section to determine the violation class and the fine amount.

(1) For purpose of this section, violation classes shall be designated as "serious," "moderate," and "minor."

(A) "Serious": Violations that are repeat violations of those in subparagraph (B) or violations which created an actual health or environmental hazard. The fine range for serious violations is \$700-\$5,000.

...

(C) "Minor": Violations that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect. The fine range for minor violations is \$50-\$400.

Business and Professions Code, section 8617 states in relevant part:

(a) The board or county agricultural commissioners...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)...for each violation... However, any violation determined by the board or the commissioner to be a serious violation as defined in Section 1922 of Title 16 of the California Code of Regulations shall be subject to a fine of not more than five thousand dollars (\$5,000) for each violation. ...

Appellant's Contention

As to the first violation, Mega Fume does not dispute that it violated Title 3, Section 6600(a)¹ for failing to use pest control equipment in good repair, the fine classification, or the fine amount. Instead, Mega Fume argues that it properly trained the licensee (field representative) who could have “sealed the rips, picked another tarp, or decided to not shoot the job,” and that as a result, the licensee—not the company—should be held responsible for the violation. (Hearing; Mega Fume Appeal Letter to DRC, dated March 3, 2017.)

As to the second violation of Title 16, Section 1974(b), Mega Fume disputes the violation, stating that it complied with the language of that section by placing fumigation warning signs at the fumigation site. (*Id.*) Mega Fume further argues that it cannot control everything that happens at a fumigation site after the signs are posted, and that if a violation is found, that it too, should be charged to the licensee and not the company. (*Id.*)

The Commissioner's Decision

In the NOPA, the Commissioner classified the violation of Title 3, Section 6600(a) for failing to use pest control equipment in good repair as “serious” and proposed a fine of \$700, and classified the violation of Title 16, Section 1974(b) for failing to post clearly visible fumigation warning signs as “minor” and proposed a fine of \$100, for a total fine of \$800. (County Ex. C.)

The hearing officer found that Mega Fume violated Section 6600(a) because Mega Fume did not dispute that the tarp was torn in multiple places or that the total length of the tears was at least 23 inches. (Hearing Officer's Proposed Decision (Proposed Decision), p. 7.) The hearing officer further upheld the County's proposed “serious” fine classification for this violation based on Mega Fume's violation history. (*Id.* at pp. 5, 8.) Next, the hearing officer found that Mega Fume violated Section 1974(b) because the County demonstrated that during its inspection, it observed that the required fumigation warning signs were either on the ground or on the tarp but folded over, making them not clearly visible from accessible sides. (*Id.* at pp. 3, 7.) Although Mega Fume argued for both violations that the licensee, not the company, should be held responsible, the hearing officer noted that “there was general agreement that the County has discretion regarding which party to hold responsible,” and found that the County proved both violations against Mega Fume. (*Id.* at p. 8.)

On February 2, 2017, the Commissioner adopted the hearing officer's proposed decision in its entirety. (Commissioner's Notice of Decision, Order, and Right to Appeal.)

¹ Unless noted otherwise, all section and title references shall be to the California Code of Regulations.

Analysis

A. The Commissioner's decision to fine Mega Fume for failing to use pest control equipment in good repair is supported by substantial evidence, and is within the Commissioner's discretion.

In its appeal, Mega Fume does not challenge the Commissioner's decision that Mega Fume violated Title 3, Section 6600(a), the classification of the violation as "serious," or the penalty amount. Title 3, Section 6600(a) requires that "[e]ach person performing pest control shall: Use only pest control equipment which is in good repair and safe to operate." At the hearing, the County presented evidence that during the perimeter tarp inspection on March 8, 2016, Inspector Teshome located at least eleven tears in the tarp at various locations, measuring approximately 23 inches in total length. (Teshome Testimony; County Exs. D-F.) Inspector Teshome further testified that he observed several additional tears which were located on portions of the tarp which were too high on the structure for him to measure. (Teshome Testimony.) The County also presented evidence that it classified this violation as "serious" because of Mega Fume's history of noncompliance, specific to using fumigation tarps in ill repair. (Testimony of G. Creekmur (Creekmur Testimony); County Exs. K, M.) At the hearing and on appeal, Mega Fume does not dispute these findings. (Hearing; Mega Fume Appeal Letter to DRC.)

