

**BEFORE THE DIRECTOR OF THE  
DEPARTMENT OF PESTICIDE REGULATION  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
the Agricultural Commissioner of  
the County of Monterey  
(County File No. 1270408)

Administrative Docket. No. 122

**The Gardener's Friend, Inc.**  
**605 Redwood Avenue**  
**Sand City, California 93955**

Appellant /

**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5 and Title 3, California Code of Regulations (3 CCR), section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Monterey CAC found that the appellant, The Gardener's Friend, Inc. (GFI), committed one violation of the State's pesticide laws and regulations, pertaining to 3 CCR section 6614(b)(1). The commissioner imposed a penalty of \$700 for the violation.

GFI appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

**Standard of Review**

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the CAC's decision. The Director 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 Director 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 CAC's decision. If the Director finds substantial evidence in the record to support the CAC's decision, the Director affirms the decision.

### **Factual Background**

GFI was hired to treat three oak trees for oak worm larvae in an apartment complex owned by Doug Haynie. Jeff and Joyce Haferman own and occupy a house adjacent to the apartment complex that shares a common driveway and courtyard area. Limbs of one of the oak trees extend over an eight-to-ten-foot high privacy fence onto the Hafermans' property. On May 20, 2004, at 6:30 a.m., an employee of GFI, Nick Klemek, applied Orthene 97 to the oak trees, including the oak tree overhanging the Haferman property. Joyce Haferman was outside in her backyard hanging clothes on the clothesline. At hearing, Ms. Haferman testified that she heard a generator running, and felt drops hit her face and body. She also testified that she could smell a chemical.

Ms. Haferman went out into the driveway and asked Mr. Klemek to stop spraying. He replied that he was almost done, and that she should go inside and wash the chemical off with soap and water. He continued spraying. Mr. Haferman then went out into the driveway, and insisted Mr. Klemek stop spraying. Mr. Klemek informed Mr. Haferman that the chemical was benign, but that he should go inside and wash it off. Mr. Klemek stopped spraying, collected his equipment, and left.

By the end of the day Ms. Haferman felt nauseous and dizzy. The next day and despite continuing symptoms of nausea and dizziness, Ms. Haferman went to work. She left work early to go to her physician, but the office was closed. She then drove herself to the emergency room. She was noted to be suffering from dizziness and nausea, with some motor deficits. She was held eight hours for observation. By the time she was released from the hospital, Ms. Haferman's symptoms had subsided.

The County of Monterey Agricultural Department investigated the Hafermans' complaint and issued GFI a notice of violation of 3 CCR section 6614(b)(1). The County imposed a serious fine of \$1,000 because the spraying resulted in an actual health hazard. GFI appealed the violation and requested a hearing. After hearing the evidence presented, the Hearing Officer found that GFI violated 3 CCR section 6614(b)(1) and that the violation was classified as serious

because an actual health hazard resulted. However, the Hearing Officer also found that the County failed to present evidence to support the fine at the highest end of the penalty range, and, since Respondent presented evidence to show that a severe (emphasis added by Hearing Officer) health hazard did not occur, the Hearing Officer reduced the proposed penalty to \$700. GFI appealed the Hearing Officer's decision.

### **California Code of Regulations section 6614(b)(1)**

3 CCR section 6614(b)(1) provides: “[n]otwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when: (1) [t]here is a reasonable possibility of contamination of the bodies or clothing of persons not involved in the application process;”

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, a minor violation is one that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect, and the fine range is \$50 to \$150 per violation. A moderate violation is a repeat of a minor violation or one that posed a reasonable possibility of creating a health or environmental effect, and the fine range is \$151 to \$400 per violation. A serious violation is a repeat of a moderate violation or one that created an actual health or environmental hazard, and the fine range if \$401 to \$1,000 per violation.

### **Appellant's Allegations**

The Appellant contends that the Hearing Officer improperly based her decision on a “fictional circumstance” identified as the finding that “[i]f the 10 foot high privacy fence WAS NOT THERE and Nicolas Klemek saw Ms. Haferman in her yard that Nicolas Klemek would have not proceeded with the application until Ms. Haferman was inside her house.” Appellant contends that since the fence was there, and because the applicator used due care in that circumstance, the Hearing Officer should have considered facts, not hypotheticals to find that the applicator used due care. In addition, the Appellant contends that it would be unreasonable for the applicator to assume that at 6:30 a.m. Ms. Haferman would be standing behind the 10-foot high fence, and that the applicator used due care. Lastly, the Appellant contends that the circumstances do not support the fine imposed of the “severe” category, and that the violation, if one occurred, would only be in the “minor” category.

### **The Hearing Officer's Decision**

The Hearing Officer made eight findings of fact. As pertinent to this decision, the Hearing Officer found that there was enough evidence in the record to establish that the GFI

applicator took precautions to prevent substantial drift from occurring, and that there was also enough evidence in the record to establish that the applicator did not know Ms. Haferman was in her yard on the other side of the fence. The Hearing Officer then found that had the privacy fence not been there, the applicator would have seen Ms. Haferman standing in her yard. The last finding (#8) was as follows: “[g]iven the due care that Mr. Klemek took to cover himself and protect private property (parked vehicles) in the area, it is consistent to assume that had the fence not been there, Mr. Klemek would not have made the application until Ms. Haferman had followed his requests to go inside her house pending the conclusion of the application—thereby preventing the reasonable possibility of contamination of a person not involved in the application process.”

