

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

P. WILSON EXTERMINATING CO.,)
PHILLIP WILSON AND CARL)
SIMPSON,)

Plaintiffs,)

5.)

STATE OF DELAWARE)
DEPARTMENT OF AGRICULTURE,)
Defendant.)

C.A. No.: 00A-08-012-FSS

Submitted: March 14, 2001
Decided: June 27, 2001

ORDER

*Upon Appellant's Appeal from the Department of Agriculture -- **REMANDED***

Mark H. Froehlich, Esquire, Froehlich & Associates, P.A., 724 Yorklyn Road, Suite 135, Hockessin, Delaware, 19707. Attorney for Appellants.

James J. Hanley, Esquire, Carvel State Office Building, 820 N. French Street, 6th Floor, Wilmington, Delaware, 19801. Deputy Attorney General for the State of Delaware- Department of Agriculture.

SILVERMAN, J.

1. Plaintiffs, P. Wilson Exterminating Company, Philip Wilson and Carl Simpson, appeal the Department of Agriculture's August 23, 2000 decision suspending the company's license

for one year and its applicators' certificates for six months. They allege that the disciplinary statute is ambiguous. And, they claim the Department, in violation of 3 *Del. C. § 1225(a)(3)*, "failed to account for the appropriateness of the penalty against the size of the business and the gravity of the violation."

2. On April 13, 2000, the Department's Pesticide Division filed a complaint against Plaintiffs, seeking to revoke P. Wilson's license, based on several 3 *Del. C. § 1234* and Delaware Pesticides Rules and Regulations violations for failing "to complete, maintain, and provide pesticide applications as required" by the statute. This case involves four separate dates when P. Wilson was called out to the New Castle County Department of Motor Vehicles for termite swarms. The dates are: February 23, 2000; March 6, 2000; March 9, 2000; and March 14, 2000. After a hearing on July 24, 2000, before the Agriculture Department's Deputy-Secretary, the Department revoked P. Wilson's license for one year and suspended "both the pesticide applicator certifications for Philip Wilson and Carl Simpson for six months."

3. Upon appeal from an administrative agency's decision, the Court determines whether the agency's decision is supported by substantial evidence and free from legal error.¹ Unless the agency has abused its discretion, its decision stands.² Choice of penalty is within an administrative agency's discretion if it is based on substantial evidence and not outside its statutory authority.³ To find abuse of discretion, the Court determines whether the agency's chosen penalty

¹ ***Public Water Supply Co. v. DiPasquale*, Del. Supr., 735 A.2d 378, 381 (1999) (citing *Stoltz Mgt.Co., Inc. v. Consumer Affairs Bd.*, Del. Supr., 616 A.2d 1205, 1208 (1992).**

² **Id.**

³ ***Warmouth v. Delaware State Bd. of Examiners in Optometry*,**

“is so disproportionate to the offense in light of all the circumstances as to be shocking to one’s sense of fairness.”⁴ If the Court so finds, it “shall reverse or modify the agency’s decision and render an appropriate judgement.”⁵

4. Here, as mentioned, the Department revoked P. Wilson’s license for one year. And, pursuant to 3 *Del. C.* § 1220(b), the agency suspended Philip Wilson’s and Carl Simpson’s certifications for six months. According to the Department, sanctions were based on the hearing officer’s findings that P. Wilson violated 3 *Del. C.* § 1234 as well as prior record keeping problems.

Del. Super., 514 A.2d 1119, 1123 (1985).

⁴ **Id.**

⁵ ***Kirpat, Inc. v. Delaware Alcoholic Beverage Control Com’n*, Del. Super., C.A. No. 97A-08-012, Cooch, J. (Mar. 31,1998), Order at 3, (quoting *Pusey v. Delaware Alcoholic Beverage Control Com’n*, Del. Supr., 596 A.2d 1367, 1371-1372 (1991)), *aff’d*, Del. Supr., 720 A.2d 559 (1998).**

5. Plaintiffs argue that this case involves the Department's and their own problems interpreting 3 *Del. C.* §§ 1234(a)'s and (b)'s, and the regulations' time requirements for reporting termiticide applications. The statute requires that "licensees or certified commercial pesticide applicators" maintain pesticide application records⁶ to be kept for two years from the pesticide's application.⁷ The regulations' § 22.03(b) requires commercial applicators to disclose applications for subterranean termites within 14 days from application.⁸ The statute and regulations are clear. Taken together, a commercial applicator is required to disclose application information within 14 days of application and must maintain application records for two years from the application date. There is no room for interpretation. A commercial applicator has 14 days from the application date to provide the information on the application. The record is relatively unclear as to whether Plaintiffs provided the required information within 14 days. Pesticide Inspector Stephen J. McReynolds, however, testified that Plaintiffs' submitted application information was incomplete. If so, then Plaintiffs violated the regulation requirements, and the agency may levy sanctions.

⁶ **3 *Del. C.* § 1234(a): The department shall require the licensee or certified commercial applicator to maintain records with respect to applications of pesticides. Such relevant information as the Department may deem necessary may be specified by regulation. The Department may require the licensee to maintain records related to applications of certain "state restricted" pesticides.**

⁷ **3 *Del. C.* § 1234(b): Such records shall be kept for a period of 2 years from the date of the application of the pesticide to which the records refer.**

⁸ **22.03(b): Within fourteen (14) days following the termiticide application, the following information is furnished in writing to the customer or appropriate person**

6. The statute's civil penalty provision for pesticide violations is contained in § 1225(a)(3). Both sides refer to it. The statute states:

In determining the amount of the penalty, the Secretary shall consider the appropriateness of such penalty to the size of the person's ability to continue in business and the gravity of the violation. Whenever the Secretary finds the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Secretary may issue a warning in lieu of assessing a penalty.⁹

Although this case involves a license revocation and certificate suspensions, § 1225(a)(3)'s approach applies. The Secretary ought to take into account whether or not the licensee exercised due care, or caused significant harm to health or the environment. If the licensee was reckless, or significantly harmed health or the environment, that supports the strongest sanctions. If the converse is true, the Department should exercise its discretion with lenience. As mentioned above, sanctions must not shock one's sense of fairness.

7. The Court understands that P. Wilson is not a "first offender" as to record keeping problems. The Court also appreciates how important record keeping is where pesticide applications are concerned. Without timely, accurate records the Department's ability to protect the public is undermined. The Court further understands that the record suggests that someone was sickened by the pesticide. Nevertheless, the Department did not prosecute P. Wilson for misapplying the pesticide. And, there are many mitigating factors regarding sanctions, as well. According to the record, for example, it appears that sanctions will severely impair P. Wilson's business, if not end it completely. As the company's majority owner, Philip Wilson testified that the license suspension would prevent the company from fulfilling its contractual obligations. He also testified that P.

⁹ **3 Del. C. § 1225(a)(3).**

Wilson was his only livelihood and income. Carl Simpson, minority company owner, testified that P. Wilson also is his only livelihood and income source.

8. Unfortunately, considering the important, conflicting concerns presented here, the Court cannot decide whether the punishment fits the misconduct. It is not clear that the Department weighed mitigators when imposing the penalty. If the Department took mitigators into account, it is unclear how it arrived at the penalty. Further, it is unclear how this case compares to similar cases.

9. This case is **REMANDED** to the Department of Agriculture to impose lesser sanctions or to make detailed findings providing specific reasons why the sanctions were imposed, and comparing them to sanctions levied in similar disciplinary hearings, if any.

IT IS SO ORDERED.

Judge

cc: Prothonotary (Civil Appeals Division)