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# Department of Pesticide Regulation



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Environmental  
Protection Agency

May 30, 2000

EXECUTIVE OFFICE #00-01

TO: County Agricultural Commissioners

SUBJECT: SUMMARY OF FRESNO COUNTY SUPERIOR COURT DECISION  
DENYING PETITION FOR WRIT OF MANDATE  
PHIL SCHUH/PHIL SCHUH FARMS, INC. V. DPR (CASE NO. 630353-1)

The Superior Court of California, County of Fresno, Central Division, issued a 56-page decision on April 13, 2000, denying petitioner's (Phil Schuh/Phil Schuh Farms, Inc.) Petition for Writ of Mandate seeking to order the Department of Pesticide Regulation (DPR) to set aside and vacate the Director of DPR's ("Director") March 19, 1999 Decision. The Director's Decision upheld the Fresno County Agricultural Commissioner's December 8, 1998 Decision imposing a total civil penalty of \$14,832.00 for 32 violations of Food and Agricultural Code (FAC) section 12973, and one violation each of Title 3, California Code of Regulations (3CCR), sections 6618(b) and 6776.

## Factual Summary

On Thursday, July 30, 1998, workers supplied by labor contractor Elesio (Flaco) Montejano were working on petitioners' property, in the northeast quarter of section 18 (NE 18). Phil Schuh drove by the field several times that day, and thought that the workers were finished, or would finish by the end of the day.

During the early morning hours of Friday, July 31, 1998, NE 18 was sprayed with three pesticides, including Furadan. The application was completed at approximately 4:00 a.m. That same day, at approximately 5:30 or 6:00 a.m., Schuh spoke with Montejano regarding that day's work. Schuh contends that neither he nor Montejano mentioned NE 18, that Montejano only indicated that his workers were finishing field 32 and asked if they should then go to SE 18. At that point, Schuh told Montejano that the workers could not go into SE 18 because it had been sprayed that Wednesday. Schuh told the investigator and testified at the commissioner's administrative civil penalty hearing that Montejano never mentioned that his crew would be going into NE 18 that day. Montejano, though, told the investigator that he (Montejano) informed Schuh that morning that the workers had another three to four hours of work remaining on NE 18. It was not until Montejano reported later, on July 31, 1998, to Schuh that the workers had become ill that Schuh said that the field had been sprayed. Schuh also testified that he talked to Montejano about five times each day, and that Montejano could be reached by cell phone.



There is no dispute that Schuh did **not** orally notify Montejano, or any of the workers, that the field had been sprayed before 32 workers entered the field. Nor is there any dispute that Schuh **failed** to post the field. All 32 workers suffered adverse symptoms from exposure to the pesticides.

Procedural Summary

On November 3, 1998, the County of Fresno Agricultural Commissioner/Sealer's Office ("Commissioner") served a Notice of Proposed Action on petitioners, advising that penalties totaling \$14,832 were proposed to be imposed for violations of:

- (1) 3CCR section 6618(b), for failure to orally notify either Montejano or the workers of the pesticide application (a \$1,000 fine);
- (2) 3CCR section 6676, for failure to post the field (another \$1,000 fine); and
- (3) FAC section 12973, for failure to comply with the Furadan label, by "allowing" the 32 workers to enter the field before it was safe to do so (a fine of \$401 for each worker, or \$12,832).

The notice advised that the petitioners were entitled to a hearing. On December 8, 1998, the hearing was held, at which evidence was taken and heard. On December 8, 1999, the Commissioner served his Notice of Proposed Decision, Order, and Right to Appeal. The Notice indicated that the Commissioner found that petitioners violated 3CCR sections 6618 and 6776 and FAC section 12973, and that the full \$14,832 in penalties would be imposed.

Petitioners served a Notice of Appeal to the Director of DPR. The Director considered the record and the findings, and on March 19, 1999 rendered his decision, sustaining (upholding) the Commissioner's findings.

Petitioners then filed with the court a Petition for Writ of Mandate on April 19, 1999, asking the court to order DPR to set aside and vacate its March 19, 1999 decision sustaining the Commissioner's December 8, 1998 decision. Petitioners also asked the court to remand the case to DPR to reconsider its decision. The Petitioners also filed a Petition for an Alternative Writ of Mandate to stay the imposition of civil penalties until the court rendered its decision on the Petition for Writ of Mandate. The court granted the Alternative Writ on April 23, 1999, suspending the effects of the Director's Decision pending judicial resolution of the matter.

After the petition was filed, briefs/written arguments were filed by the petitioners and the Attorney General on behalf of DPR's Director. Oral arguments were heard by Judge Edward Sarkisian in Fresno County Superior Court on March 20, 2000.

