

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,

Petitioner,

vs.

Case No. 20-4043PL

DAVID APONTE,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Brittany O. Finkbeiner conducted the final hearing in this case for the Division of Administrative Hearings (DOAH) on November 12, 2020, by Zoom conference.

APPEARANCES

For Petitioner: Lee Damessous, Esquire
Department of Agriculture
and Consumer Services
407 South Calhoun Street, Suite 520
Tallahassee, Florida 32399-0800

For Respondent: David Aponte, pro se
Home Care Pest Control, Inc.
672 Northwest 118 Street
Miami, Florida 33138

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent violated Florida Administrative Code Rules 5E-14.108(6) and 5E-14.112(7)(b), as alleged in the Administrative Complaint. If it is found that Respondent has committed

any of the rule violations alleged, the penalty that should be imposed must also be determined.

PRELIMINARY STATEMENT

On July 22, 2020, the Department of Agriculture and Consumer Services (Department or Petitioner) filed a two-count Administrative Complaint against Respondent David Aponte (Respondent). The first count alleged that Respondent violated rule 5E-14.108(6), by failing to have two properly functioning self-containing breathing apparatus (SCBA) devices at a fumigation site. The second count alleged that Respondent failed to open all exterior doors during the one-hour aeration period, in violation of rule 5E-14.112(7)(b). For the alleged violations, the Department sought to impose discipline against Respondent pursuant to section 482.161, Florida Statutes.

Respondent submitted an Election of Rights form disputing the allegations in the Administrative Complaint and requesting a hearing on August 10, 2020. The Department transmitted the matter to DOAH on September 9, 2020, for the assignment of an ALJ.

The final hearing was held on November 12, 2020. Petitioner presented the testimony of Victor Zuclich (Mr. Zuclich), Environmental Specialist II, with the Department. Petitioner's exhibits 1, 2, 7, 11, and 13 through 16 were admitted into evidence. Respondent testified on his own behalf and did not call any other witnesses. Respondent's exhibits 1 and 2 were admitted into evidence.

A one-volume Transcript of the final hearing was filed with DOAH on December 9, 2020. The parties submitted timely proposed recommended orders, which were duly considered in the preparation of this Recommended Order.

All references to the Florida Statutes and the Florida Administrative Code are to the 2019 versions, unless specified otherwise.

FINDINGS OF FACT

1. On June 26, 2020, The Department's inspector, Mr. Zuclich, inspected a fumigation operation conducted by Home Care Pest Control, Inc., at 520 SW 47th Ave, Coral Gables, Florida, 33134.

2. Respondent is the certified operator of Home Pest Control, Inc., as defined in section 482.021(5).

3. The Department has the authority to discipline the licenses of certified operators. § 482.161, Fla. Stat.

4. Respondent used the fumigant Zythor during the fumigation of the subject property.

5. The Department's inspector, Mr. Zuclich, first arrived at the site of the fumigation during the active aeration phase. He observed the crew conducting their work for approximately 15 minutes.

6. The inspection took place during the one-hour active aeration phase of the fumigation process, which is when the gas is allowed to escape the structure after the active fumigation phase is complete.

7. During the inspection, Mr. Zuclich asked Respondent if he could demonstrate that the two SCBAs that were visible at the fumigation site were functional.

8. Through his inspection, Mr. Zuclich determined that the first SCBA tank he checked had two and a half pounds of gas, which is an acceptable level. The second SCBA, however, showed a reading of zero. Respondent explained to Mr. Zuclich that the second SCBA did have air in it, but the gauge on the unit was not functioning properly. Mr. Zuclich then gave Respondent the opportunity to demonstrate that the second SCBA was, in fact, operational by turning it on and using it. However, even in doing so, the SCBA failed to function. Respondent had recently taken the second SCBA to

be filled with air and did not know that it was inoperable until he attempted to demonstrate it for Mr. Zuclich during the inspection.

9. Mr. Zuclich inspected a truck that was marked with the logo for Respondent's company. He also requested access to inspect the interior and the cargo bed of Respondent's personal vehicle, which Respondent denied. To the extent that Mr. Zuclich was able to make a plain-view observation from the outside of the personal vehicle, he could not see any additional SCBA equipment. Mr. Zuclich testified credibly that he believed if such equipment were present in the vehicle, he would have been able to see them from his vantage point because of their large size.

10. Following his inspection, Mr. Zuclich filled out an affidavit onsite summarizing his observations, including the inadequacy with respect to Respondent's SCBA equipment. Respondent signed the affidavit that Mr. Zuclich wrote, which included some clarifying language at Respondent's request.

11. Respondent testified that he had spare SCBA tanks in both his personal and fumigation vehicles. However, according to his testimony, he did not produce the additional SCBA equipment over the course of the inspection because Mr. Zuclich did not ask him to do so. Respondent's testimony on this point is not credible because it is illogical that he would not have submitted other available SCBA equipment for inspection despite the fact that it was clear that Mr. Zuclich was documenting the deficiency in SCBA equipment as part of his inspection. Respondent's testimony is rejected to the extent that it conflicts with Mr. Zuclich's testimony as to the availability of additional SCBA tanks at the fumigation site.

12. During his inspection, Mr. Zuclich further observed, and documented, that one of the exterior doors on the structure being fumigated was closed and locked during the one-hour active aeration period.

13. Respondent testified that he did not receive keys from the homeowner to the exterior door that remained closed during active aeration. He further

testified that he could not access the door because it was blocked and locked from the inside. He did not know definitively whether the door was operable.

