

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

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Santa Barbara
(County File No. 12-SCP-SB-08/09)

Docket. No. S-021

**Mission City Fumigation
Scott R. Howell, President
1608 Copenhagen Drive
Solvang, California 93463**

DECISION

Appellant/

Procedural Background

Pursuant to Business and Professions Code (BPC) section 8617, and Food and Agricultural Code (FAC) section 15202, the County Agricultural Commissioner (CAC) 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 Santa Barbara CAC found that Mission City Fumigation (appellant or MCF) violated FAC section 12973 by using a pesticide in conflict with the label. The CAC rejected the Hearing Officer's Proposed Decision finding no violation, and levied a fine in the serious range at \$700.00.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee or DRC). The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the DRC were John Tengan for the structural pest control industry, Bill Douglas for the Structural Pest Control Board (SPCB), and Jodi Clary 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 CAC'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

Over several days ending on October 13, 2009, MCF performed a series of fumigations on six commercial residential structures consisting of 141 apartments using the pesticide Vikane. An apartment in one of the final two buildings to be fumigated was found to be unprepared for the fumigation, and the tenant's cat remained hiding in the apartment. The cat was killed by the fumigation.

The pesticide label of Vikane has the following statement: "Remove from the structure to be fumigated all persons, domestic animals, pets and desirable growing plants."

The CAC issued a Notice of Proposed Action (NOPA) on February 2, 2010 and proposed to fine MCF the sum of \$700.00. The NOPA charged MCF with one violation of FAC 12973 that prohibits the use of any pesticide in conflict with the label. MCF requested a hearing that was held on May 18, 2010. After hearing the evidence, the Hearing Officer found that MCF did not violate FAC section 12973. The CAC did not adopt the Hearing Officer's Proposed Decision because he found that she had made mistakes of law. MCF filed this appeal before the Disciplinary Review Committee.

Applicable Statutes and Regulations

FAC section 12973 states that 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.

CCR, title 16, section 1922 defines a "serious" violation as one that is a repeat "B" violation or a violation which poses an actual health or environmental hazard. The fine range for serious violations is \$700.00 to \$5,000.00.

Appellant's Contentions

The Appellant contends that the Hearing Officer did not make any mistakes of law. The Appellant disagreed with the CAC's conclusion that the Hearing Officer inserted the use of due diligence into the statute. The Appellant argued that the basis for the Hearing Officer's decision was that they did not violate FAC section 12973 because they removed all food, plants and animals found after conducting a thorough search of the apartment. Appellant argued at hearing

and in its appeal that they took all steps necessary to comply with the label requirement to remove food, plants and animals.

The Hearing Officer's Determination

The Hearing Officer found the MCF did not violate FAC section 12973 because they properly notified the on-site property manager of the unprepared apartment, obtained her approval to do the fumigation, did their own fruitless search for a possible cat, and then having no reason to delay, proceeded. The Hearing Officer concluded that this use did not conflict with the Vikane label. The Hearing Officer also found that MCF did not have the tenant's phone number, and that the burden was on the apartment manager to call the tenant to ensure the cat had been removed. Even though the apartment was completely unprepared for fumigation, the apartment manager knew the tenant did not attend the informational meetings regarding the upcoming fumigations, and that it would have been prudent to call the tenant, the Hearing Officer felt that the call was for the apartment manager to make, and was not MCF's obligation. Without this "red flag" from the manager, the Hearing Officer found that MCF was only doing due diligence and searching for a possible cat since there was no direct evidence that a cat was present.

The CAC's Decision

The CAC rejected the Hearing Officer's Proposed Decision because he felt she made substantive mistakes in law about "due diligence" and "liability", and because the Hearing Officer incorrectly felt she must rely only on direct evidence. The CAC noted that due diligence is not an element of FAC section 12973, and is thus not a defense to the violation. The CAC also noted that a Structural Pest Control Board licensee has a legal requirement to exercise due diligence in his work, and that relying on the decision of an apartment manager is not due diligence. The CAC also pointed out that it is MCF who makes the application and used the pesticide, and was responsible for complying with FAC section 12973, not the apartment manager. The CAC felt that the Hearing Officer's discussion that "direct evidence" is important to establish facts was incorrect as well. The CAC found that there was sufficient evidence both direct and circumstantial presented at the hearing that there was the possibility that a cat was in the apartment, and that MCF was responsible for removing the cat under the provisions of the label.

