BEFORE THE
STRUCTURAL PEST CONTROL BOARD
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

AMBD Inc.
dba D&S TERMITE CONTROL,
David Paul Dierolf, C.E.O.,
Dawn Marie Charrette, President and Qualifying Manager in Br. 1 & 3
Peter John-Paul Charrette, Vice President
Michael Robert Saunders, Vice President
Travis Stadley, Qualifying Manager in Br. 2
3638 Bancroft Drive
Spring Valley, CA 91977

Company Registration No. PR 1164, Br. 1, 2 & 3

and

DAWN MARIE CHARRETTE
Aka DAWN MARIE DIEROLF
Aka DAWN MARIE DIEROLF-CHARRETTE
3638 Bancroft Drive
Spring Valley, CA 91977

Operator's License No. OPR 9119, Br. 1 & 3
Field Representative License No. FR 12741, Br. 1
Field Representative License No. FR 21851, Br. 3

President and Qualifying Manager in Br. 1 & 3 for D&S Termite Control

and

DAVID PAUL DIEROLF
3638 Bancroft Drive
Spring Valley, CA 91977

Operator's License No. OPR 8044, Br. 1 & 3

C.E.O. for D&S Termite Control

and

DECISION OF THE STRUCTURAL PEST CONTROL BOARD UPON REMAND

Case No. 2006-57

OAH Hearing: January 18 - March 2, 2011

PETER JOHN-PAUL CHARRETTE
3638 Bancroft Drive
Spring Valley, CA 91977

Field Representative License No. FR 19144, Br. 1

Vice President for D&S Termite Control

and

MICHAEL ROBERT SAUNDERS
3638 Bancroft Drive
Spring Valley, CA 91977

Operator's License No. OPR 5869, Br. 1 & 3

Vice President for D&S Termite Control

and

CHRISTOPHER HARRISON PARISH
3638 Bancroft Drive
Spring Valley, CA 91977

Field Representative License No. FR 23237, Br. 1 & 3
Registered Applicator's License No. RA 34241, Br. 3

Respondents

BOARD JURISDICTION

The Structural Pest Control Board has jurisdiction to prosecute a disciplinary action against a licensee under Business and Professions Code[1] sections 8617 and 8620.[2] Discipline can only be imposed after the licensee is afforded a hearing held pursuant to Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, known as the Administrative Procedures Act ("APA").[3]

[1] All further statutory references are to the Business and Professions Code unless otherwise indicated.
[2] The Board administers a comprehensive scheme of licensing persons and companies who conduct structural pest control board as set forth in the Structural Pest Control Act. It is unlawful to conduct such activities without proper licensing. See § 8500 et. seq and the implementing regulations, Cal. Code of Regs., tit. 16, §1900 et. seq.
[3] § 8620.

Under the APA, an agency (here the Board) can originally hear the case itself or the case can originally be heard by an administrative law judge. Within 100 days of receipt of the ALJ's proposed decision, the Board can adopt the decision in its entirety, reduce or mitigate the penalty, make technical or other changes, reject the proposed decision and refer the case back to the ALJ, or reject the proposed decision and decide the case upon the record.[4]

PROCEDURAL HISTORY

The complainant in this case was then Board Registrar Kelli Okuma. Ms. Okuma brought a disciplinary action against the Respondents in her capacity as Registrar, issuing a Second Amended Accusation which is the charging document in the case on January 8, 2011. The Second Amended Accusation stated six causes for discipline against the Respondents under the disciplinary provisions of the Structural Pest Control Act. All Respondents' licenses were subject to discipline for failure to comply with all applicable fumigations laws and regulations.[5] Respondents D&S, Dawn Charrette, and Christopher Parish were charged with gross negligence for the manner in which they conducted the fumigation under section 8642. Respondents (D&S, Dawn Charrette and Christopher Parish) licenses were also subject to discipline for failing to vacate the occupant, failing to remove food and medicines, and failing to secure the exterior of the building under Food and Agricultural Code section 12973. Lastly, Respondents D&S, Dawn Charrette, and Peter Charrette were charged with failure to maintain a proper fumigation log.[6]

The matter was assigned to the San Diego Office of the California Office of Administrative Hearings (OAH), and assigned case number OAH No. L-2006070475. The hearing, as required under the APA, was conducted by Administrative Law Judge ("ALJ") Mary Agnes Matyszewski on January 18, 19, 20, 24, 31 and February 1, 2, 7, 8, 9, 10, 14, 15, 16, 22, 23, 28 and March 2, 2011.

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[4] Government Code, §11517.
[5] The violations supporting this charge were for failure to vacate all occupants and secure the premises from entry prior to fumigation, code sections 8505.4, 8505.6, and 8505.7.
[6] 8505.13.

Carl Sonne, Deputy Attorney General, represented complainant Kelli Okuma. James L. Frederick, Attorney at Law, represented respondents A.M.B.D., Inc. dba D&S Termite Control, Dawn Marie Charrette, David Paul Dierolf, and Peter John-Paul Charrette. John Mitchell, Attorney at Law, represented respondents Michael Robert Saunders and Christopher Harrison Parish. The matter was submitted to the ALJ on March 3, 2011.

