

**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 Madera
(County File No. 05-ACP-MAD-04/05)

Administrative Docket No. 135

DECISION

Charles S. Mosesian – Mosesian Vineyards
27241 Avenue 12
Madera, California 93637
Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners (CAC) may levy a civil penalty up to \$5,000 for certain violations of California’s pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Madera CAC found that the appellant, Charles S. Mosesian – Mosesian Vineyards (“Mosesian” or “Appellant”), committed four violations of the State's pesticide laws and regulations pertaining to 3 CCR sections 6723.2(a), 6724(d), 6734(c), and 6761.1(a). The commissioner imposed a total penalty of \$1,050 for the four violations.

Appellant 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 commissioner'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 commissioner'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 commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Factual Background

The Madera CAC issued an Amended Notice of Proposed Action¹ on April 4, 2005, to Appellant for four violations of California's pesticide laws.

Violation one found that Appellant had failed to display at a central location its application-specific information for its employees that handled pesticides. There is information in the record that on June 25, 2003, Madera County Agricultural Inspector Jose Bueno, conducted a pest control records inspection at Appellant's headquarters. Mr. Richard Mosesian was Appellant's representative during Mr. Bueno's inspection. Mr. Mosesian² failed to produce the requisite information upon Mr. Bueno's request, a violation of 3 CCR section 6723.1(a). The Madera CAC found violation one to be a moderate-level violation and assessed a fine of \$200.

Violation two found that Appellant had failed to assure that training was completed before its employee was allowed to handle pesticides. There is information in the record that on March 18, 2004, Mr. Bueno conducted a pesticide use monitoring inspection on the Mosesian property. Mr. Antonio Sanchez, an employee of Appellant, was applying Roundup Original, EPA registration number 524-445, at the time of the inspection. Mr. Bueno asked Mr. Sanchez if he had received pesticide safety training covering the use of Roundup. Mr. Sanchez said "No," a violation of 3 CCR section 6724(d). The Madera CAC found violation two to be a moderate-level violation and assessed a fine of \$350.

Violation three found that Appellant failed to assure that its employee had one pint of water immediately available for emergency eye flushing. There is information in the record that on March 18, 2004, Mr. Bueno conducted a pesticide use monitoring inspection on the Mosesian property. Mr. Sanchez was applying Roundup Original. Mr. Bueno asked Mr. Sanchez at the time of the Roundup application if Mr. Sanchez had the requisite one pint of water. Mr. Sanchez told Mr. Bueno that he did not have the one pint of water for emergency eye wash, a violation of 3 CCR section 6734(c). The Madera CAC found violation three to be a moderate-level violation and assessed a fine of \$300.

¹ Although not admitted into evidence, the initial Notice of Proposed Action was issued on January 12, 2005.

² Unless otherwise indicated, hereinafter, "Mr. Mosesian" refers to Mr. Richard Mosesian.

Violation four found that Appellant had failed to display at a central location its application-specific information for its employees that worked in the fields. There is information in the record that on June 25, 2003, Mr. Bueno conducted a pest control records inspection of Appellant's headquarters. At the time of the inspection, Mr. Mosesian failed to produce the requisite information as requested by Mr. Bueno, a violation of 3 CCR section 6761.1(a). The Madera CAC found violation four to be a moderate-level violation and assessed a fine of \$200.

Appellant's Arguments

In its written submission Appellant argues that "much of [the hearing testimony] was simply ignored by the hearing officer in rendering her decision. . . ."

Appellant argues that violations one and four arise from the same occurrence, and therefore, cannot support two violations. In its written brief, Appellant cites three criminal cases to support his argument.³ The Appellant also argues that the terms "handler" and "field worker" are synonymous, and concludes that "employees employed to work in fields obviously covers and includes employees employed to handle pesticides," claiming that the violations of 3 CCR section 6723.1(a) and 3 CCR section 6761.1(a) are identical.

Appellant argues that the CAC offered no evidence to support violations one and four that the application-specific information was not available while its employees were employed either to work in fields, or while its employees were employed to handle pesticides. Appellant also argues that the Hearing Officer's decision regarding violations one and four relies exclusively on the conclusion in Mr. Bueno's inspection report, signed by Mr. Mosesian on June 25, 2003, that the application-specific information could not be produced.

