

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

Alleged Violations of Article 33 of the
Environmental Conservation Law and
Parts 320 through 329
of Title 6 of the Official Compilation
of Codes, Rules and Regulations
of the State of New York ("6 NYCRR"),

- by -

DERRICK DUDLEY,
d/b/a HOLLOWAY PEST CONTROL and
d/b/a HOLLOWAY'S PROFESSIONAL EXTERMINATORS,

Respondent.

DEC File No. R7-20090115-2

DECISION AND ORDER OF THE COMMISSIONER

July 24, 2009

DECISION AND ORDER OF THE COMMISSIONER

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") commenced this administrative enforcement proceeding against respondent Derrick Dudley, d/b/a Holloway Pest Control and d/b/a Holloway's Professional Exterminators, by service of a notice of hearing and complaint dated April 23, 2009. In accordance with 6 NYCRR 622.3(a)(3), respondent was personally served with a copy of the notice of hearing and complaint on May 1, 2009 at 825 West Onondaga Street, Syracuse, New York.

The complaint alleges that respondent violated three provisions of Environmental Conservation Law ("ECL") article 33: ECL 33-1205(1), for failing to maintain complete pesticide use records for each commercial pesticide application; ECL 33-1301(8), for engaging in the application of pesticides without a pesticide applicator certificate issued by the Commissioner; and ECL 33-1301(8-a), for engaging in the business of applying pesticides without a valid business registration from the Commissioner.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on May 21, 2009 and has not been extended by Department staff. Department staff filed a motion for default judgment dated June 2, 2009 with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois who prepared the attached summary report. I adopt the ALJ's summary report as my decision in this matter, subject to the following comments.

The Department's regulations governing motions for a default judgment do not prescribe the circumstances under which a defaulting respondent is entitled to notice of the motion by staff for a default judgment (see 6 NYCRR 622.15). The provisions of the CPLR applicable to motions for default judgments have been consulted for the governing procedure (see Matter of Makhan Singh and L.I.C. Petroleum, Inc., Decision and Order of the Commissioner, March 19, 2004, at 2-3).

Under CPLR 3215(g)(1), notice of an application for a default judgment is required only where the defending party has appeared or where more than one year has elapsed between the date of the default and the motion. Here, although no requirement existed for Department staff to provide notice to respondent of staff's motion for default judgment, Department staff served the

motion upon respondent (see Affidavit of Service dated July 1, 2009 sworn to by Michael E. Barnholdt).

To ensure consistency in light of the practice of a number of Department attorneys who serve such default motions on respondents whether or not required by the CPLR, and the benefit to the process in providing additional notice to a respondent and any representative of that respondent (if one is known), I conclude that serving a motion for a default judgment upon a respondent in all circumstances is appropriate. Accordingly, I hereby direct Department staff in all administrative enforcement proceedings commenced on or after one month following the issuance of this decision (that is, August 24, 2009), to serve motions for default judgment upon respondents and their representatives (if known) even where such service is not required under CPLR 3215(g)(1).

On the merits of this motion, I conclude that the proposed civil penalty is appropriate.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondent Derrick Dudley is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the complaint, are deemed to have been admitted by respondent.

III. Respondent is adjudged to have violated: ECL 33-1205(1), for failing to maintain pesticide use records for each commercial pesticide application; ECL 33-1301(8), for engaging in the application of pesticides without a pesticide applicator certificate issued by the Commissioner; and ECL 33-1301(8-a), for engaging in the business of applying pesticides without a valid business registration from the Commissioner.

IV. Respondent Derrick Dudley is hereby assessed a civil penalty in the amount of five thousand dollars (\$5,000) which shall be due and payable within thirty (30) days after service of this decision and 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 or delivered to the Department at the following address: New York State Department of

Environmental Conservation, Region 7 Office, 615 Erie Boulevard West, Syracuse, New York 13204-2400, Attn: Assistant Regional Attorney Margaret A. Sheen.

V. All communications from respondent to the Department concerning this order shall be made to Assistant Regional Attorney Margaret A. Sheen, New York State Department of Environmental Conservation, Region 7 Office, 615 Erie Boulevard West, Syracuse, New York 13204-2400.

