

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) Case No. 07-5600PL
)
LARRY KRAVITSKY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on December 18, 2008, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: David W. Young, Senior Attorney
Office of the General Counsel
Department of Agriculture and
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407 South Calhoun Street
Tallahassee, Florida 32399-0800

For Respondent: Larry Kravitsky, pro se
3300 South Ocean Boulevard
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Larry Kravitsky, as alleged in Petitioner's Administrative Complaint issued by Petitioner, the Department of Agriculture and Consumer Services, on February 13, 2007, provided pest control services in violation of Section 482.165(1), Florida Statutes (2006), whether he applied a pesticide in a manner inconsistent with its label in violation of Florida Administrative Code Rule 5E-14.106(1), and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

On or about February 13, 2007, the Department of Agriculture and Consumer Services issued an Administrative Complaint and Settlement Agreement, Notice to Cease and Desist, BEPC Case Number 06-1951, Administrative Complaint Number A47018, against Larry Kravitsky. It is alleged in Count 1 of the Administrative Complaint that Respondent had committed a violation of Section 482.165(1), Florida Statutes (2006), by "practicing pest control in the State of Florida without a Pest Control Business License" In Count 2 it is alleged that Respondent violated Florida Administrative Code Rule 5E-14.106(1) by "[a]pplying a pesticide in a manner inconsistent with its labeling"

On or about February 28, 2007, Respondent disputed the facts upon which the Administrative Complaint is based and requested a formal administrative hearing pursuant to Sections 120.569, and 120.57(1), Florida Statutes. On December 4, 2007, the matter was filed by Petitioner with the Division of Administrative hearings requesting that an administrative law judge be assigned to conduct the formal administrative hearing requested by Respondent. The matter was designated DOAH Case No. 07-5600PL and was assigned to the undersigned.

The final hearing of this matter was initially scheduled for February 11, 2008, by Notice of Hearing by Video Teleconference entered December 11, 2007. The hearing was subsequently continued to allow certain related criminal charges against Respondent to be resolved. Once the criminal matter was resolved, the hearing was scheduled for December 18, 2008.

At the final hearing Petitioner presented the testimony of Mary Cohen, Patricia Lucas, Lori Kelley, and Michael J. Page. Petitioner had 18 Exhibits, identified as Petitioner's Exhibits numbered 1, 3, 4, 8, 11 through 16, 18, 19, 22, 26, 28, and 30 through 32, admitted. Petitioner's Exhibit 30 is the deposition testimony of Michael Petrozzino, Petitioner's Exhibit 31 is the deposition testimony of Respondent, and Petitioner's Exhibit 32 is the deposition testimony of Carlos Rojas.

Petitioner also offered the deposition testimony, marked as Petitioner's Exhibit 29, of Cara Beth Walker. Petitioner informed Respondent when the deposition was taken that, due to Ms. Walker's employment, which necessitated her frequent absences from the State, that it would be used in lieu of her testimony at hearing if she were unable to attend the hearing. At hearing, Petitioner represented that Ms. Walker was more than 100 miles from either hearing location. In an abundance of caution, the deposition transcript was admitted conditioned upon Petitioner filing e-mails from Ms. Walker addressing her absence from the State on the date of the hearing.

On February 24, 2009, Petitioner filed Petitioner's Notice of Filing e-Mails from Witness, Cara Beth Walker. On April 2, 2009, Respondent filed Respondent's Objection to Admission of Deposition as Evidence. After full consideration of the pleadings, the deposition testimony of Cara Beth Walker, Petitioner's Exhibit 29, is admitted.

Respondent testified on his own behalf and presented testimony from Carlos Rojas and John F. McDonough. No exhibits were offered at hearing by Respondent. He was given ten days from the date of the hearing, however, to file a list of pesticides that contain Diphacinone. Respondent did so and

Petitioner filed an objection to the document. The document, marked as Respondent's Exhibit 1, is hereby admitted.

On March 4, 2009, the parties were informed by Notice of Filing Transcript that the transcript of the final hearing had been filed on March 3, 2009, and that proposed recommended orders were to be filed on or before April 3, 2009. Petitioner filed Petitioner's Proposed Recommended Order on April 1, 2009. Respondent filed Respondent's Proposed Final [sic] Order on April 10, 2009. Although Respondent's submittal was late, it does not appear that he gained any advantage by his actions. Accordingly, both submittals have been fully considered in preparing this Recommended Order.