Appellant argues that there is no evidence that field workers were employed by Appellant in June 2003. Appellant also argues that Mr. Bueno had no information or knowledge at the time of his inspection that the appellant's employees were actually engaged in the handling of pesticides. Appellant hints that it was Mr. Mosesian, or some other person other than its employee, that actually applied pesticides during the relevant time period.

Appellant also notes that the "claimed violations" precede the Notice of Proposed Action by a year and a half, apparently making a statute of limitations claim.⁴

Appellant argues that its pesticide use reports⁵ (PUR) satisfied its duty to conform with its application-specific information. Appellant argues that the PUR contain identical information to that required by 3 CCR sections 6723.1(a) and 6761(a).

³ Neal v. California (1960) 55 Cal.2d 11, People v. Latimer (1993) 5 Cal.4th 1203, and People v. Nubla (1999) 74 Cal.App.4th 719.

⁴ Appellant also notes that violations two and three "arise out of even earlier events occurring May 14, 2003; that the hearing was held on May 5, 2005, and June 6, 2005; and that the decision was issued on July 10, 2006.

⁵ Pesticide use reports are mandated by 3 CCR section 6624.

Appellant argues that the Hearing Officer disregarded 3 CCR section 6724(d) (violation 2), which allows the provisions of 3 CCR section 6724 to be satisfied by an employee's prior training in connection with other employment.

Appellant alleges a hose bib near the application site satisfied the requirement of 3 CCR section 6724(c) (violation 3) to have water immediately available for "flushing" purposes while applying Roundup.

The Madera CAC levied a fine of \$200 for violation one, \$350 for violation two, \$300 for violation three, and \$200 for violation four. Appellant did not contest the amount of the fines.

Analysis of the Hearing Officer's Decision

Appellant argues that "much of [the hearing testimony] was simply ignored by the hearing officer in rendering her decision. . . ." During the hearing, the Appellant alleged that the Madera CAC conducted its inspection as retaliation for a Mosesian employee's complaint that Mr. Bueno had refused to provide her with the correct answers following a pesticide exam. The Hearing Officer did address this issue in her proposed decision. The record indicates that Mr. Bueno's action in refusing to provide exam answers was appropriate, indicating that the complaint relating to that action would have been of minor concern to the CAC. The Hearing Officer's assessment of this issue as having little bearing on this case is legitimate and a valid exercise of discretion. Further, there is no evidence to support the possibility that the investigation was retaliation for the complaint.

Appellant argues in its written brief that the "lengthy delays between the occurrences claimed to result in violations, the issuance of the Notice of Proposed Action, the hearing before the Department's Hearing Officer and the issuance of the proposed decision more than a year after the hearing, Appellant in this case plainly did not receive any fair hearing." FAC section 13000 provides that an action brought pursuant to FAC section 12999.5 must be within two years of the occurrence of the violation. In this case, the action was timely. FAC section 12999.5 is silent as to the duration between the hearing and time that the CAC's decision is issued. The Madera CAC's decision was issued a year after the hearing; however, such delay in its issuance did not deny Appellant's due process rights or impede its right to a fair hearing.

Violation One

Regarding violation one, 3 CCR section 6723.1(a) requires displaying application-specific information while employees are employed to handle pesticides. The information includes identification of the treated area, time and date of the application, restricted-entry interval (REI), and the product name, EPA registration number, and active ingredient(s). The information shall be displayed within 24 hours of completion of an application and relates to all applications made on any treated field⁶ on which an REI was in effect within the last 30 days within one-quarter mile

⁶ The regulation refers to a 'treated field' which is defined by 3 CCR section 6000 as "a field that has been treated with a pesticide or had a restricted entry interval in effect within the last 30 days. A treated field includes associated roads, paths, ditches, borders, and headlands, if the pesticide was also directed to those areas. A treated field does not include areas inadvertently contaminated by drift or over spray."

of where the employees will be working. Section 6723.1(c) provides, “The original or copies of the documents otherwise required to be maintained by this chapter may be used to meet the requirement of this Section provided they contain the information required by this section.” (Emphasis added.)

