

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations
of Article 33 of the Environmental
Conservation Law ("ECL") and Part 325 of
Title 6 of the Official Compilation of
Codes, Rules and Regulations of the
State of New York ("6 NYCRR"),

ORDER

DEC Case No.
CO2-20100514-64

- by -

GARRY DOCTOR,

Respondent.

Staff of the Department of Environmental Conservation ("Department") moves for an order without hearing in lieu of complaint against respondent Garry Doctor. Staff alleges, among other things, that respondent applied pesticides at restaurants located in Brooklyn, New York, without the proper certification in violation of Environmental Conservation Law ("ECL") article 33 and its implementing regulations at part 325 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). For the violations alleged, staff seeks a civil penalty and revocation of respondent's commercial pesticide applicator certification (no. C2837028).

Department staff's motion was personally served upon respondent on June 3, 2010. Although respondent had twenty days to serve an answer to the motion, the Department has received no response from respondent.

Department staff filed its motion with the Department's Office of Hearings and Mediation services on June 17, 2010. The matter was assigned to Chief Administrative Law Judge ("ALJ") James T. McClymonds, who prepared the attached summary report.

By memorandum dated July 14, 2010, Alexander B. Grannis, Commissioner of Environmental Conservation, delegated decision making authority in this matter to the undersigned Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services.

I adopt the Chief ALJ's summary report as my decision in this matter, subject to the following comments. Department staff has demonstrated its entitlement to judgment as a matter of law on its claim that on 136 separate occasions, respondent applied pesticides at two restaurants in Brooklyn without the proper training or certification. In addition, staff established as a matter of law that respondent failed to file an annual report for the 2009 calendar year.

Respondent's conduct constitutes a significant disregard for human health, safety, and environmental protection. Accordingly, I conclude that revocation of respondent's commercial pesticide applicator certification is clearly warranted on this record.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Department staff's motion for order without hearing is granted in part, and otherwise denied.

II. Respondent Garry Doctor is adjudged to have committed the following violations:

A. during the period from October 14, 2007, to March 18, 2010, respondent made 136 commercial pesticide applications at two restaurants located in Brooklyn, New York, without the required Category 7F, food processing, commercial pesticide applicator certification, in violation of ECL 33-1301(8) and 6 NYCRR 325.7(b); and

B. respondent failed to file an annual report for calendar year 2009, in violation of ECL 33-1205(1).

III. As a result of the violations determined above, a civil penalty in the amount of one hundred thirty-seven thousand dollars (\$137,000) is hereby imposed against respondent Garry Doctor. The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address: Rebecca L. Denué, Esq., Senior Attorney, New York State Department of Environmental Conservation, Office of the General Counsel, 625 Broadway, 14th Floor, Albany, New York 12233-1500.

IV. Respondent Garry Doctor's commercial pesticide applicator certification no. C2837028 is hereby revoked.

V. All communications from respondent to the Department concerning this order shall be made to Rebecca L. Denué, Esq., Senior Attorney, New York State Department of Environmental Conservation, Office of the General Counsel, 625 Broadway, 14th Floor, Albany, New York 12233-1500.

XI. The provisions, terms and conditions of this order shall bind respondent Garry Doctor, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Louis A. Alexander
Assistant Commissioner

Dated: July 21, 2010
Albany, New York

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 33 of the Environmental Conservation Law ("ECL") and Part 325 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

SUMMARY REPORT

DEC Case No.
CO2-20100514-64

- by -

GARRY DOCTOR,

Respondent.

Appearances of Counsel:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Rebecca L. Denué of counsel), for staff of the Department of Environmental Conservation

-- No appearance for respondent Garry Doctor

SUMMARY REPORT ON MOTION FOR ORDER WITHOUT HEARING

Staff of the Department of Environmental Conservation ("Department") moves for an order without hearing in lieu of complaint against respondent Garry Doctor. Staff alleges, among other things, that respondent applied pesticides in several restaurants located in Brooklyn, New York, without the proper certification in violation of Environmental Conservation Law ("ECL") article 33 and its implementing regulations at part 325 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). For the violations alleged, staff seeks a civil penalty and revocation of respondent's commercial pesticide applicator certification.

For the reasons that follow, I recommend that the Commissioner grant Department staff's motion in part, impose a civil penalty, and revoke respondent's commercial pesticide applicator certification.