On April 29, 2009, Petitioner filed a request for hearing with the Division of Administrative Hearings in the case of Larry Kravitsky vs. Department of Agriculture and Consumer Services, Agency Case No. A61227. That request was designated DOAH Case No. 09-2300 and was assigned to the undersigned. That case involves the proposed denial by Petitioner in this case of an application from Respondent for a pest control identification card based upon the underlying facts of this case. On May 7, 2009, Petitioner in this case filed a motion to consolidate DOAH Case No. 09-2300 with this matter. The motion was objected to by Respondent in this case. Following a telephone conference held on or about May 21, 2009, the motion was denied. The

issuance of this Recommended Order was delayed until the motion to consolidate could be ruled upon.

All further references to the Florida Statutes in this Recommended Order are to the 2006 edition, unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, the Florida Department of Agriculture and Consumer Services, Bureau of Entomology and Pest Control (hereinafter referred to as the "Bureau"), is charged with the responsibility of administering and enforcing the provisions of Chapter 482, Florida Statutes, the "Structural Pest Control Act."

2. At the times relevant to this matter, Respondent Larry Kravitsky was not licensed to perform pest control services. While he had applied for an identification card with the Bureau, that application had been denied.

3. At the times relevant to this matter, Cara Beth Walker resided at 6485-4 Bay Club Drive, Fort Lauderdale, Florida (hereinafter referred to as the "Property").

4. At the times relevant, Sears Pest Control Incorporated, d/b/a Ship Shape Pest Control (hereinafter referred to as "Ship Shape"), was a licensed pest control business in the State of Florida. Ship Shape, owned by Mr. Kravitsky's brother, Alan J. Kravitsky, was qualified to conduct pest control at the times

relevant through Lori Kelley. The evidence failed to prove that anyone at Ship Shape had authorized Mr. Kravitsky to perform pest control services in June 2006.

5. On June 5, 2006, John McDonough, then in the employ of Ship Shape, arrived at the Property, where he had previously provided treatment for ants. Mr. McDonough, who applied for a Pest Control Employee-Identification Card on June 9, 2006, which was approved as of June 10, 2006, was not a certified operator in charge or even familiar with rodent control, came to the Property because of a problem Ms. Walker was having with what she believed were rodents.

6. When Mr. McDonough arrived, he told Ms. Walker that he had to wait for Mr. Kravitsky and the equipment necessary to perform any treatment to arrive. Ms. Walker was unable to remain at the Property because of her employment, so she left before the treatment was completed. While Ms. Walker testified as to Mr. Kravitsky's arrival and initial involvement in the treatment, that testimony has been rejected as unconvincing. There were simply too many inconsistencies in Ms. Walker's testimony concerning what took place on June 5, 2006, and with the more convincing testimony of Carlos Rojas to be given any credence by this finder of fact.

7. What the evidence did prove, however, is that at some time after Mr. McDonough arrived at the Property, Mr. Kravitsky

and Mr. Rojas arrived in separate vehicles. Mr. Rojas was also employed by Ship Shape but did not have a Pest Control Employee-Identification Card or pest control license. Mr. Rojas had been directed by Mr. Kravitsky to go to the Property that morning.

8. Mr. Kravitsky brought electrical cords, a drill, and an electric duster to the Property. The electric duster was filled with Ditrac, a powder used to eliminate rodents. Mr. Rojas was not aware of what the powder was and had no experience using an electric duster. Mr. Kravitsky did not try to explain what the electric duster was for or how to use it. Instead, Mr. Kravitsky instructed Mr. Rojas to follow Mr. McDonough's instructions. Mr. Kravitsky then left the Property, leaving Mr. McDonough in charge.

9. Mr. Rojas was told by Mr. McDonough to drill holes in the walls. Next, Mr. Rojas was told to plug the electric duster into an electric outlet and then place a nozzle from the electric duster in the holes that had been drilled. Mr. Rojas was told to turn the duster on and to leave it on from one to three minutes in each hole. Mr. Rojas followed these instructions.

10. The operation took approximately an hour to complete, at which time Mr. Kravitsky returned. All three men then left the Property.

11. The evidence failed to prove that anyone other than Mr. Kravitsky was involved in authorizing the treatment of the Property on June 5, 2006. Lori Kelly, the certified operator in charge of Ship Shape knew nothing about the job until after it was completed. At no time did Ms. Kelly direct or authorize the use of Ditrac at the Property. Ms. Kelly became aware of the treatment of the Property when Mr. Kravitsky told her that she would be contacted about the job. While she could not recall at hearing whether she had been asked by Kravitsky to say that she had been present during the treatment, she signed a statement on July 7, 2006, indicating that she had been. While she acknowledged that the statement was given when her memory was probably better, she did not testify that the statement refreshed her memory.