There is evidence in the record that in May 2003, Appellant made pesticide applications to 22 sites totaling 688 acres.⁷ Each application was repeated two, three, or four times during May 2003; hence, Appellant made 70 pesticide applications to 688 acres. Each application in May was sulfur. In June 2003, Appellant made pesticide applications to 29 sites totaling 756 acres. Each application was repeated two, three, or four times during June 2003; hence, Appellant made 75 pesticide applications to 756 acres. The pesticides applied in June were sulfur, Imidan with Surphtac, and Asana with Surphtac. Therefore, Appellant made 145 pesticide applications in May and June 2003.

The facts in the record indicate that Appellant made pesticide applications within the 30-day time period prior to the CAC inspection that would have required posting of application-specific information. Labels for all of the applied pesticides are included in the record.⁸ Britz Magic Sulfur Dust, Imidan, and Asana all have REIs of 24 hours. The signal words on the labels are “Caution,” “Warning,” and “Warning,” respectively. Surphtac is a spray adjuvant. The signal word on the label is “Danger.” Applications of Imidan were made on June 3, 2003. Applications of Asana were made on June 4, 2003. Surphtac was applied with both Imidan and Asana on June 3rd and June 4th. All of the other applications in June were sulfur.

The record shows that during his pest control records inspection on June 25, 2003, Mr. Bueno asked Mr. Mosesian if he had application-specific information that would satisfy the requirement for pesticide handlers.⁹ Mr. Mosesian told Mr. Bueno “No.” When asked by Mr. Bueno during his inspection, Mr. Mosesian could not or did not produce the application-specific information for its pesticide handlers as required by 3 CCR section 6723.1(a), but did show Mr. Bueno its PURs. Per Mr. Bueno, the PURs were not for applications within 30 days of the inspection.¹⁰

The record also shows that Mr. Bueno testified that when he asked Mr. Mosesian if he employed persons to handle pesticides, Mr. Mosesian said that he did.¹¹ Appellant’s argument that the Hearing Officer relied solely on Mr. Mosesian’s signature on the inspection report to show that it employed pesticide handlers is incorrect. At the hearing, Appellant’s attorney questioned Mr. Bueno regarding who applied pesticides on the Mosesian property. During the hearing, Appellant’s attorney asked “And, in fact, it’s entirely possible that the [pesticide] application

7 See Hearing Exhibit 5, pesticide use reports.

8 See Hearing Exhibit 6, registered labels.

9 Hearing transcript, page 33, lines 8-14; and page 51, lines 6-24.

10 Hearing transcript, page 52, lines 7-24.

11 Hearing transcript, page 29, lines 6-12; page 42, lines 10-23.

may have been done by an owner as opposed to an employee; is that right?”¹² However, no additional testimony or evidence was ever submitted by Appellant to support the insinuation that someone other than its employees applied the pesticides -- the inference is that the Appellant’s employees applied the pesticides. In fact, during the hearing, Mr. Charles Mosesian testified that his employees applied pesticides. There is sufficient evidence in the record to support the violation.

At the hearing, Appellant argues that its PURs satisfied the requirements of section 6723.1(a). Appellant is incorrect. The PURs provided by Mr. Mosesian to Mr. Bueno did not list the active ingredients of its applications of Imidan, Asana, and Surphtac in June,¹³ and the PURs provided were not for applications to be posted during the 30 days prior to the inspection.

Appellant argued during the hearing that the Mosesian property consists of fields that are separated by vast areas, inferring its violation of 3 CCR section 6723.1(b) did not occur, as all his treated areas were further than the 1/4 mile requirement from where his handlers worked. This argument is not supported by the evidence. The PUR reports show multiple application to same fields within 30 days of the inspection. No information on these applications was produced by Mr. Mosesian at the time of the inspection.