The court rendered its decision on April 13, 2000, and made the following determinations on the issues raised by Phil Schuh/Phil Schuh Farms:

- 1) Since a farmer does not have a fundamental vested right in not being economically penalized for violating the law, the substantial evidence test, not the independent judgment test, applies to the court's review of the findings of the agency;
- 2) Penal Code section 654 does not apply to civil fines;
- 3) The agencies' finding that Schuh "allowed" 32 workers to enter the pesticide-treated field is upheld;
- 4) Imposition of a fine based on each worker exposed is not arbitrary or unreasonable; thus, the agency's interpretation that the law allows levy of a fine based on each worker must be accorded great weight and is upheld; and
- 5) The fines, as determined by the County Agricultural Commissioner, were not excessive.

The legal issues are discussed in detail below.

#### Legal Issues and Court's Holding

The issues considered and the court's holdings are as follows:

**Issue 1: Did DPR proceed in excess of its jurisdiction and prejudicially abuse its discretion in a manner required by law when it sustained the Commissioner's decision to impose separate and multiple penalties for violations of FAC section 12973, 3CCR sections 6618 and 6776, when all violations arose from the same act or omission?**

The Furadan label provided, in relevant part, the following:

"Do not enter or allow worker entry into treated areas during restricted entry interval (REI) of 48 hours ..."

"Notify workers of application by warning them orally and by posting warning signs at entrances to treated areas."

Petitioners believed that they should have been penalized under only one statute or regulation. It is clear from the record that petitioners failed to orally notify the labor contractor, and they failed

to post the field. Both of those acts were required by the Furadan label, so it is clear that they violated FAC section 12973. But the regulations at issue (§§ 6618 and 6776) also require oral notice and posting, respectively. Petitioners contended that if they were penalized under FAC section 12973, they should not also be penalized under the regulations, because that would violate Penal Code (PC) section 654.

PC section 654 provides that an offender may only be punished once for the same act or omission, or for an indivisible course of conduct. DPR argued that PC section 654 only applied to criminal provisions of a statute, and that FAC section 12999.5 imposes only civil, not criminal penalties. The court analyzed FAC section 12999.5 in conjunction with the entire statutory scheme of which it is a part (other penalty provisions of FAC Division 7, such as FAC sections 12996 [criminal punishment], 12997 [in lieu of criminal prosecution, the Director may civilly prosecute under 12998 and 12999, or levy civil penalties under FAC 12999.4], and 12999.4 [commissioner may levy civil penalties]). The court determined that it was clear from the entire statutory scheme that the *legislature intended FAC section 12999.5 to allow for civil penalties, not criminal ones*. Therefore, the court held that PC section 654 did not apply in this case.

The court further held that petitioner could be fined for each violation of a statute or regulation, concluding that the imposition of multiple penalties for violations of FAC section 12973 and 3CCR sections 6618 and 6776 were appropriate.

Therefore, the court concluded that DPR did not proceed in excess of its jurisdiction and did not prejudicially abuse its discretion when it sustained the Commissioner's decision to impose separate and multiple penalties for violations of FAC section 12973, 3CCR sections 6618 and 6776, when all violations arose from the same act or omission.

**Issue 2: Did DPR proceed in excess of its jurisdiction and prejudicially abuse its discretion when it sustained the Commissioner's finding that petitioner "allowed" 32 workers to enter the field on July 31, 1998, when the finding was not supported by the evidence?**

The petitioners contended that the Commissioner found that FAC section 12973 had been violated, not specifically because petitioners failed to orally warn and to post the field (both required by the Furadan label), but because petitioners "allowed" the workers into the field (prohibited by the label). The court said that there were three different ways that petitioners could have used Furadan in conflict with the label and thereby violated FAC section 12973, by: (1) allowing worker entry, (2) failing to orally notify of the spraying, or (3) failing to post the field. Petitioners admitted that they deserved to be penalized under FAC section 12973, because of their failure to warn and post. Thus, the court said, whether they "allowed" workers onto the field is immaterial, because they did violate FAC section 12973, regardless of the basis cited. The Court said it was unclear as to why petitioners raised the issue of whether the evidence

supported the finding that they “allowed” the workers onto the field, except to argue under Issue 3 that they should have not been fined 32 times for each of the 32 workers. Petitioners argued that there was no evidence that they “allowed” the workers to enter the field; there was no affirmative action on Mr. Schuh’s part, such as instructing the labor contractor to send his crew into NE 18. Further, petitioners stated that Mr. Schuh did not know that any workers were going into the field at all, which is why he did not give notice to Mr. Montejano that the field had been sprayed.

DPR argued that even though petitioners failed to orally warn and post, they still could have prevented exposure by restricting worker entry, which was a third duty required by the label, separate from the duties to orally notify and to post. DPR argued that instead of assuming that the workers had finished working in the treated field, Schuh could have asked Montejano directly. Further, Schuh also could have gone to the field on the morning of July 31 to ensure no worker would enter. DPR also argued that to “allow” workers to enter the treated field does not require a showing that petitioners *ordered* the workers to enter. Passive acts, DPR argued, such as the failure to restrict entry, are enough to support a finding of having allowed the workers to enter.