12. Mr. Kravitsky's and Mr. McDonough's account at hearing of what transpired on June 5, 2006, at the Property is rejected as not credible. The Bureau in proposed findings of fact 11, 12, 14 and 15 of Petitioner's Proposed Recommended Order explain in detail some of the reasons why Mr. Kravitsky's testimony has been rejected. Information obtained from David Beswick by the Bureau, however, has not been relied upon in making this or any other finding in this Recommended Order because that information is hearsay.

13. Mr. Kravitsky admitted to Ms. Walker on or about June 16, 2006, that the powder used on June 5, 2006, was Ditrac. He also admitted to her that three pounds of Ditrac had been used.

14. Several weeks after the treatment at the Property, Mr. Kravitsky admitted to Mr. Rojas that the treatment had been a disaster and warned Mr. Rojas that someone from Petitioner would be contacting him about the job. Mr. Kravitsky told Mr. Rojas to decline to talk about the treatment because he would be represented by legal counsel provided by Mr. Kravitsky.

15. The Bureau, following established procedures, took samples from different areas of the Property on June 16, 2006. Additional samples were taken on June 26, 2006, by Mary Cohen, who was accompanied by Richard Lucas. Again, established procedures, described in detail by Ms. Cohen, were followed.

16. The samples taken at the Property were tested by Patty Lucas, Director of the Bureau's Pesticide laboratory. Ms. Lucas utilized procedures accepted in the scientific community to determine where Diphacinone, the active ingredient in Ditrac was present. Two of the samples taken on June 16, 2006, and two of the samples taken on June 26, 2006, tested positive for Diphacinone. These tests results are consistent with Mr. Kravitsky's admission to Ms. Walker that Ditrac had been used in the treatment of the Property.

17. The Ditrac label, Petitioner's exhibit 3, contains the following "PRECAUTIONARY STATEMENTS HAZARDS TO HUMANS AND DOMESTIC ANIMALS WARNING" concerning use of the chemical"

May be fatal if swallowed or absorbed through the skin. Do not get in eyes, on skin or on clothing. Wear protective clothing and rubber gloves. Wash arms and face with soap and water after mixing or handling and before eating, drinking, or using tobacco. Remove contaminated clothing and wash before reuse.

18. The label also warns that Ditrac is a "RESTRICTED USE PESTICIDE Due to Acute Oral Toxicity" and that it is "[f]or retail sale to, and use only by, Certified Applicators, or persons under their direct supervision and only for those uses covered by the Certified applicator's Certification."

19. Finally, of importance in this case, the Ditrac label includes the following instruction concerning "APPLICATION DIRECTIONS: . . . Do not use power dusting devices"

20. Mr. Kravitsky, contrary to the warnings and directions for use of Ditrac, without authorization by anyone at Ship Shape, and without any license or other authorization from the Bureau, directed Mr. Rojas to use an electric duster filled with Ditrac in the Property. His actions constituted the practice of pest control and the use of a pesticide in a manner inconsistent with the pesticide's label.

CONCLUSIONS OF LAW

A. Jurisdiction.

21. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

B. The Burden and Standard of Proof.

22. The Bureau seeks to impose penalties against Mr. Kravitsky through the Administrative Complaint that include the imposition of administrative fines. Therefore, the Bureau has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

23. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

. . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and

explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

C. The Charges of the Administrative Complaint.

24. The Bureau has charged Mr. Kravitsky in Count 1 with having violated Section 482.165(1), Florida Statutes, which provides:

(1) It is unlawful for a person, partnership, firm, corporation, or other business entity not licensed by the department to practice pest control.

25. In Count 2, the Bureau has charged Mr. Kravitsky with having violated Florida Administrative Code Rule 5E-14.106(a), which governs the "Use of Pesticides - Labels, Limitations, Precautions":

Only those pesticides having federal or state label registration clearance shall be used. It shall be unlawful to use any registered pesticide in a manner inconsistent with its label and labeling, except as provided by the United States Environmental Protection Agency, the United

States Department of Agriculture, or the Department.

