

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

FLORIDA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,

Petitioner,

vs.

Case No. 21-2720

SPANISH RIVER NURSERY, LLC,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge (“ALJ”) Darren A. Schwartz of the Division of Administrative Hearings (“DOAH”) for final hearing on November 10, 2021, by Zoom conference.

APPEARANCES

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

For Respondent: Manuel Rivero, pro se
Spanish River Nursery, LLC
8571 156 Court South
Delray Beach, Florida 33446

STATEMENT OF THE ISSUES

Whether Respondent, Spanish River Nursery, LLC (“Respondent”), violated the statutes and rules alleged in the Administrative Complaint; and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On July 2, 2021, Petitioner, Florida Department of Agriculture and Consumer Services (“Department”), issued a three-count Administrative Complaint against Respondent, seeking to impose an administrative fine in the amount of \$2,600.00. Respondent timely filed a request for a formal administrative hearing to contest the allegations. Subsequently, the Department referred the matter to DOAH to assign an ALJ to conduct the final hearing.

The final hearing was held on November 10, 2021, by Zoom conference. At the hearing, the Department presented the testimony of Ryan DeSutter. The Department’s Exhibits 1, 2, 5 through 8, 10, 12, and 14 were received into evidence. Respondent presented the testimony of David Jordling. Respondent did not offer any exhibits into evidence.

The one-volume final hearing Transcript was filed at DOAH on January 4, 2022. The parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order. Unless otherwise indicated, all statutory and rule references are to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. The Department is the state agency charged with administering the Florida Pesticide Law (“FPL”), chapter 487, part I, Florida Statutes.
2. Respondent is a nursery doing business in Florida subject to the FPL.
3. In January 2019, the Department conducted an initial inspection of Respondent’s nursery to determine compliance with the FPL.
4. Following this initial inspection, the Department issued a four-count Administrative Complaint to Respondent on April 15, 2020, alleging that Respondent violated the FPL by failing to provide: (1) pesticide safety

information in a central display area; (2) the required Worker Protection Standard (“WPS”) training for agricultural workers; (3) supplies for decontamination; and (4) the label required for personal protection equipment.

5. Respondent did not dispute the allegations in the initial Administrative Complaint; rather, Respondent hired David Jordling (“Mr. Jordling”) to address the issues raised during the 2019 original inspection and bring Respondent into compliance.

6. On October 27, 2020, Erik Cruz (“Mr. Cruz”), a pesticide “handler” employed by Respondent, sprayed a pesticide, Kocide 2000-0 Fungicide/Bactericide (“Kocide 2000”), upon ornamental plants situated in greenhouses located at Respondent’s nursery.

7. In Count I of the instant Administrative Complaint, the Department alleges that Respondent violated WPS 40 C.F.R. § 170.311, adopted by reference in Florida Administrative Code Rule 5E-2.039, by failing to maintain pesticide safety information at the central display area within 30 days following Mr. Cruz’s pesticide application.

8. On November 19, 2020, Department Inspector Ryan DeSutter (“Mr. DeSutter”) conducted an unannounced reinspection of Respondent’s nursery. During his reinspection, Mr. DeSutter observed there was no pesticide safety information located at the central display area in violation of 40 C.F.R. § 170.311 and rule 5E-2.039.¹

9. The clear and convincing evidence adduced at hearing demonstrates that Respondent violated 40 C.F.R. § 170.311 and rule 5E-2.039, by failing to display safety information in the central display area within 30 days following Mr. Cruz’s application of the Kocide 2000 on October 27, 2020.

10. In Count II of the instant Administrative Complaint, the Department alleges that Respondent violated 40 C.F.R. §§ 170.401 and 170.501, adopted

¹ Mr. DeSutter did not conduct the initial inspection in January 2019.

by reference in rule 5E-2.039, by failing to provide WPS training to its agricultural employees within the last year, and not identifying the “EPA approval number” in its training records.

11. During his reinspection on November 19, 2020, Mr. DeSutter reviewed Respondent’s training records. At the hearing, Mr. Jordling persuasively and credibly testified that he trained Mr. Cruz as a “handler” in May 2019, and that his reference to Mr. Cruz in the training record as a “W,” meaning “worker,” instead of “H,” meaning “handler,” was a mistake.

12. Although Mr. Cruz was trained as a “handler” in May 2019, he did not receive retraining as a “handler” within one-year immediately preceding the date of his pesticide application on October 27, 2020. In addition, some “workers” were not retrained as of the date of the reinspection. Finally, although Respondent identified a training video in the record, the “EPA approval number” for the training material was not identified in the training record.