The ALJ issued her Proposed Decision on April 4, 2011. The Order of the Proposed Decision dismissed the Second Amended Accusation against the licenses of David Dierolf and Michael Saunders. The Order publicly reprimanded the license of D&S for failing to remove food and medicines before fumigation, failing to secure an exterior door, and failing to accurately maintain the fumigation log on March 7, 2005. The Order publicly reprimanded the license of Dawn Charrette for failing to remove food and medicines before fumigation on March 7, 2005. The license of Peter Charrette was publicly reprimanded for failing to remove food and medicines before fumigation, failing to secure an exterior door, and failing to accurately maintain the fumigation log on March 7, 2005. The license of Christopher Parish was publicly reprimanded for failing to remove food and medicines before fumigation and failing to accurately maintain the fumigation log on March 7, 2005. The Order awarded the Board $5,000 in costs.

The Board rejected the ALJ's Proposed Decision and issued an Order of Non-Adoption of Proposed Decision on July 8, 2011. The Board ordered transcripts of the hearing from the OAH, and received the final transcript on October 3, 2011. The record was provided to the parties, and the Board issued an Order Fixing Date of Submission of Written Argument on October 17, 2011, with written argument due to the Board on December 1, 2011. Written argument was received timely from both parties.

THE BOARD'S DECISION ADOPTED DECEMBER 27, 2011

The Board issued its Decision pursuant to the provisions of Government Code section 11517(c)(2)(E) on December 27, 2011[7]. The Board's decision imposed the following discipline:

[7] An Order modifying the decision was issued Nunc Pro Tunc was issued January 12, 2012 correcting the Board's Decision to include specific terms and conditions of probation.

The Second Amended Accusation number 2006-57 filed against David Dierolf, Operators License Number OA 8044 issued in Branches 1 and 3, was dismissed;

The Second Amended Accusation number 2006-57 filed against Michael Saunders, Operator's License No. OA 5869 issued in Branches 1 and 3, was dismissed;

Company Registration certificate no. PR 1164 issued in Branches 1 and 3 to A.M.B.D., Inc. dba D&S Termite Control was revoked for failing to remove all occupants prior to fumigation, for failing to remove all food and medicines before fumigation, for failing to secure an exterior door, and for failing to accurately maintain the fumigation log on March 7, 2005. The revocation was stayed and the Company Registration was placed on a three-year probation. The Company Registration certificate was actually suspended for 150 days during the three year probation. In lieu of 45 days of the suspension, D&S Termite Control was assessed a civil penalty of $10,000.00. The suspension was to be completed and the penalty to be paid three months prior to the end of the probationary period.

Operator's License Number OPR 9119 issued in Branches 1 and 3 to Dawn Charrette was revoked for failing to remove all occupants prior to fumigation, for failing to remove all food and medicines before fumigation, for failing to secure an exterior door, and for failing to accurately maintain the fumigation log on March 7, 2005.

Field Representative's License No. FR 19144 issued in Branch 1 to Peter Charrette was revoked for failing to remove all occupants prior to fumigation, for failing to remove all food and medicines before fumigation, for failing to secure an exterior door, and for failing to accurately maintain the fumigation log on March 7, 2005. The revocation was stayed and the Field Representative's License was placed on a three-year probation.

Field Representative's License No. FR 23237 issued in Branches 1 and 3 to Christopher Parish, was revoked for failing to remove all occupants prior to fumigation, for failing to remove all food and medicines before fumigation, for failing to secure an exterior door, and for failing to accurately maintain the fumigation log on March 7, 2005.

The Board was awarded costs of $100,000.00.

APPEAL, WRIT AND REMAND

Petitioners filed a timely Writ of Mandate before the Superior Court, County of San Diego appealing the Board's Decision. The matter came on for hearing on September 14, 2012. The Court issued its Statement of Decision filed on October 1, 2012. The Decision discussed the Standards of Care applicable in the case and specifically the Board's findings and conclusions regarding the negligence of the Petitioners and findings and conclusions regarding the gross negligence of the Petitioners.

The Court found that the Board correctly applied the applicable law on the negligence standard of care set forth in the fourth cause for discipline. However, the Court gave the ALJ's credibility findings in favor of Petitioner Parish's sworn testimony during the administrative hearing deference and great weight, overturning the Board's finding that the Petitioners' actions constituted gross negligence[8]. As a result, the Court found that the weight of the evidence did not establish that the Petitioners were grossly negligent in their search of the premises. However, the Court did find that "Petitioners' knowing, willful failure to comply with the label instructions in the removal of food and medicine was an extreme departure from the ordinary standard of conduct and constitutes gross negligence." The Court went on to say that the evidence showed "this was not an isolated instance", and that the repeated failure to comply with the law had the potential to cause great harm to the tenants of affected properties.