PROCEEDINGS

Department staff moves, pursuant to 6 NYCRR 622.12, for an order without hearing in lieu of complaint against respondent Garry Doctor. The motion was personally served upon respondent on June 3, 2010. Although respondent had twenty days to serve an answer to the motion, the Department has received no response from respondent.

Department staff filed the motion with the Department's Office of Hearings and Mediation services on June 17, 2010. The matter was assigned to the undersigned Chief Administrative Law Judge ("ALJ") James T. McClymonds. The papers filed on the motion consist of the following:

- a cover letter dated June 17, 2010, from Rebecca Denué, Senior Attorney, to James T. McClymonds, Chief ALJ;
- an affidavit of personal service by Environmental Conservation Officer Nathan Favreau;
- a notice of motion for order without hearing dated May 26, 2010;
- an affidavit in support of motion for order without hearing by Robert Jablonski, Pesticide Control Specialist II, Department of Environmental Conservation, Bureau of Pesticide Management, Region 2, dated May 26, 2010, with Exhibits A through K;
- an affirmation in support of motion for order without hearing by Rebecca L. Denué, dated May 26, 2010, with Exhibits 1 through 2; and
- a memorandum of law in support of motion for order without hearing, dated May 26, 2010.

In its motion, which serves as the complaint in this matter, Department staff alleges the following violations:

- (1) during the period from October 14, 2007, to March 18, 2010, respondent made 136 commercial pesticide applications at restaurants located in Brooklyn, New York, without the required Category 7F, food processing, commercial pesticide

applicator certification, in violation of ECL 33-1301(8) and 6 NYCRR 325.7(b);

(2) between the dates of August 20, 2009, and March 19, 2010, respondent made seven commercial pesticide applications without being affiliated with any registered business in violation of ECL 33-1301(8-a) and 6 NYCRR 325.23(a); and

(3) respondent failed to file an annual report for the year 2009, in violation of ECL 33-1205(1).

As a result of the violations alleged, Department staff seeks a civil penalty in the amount of \$137,250. In addition, staff seeks revocation of respondent's Category 7A, structural and rodent, commercial pesticide applicator certification.

STANDARDS OF REVIEW

Motions for order without hearing pursuant to 6 NYCRR 622.12 are governed by the same standards as apply to summary judgment motions under CPLR 3212 (see 6 NYCRR 622.12[d]). The party moving for summary judgment has the initial burden of establishing its claims sufficiently to warrant directing judgment in the movant's favor as a matter of law (see CPLR 3212[b]; Smalls v AJI Indus., Inc., 10 NY3d 733, 735 [2008]; Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003, at 4). As the moving party, Department staff carries its initial burden by offering sufficient evidence to demonstrate the absence of any material issues of fact (see Smalls, 10 NY3d at 735; Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 3).

A summary judgment motion may not be granted merely because the party against whom judgment is sought fails to submit papers in opposition to the motion (see Liberty Taxi Mgmt. v Gincheran, 32 AD3d 276, 277 n * [1st Dept 2006]). A movant's failure to sufficiently demonstrate its right to summary judgment requires denial of the motion regardless of the sufficiency, or lack thereof, of the opposing papers (see id.). Thus, where, as here, staff's motion is unopposed by respondent, it must still be determined whether staff has fulfilled its burden of demonstrating that no genuine issues of material fact exist and its entitlement to judgment as a matter of law (see id.).

When evaluating Department staff's proof, summary judgment must be denied if doubt remains concerning the absence of triable issues (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). On the other hand, if Department staff demonstrates the absence of triable issues of fact on the allegations underlying its charges, and those factual allegations constitute violations of law, staff's motion may be granted (see Matter of Hornburg, Order of the Commissioner, Aug. 26, 2004, adopting Hearing Report, at 10).

Department staff may support its prima facie showing with evidence such as affidavits attested to by individuals with personal knowledge of the facts and other documentary evidence (see CPLR 3212[b]). In addition, given the administrative context of this proceeding, staff may also support its prima facie showing with hearsay evidence, so long as it is sufficiently reliable, relevant and probative (see Matter of Tractor Supply Co., at 2-3).

FINDINGS OF FACT

Applying the summary judgment principles discussed above, the following facts may be determined as a matter of law on this motion.