Appellant argued at the hearing that 3 CCR sections 6723.1(a) and 6761.1(a) are virtually identical; to quote Appellant’s counsel, “. . . [V]iolations 1 and 4, that these claimed violations are premised on precisely the same factual scenario or alleged factual scenarios. And that they are alleged to be a violation of two different regulations. Both of which, are absolutely identical in every way.”¹⁴ Appellant is incorrect. Title 3 CCR section 6000 separately defines “fieldworker” and “handle.” “Fieldworker” means any person who, for any kind of compensation, performs cultural activities in a field. . . .” “Handle”¹⁵ relates to activities specifically tied to the handling and applications of pesticides. The two terms are not synonymous, as a fieldworker may not be a pesticide handler.

A grower could violate 3 CCR section 6723.1(a) by employing only persons who handle pesticides and not employing fieldworkers. The opposite is also true -- a grower could violate 3 CCR section 6761.1(a) if it employs only fieldworkers and employs no handlers. Each regulation protects an employee with a specific job task and stands alone, independent of the other regulation.

12 Hearing transcript, page 99, lines 15-17.

13 Even though the active ingredient “sulfur” is in the name of “Britz Dusting Sulfur”, the PUR does not contain a space or line to list such active ingredient.

14 Hearing transcript, page 20, lines 21-25.

15 “Handle” means mixing, loading, transferring, applying (including chemigation), or assisting with the application (including flagging) of pesticides, maintaining, servicing, repairing, cleaning, or handling equipment used in these activities that may contain residues, working with opened (including emptied but not rinsed) containers of pesticides, adjusting, repairing, or removing treatment site coverings, incorporating (mechanical or watered-in) pesticides into the soil, entering a treated area during any application or before the inhalation exposure level listed on pesticide product labeling has been reached or greenhouse ventilation criteria have been met, or performing the duties of a crop advisor, including field checking or scouting, making observations of the well being of the plants, or taking samples during an application or any restricted entry interval listed on pesticide product labeling. . . .”

Appellant argues that the CAC cannot charge two violations for the same incident and cites several criminal cases involving felony convictions to support its argument. This is not a criminal action. The two regulations that Appellant was found to have violated specify two separate and distinct types of employees afforded protection -- fieldworkers and pesticide handlers. The regulations violated are designated to protect two separate and distinct employees classifications.

Appellant, by its own admissions, employed both handlers and fieldworkers.¹⁶ Appellant's restricted-use permit indicated that handlers would be employed.¹⁷ The PURs shows 145 pesticide applications in the two calendar months prior to the inspection. The posting requirement is "within 24 hours." The record shows that Mr. Mosesian only produced PURs for applications that occurred over 30 days prior to the inspection; the inference is that Appellant failed to comply with the "24 hour" requirement set forth in the regulation.¹⁸ The information on the PURs in the hearing record shows that Appellant applied pesticides as early as May 1, 2003, and as late as June 29, 2003. The evidence is sufficient to show that that the Appellant failed to have the required information available to its handlers, as required by 3 CCR section 6723.1(a).

At the time of his inspection, Mr. Bueno told Mr. Mosesian that he could be in compliance with maps, diagrams, PURs with maps, or even a handwritten paper in association with the pesticide label.¹⁹ Mr. Mosesian did not or could not provide Mr. Bueno with any documents to comply with the regulation.

Finally, Mr. Bueno's testimony that he was told by Mr. Mosesian that he employed pesticide handlers and that he had no application-specific information for its pesticide handlers available was never contradicted.

Therefore, substantial evidence exists before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision.

Violation Two

As to violation two, the factual evidence is undisputed that on March 18, 2004, Mr. Bueno conducted a pesticide use monitoring inspection on the Mosesian property. Mr. Sanchez was applying Roundup Original. Mr. Bueno asked Mr. Sanchez at the time of the Roundup application if Mr. Sanchez had been given training prior to handling the pesticide Roundup. Mr. Sanchez said that his employer had not provided any training to him, but he had training from his prior employee. Title 3 CCR section 6724 provides that "Initial training may be waived if the employee submits a record showing that training meeting the requirements of this Section and covering the pesticides and use situations applicable to the new employment situation was received within the last year."