Instead, Mega Fume argues that the Commissioner should have charged the licensee, and not Mega Fume, with the violation. (*Id.*) As support for its argument, Mega Fume argues that it properly trained the licensee and that in order to effectuate change in the industry, "the licensee must be responsible for preparing the job site." (*Id.*) However, Business and Professions Code section 8617 expressly provides the Commissioner with authority and the discretion to levy administrative penalties against licensees *or* registered companies. (*See* Bus. & Prof. Code § 8617, subd. (a) (emphasis added).) In this case, the County presented ample evidence justifying its reasoning to fine Mega Fume instead of the licensee. First, Inspector Teshome testified that the high number and aggregate length of the tears suggested that Mega Fume had not provided the licensee equipment in good repair or instructed the use of only equipment in good repair. (Teshome Testimony; Creekmur Testimony.) Further, Deputy Director Creekmur testified that the Commissioner is more likely to fine a company when there are repeated violations, as was the case here, in an attempt to motivate the company to correct its behavior. (Creekmur Testimony; County Exs. K, M.) He also testified that Mega Fume is responsible for providing overarching compliance with the law, as there were multiple licensees working on the same job. (*Id.*) Moreover, all parties agreed that the Commissioner's decision to issue a violation to Mega Fume, instead of the licensee, is within the Commissioner's enforcement discretion. (Hearing; Proposed Decision, pp. 5-8.) Accordingly, the Committee finds that the Commissioner had authority to charge either the licensee or Mega Fume, that its decision to fine Mega Fume was squarely within his discretion, and that the fine levied against Mega Fume was proper.

B. The Commissioner's decision to fine Mega Fume for failing to have fumigation warning signs that were clearly visible from all accessible sides of the fumigation site is supported by substantial evidence, and is within the Commissioner's discretion.

In its appeal, Mega Fume argues that it complied with Title 16, Section 1974(b) because it placed the required fumigation warning signs at the time of the fumigation, and further argues that the Commissioner should have fined the licensee instead of Mega Fume. (Hearing; Mega Fume Appeal Letter to DRC.) Title 16, Section 1974(b) states in relevant part:

(b) Fumigation warning signs shall also be placed on the outside of the surface of the tarps used to seal the structure and *shall be clearly visible on all accessible sides* of the space under fumigation and from any direction from which the site may be approached." (Cal. Code of Regs., tit. 16, § 1974 (emphasis added).)

Here, the County presented oral and documentary evidence that one day after the March 7, 2016 fumigation, an inspection of the fumigated property revealed that most of the fumigation warning signs were either on the ground or folded over so that the information on the signs was not clearly visible on all accessible sides of the structure. (Teshome Testimony; County Exs. D-F.) At both the hearing and in its argument to the Committee, the County explains that when fumigation warning signs are folded over or lying on the ground, they are not clearly visible and cannot serve their purpose of warning those who may approach the structure that a fumigation is occurring. (Teshome Testimony; County Appeal Letter to DRC, dated March 15, 2017.) The County further points out that fumigation warning signs contain all the required information and the responsible company in the event of a problem. (*Id.*) The Committee finds Mega Fume's argument that it complied with this regulation because its licensee initially placed the required fumigation signs at the fumigation site and that it cannot control everything that happens to the signs after they are posted, to be unpersuasive and disingenuous. (Hearing; Mega Fume Letter to DRC.) Subsection (a) of Title 16, Section 1974 states that the fumigation warning signs be posted and "kept at those locations until the structure is declared to be safe for re-occupancy..." In fact, Mega Fume acknowledged its awareness of this corresponding requirement during the hearing. (*See* Hearing at 1:09:29 ["We were only written up for (b). We weren't written up for (a)."]) The hearing officer also noted that "[i]t is expected that the method used to attach the signs should hold for more than 24 hours." (Proposed Decision, p. 8.) In short, the County presented substantial evidence that its inspection revealed most of the fumigation warning signs to be on the ground or folded over, resulting in the signs not being clearly visible from all accessible sides. Accordingly, the Committee affirms the Commissioner's decision.

Finally, Mega Fume again argues that this fine and violation should be charged to the licensee instead of Mega Fume. For the same reasons stated in Subsection A above, the Committee finds that under Business and Professions Code section 8617, the Commissioner had the authority and discretion to charge either the licensee or the registered company. The

Committee finds that the Commissioner's decision to fine Mega Fume was squarely within his discretion and that the fine was proper.

Conclusion

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

Disposition

The Los Angeles County Agricultural 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 appellant to seek judicial review of the Committee's decision as set forth below.

The \$800 civil penalty levied by the Commissioner against Mega Fume 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, Suite 1500
Sacramento, California 95815

Judicial Review

Business and Professions Code, 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: MAY 16 2017

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