13. The clear and convincing evidence adduced at hearing demonstrates that Respondent violated 40 C.F.R. §§ 170.401 and 170.501 and rule 5E-2.039, by failing to retrain Mr. Cruz as a “handler” within the last year immediately preceding his pesticide application on October 27, 2020; failing to timely retrain “workers” by the date of the reinspection; and failing to identify the EPA approval number for the training material in the training record.

14. In Count III of the instant Administrative Complaint, the Department alleges that Respondent only maintained a 24-hour restricted entry interval (“REI”) following the application of the Kocide 2000 by Mr. Cruz on October 20, 2020, in violation of the pesticide label REI of 48 hours, in violation of 40 CFR § 170.407, adopted by reference in rule 5E-2.039 and section 487.031(10), Florida Statutes.

15. At the hearing, Mr. Jordling persuasively and credibly testified that the Kocide 2000, sprayed by Mr. Cruz on October 27, 2020, was sprayed on

plants located in greenhouses at Respondent's nursery. Because the pesticide was sprayed on plants located in greenhouses, the REI as specified on the labeling may be reduced by Respondent to 24 hours.

16. In sum, the Department failed to prove by clear and convincing evidence that Respondent violated 40 C.F.R. § 170.407, adopted by reference in rule 5E-2.039 and section 487.031(10), by failing to maintain a 48-hour REI following Mr. Cruz's application of Kocide 2000 on October 20, 2020.

17. As to Count III, the Department attempts to attack the credibility of Mr. Jordling's testimony based on his alleged violation of the rule of sequestration. This possible violation was not brought to the undersigned's attention during the hearing and was raised for the first time in Respondent's Proposed Recommended Order. When a party's counsel suspects a witness has violated the rule, the issue should be brought to the "immediate attention" of the ALJ and opposing party. *Del Monte Banana Co. v. Chacon*, 466 So. 2d 1167, 1171 (Fla. 3d DCA 1985). Even if a violation occurred, it would have been within the undersigned's discretion to determine how to remedy the violation. *Id.*

18. In the instant case, the Department challenges Mr. Jordling's testimony, in which he stated that "Spanish River is 35 acres. It's not 15 acres as previously spoken about." Whether Spanish River consists of 35 or 15 acres, however, is not significant to the undersigned's resolution of the relevant issues under Count III.

19. The undersigned had the distinct opportunity to observe the demeanor and credibility of Mr. Jordling while testifying, and found his testimony regarding the application of the Kocide 2000 in greenhouses on Respondent's property by Mr. Cruz on October 27, 2020, to be persuasive and credible.

20. Notably, Mr. DeSutter was unaware if there are greenhouses on Respondent's property because his investigation was conducted primarily in the front area where the nursery's office is located and the greenhouses are

not located. At the hearing, Mr. DeSutter acknowledged that he did not view a “good portion” of the nursery.

21. As to the appropriate amount of the administrative fine for Respondent’s violations under Counts I and II of the instant Administrative Complaint, no actual harm or damage was caused by the violations, Respondent did not benefit monetarily from the noncompliance, and none of the violations were committed willfully.

22. In fact, as to Count I, a poster including safety information was properly displayed by Respondent at the central display area in November 2020, prior to the arrival of Tropical Storm Eta. However, as Mr. DeSutter acknowledged during the hearing, Tropical Storm Eta came through the area within days prior to his reinspection. High winds attributable to Tropical Storm Eta caused the safety poster that had been displayed in the central display area to be blown away.

23. On the date of Mr. DeSutter’s reinspection, Respondent was still in the process of cleaning up the property due to the high winds and damage caused by impacts from Tropical Storm Eta, and therefore, no safety information was, in fact, on display in the central display area at the time of the reinspection. However, Respondent had not sprayed any pesticides since Mr. Cruz’s application of Kocide 2000 on October 27, 2020.

24. At his November 19, 2020, reinspection, Mr. DeSutter provided Respondent with a new poster, which Respondent immediately posted and displayed at the central display area. According to Mr. DeSutter, Respondent’s placement of this new poster in the central display area during his reinspection on November 19, 2020, immediately brought Respondent into compliance with the applicable laws. Thus, Respondent was only not in compliance for a very short period of time, a period of time in which there was no spraying of pesticides at the nursery.