1. Respondent Garry Doctor presently holds commercial pesticide applicator certification no. C2837028. Respondent's certification category is 7A, structural and rodent control. Respondent's original certification date was June 30, 2004. Respondent was recertified on May 21, 2008, and his certification will expire May 21, 2011.
2. Respondent does not hold a category 7F, food processing, certification.
3. On August 20, 2009, Rasheen Jordan, the owner of the registered commercial pesticide application business All-City Pest Control, LLC (business registration no. 14265), requested that respondent be removed from All-City's business registration. Previously, respondent was a partner in the business, but that partnership dissolved in June 2009. A new business registration was issued for All-City on August 20, 2009, with only Mr. Jordan listed as a certified applicator.

4. After Mr. Jordan dissolved his partnership with respondent, respondent began doing business under the name Reliable Pest Control.

5. An inspection of the records maintained at Popeye's Chicken & Biscuit, 850 Pennsylvania Avenue, Brooklyn, New York 11207, revealed that respondent made a total of 65 commercial pesticide applications at the restaurant during the period from October 30, 2007, through September 11, 2009. The exterminating company listed on the extermination service report was All-City Pest Control.

6. An inspection of the records maintained at Popeye's Chicken & Biscuit, 290 Livingston Street, Brooklyn, New York 10574, revealed that respondent made a total of 66 commercial pesticide applications at the restaurant during the period from October 14, 2007, through July 30, 2009. The exterminating company listed on the extermination service report listed All-City Pest Control.

7. A further inspection of the records maintained at 850 Pennsylvania Avenue Popeye's Chicken & Biscuit revealed that respondent made an additional 5 commercial pesticide applications at the restaurant after the applications noted at the prior inspection and through March 18, 2010. The final page of the extermination service report, which included respondent's applications at the restaurant after August 20, 2009, listed Reliable as the exterminating company.

8. Reliable Pest Control Inc. is a domestic business corporation registered with the New York State Secretary of State. It is unknown whether Reliable Pest Control Inc. is the Reliable listed on the 850 Pennsylvania Avenue Popeye's extermination service report or the Reliable Pest Control operated by respondent. It is also unknown whether respondent is affiliated with the Reliable Pest Control Inc. registered with the Secretary of State. However, the Department's records do not contain a commercial pesticide business registration for any entity named Reliable or Reliable Pest Control.

DISCUSSION

Based upon the evidence presented on staff's motion, and the reasonable inferences drawn from that evidence, I conclude that Department staff has established its entitlement

to summary judgment on two of the statutory violations and two of the regulatory violations charged. ECL 33-1301(8) provides that it is unlawful for any person to engage in the application of pesticides without a pesticide applicator certificate registration issued by the Department, except while working under the direct supervision of a certified applicator. Section 325.7(b) of 6 NYCRR further provides that no certified commercial pesticide applicator shall engage in the application of pesticides for which certification is required other than in a category or subcategory specified on the certification held by the applicator.

The Department requires a commercial pesticide applicator to hold a category 7F certification to apply pesticides in restaurants (see 6 NYCRR 325.16[g][5] [food processing subcategory]). The regulatory subcategory for commercial pesticide applications to areas where food or food products are prepared is different from the subcategory for structural and rodent control, which expressly excludes food processing areas from the subcategory (see 6 NYCRR 325.16[g][1] [structural and rodent]).

Respondent holds a category 7A certification, which is the certification for structural and rodent pesticide applications. Respondent does not hold a category 7F certification and, thus, is not authorized to apply pesticides in food processing areas such as restaurants. The record reveals that respondent made 136 separate commercial pesticide applications at two Popeye's Chicken and Biscuit restaurants in Brooklyn, New York, without a category 7F certification. Accordingly, Department staff has established 136 separate violations of ECL 33-1301(8) and 6 NYCRR 325.7(b).

Department staff has also established the violation of ECL 33-1205(1) charged. ECL 33-1205(1) requires all commercial pesticide applicators to file by February 1 an annual report documenting pesticide applications during the prior calendar year. The record reveals that although respondent applied pesticides during the calendar year 2009, he failed to file a report for that year. Accordingly, Department staff has established the ECL 33-1205(1) violation charged.