The court concluded that in following the common [dictionary] definitions of the word “allow,” and applying a common-sense interpretation to these particular facts and circumstances, it appeared that petitioners did “allow” the workers onto the field. That is, for example, to find that petitioners allowed the workers to enter it should not be required to find that the workers *specifically asked* to be able to enter and petitioners then “allowed” them to do so by telling them that they could. Schuh had more than sufficient opportunity to warn Montejano that the field had been sprayed. Not only did he have direct access to Montejano by being able to call him on his cell phone, he actually spoke directly with Montejano approximately 1½ hours after the spraying had been completed. The court said that it would have been a very simple matter for Schuh to at least tell Montejano specifically that the field had just been sprayed, and to warn him of the 48 hour restricted entry requirement. Instead, Schuh made an assumption without confirming that Montejano was finished in NE 18.

The court held that DPR did not proceed in excess of its jurisdiction and prejudicially abuse its discretion since the evidence was sufficient to support the findings of the Commissioner and Director that petitioners “allowed” 32 workers to enter the field.

**Issue 3: Did DPR proceed in excess of its jurisdiction and prejudicially abuse its discretion by failing to proceed in a manner provided by law by sustaining the Commissioner’s decision to impose penalties for 32 separate violations of FAC section 12973, when such punishment is not authorized by that statute or by FAC section 12999.5?**

Petitioners made five principal arguments:

- 1) There should at most be only two penalties under FAC section 12973, one for failing to notify and one for the worker entry. Thus, DPR exceeded its jurisdiction and abused its discretion by imposing 32 separate penalties for each worker who entered the field.
- 2) 3CCR 6618(b) requires a property owner to only notify the labor contractor, not the workers, of the pesticide application.
- 3) Since the labor contractor supplies the field workers, it was impossible for petitioners to know from one day to the next how many workers would be working in any particular field.
- 4) FAC sections 12973 and 12999.5 should be interpreted to comport with the intent of the Legislature and promote the purpose of the statute, and to avoid an interpretation that would lead to absurd consequences. Petitioners contended that it could not have been the intent of the Legislature, in enacting FAC sections 12973 and 12999.5, to punish the operator of the property for each and every worker who enters a treated area when notice is not given, since notice is not required to be given to each of the workers individually, and it is completely out of the control of the farmer how many workers go into a field on any given day.
- 5) Fines imposed by the Commissioner were excessive and that the Commissioner abused its discretion by "throwing the book" at petitioners by charging them with multiple fines.

DPR argued that the court should accord great weight to DPR's interpretation of the laws and regulations they are charged with implementing.

Further, DPR argued that petitioners "miss the mark" when they argue that they were only required to notify the labor contractor under 3CCR section 6618. Petitioners were fined under FAC section 12973, not 3CCR section 6618, for use in conflict with the label by allowing worker entry. DPR also noted that the label requires compliance with 40 CFR part 170, which requires that the property operator notify each worker of the pesticide spraying. However, the court said that "agricultural employer" as used in the federal regulation, could be interpreted to mean property owner, and/or the labor contractor.

The court noted that the statutes and regulations at issue here are somewhat ambiguous. It is not entirely clear whether the property owner is required to directly notify each worker, or whether he need only notify the "supervisor" of the workers. Recognizing this, the court, citing a long line of cases, said that it must accord "great weight" to the interpretation given by DPR. Petitioners did not show that DPR's interpretation was arbitrary, capricious, or had no reasonable basis. Therefore, the court did not set aside DPR's decision.

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In determining whether the civil penalties were excessive, the court followed the rule cited in *Lake v. Civil Service Com'n of Fire Dept., City of Bakersfield (1975) 47 Cal.App.3d 224*, which provided the standard to be used when reviewing the penalties imposed by an administrative agency:

“ ... The propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency, and its decision may not be disturbed unless there has been a manifest abuse of discretion ... One of the tests suggested for determining whether the administrative body acted within the area of its discretion is whether reasonable minds may differ as to the propriety of the penalty imposed. The fact that reasonable minds may differ will fortify the conclusion that there was no abuse of discretion.”

Although the court recognized petitioner's argument that it would be impracticable to expect a property owner to notify each worker who is under the direct supervision and control of a labor contractor, it concluded that a reasonable person could find and conclude that it was appropriate to penalize the property owner for each worker who suffered injury. Further, the court stated that there must be some recognition of the proportion and magnitude of the consequences of petitioner's conduct. The court held that there was no “manifest abuse of discretion” in the imposition of civil penalties, and that the fines were not excessive.

#### Conclusion

Please note that another Superior Court may have decided this case differently. Furthermore, since this was a Superior Court decision, it may be appealed. The petitioners have 60 days from the filing of the notice of entry of judgment to file a notice of appeal. The notice of entry of judgment was filed by the Attorney General on behalf of DPR's Director on or about May 24, 2000. It is not known whether petitioners will file a notice of appeal. If you have any questions regarding this case, please contact Staff Counsel Dee Brown at (916) 324-2666.

Sincerely,



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cc: Dave Duncan  
Mr. Daniel Merkley, Agricultural Commissioner Liaison