CONCLUSIONS OF LAW

14. DOAH has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569 and 120.57(1), Florida Statutes.

15. The Administrative Complaint against Respondent alleges violations of rule 5E-14.108(6), for failing to have two properly functioning SCBA devices at a fumigation site; and of rule 5E-14.112(7)(b), for failing to open all exterior doors during the one-hour aeration period. The Department seeks to impose discipline against Respondent's license for the alleged violations.

16. A proceeding to impose discipline upon a license is penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973). Therefore, Petitioner bears the burden of proving the charges against Respondent by clear and convincing evidence. *Fox v. Dep't of Health*, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) (citing *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996)).

17. The clear and convincing standard of proof has been described by the Florida Supreme Court as follows:

Clear and convincing evidence requires that evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

18. Disciplinary rules and statutes generally must be construed strictly, in favor of the one against whom the penalty would be imposed. *Griffis v. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011). The present case, however, arises under chapter 482, the provisions of which “shall be liberally construed in order to effectively carry them out in the interest of the public and its health, welfare, and safety.” § 482.241, Fla. Stat.

19. Rule 5E-14.108(6) states:

When crew members are present on the fumigation site, two properly functioning, positive pressure self-containing breathing apparatus (SCBA) must be available at all times when the structure is under fumigation (fumigant release, exposure period, aeration and at other times when the state law or the fumigant label requires the use or presence of a SCBA). Two SCBA do not need to be present at the fumigation site for activities that do not involve workers exposure to fumigant concentration above threshold permitted by the fumigant label. Such activities could include but would not be limited to, remote monitoring, using a Fumiscope, TIF leak detection, job site cleanup, DACS inspections and Quality Assurance Reviews.

20. Count 1 of the Administrative Complaint states, in its entirety:

Mr. David Aponte, JF122584 is in violation of Section 5E-14. 108(6), F.A.C., when on June 6, 2020 at a property located at 520 SW 47th Ave., Coral Gables, FL 33134 under fumigation by Home Care Pest Control, INC., JB 124118, there was only one functional SCBA with less than five pounds of air and a second SCBA showing an air tank gauge with a zero reading during the one-hour active aeration phase of the fumigation.

21. The Department proved, by clear and convincing evidence, that two SCBAs were not available at the fumigation site during the aeration period with crew members present, in violation of rule 5E-14.108(6).

22. Rule 5E-14.112(7)(b), states, in pertinent part:

All exterior doors and entrances to the fumigated structure(s) shall be posted with a warning sign on or at each door or entrance prior to the release of the fumigant, locked and secured with a secondary locking device(s) or barred or otherwise secured against entry until the end of the exposure period, then opened for ventilation and relocked, barred or otherwise secured against reentry, including the reinstallation of secondary device(s) until declared to be safe for reoccupancy by the person exercising direct and personal supervision of the fumigation operation as required by subsections 5E-14.112 (1) and (2), F.A.C.

23. Count 2 of the Administrative Complaint states, in its entirety:

Mr. David Aponte, JF122584 is in violation of Section 5E-14. 112(7)(b), F.A.C., when on June 6, 2020 at a property located at 520 SW 47th Ave., Coral Gables, FL 33134 under fumigation by Home Care Pest Control, [INC.,] JB124118, the door located by the North-East side of the structure was closed during the one-hour active aeration phase of the fumigation.

24. The Department proved, by clear and convincing evidence, that Respondent failed to open all exterior doors during the one-hour aeration period, in violation of rule 5E-14.112(7)(b). Although Respondent testified that he did not open one of the exterior doors for reasons that may have been logical, the text of the rule requires that “[a]ll exterior doors” be opened for ventilation during the relevant period, without exception.

25. Disciplinary action must be predicated solely on violations both pled in the Administrative Complaint and proven at hearing. Due process prohibits the Department from taking disciplinary action based on matters not specifically alleged or charges not specifically made in the Administrative Complaint. *Cottrill v. Dep’t of Ins.*, 685 So. 2d 1371 (Fla. 1st DCA 1996); *Trevisani v. Dep’t of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005).

Accordingly, the undersigned must calculate a fine based only upon matters that were pled in the Administrative Complaint and proven at the hearing.

26. The Fine Guide outlined in rule 5E-14.149(15), provides a formula for calculating penalties based on values in sections A-G. Specifically, the formula is: $A(B + C + D + F)G$. The undersigned has determined that a value of 1 is appropriate in section A, because no “[h]uman, animal, or environmental harm” was identified by the Department. Section B requires a value of 0 because “no pesticide [was] involved in [the] complaint” in the context of “human or animal hazards.” In section C, a value of 1 should be assigned because the Department did not present any evidence as to the cost of any damage, making such a calculation “[u]nknown or under \$1,000.” Section D requires a value of 1 because there was “[n]o evidence [that the] violation was committed deliberately.” Section F also requires a value of 0, as there was no evidence of investigative costs. Finally, a value of 250 is assigned to section G because Respondent was the certified operator responsible for the violations in this case. Having plugged the above numbers into the equation in rule 5E-14.149(15), the undersigned has determined that the appropriate fine is \$750. $1(1 + 0 + 1 + 1 + 0 + 0) 250 = 750$.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department impose a fine of \$750 against Respondent’s license.

DONE AND ENTERED this 7th day of January, 2021, in Tallahassee, Leon County, Florida.



BRITTANY O. FINKBEINER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of January, 2021.

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 this case.