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

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: July 24, 2009
Albany, New York

In the Matter of Alleged
Violations of article 33 of the
Environmental Conservation Law and
parts 320 through 329 of title 6
of the Official Compilation of
Codes, Rules and Regulations of
the State of New York

SUMMARY REPORT

DEC File No.
R7-20090115-2

- by -

DERRICK DUDLEY
d/b/a Holloway Pest Control
and
d/b/a Holloway's Professional
Exterminators,

July 22, 2009

Respondent.

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative proceeding by serving a notice of hearing and complaint upon Derrick Dudley on May 1, 2009. The complaint alleges violations by Derrick Dudley (the "Respondent") doing business as ("d/b/a") Holloway's Professional Exterminators and Holloway Pest Control, with business addresses of 506 West Onondaga Street, Syracuse, New York and 514 West Onondaga Street, Syracuse, New York.

The complaint alleges that the Respondent violated Environmental Conservation Law ("ECL") article 33 and parts 320 through 329 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by failing to maintain required records of commercial pesticide applications, and making commercial pesticide applications without being a certified pesticide applicator and without a valid pesticide business registration.

On June 2, 2009, DEC Staff transmitted to the DEC Office of Hearings and Mediation Services (OHMS) a motion for default judgment against the Respondent on the basis that the Respondent failed to file a timely answer to the complaint. In support of its motion for a default judgment, DEC Staff submitted an affirmation of Margaret A. Sheen, Esq., Assistant Regional Attorney, DEC Region 7, an affidavit of personal service of the notice of hearing and complaint, a copy of the notice of hearing and complaint, and a proposed order.

The motion for a default judgment was made pursuant to 6 NYCRR 622.15. DEC Staff sought an order of the Commissioner finding the Respondent liable for the alleged violations, requiring the Respondent to pay a civil penalty of \$5,000,¹ and requiring the Respondent to cease and desist from any and all future violations of the ECL and 6 NYCRR.

The motion was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois (the undersigned) as stated in Chief ALJ James T. McClymonds's letter of June 15, 2009.

Ms. Sheen's June 2, 2009 transmittal letter to OHMS referred to an affidavit of service of the motion, but this affidavit was not attached with the correspondence. (The correspondence included the affidavit of service of the notice of hearing and complaint.) On June 25, 2009, I wrote to Ms. Sheen and requested a copy of the affidavit of service of the motion, or confirmation that there was not such an affidavit. I also requested clarification of the basis for using 825 West Onondaga Street, Syracuse, New York as the address for DEC Staff's mailing of the Respondent's copy of the motion. This address was noted in the "cc" section of Ms. Sheen's June 2 letter, and the affidavit of service of the notice of hearing and complaint identifies 825 West Onondaga Street as the address at which the Respondent was served with the notice of hearing and complaint. The complaint, however, identifies two other addresses on West Onondaga Street as the Respondent's places of business.

On July 2, 2009, Ms. Sheen sent a letter and related documents to me, with a copy to the Respondent at the 825 West Onondaga Street address, in response to my questions. The letter stated that there was not an affidavit of service dated June 2, 2009, but that an affidavit of service was executed by Michael E. Barnholdt, of the DEC, on July 1, 2009 for the June 2, 2009 mailing of the motion. A copy of Mr. Barnholdt's July 1, 2009 affidavit of service was enclosed with Ms. Sheen's July 2, 2009 letter.

¹ The April 23, 2009 complaint sought a civil penalty of \$5,000, and Ms. Sheen's affirmation in support of the motion for default judgment stated that staff requests that the Commissioner issue an order granting the relief requested in the complaint and such other further relief as may be just and proper. The motion and the draft order, however, refer to a civil penalty of \$7,000. I am considering the requested penalty amount to be \$5,000.

With respect to the three West Onondaga Street addresses, Ms. Sheen's July 2, 2009 letter stated that the certified mailings to the Respondent at 506 and 524 (sic, probably 514) West Onondaga Street were returned by the Postal Service as unclaimed, and those two addresses appeared abandoned when an Environmental Conservation Officer ("ECO") attempted to personally serve the Respondent. Ms. Sheen also stated that there is a tax lien of more than \$13,000 on 506 West Onondaga Street. Ms. Sheen stated that the Respondent had signed a sales order invoice, a copy of which was enclosed with her letter, using 825 West Onondaga Street as his contact address. Ms. Sheen's letter stated that Leaza B. Holloway, the Respondent's deceased mother, was the owner of Holloway's Professional Exterminators and Holloway Pest Control, and that Ms. Holloway's last known address was 825 West Onondaga Street. A copy of a property description report for 825 West Onondaga Street, that identified Ms. Holloway as the owner, was enclosed with Ms. Sheen's letter. The affidavit of service for the notice of hearing and complaint states that these documents were personally served upon the Respondent at 825 West Onondaga Street.

