



Florida Department of Agriculture & Consumer Services
CHARLES H. BRONSON, Commissioner
The Capitol PL-10, Tallahassee, FL 32399-0800

PLEASE REPLY TO:
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April 13, 2007

Honorable Lawrence P. Stevenson
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Re: *DACS vs. Ag-Mart Produce, Inc, Justin Oelman and Josh Cantu*
Agency Complaint No.: A39733; DOAH Case No. 06-0729 and
DACS vs. Ag-Mart Produce, Inc, Warrick Birdwell and Charles Lambert
Agency Compliant No.: A39374, DOAH Case No. 06-0730
FDACS Docket No. 2005-0107

Dear Judge Stevenson:

Enclosed please find your copy of the Department's Final Order.

If you have any questions, please do not hesitate to contact me at the above listed number.

Sincerely,

A handwritten signature in cursive script that reads "David W. Young".

David W. Young
Senior Attorney

DWY:kjh
Enclosure

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COMMISSION OF
ADMINISTRATIVE
HEARINGS

STATE OF FLORIDA
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Petitioner,
vs.

AGENCY CASE NO. A39733
DOAH Case No. 06-0729
(Consolidated)

AG-MART PRODUCE, INC.; JUSTIN
OELMANN AND JOSH CANTU,

Respondents.

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Petitioner,
vs.

AGENCY CASE NO. A39374
DOAH Case No. 06-0730
(Consolidated)

AG-MART PRODUCE, INC.; WARRICK
BIRDWELL; AND CHARLES LAMBERT,

Respondents.

FINAL ORDER

THIS CAUSE arising under the Florida Pesticide Law, Chapter 487, Part I, Florida Statutes (2005), came before the Commissioner of Agriculture of the State of Florida for consideration and final agency action after entry of a Recommended Order. The Commissioner of Agriculture, as head of the Department of Agriculture and Consumer Services, has jurisdiction over the subject matter and the parties thereto.

I. BACKGROUND

On October 12, 2005, Petitioner, the Department of Agriculture and Consumer Services (the Department), issued two Administrative Complaints against Respondent Ag-Mart Produce, Inc. (hereafter "Ag-Mart") and its licensed pesticide applicators

working at Ag-Mart's South Florida farm in Immokalee and its North Florida farm in Jennings. The Administrative Complaints alleged a total of 88 separate violations of the Florida Pesticide Law, Chapter 487, Part I, Florida Statutes (2005), and of Florida Administrative Code Rules 5E-2, which governs pesticides, and 5E-9, which governs licensure for pesticide applicators. The Administrative Complaints were forwarded to DOAH on February 27, 2006. The Administrative Complaint regarding Ag-Mart's Immokalee farm was assigned DOAH Case No. 06-0729 (the South Florida Complaint). The Administrative Complaint regarding Ag-Mart's Jennings farm was assigned DOAH Case No. 06-0730 (the North Florida Complaint). By Order dated March 7, 2006, the parties' joint motion to consolidate the cases for hearing was granted, and the consolidated matter was set for hearing on May 19, 2006 before the Honorable Lawrence P. Stevenson, Administrative Law Judge. Prior to the hearing, the parties resolved 10 of the asserted violations in their Pre-Hearing Stipulation. The Administrative Law Judge entered a Recommended Order on March 16, 2007.

On April 2, 2007, Respondent's counsel served Respondent's Exceptions to Recommended Order setting forth three (3) exceptions to the Administrative Law Judge's Preliminary Statements and Findings of Fact, and one (1) exception to the Conclusions of Law. Petitioner's counsel also served Department's Exceptions to Recommended Order setting forth one (1) exception to the RECOMMENDATION, and one (1) exception to the Conclusions of Law.

The record consists of all notices, pleadings, motions, intermediate rulings, evidence admitted and matters officially recognized, the transcript of the proceedings,

proposed findings and exceptions, stipulations of the parties, and the Recommended Order of the ALJ.

The Recommended Order is attached and incorporated herein, as Exhibit "1".

II. EXCEPTIONS

Petitioner's Exception No. 1: The Administrative Law Judge erroneously omitted reference to Counts XIX and XXII of the North Florida Complaint in his RECOMMENDATION as counts for which violations were found to have been committed although the Administrative Law Judge included the counts in determining the recommended fine.

Petitioner correctly asserts that the Recommendation, Page 49, contained in Paragraph 1 erroneously omitted reference to proven violations contained in Counts XIX and XXII; citing Paragraphs 73, 74 and 92.

Petitioner's Exception No. 2: The Administrative Law Judge erroneously held that failing to seek amendment of the South Florida Administrative Complaint at the hearing to allege the existence of additional spray tickets introduced into evidence caused Counts XXXI, XXXII, XLI, and XLII of the Complaint to be "not proven by clear and convincing evidence."

Petitioner's disagreement with the finding of the Administrative Law Judge that Counts XXXI, XXXII, XLI, and XLII were not proven by clear and convincing evidence due to Petitioner's failure to amend the South Florida Complaint to allege the fact of the second spray ticket is noted for the record. Petitioner correctly points out that the presented legal issue, which is not filed as a formal exception, is outside the Department's jurisdiction.