16 Hearing transcript, page 61, lines 7-21.

17 Hearing transcript page 34, lines 6-12.

18 Hearing transcript, page 32, lines 8-18.

19 Hearing transcript, all of pages 30 and 31 and page 32, until line 18; page 54, lines 1-7.

Neither Mr. Sanchez, Mr. Sanchez's supervisor Mr. Antonio Alejo, nor Appellant tendered any such documentation, as required by section 6724, during the hearing to show Mr. Sanchez was previously trained, nor did Mr. Sanchez or Appellant offer any testimony, documentation, or declarations from Mr. Sanchez's previous employer to show Mr. Sanchez's previous training. The language is clear that it is the employee who submits a record showing his/her training. The employee would have tendered such documentation to Appellant. Appellant did not produce the document, and the exception to this requirement was not shown.

Mr. Bueno's inspection report (see County Exhibit 11) documented that while applying Roundup Mr. Sanchez did not have all of the requisite personal protective equipment required by the Roundup label, that Mr. Sanchez's service container was not in compliance, that Mr. Sanchez did not have the Roundup label in his possession, and that Mr. Sanchez's decontamination facility did not contain an extra pair of overalls, nor did Mr. Sanchez have the required water on his person or in the vehicle use to apply the pesticide to flush his eyes. The inference is that Mr. Sanchez had not been trained. Therefore, substantial evidence exists before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision.

Violation Three

As to violation three, the factual evidence is undisputed that on March 18, 2004, Mr. Bueno conducted a pesticide use monitoring inspection on the Mosesian property. Mr. Sanchez was applying Roundup Original. Mr. Bueno asked Mr. Sanchez at the time of the Roundup application if Mr. Sanchez had the requisite one pint of water for emergency eyewash. Mr. Sanchez told Mr. Bueno that he did not have in his possession the one pint of water, a violation of 3 CCR section 6734(c). "Immediately available" is defined in section 6734 as, "carried by the handler or on the vehicle or aircraft the handler is using." Immediately available is not a hose bib some yards away. It is mere coincidence that Mr. Sanchez was applying Roundup near a hose bib. Therefore, substantial evidence exists before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision.

Violation Four

Appellant admitted during the hearing that it employed three persons who irrigated its property and performed other tasks in June 2003.²⁰ Appellant also admitted that its employees worked on the property from March through September; the time at issue in this matter was May and June of 2003. The Appellant admitted that it had 800 acres that required irrigation. The CAC provided documentation that there was no rainfall during June 2003 -- the inference is that irrigation occurred on the Appellant's property during June 2003. Appellant applied pesticide 70 times to 688 acres in May 2003, and 75 times to 756 acres in June 2003. Britz Magic Sulfur Dust was applied 138 times in May and June. Imidan with Surphtac was applied five times in June 2003.

²⁰ Hearing transcript, page 113, lines 20-22; page 115, lines 7-10.

Asana with Surphtac was applied twice in June 2003. The record's inference is that many pesticide applications were made on Appellant's property during the same time period its employees worked on irrigation.

As pointed out by Mr. Bueno, Appellant would be required to have the application-specific information available to its employees for the Imidan application on June 3, 2003. This application would fall under the definition of a treated field for which information was required to be posted under 3 CCR section 6761.1(a) until August 7, 2003.²¹ Mr. Mosesian did not produce the information required by 3 CCR section 6761.1(a) to Mr. Bueno on June 25, 2003.

As stated above, Mr. Bueno, at the time of his inspection, told Mr. Mosesian that he could be in compliance with maps, diagrams, PURs with maps, or even a handwritten paper.²² Mr. Mosesian did not provide Mr. Bueno with any documents to comply with the regulation. Therefore, substantial evidence exists before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision.

Conclusion

For violations one, two, three, and four, the commissioner's decision is supported by substantial evidence.

Disposition

The commissioner's decision is affirmed in its entirety. The commissioner shall notify Appellant how and when to pay the \$1,050 fine.

Judicial Review

Under FAC section 12999.5, Appellant may seek court review of the Director's decision within 30 days of the date of the decision. 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

Dated: 8 November 2006

By: MaryAnn Warmerdam
Mary-Ann Warmerdam, Director

21 See footnote 13 for the definition of "treated field."

22 Hearing transcript, page 54, lines 1-7.