D. Count 1; Alleged Violation of Section 482.165(1), Florida Statutes.

26. In order for an individual to practice pest control in Florida he or she must have a pest control operator's certificate or an employee identification card. §§ 482.111 and 482.091, Fla. Stat. At the times relevant to this matter, Mr. Kravitsky had neither an employee identification card nor a pest control operator's certificate. He was, therefore, not authorized to practice pest control in Florida in June 2006.

27. What constitutes "pest control" is defined in Section 482.021(21), Florida Statutes, to include, in part, the following:

(a) The use of any method or device or the application of any substance to prevent, destroy, repel, mitigate, curb, control, or eradicate any pest in, on, or under a structure, lawn, or ornamental;

(b) The identification of or inspection for infestations or infections in, on, or under a structure, lawn, or ornamental;

(c) The use of any pesticide, economic poison, or mechanical device for preventing, controlling, eradicating, identifying, inspecting for, mitigating, diminishing, or curtailing insects, vermin, rodents, pest birds, bats, or other pests in, on, or under a structure, lawn, or ornamental;

. . . .

28. The Bureau has proved clearly and convincingly that Mr. Kravitsky practiced pest control in violation of Section 482.165(1), Florida Statutes, when he directed Mr. Rojas to drill holes for the purpose of applying Ditrac and by providing a power duster filled with Ditrac which he instructed to Mr. Rojas to use in the treatment of the Property.

E. Count 2; Alleged Violation of Florida Administrative Code Rule 5E-14.106(1).

29. In pertinent part, the instructions for use of Ditrac limit the use of the chemical to "Certified Applicators, or persons under their direct supervision and only those covered by the Certified Applicator's Certification." The evidence proved clearly and convincingly that Mr. Kravitsky did not comply with this direction.

30. The directions for use of Ditrac also specify that a power dusting device should not be used in the application of the pesticide. The evidence proved clearly and convincingly that Mr. Kravitsky did not comply with this direction.

31. Accordingly, it is concluded that the Bureau proved clearly and convincingly that Mr. Kravitsky violated Florida Administrative Code Rule 5E-14.106(1), as alleged in the Administrative Complaint.

F. Appropriate Penalty.

32. Section 482.161, Florida Statutes, provides the Bureau's authority to discipline Mr. Kravitsky in this matter. In pertinent part, the Bureau is granted the following authority:

(1) The department may issue a written warning to or impose a fine against, or deny the application for licensure or licensure renewal of, a licensee, certified operator, limited certificateholder, identification cardholder, or special identification cardholder or any other person, or may suspend, revoke, or deny the issuance or renewal of any license, certificate, limited certificate, identification card, or special identification card that is within the scope of this chapter, in accordance with chapter 120, upon any of the following grounds:

(a) Violation of any provision of this chapter or of any rule of the department adopted pursuant to this chapter.

. . . .

(7) The department, pursuant to chapter 120, in addition to or in lieu of any other remedy provided by state or local law, may impose an administrative fine, in an amount not exceeding \$5,000, for the violation of any of the provisions of this chapter or of the rules adopted pursuant to this chapter. In determining the amount of fine to be levied for a violation, the following factors shall be considered:

(a) The severity of the violation, including the probability that the death, or serious harm to the health or safety, of any person will result or has resulted; the severity of the actual or potential harm; and the extent to which the provisions of this chapter or of the rules adopted pursuant to this chapter were violated;

(b) Any actions taken by the licensee or certified operator in charge, or limited certificateholder, to correct the violation

or to remedy complaints;

(c) Any previous violations of this chapter or of the rules adopted pursuant to this chapter; and

(d) The cost to the department of investigating the violation.

33. Section 482.165(8), Florida Statutes, grants the following authority to an administrative law judge to recommend the following alternative discipline:

(8) An administrative law judge may, in lieu of or in addition to imposition of a fine, recommend probation or public or private reprimand. A public reprimand must be made in a newspaper of general circulation in the county of the licensee

34. In Petitioner's Proposed Recommended Order, the Bureau has suggested the imposition of a fine in the amount of \$4,000.00. In light of the "PRECAUTIONARY STATEMENTS HAZARDS TO HUMANS AND DOMESTIC ANIMALS WARNING" printed on the Ditrac label, which was ignored by Mr. Kravitsky, the requested fine is reasonable and authorized under Section 482.165, Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Department of Agriculture and Consumer Services finding that Larry Kravitsky violated Section 482.165, Florida Statutes, and Florida Administrative Code Rule 5E-14.106(6), as alleged in the

Administrative Complaint and imposing a fine in the amount of \$4,000.00.

DONE AND ENTERED this 2nd day of June, 2009, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in these cases.