Analysis

As a preliminary matter, the CAC is correct in his discussion that circumstantial evidence is sufficient to establish a fact and that it is not necessary to rely only on direct evidence. The CAC is also correct that due diligence is not an element of a violation of FAC section 12973, and that the applicator is charged with following the pesticide laws, the apartment manager is not.

The Vikane label clearly states that prior to fumigation, the applicator must "Remove from the structure to be fumigated all persons, domestic animals, pets and desirable growing

plants". The testimony was uncontroverted at hearing that upon entry of this apartment, it was clear to MCF that the tenant had done nothing to prepare the apartment for fumigation. The other tenants missed a few minor items that needed to be removed or bagged, such as salt and pepper shakers, but this apartment was completely unprepared with all its food and other items remaining, including a cat bowl with cat food and a cat bed. The MCF employees were concerned enough with the lack of preparation and the presence of pet items to contact the apartment manager. The manager's response was that the tenant had been notified and that MCF should remove the food and proceed with the fumigation. The MCF employees did search the apartment for a cat. These facts are clearly established at hearing. Also established at hearing was the fact that no one called the tenant to inquire if her cat was in the apartment. A simple phone call to the tenant would have resulted in the knowledge that the cat was present in the apartment. When the tenant returned home that evening, she was able to tell MCF employees where to find the cat. Evidence was also uncontroverted that the tenant was confused and thought, reasonably or not, the fumigation was to start at 8 pm that evening, not 8 am that morning.

Sufficient evidence, both direct in the way of testimony, and circumstantial in the way of the items left in the apartment, exists in the record that the tenant had taken no steps to prepare the apartment for fumigation and such evidence also establishes the possibility that the cat was present. Testimony from the MCF employees, however, also established the fact that, in their experience, people commonly leave food behind in the premises but rarely leave pets. The amount of food left behind and the cat items caused the MCF to conduct a search for a cat. Even though the most prudent thing to do was to call the tenant, MCF employees relied on the approval of the apartment manager to proceed. These facts are clearly established.

The true issue here is not factual, but what level of action is required by the Vikane label. The CAC interprets the label to require removal of pets, period. The Hearing Officer interpreted the label as including some recognition of the circumstances surrounding the violation, and the efforts of MCF. The DRC is likewise in conflict. Two members of the Committee feel that a common sense approach is appropriate and requires the conclusion that MCF took the precautions required by the label. The other member of the Committee feels that the label is unequivocal and requires removal of the pet. Moreover, that member feels that a common sense approach would have required MCF to call the tenant *under these circumstances*. The applicator of a pesticide cannot rely on the property manager to determine if he is in compliance with pesticide laws. As pointed out by the County Advocate, a list of apartments with pets could have been obtained prior to fumigation, and tenants could have been required to sign a document that their pets had been removed. This common sense practice could actually save MCF time in searching apartments for pets, especially since cats can be very hard to find. And most simply, the tenant of an apartment completely unprepared for fumigation should have been contacted. She could have told MCF that her cat was in the apartment, could have told them where to look for her cat so it could be removed, or could have returned to retrieve the cat.

Mission City Fumigation
Docket No. S-021
Page 5

The DRC is divided on what the label requires, but finds that, under the specific circumstances of this case, it is not appropriate to charge MCF with a violation. This decision is limited to this case.

Conclusion and Disposition

The Santa Barbara CAC's decision is overturned. No penalty will issue.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: February 14, 2011

By: Jodi Clary
Jodi Clary, Member
For the members of the Disciplinary
Review Committee