As of the date of this report, the Office of Hearings and Mediation Services has not received any correspondence from or on behalf of the Respondent concerning this matter.

DEFAULT PROCEDURES

Subdivision 622.15(a) of 6 NYCRR (Default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or to file a timely answer; and (3) a proposed order."

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]."

FINDINGS OF FACT

1. Derrick Dudley (the "Respondent") does business under the names Holloway's Professional Exterminators and Holloway Pest Control, with business addresses of 506 West Onondaga Street, Syracuse, New York and 514 West Onondaga Street, Syracuse, New York.

Default

2. On January 16, 2009, DEC Staff mailed a notice of hearing and complaint to the respondent, by certified mail, return receipt requested, addressed to him at Holloway's Professional Exterminators, 506 West Onondaga Street, Syracuse, New York 13204. This mailing was returned to DEC Staff by the United States Postal Service as mail unclaimed by the Respondent.

3. On April 3, 2009, DEC Staff again mailed a notice of hearing and complaint to the Respondent at the Holloway's Professional Exterminators, 506 West Onondaga Street address, and also mailed it to the Respondent at Holloway Pest Control, 514 West Onondaga Street, Syracuse, New York 13204. Both of these mailings were by certified mail, return receipt requested. Both mailings were returned to DEC Staff by the United States Postal Service, as mail unclaimed by the Respondent.

4. On May 1, 2009, ECO Chrisman Starczek personally served a notice of hearing and complaint, dated April 23, 2009, upon the Respondent at 825 West Onondaga Street, Syracuse, New York.

5. The twenty-day time period within which the Respondent was required to serve an answer to the complaint expired on May 21, 2009, and the Respondent failed to serve an answer. The Respondent also did not contact DEC Staff about this matter in any way. The notice of hearing stated that failure to timely answer will result in a default under 6 NYCRR 622.15 and a waiver of Respondent's right to a hearing.

Violations

6. On August 18, 2008, a DEC Pesticide Control Specialist inspected Holloway's Professional Exterminators and discovered that the Respondent failed to maintain true and accurate records of commercial pesticide applications made by or on behalf of Holloway's Professional Exterminators. The Respondent's records were deficient with regard to Environmental Protection Agency registration numbers and dosage rate, and records did not exist for various commercial pesticide applications.

7. On August 27, 2008, DEC Staff performed an inspection at the Southwest Community Center, 401 South Street, Syracuse, New York and discovered that the Respondent had unlawfully provided commercial pesticide applications at that location. On August 28, 2008, DEC Staff performed inspections at J&B Market, 409 Bellevue Avenue, Syracuse, New York and at S&R Convenience Store at 303 South Avenue, Syracuse, New York and discovered that the Respondent had unlawfully provided commercial pesticide applications at both of these locations. The Respondent was not certified as a commercial pesticide applicator at the times of these commercial pesticide applications.

8. On or before August 18, 2008, the Respondent made commercial pesticide applications in the City of Syracuse without a valid pesticide business registration issued by the DEC.

DISCUSSION

The complaint's third cause of action alleges that the Respondent violated ECL article 33 by making commercial pesticide applications without a valid pesticide business registration issued by the DEC (complaint, paragraph 19). This paragraph alleges, "On or before August 18, 2008, in the City of Syracuse, Onondaga County, New York, Respondent violated the statute(s) and/or rule cited above, in that Respondent made commercial pesticide applications without a valid pesticide business registration issued by the Department."

The complaint also alleges, at paragraph 12, "According to Department records, there was not a certified applicator working for Holloway's Professional Exterminators at the time of violations. Therefore, any such business registration was suspended at the time of violations due to the lack of a certified applicator." The complaint does not contain allegations about whether Holloway's Professional Exterminators ever had a business registration, nor about the results of a search of DEC records for a business registration for this business.