The Hearing Officer concluded that: “[t]he evidence establishes that despite preventing substantial drift, a pesticide application was made by GFI on the morning of May 20, 2004, when there was a reasonable possibility of contamination of a person not involved in the application process,” finding that GFI violated 3 CCR section 6614(b)(1). The Hearing Officer determined that the violation should be classified as serious, but, because the county presented little to no evidence to support a fine at the high end of the penalty range, and because the application did not result in a severe health hazard, the Hearing Officer reduced the penalty to \$700.

### **Analysis and Conclusion**

Mr. Klemek testified that he surveyed the premises, was aware of the private dwelling, noticed a birdhouse in the back yard, and noticed a privacy fence separating the premises. He placed a plastic cover on a car parked under the tree. His testimony was uncontroverted that he sprayed the tree with his back to the fence. There is substantial evidence in the record to support the Hearing Officer’s finding that Mr. Klemek took precautions to prevent substantial drift.

Witness testimony from the Hafermans and from Mr. Klemek establishes that the applicator did not know that Ms. Haferman was outside at the time of the application. Thus, the record supports the Hearing Officer’s finding of fact. The Hearing Officer goes on to assume that had the fence not been there, and Ms. Haferman been outside, Mr. Klemek would not have sprayed the tree. Although not articulated fully, the Hearing Officer seems to be concluding that there was a reasonable possibility someone could have been in the yard, and the Respondent should have looked to eliminate the possibility before spraying. Therefore, the Hearing Officer concludes that the evidence establishes that despite preventing substantial drift, Mr. Klemek applied a pesticide when there was a reasonable possibility of contamination of a person not involved in the application process. Appellant’s contentions are addressed below.

Mr. Klemek testified that he used a high-pressure delivery system, with a pinpoint tip, albeit set at a “medium” pressure, to shoot pesticide one hundred feet up into the tree. The  
GFI

pressure was sufficient to blow the light covering off of the car. Mr. Klemek had to hold the cover on while applying the pesticide. Testimony established that the tree was “drenched.” Photographs were introduced into evidence showing wetness on the ground under the tree, up to the privacy fence, and up to the Haferman’s garage door. Appellant argued at hearing that the pesticide did not drift over the Hafermans fence and that they did not get sprayed. The method of application, the photographs, and the Hafermans’ testimony established that the pesticide spray did go over the fence. Substantial evidence in the form of the Hafermans’ testimony supports that they were contaminated by the spray application of Orthene by GFI. Thus, the fact that actual contamination of a person did occur, and common sense, supports the conclusion that there was a reasonable possibility of contamination of a person at the time of application.

GFI asserts the applicator exercised all possible due care in its application method and it was not reasonable to assume that Ms. Haferman would be outside in her yard at 6:30 a.m. A generator that could be heard by the residents powered the spray delivery system. The day of the week was Thursday. These two facts are sufficient to establish a likelihood that the occupants of the dwelling would be awake, and could possibly be outside. In addition, Mr. Klemek testified that he did not contact the occupants of the house. GFI did not give notice to the occupants of the house or to the tenants. Mr. Klemek testified that it was up to the property management company to give notice to the tenants.<sup>1</sup> Lastly, Mr. Klemek testified that he did not look over the fence. After all, he testified, it is a privacy fence. Due care would have required that, at 6:30 a.m., before starting his generator, Mr. Klemek knock on the Haferman’s door and request that they stay in the residence during his application. The Hearing Officer found that Mr. Klemek took due care to cover himself and the car, but she did not find that he exercised due care in making the pesticide application.

Lastly, the Appellant argues that should the violation be upheld, it should be found to be considered in the “minor” category. Substantial evidence exists in the record in the form of Ms. Haferman’s testimony and her medical records to support that an actual health hazard occurred as a result of the pesticide application. Therefore, the evidence supports a penalty in the “serious” range. The Hearing Officer legitimately exercised her discretion to reduce the fine within that range.

In conclusion, the Director finds that the evidence in the record is sufficient to support the Hearing Officer’s decision.

GFI

Docket No. 122

---

1 GFI submitted in its evidence packet a copy of a computer generated invoice with instructions to contact the Hafermans prior to spraying. Bradley Klemek testified that the notation to contact the Hafermans was added after the incident. The document itself is not dated in a manner to support this assertion. However, the County did not argue that this document is evidence that GFI failed to contact the Hafermans and thus failed to exercise due care. The Hearing Officer also did not address this document. The Director finds that this document provides additional support for the finding that a reasonable possibility of contamination of a person not involved in the application process existed absent notice or an actual inspection of the Haferman yard before spraying.

**Disposition**

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$700 fine.

**Judicial Review**

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA  
DEPARTMENT OF PESTICIDE REGULATION**



By: \_\_\_\_\_  
Mary-Ann Warmerdam  
Director

Dated: 4/22/05 \_\_\_\_\_