Department staff has failed, however, to establish its entitlement to summary judgment on the ECL 33-1301(8-a) and 6 NYCRR 325.23(a) violations charged. ECL 33-1301(8-a) provides that it is unlawful for any person or business to engage in the business of applying pesticides unless the business is

registered. Section 325.23(a) provides that each business engaged in the commercial application of pesticides must register annually with the Department. Department staff has charged respondent individually for these violations. If Reliable or Reliable Pest Control is not a corporation, respondent might be personally liable for not registering the unincorporated business with the Department. However, viewing the evidence most favorably to respondent, as I must on summary judgment (see, e.g., Amo v Little Rapids Corp., 268 AD2d 712, 715 [3d Dept], mod by 275 AD2d 565 [3d Dept 2000]), a triable issue of fact exists concerning whether Reliable or Reliable Pest Control is the corporation registered with the Secretary of State. If Reliable or Reliable Pest Control is a corporation, the corporation would be liable for the business registration violation, not respondent individually. Moreover, assuming Reliable or Reliable Pest Control is a corporation, Department staff has not provided sufficient evidence that would warrant piercing the corporate veil or otherwise holding respondent liable for the omissions of the corporation as a matter of law. Thus, summary judgment must be denied on these charges.

PENALTY AND OTHER RELIEF

Department staff seeks a civil penalty in the amount of \$1,000 per violation. ECL 71-2907(1) authorizes a civil penalty of up to \$5,000 for the first violation of ECL article 33 or its implementing regulations, and up to \$10,000 for any subsequent violation.

The Department's Pesticide Enforcement Policy (Commissioner Policy DEE-12, March 26, 1993 ["DEE-12"]) provides that the minimum penalty level accepted in consent orders for the violations established on this motion is \$1,000 per violation (see id., Appendix I[IV] [\$1,000 for each unlawful application of pesticides with no known property damage, environmental damage, or exposure; \$1,000 for each failure to file annual report]). Generally, penalties imposed in adjudicated cases are significantly higher than the penalty amounts the Department accepts in consent orders (see id., Appendix I[I]).

In this case, Department staff seeks the minimum penalty provided for in the Department's policy, and I recommend that the Commissioner impose that penalty. Accordingly, for the 136 separate violations of ECL 33-1301(8) and 6 NYCRR 325.7(b), and the single violation of ECL 33-1205(1), I recommend that the

Commissioner impose a total civil penalty in the amount of \$137,000 (137 violations at \$1,000 per violation).

Department staff also seeks revocation of respondent's commercial pesticide applicator certification. Staff points out that in order to obtain a Category 7F, food processing, certification, an applicator would need specific training to assure that food does not come into contact with or become contaminated by any pesticides during preparation. Staff further asserts that as a Category 7A certification holder, respondent would be aware of the additional training requirements. Staff argues that because of the risk to the public from respondent's unauthorized pesticide applications in the past, and the possibility that he may be continuing to apply pesticides in restaurants, respondent's certification should be revoked.

Under the Department's Pesticide Enforcement Policy DEE-12, a certification should be revoked where the respondent has engaged in conduct indicative of disregard for health, safety and environmental protection (see DEE-12, Appendix I[I]; see also Matter of Mohawk Valley Organics, LLC, Order of the Commissioner, July 21, 2003 [permit revocation based upon violations that constitute a significant threat to public health and the environment]). As a certified pesticide applicator with a Category 7A certification, respondent may reasonably be expected to know about the enhanced training requirements for a Category 7F certification. Nevertheless, respondent applied pesticides in restaurants without the appropriate training and certification on at least 136 separate occasions over an almost two and one-half year period. Respondent's conduct indicates a significant disregard for health, safety, and environmental protection. Accordingly, I recommend that respondent's Category 7A certification be revoked.

CONCLUSIONS OF LAW

1. Department staff established that during the period from October 14, 2007, to March 18, 2010, respondent made 136 commercial pesticide applications at restaurants located in Brooklyn, New York, without the required Category 7F, food processing, commercial pesticide applicator certification, in violation of ECL 33-1301(8) and 6 NYCRR 325.7(b).

2. Department staff also established that respondent failed to file an annual report for the year 2009, in violation of ECL 33-1205(1).

3. For the violations established, a civil penalty in the amount of \$137,000 is authorized pursuant to ECL 71-2901(1).

4. Respondent's conduct in applying pesticides in restaurants without the required training and certification is indicative of a significant disregard for health, safety, and environmental protection, warranting revocation of respondent's Category 7A pesticide applicator certification.

RECOMMENDATION

Accordingly, I recommend that the Commissioner:

- (1) grant Department staff's motion for order without hearing in part, and otherwise deny the motion;
- (2) hold respondent liable for the violations established above;
- (3) impose a civil penalty in the amount of \$137,000; and
- (4) revoke respondent Garry Doctor's commercial pesticide applicator certification no. C2837028.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: July 20, 2010
Albany, New York