It is unclear whether DEC Staff is alleging that Derrick Dudley d/b/a Holloway's Professional Exterminators did not have a pesticide business registration at all, or that such a registration exists but DEC Staff considers it to have been automatically suspended due to the business's lack of a certified pesticide applicator. Although a pesticide business registration could be suspended if the business does not employ a certified pesticide applicator (see, 6 NYCRR 325.23[e]), such suspension

would not be automatic but would occur after the business had an opportunity to be heard (6 NYCRR 325.23[f]).

In the present case, however, DEC Staff made both the allegation in paragraph 12 and the allegation in paragraph 19. The Respondent defaulted and did not contest the allegation that he made commercial pesticide applications without a valid pesticide business registration issued by the Department. There is nothing in the record that indicates that the Respondent ever had a pesticide business registration.

Thus, this report recommends that the Commissioner find that the Respondent violated ECL section 33-1301(8-a) by engaging in the business of applying pesticides without being registered by the Commissioner as a pesticide business.

Pursuant to ECL 71-2907(1), any person who violates any provision of ECL article 33 or any rule or regulation issued thereunder shall be liable to the people of the State for a civil penalty not to exceed five thousand dollars for a first violation, and a penalty not to exceed ten thousand dollars for a subsequent offense. Even if the Commissioner does not find the Respondent in violation for the third cause of action (commercial application of pesticides without a pesticide business registration), a penalty of \$10,000 could be imposed for the other two causes of action, a larger amount than the penalty sought in the complaint (\$5,000).

The DEC Civil Penalty Policy (DEE-1, issued June 20, 1990) is used as guidance in arriving at penalty amounts in DEC administrative enforcement hearings. The DEC Pesticide Enforcement Guidance Memorandum ("Pesticide EGM," revised March 26, 1993) divides pesticide violations into three tiers of priority.

Ms. Sheen's affirmation that accompanied the motion for a default judgment compared the facts of this case to the factors in the Civil Penalty Policy. These factors include: whether the violator has been unresponsive to DEC enforcement action, the economic benefit the respondent obtained by failing to comply with the law, the gravity of the violation, any prior history of non-compliance, and ability to pay a penalty.

In the present case, the Respondent has been completely unresponsive to DEC's enforcement action, and he obtained some economic benefit by avoiding costs of record-keeping and the costs of obtaining pesticide applicator certification and business registration. The violations are within the second tier

of violations in the Pesticide EGM and are violations that interfere with the DEC's ability to protect the public from adverse effects of pesticide use. Ms. Sheen stated, based on DEC records, that this is the Respondent's first violation of the provisions the complaint alleges he violated. Under the Civil Penalty Policy, a respondent has the burden of demonstrating inability to pay, but the Respondent in this case presented no answer or evidence.

The \$5,000 penalty sought by DEC Staff in the complaint is less than the maximum penalty authorized for the violations, is consistent with the Civil Penalty Policy, is warranted by the circumstances of the case, and is generally consistent with penalties imposed in other pesticide enforcement cases.

The motion for a default judgment also requested that the Commissioner order that the Respondent "shall immediately comply with the ECL and the Department's rules and regulations." (see, proposed order, at paragraph I.B). Based on the Assistant Commissioner's order in Matter of Island Landscape LCP, Corp. (February 8, 2007) and the summary report accompanying that order, it is not necessary to order the Respondent to comply with the environmental laws and regulations because everyone is required to comply with these laws and regulations.

CONCLUSIONS

1. The Respondent failed to file a timely answer and defaulted.
2. The Respondent violated ECL section 33-1205(1) by failing to maintain certain required records of pesticide applications.
3. The Respondent violated ECL section 33-1301(8) by applying pesticides without a pesticide application certificate registration issued by the Commissioner.
4. The Respondent violated ECL section 33-1301(8-a) by engaging in the business of applying pesticides without a valid pesticide business registration issued by the Commissioner.
5. For violations of ECL article 33, including the three provisions violated by the Respondent, ECL section 71-2907(1) authorizes a civil penalty not to exceed five thousand dollars for a first violation, and not to exceed ten thousand dollars for a subsequent offense, to be assessed by the Commissioner after a hearing or opportunity to be heard.

RECOMMENDATION

I recommend that the Commissioner find the Respondent liable for the violations alleged in the complaint, and that a penalty of \$5,000.00 (five thousand dollars) be imposed upon the Respondent.

Albany, New York
July 22, 2009

_____/s/_____
Susan J. DuBois
Administrative Law Judge