BEFORE THE DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Alameda
(County File No. 2010912)

Docket. No. S-020

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

Appellant/

DECISION

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 Alameda CAC found that Mission City Fumigation (appellant or MCF) violated FAC section 12973 by using a pesticide in conflict with the label. In adopting the Hearing Officer's determination that the fine should be lowered from $500.00 to $300.00, the CAC levied a fine of $300.00 for the violation.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the Disciplinary Review Committee 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

On April 22, 2009, MCF performed a fumigation on a residential structure using the pesticide Vikane. The Alameda CAC conducted an inspection of the certification phase of the fumigation on April 24, 2009. The CAC's inspector found an opened tube of toothpaste in a bathroom, and several food items (a package of turkey dressing, boxes of baking soda, and a jar of peanuts) on a shelf in the attached garage which had also been fumigated. None of the items were doubled bagged nor were they in factory sealed air tight containers.

The pesticide label of Vikane has the following statements: " Remove edible items from the structure before the fumigation if they cannot be adequately sealed to prevent exposure to Vikane" and "Food, feed, drugs (including tobacco products) and medicinals (including those items in refrigerators and freezers) not in plastic, glass or metal bottles, cans, or jars with the original manufacturer's air-tight seal intact need to be removed from the fumigated site, or doubled bagged in Nylofume bags, which are available from distributors of Vikane gas fumigant."

The CAC issued a Notice of Proposed Action (NOPA) on November 5, 2009 and proposed to fine MCF the sum of $500.00. 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 March 2, 2010. After hearing the evidence, the Hearing Officer found that MCF violated FAC section 12973 and that the fine in the moderate range was justified. However, the Hearing Officer lowered the fine to $300.00 based on his finding that MCF is a responsible company with a good compliance history, and a good training program. 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 "moderate" violation as one that is a repeat minor violation or a violation which poses a reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is $250.00 to $1,000.00.

Appellant's Contentions

The Appellant states three grounds for his appeal. He concedes that a violation of FAC 12973 occurred but argues that the violation cannot be placed in the moderate range because there was no reasonable possibility of a health effect should the food be ingested or consumed. The Appellant asserts that per his company policy of having two different licensees conduct the introduction phase of the fumigation, and the certification phase, the food items would have been located and removed so that no possibility of harm to the homeowner existed. Appellant asserts that his company had not received a violation over the previous 27 months so that any fine should be placed at the lowest level possible. Appellant asserts that his licensee should have been fined and not the company because the company has satisfied the six criteria established to cite individuals.

The Hearing Officer's Determination

The Hearing Officer found the MCF had violated FAC section 12973 when failing to remove the food items and toothpaste from the structure prior to the fumigation as required on the label. The Hearing Officer found that the failure to remove these items can create a reasonable possibility of a health effect should the items be ingested or consumed and thus the fine in the moderate category is appropriate. However, because MCF has shown that they were a responsible company with a good compliance history and a good training program, the Hearing Officer reduced the fine to $300.00. Lastly, the Hearing Officer found that the CAC has the discretion to fine the licensee, the employer, or both.

Analysis

There is no doubt, and the Appellant has admitted, that MCF violated FAC section 12973 when the licensee in charge of introducing the fumigant failed to remove the toothpaste and other food items prior to introducing Vikane into the structure. The Vikane label is clear that removal of edible items is required prior to introduction of the fumigation. The Committee finds that the violation of FAC section 12973 is well supported by the evidence presented to the Hearing Officer.

CCR, title 16, section 1922 defines a "moderate" violation as a violation which poses a reasonable possibility of creating a health or environmental effect. The violation here is one that would create a reasonable possibility of creating a health effect due to the very toxic nature of the pesticide involved (Vikane) and the likelihood of harm to any person who might ingest or consume items left during the fumigation. The items were found by the CAC's inspector during the certification phase of the fumigation. Appellant argues that his employee did not have the chance to find and remove the items during the certification phase because his first priority was to move through the house to test the level of fumigant and that the employee would have found the items during his second sweep through the house. Perhaps the employee would have, but MCF's employees had failed to notice the items during the previous two phases of the fumigation and during the first half of the third phase. If the licensee in charge of introducing

the fumigant had followed the label the possibility would not have existed. Sufficient evidence exists to support the Hearing Officer's finding of a violation and that the violation was properly in the moderate range. The Committee finds that the placing of the fine in the moderate range is also supported by the record. And the Committee agrees, as determined by the Hearing Officer, the CAC has the discretion whether to fine the licensee, the employer, or both.

The Hearing Officer is not entirely clear about his reasoning for lowering the fine, but his reasoning appears to be based on MCF's good compliance record and good training program. The CAC argued that decision to lower the fine based on mitigating circumstances was arbitrary, and that those circumstances do not sufficiently outweigh the reasons the CAC placed the fine at $500.00 initially in the Notice of Proposed Action. The CAC adopted the Hearing Officer's fine decision under the mistaken belief that he must adopt the Hearing Officer's decision. DPR issued an enforcement letter to the CACs by letter dated August 4, 2006 (ENF 06-28) updating an earlier DPR policy and advising the CACs that they do have the authority to disagree with and overturn a Hearing Officer's determination under certain circumstances. The fine level is a matter soundly within the discretion of the CAC. The Hearing Officer does not have the same level of discretion. The Hearing Officer can consider facts that establish mitigation and can recommend a lower fine level. The CAC has the final discretion to adopt the recommendation, or reject it and reinstate the fine proposed in the Notice of Proposed Action.

In this circumstance, the CAC had the authority to overrule the lowering of the fine and could have reinstated a fine of $500.00 but failed to do so because of a mistaken belief of law. The Committee, by a vote of 2-1 finds that the Hearing Officer's fine recommendation was properly rejected by the CAC, and that the fine of $500.00 is reinstated.

Conclusion

The record demonstrates that the Commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision except as to the fine level. The Committee finds that the fine should be reinstated to $500.00.

Disposition

The Alameda CAC's decision is affirmed and the fine level is modified. The Commissioner's order is stayed until 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 $500.00 civil penalty levied by the commissioner against the appellant is due and payable to the "Structural Pest Control Education and Enforcement Fund" 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
1418 Howe Avenue, Suite 18
Sacramento, California 95825

Judicial Review

BPC section 8662 provides 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: JUL 28 2010

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