Respondents' Exception No. 1: The Administrative Law Judge fails to accurately describe the parties' stipulation regarding applications of "Bravo Weather Stik."

Respondent correctly asserts that the erroneous listing referenced in Paragraph 3 of the Preliminary Statement should have also included the listing of "Bravo Weather

Stik” in Count XXXV of the South Florida Complaint in accordance with the Joint Pre-Trial Stipulation filed by the parties on May 16, 2006.

Respondents' Exception No. 2: The Administrative Law Judge's Recommended Order incorrectly spells the same of South Florida Complaint Respondent Justin Oelmann.

All references herein to the surname of Mr. Justin Oelmann, including the style of this administrative action, should be correctly spelled as Oelmann.

Respondents' Exception No.3: The Administrative Law Judge's inconsistently defines "date received" column data on Ag-Mart's Foreman Receiving Reports.

Because Respondents do not formally take exception to the administrative judge's findings regarding the specific violations found to have been proven at the North Florida farm, Respondent's contentions regarding the sufficiency and competency of the evidence pertaining to the "date received" column data is noted for the record.

Respondents' Exception No.4: The Administrative Law Judge erroneously concludes that Respondent Ag-Mart is not entitled to attorney's fees or costs in this proceeding.

Respondent's disagreement with the conclusion of the Administrative Law Judge is noted for the record. The presented legal issue is, however, outside the Department's jurisdiction

III. FINDINGS OF FACT

1. The Commissioner of Agriculture adopts the findings of fact set forth in the attached recommended order of the Administrative Law Judge (ALJ) provided, however, the reference to the listing in Paragraph 3 of the Preliminary Statement is understood to include the listing of "Bravo Weather Stik" in Count XXXV of the South Florida Complaint in accordance with the Joint Pre-Trial Stipulation filed by the parties on May

16, 2006 and all references to Mr. Oelmann in the Recommended Order are understood to refer to Justin Oelmann.

IV. CONCLUSIONS OF LAW

2. After a full review of the record, the Commissioner of Agriculture has determined that the Petitioner's Exception No. 1 and Respondent's Exceptions No. 1 and No. 2 are clerical in nature and are accepted.

3. As to Petitioner's Exception No. 2 and Respondent's Exceptions No. 3 and No. 4, the Commissioner of Agriculture has determined that the issues raised by the parties have either been waived by not taking formal exception to the Recommended Order or there is no substantive jurisdiction over the issue.

4. Except for the foregoing, the Commissioner of Agriculture adopts the Conclusions of Law made by the ALJ in his Recommended Order attached hereto.

5. The ALJ's conclusions of law as to Counts I, II, XI, XXI, XIX and XXII of the North Florida Complaint are supported by competent, substantial evidence and thus the Commissioner accepts that Respondents have committed the violations therein stated.

6. The Commissioner accepts of the Conclusions of Law that the Department has not met its burden of proof as to any of the counts in the South Florida Complaint and that these counts should be dismissed.

7. The Commissioner finds that the Pre-Hearing Stipulation of the parties resolving 10 counts of the Administrative Complaints should be approved.

Accordingly, it is thereupon

ORDERED AND ADJUDGED:

A. The Commissioner of Agriculture adopts the recommendations of the ALJ set

forth in his recommended order attached as modified by the Commissioner's acceptance of Petitioner's Exception No. 1.

B. Respondent Ag-Mart and its licensed applicators have committed the violations referenced in Counts I, II, XI, XXI, XIX and XXII of the North Florida Complaint and are hereby ordered to pay an administrative fine in the amount of \$8,400.

C. Respondent Ag-Mart and its licensed applicators shall pay \$3,000 to resolve Counts L through LIV of the South Florida Complaint and Counts XVII and XVIII of the North Florida Complaint.

D. The remaining Counts of the North Florida Complaint and the South Florida Complaint are dismissed.

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Final Order is entitled to seek review of this order pursuant to Section 120.68, Fla. Stat. (2002), and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be initiated by filing a petition for review or notice of appeal with the Agency Clerk of the Florida Department of Agriculture, Room 509 Mayo Building, Tallahassee, Florida 32399-0800. A copy of the petition for review or notice of appeal, accompanied by the filing fees prescribed by law must also be filed with the appropriate District Court of Appeal within thirty (30) days of the date this Order was filed with the Agency Clerk.

DONE AND ORDERED this ¹³ day of April, 2007.

CHARLES H. BRONSON
COMMISSIONER OF AGRICULTURE

BY: 

Terry L. Rhodes, Assistant Commissioner
Florida Department of Agriculture
and Consumer Services

Filed with the Agency Clerk this 13th day of April, 2007.



Agency Clerk

Copies to: David J. Stefany, Esquire, Attorney for Respondents
Lawrence P. Stevenson, Administrative Law Judge
State of Florida, Division of Administrative Hearings
Richard D. Tritschler, General Counsel