25. As to Count II, Mr. Cruz had been trained as a “handler” in May of 2019. Respondent’s violation amounts to a failure to timely retrain Mr. Cruz

during an approximate six-month period immediately preceding his pesticide application on October 27, 2020. In other words, Respondent was out of compliance with regard to the retraining of Mr. Cruz by approximately six months. Respondent was also out of compliance with retraining of “workers” for only a relatively short period of time. The violation for the failure to include the EPA training number on the form was an oversight by Respondent.

CONCLUSIONS OF LAW

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

27. This is a proceeding whereby the Department seeks to impose an administrative fine against Respondent’s license. A proceeding to impose an administrative fine against a license is penal in nature, and the Department bears the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. *Dep’t of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *Dep’t of Agric. and Consumer Servs. v. King*, 20-1367PL (Fla. DOAH Aug. 21, 2020; FDACS Feb. 17, 2021); *Dep’t of Agric. and Consumer Servs. v. Ag-Mart Produce, Inc.*, 06-0729 and 06-0730 (Fla. DOAH Mar. 16, 2007; FDACS Apr. 13, 2007).

28. The clear and convincing evidence standard:

Requires that the 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.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

29. Moreover, charges in such proceedings must be strictly construed, with any ambiguity construed in favor of the Respondent. *Munch v. Dep't of Prof'l Reg., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); *Dep't of Agric. and Consumer Servs. v. King*, 20-1367PL, RO at ¶ 17. The allegations set forth in the Administrative Complaint are those upon which this proceeding is predicated. *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits the Department from taking disciplinary action against a licensee based on conduct not specifically alleged in the Administrative Complaint. *Id*; see also *Delk v. Dep't of Prof'l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992); *Dep't of Agric. and Consumer Servs. v. King*, 20-1367PL, RO at ¶ 18.

30. The FPL is codified in sections 487.011 through 487.175. As set forth in section 487.012, the purpose of the FPL is to “regulate the distribution, sale, and use of pesticides . . . and to protect people and the environment from the adverse effects of pesticides.”

31. Section 487.031(10) provides that it is unlawful “[f]or any person to use any pesticide . . . in a manner other than as stated in the labeling or on the label or as specified by the department or the United States Environmental Protection Agency.” However, under section 487.031(10)(e), it is not unlawful to use any pesticide “in a manner determined by rule not to be an unlawful act.”

32. Rule 5E-2.039 adopts by reference the WPS for agricultural pesticides as specified in 40 C.F.R. § 170.

33. As to Count I, 40 C.F.R. § 170.311(b)(5) requires that pesticide safety information must be “displayed no later than 24 hours after the end of the application of the pesticide” and “displayed continuously from the beginning of the display period until at least 30 days after the end of the last applicable restricted-entry interval. . . .”

34. As detailed above, Mr. Cruz sprayed Kocide 2000 on October 27, 2020. Accordingly, Respondent violated 40 C.F.R. § 170.311 and rule 5E-2.039, as

alleged in Count I, by failing to display safety information in the central display area for 30 days following October 27, 2020.

35. As to Count II, 40 C.F.R. §§ 170.401 and 170.501 describe the training requirements for “workers” and “handlers,” respectively.

36. 40 C.F.R. § 170.305 defines a “worker” as “any person, including a self-employed person, who is employed and performs activities directly relating to the production of agricultural plants on an agricultural establishment.”

37. 40 C.F.R. § 170.305 defines a “handler” as a person who does any one task from a list of tasks, including “mixing, loading, or applying pesticides.”

38. 40 C.F.R. § 170.401(a) requires that “[b]efore any worker performs any task in a treated area on an agricultural establishment where within 30 days a pesticide application product has been used or a restricted-entry interval for such pesticide has been in effect, the agricultural employer must ensure that each worker has been trained in accordance with this section within the last 12 months.”

39. 40 C.F.R. § 170.501(a) requires that “before any handler performs activity involving a pesticide product, the employer must ensure that the handler has been trained in accordance with this section within the last 12 months.”

40. 40 C.F.R. § 170.501(d)(1)(iii) requires that training records for “handlers” and “workers” identify the EPA approval number.

41. As detailed above, although Mr. Cruz, a “handler,” had initially been trained by Mr. Jordling as a “handler” in May 2019, he had not been retrained as a “handler” within the one-year period immediately preceding his application of the Kocide 2000 on October 27, 2020. Accordingly, Respondent violated 40 C.F.R. § 170.501 and rule 5E-2.039, as alleged in Count II, by failing to retrain Mr. Cruz as a “handler” during the one-year period immediately preceding his application of the Kocide 2000 on October 27, 2020. Respondent also violated 40 C.F.R. § 170.401 and rule 5E-2.039, by failing to timely retrain “workers.” Respondent also violated

40 C.F.R. § 170.501(d)(1)(iii), by failing to identify the EPA approval number for the training video in the training record.²

42. As to Count III, 40 C.F.R. § 170.407 requires that after the application of any pesticide, the agricultural employer must not allow or direct any worker to enter or to remain in the treated area before the REI specified on the pesticide product labeling has expired and all treated area warning signs have been removed or covered.

43. Section 487.031(10) further provides that when a pesticide is applied, “any deviation from label recommendations must be with the consent of the purchaser of the pesticide application.”

44. As detailed above, the labeling on the Kocide 2000 provides for an REI of 48 hours following application. However, the REI may be reduced to 24 hours if the pesticide is applied to plants located in greenhouses. In the instant case, the pesticide was applied to plants located in greenhouses, and therefore the REI could be reduced to 24 hours. Accordingly, Respondent did not violate 40 C.F.R. § 170.407, rule 5E-2.039, or section 487.031(10), as alleged in Count III.

45. Pursuant to section 487.175(1)(e), when any person or licensee has violated any provision of the FPL or rule adopted under the FPL, the Department may enter an order imposing an administrative fine in the Class III category pursuant to section 570.971, Florida Statutes, for each violation.

46. “When imposing a fine under this paragraph, the department shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator benefited from by

² Notably, the Department does not specifically argue in its Proposed Recommended Order that Respondent failed to train its “workers” in violation of 40 C.F.R. § 170.401. Rather, the Department’s argument regarding training of employees is confined to the sufficiency of Mr. Cruz’s training as a “handler.” In addition, Mr. DeSutter acknowledged at the hearing that the basis for Count II was Mr. Cruz. In any event, because the Department alleged in Count II a violation of 40 C.F.R. § 170.401, based on a lack of proper training of “agricultural employees,” and not just Mr. Cruz’s training as a “handler,” the undersigned specifically addressed this allegation.

noncompliance, whether the violation was committed willfully, and the compliance record of the violator.” § 487.175(1)(e), Fla. Stat.; *see also Dep’t of Agric. and Consumer Servs. v. Ag-Mart Produce, Inc.*, 06-0729 and 06-0730 (Fla. DOAH Mar. 16, 2007; FDACS Apr. 13, 2007).

47. Under section 570.971(1)(c), a Class III violation may result in the imposition of an administrative fine not to exceed \$10,000.00 for each violation.

48. Applying the foregoing legal principles to the instant case, the Department sought a total administrative fine in the instant Administrative Complaint of \$2,600.00 for all of the alleged violations. However, not all of the alleged violations were proven.

49. Of those allegations proven under Counts I and II, there was no actual harm or damage caused by the violations, Respondent did not benefit monetarily from the non-compliance, and none of the violations were committed willfully. However, Respondent does have a prior record of noncompliance based on the initial Administrative Complaint issued April 15, 2020, which was not contested. On the other hand, Mr. Jordling was hired by Respondent to address the issues of concern set forth in the April 15, 2020, initial Administrative Complaint, although some of the same types of violations, as detailed above with respect to Counts I and II of the instant Administrative Complaint, were still present when Mr. DeSutter conducted his re-inspection on November 19, 2020.

50. In sum, under the particular facts of this case, an appropriate administrative fine against Respondent for those violations proven under Counts I and II of the instant Administrative Complaint is \$500.00 per count, for a total \$1,000.00.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Florida Department of Agriculture and

Consumer Services, enter a final order imposing an administrative fine against Respondent, Spanish River Nursery, LLC, in the total amount of \$1,000.00.

DONE AND ENTERED this 26th day of January, 2022, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 2022.

COPIES FURNISHED:

Andrew Espinosa
Manuel Rivero, Operations Manager
Spanish River Nursery, LLC
8571 156 Court South
Delray Beach, Florida 33446

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

Honorable Nicole "Nikki" Fried
Commissioner of Agriculture
Florida Department of Agriculture
and Consumer Services
The Capitol, Plaza Level 10
Tallahassee, Florida 32399-0810

Steven Hall, General Counsel
Florida Department of Agriculture
and Consumer Services
407 South Calhoun Street, Suite 520
Tallahassee, Florida 32399-0800

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.