The Court also discussed the discipline imposed by the Board. Although the Court stated that the Board did not appear to directly address mitigating evidence, or the lack of a prior disciplinary record, the Court found that this had no impact on the discipline imposed. The Court discussed that the violation of the label instructions created a potential harm to the public, the fact that the evidence establishes that the action was willful, that the Board was required to consider the seriousness of the violations, and the Court stated that "the Board was entitled to conclude

[8] The Court overturned the Board's finding that Respondents were grossly negligent with regard to their search of the premises but upheld the Board's finding that the Respondents were grossly negligent with regard to their failure to properly remove food and medicine.

that the Petitioners' attitude towards compliance with label instructions was woefully lacking and required a serious penalty to ensure compliance with all label instructions."

The remaining question, according to the Court, was whether the penalties imposed evidence of an abuse of discretion by the Board. The Court recognized that the Board stated that it was most concerned about the corporate disrespect for the law, and that D&S had developed a policy that would place its economic interests over protection of the consumer. However, because the Board ordered revocation based on findings and conclusions that included a finding the Petitioners were grossly negligent by failing to conduct a careful search of the subject premises, and because the Court felt there was no way of knowing whether such a drastic penalty would have been imposed without the gross negligence finding, the Court remanded the case to the Board for the "limited purpose of the Board reconsidering the penalties imposed in light of the findings in the Statement of Decision." The Court granted the Writ of Mandate, in part, for remand to the Board for reconsideration of the penalty imposed as to all Petitioners, and in all other respects denied the Writ.

On March 1, 2013, the parties were provided notice that the Board would decide the matter during its Board meeting on April 24, 2013. The parties were invited to brief this issue: *Since the Respondents are not grossly negligent in their search of the premises, can the Board levy the same level of discipline? If not, what level of discipline is appropriate?* The briefs were provided to the Board by April 5, 2013 as required.

All seven members of the Board met on April 24, 2013 to determine the issue on remand. All Board members had reviewed the entire record, and the briefs submitted, and the matter was discussed in depth in closed session on April 24, 2013. The Board's ruling was unanimous.

THE BOARD'S DECISION ON THE REMANDED ISSUE

The matter was remanded to the Board to decide one limited issue. The Board specifically rejects the Attorney General's request to expunge the previous decision and issue a new decision addressing all issues. This Decision will not discuss the prior Decision of the Structural Pest Control Board adopted December 27, 2011. This Decision discusses only the issue of: "Since the

Respondents are not grossly negligent in their search of the premises, what level of discipline is appropriate?" This Decision is issued to supplement the Decision adopted December 27, 2011.

The Level of Discipline Necessary to Protect the Public

"[T]he objective of an administrative proceeding relating to a possible license suspension is to protect the public; to determine whether a licensee has exercised his privilege in derogation of the public interest. Such proceedings are not conducted for the primary purpose of punishing an individual. It is necessary for the Department ... to effectively regulate the dangerous business of pest control. Safety in the application of pesticides must be assured by fixing responsibility for that safety on the licensee." (*Camacho v. Youde*, (1979) 95 Cal.App.3d 161, 164, 157 Cal. Rptr. 26, 28.)

To establish consistency in disciplinary penalties for similar offenses, the Structural Pest Control Board has established uniform disciplinary guidelines. The Board grants ALJs some discretion in applying the guidelines but desires that the guidelines be followed to the extent possible. Of primary importance is the effect the licensee's/registrant's conduct had or can have on the public as consumers.[9]

The minimum penalty for violation of section 8641 is suspension, stayed, 3 years' probation and the maximum penalty is license revocation with the optional condition 24 that prohibits the Respondent from having any legal or beneficial interest in any company registered by the Board currently or in the future. The minimum penalty for violation of 8642 is license revocation, stayed, 3 years' probation and the maximum penalty is license revocation with optional condition 24. Because of the court's ruling that gross negligence was not proven as to the Respondents' failure to remove the occupant from the building, this code section will only be considered as to the finding left in place by the court that the Respondents were grossly negligence in their failure to remove food, and medicines from the apartment. The minimum

[9] A Manual of Disciplinary Guidelines and Model Disciplinary Orders, Structural Pest Control Board, Department of Pesticide Regulation, State of California, 2010, Introduction.

penalty for violation of 8646 and 8647 is suspension, stayed, 3 years' probation and the maximum penalty is license revocation and optional condition 24.

The Manual also sets forth eleven factors to be considered in determining whether the minimum, maximum or intermediate penalty should be imposed. Of these factors, the following factors are relevant here and support imposition of maximum penalties: actual or potential harm to the public; actual or potential harm to any consumer: whether the conduct was knowing, willful, reckless or inadvertent; the financial benefit to the Respondent; and evidence that the unlawful act was part of a pattern of practice. During the closed session on April 24, 2013, the Board discussed again the practice of failing to remove food and medicines prior to fumigation and the subsequent degradation of the degree of inspection before fumigation and once again determined that this practice creates a potential harm to the public, and in this case, actual harm to a member of the public/consumer. The conduct was knowing, willful or reckless and was done to realize financial benefit to the Respondent. Evidence that the unlawful act was part of a pattern of practice was abundant.

Respondents argued that the passage of time that has occurred since this action was first brought, the enormous cost of the litigation, and the fact that Respondents have not received any violations during that time should mitigate all or most of the penalties. The Board rejects this argument. A violator should not avoid penalties simply because he or she chooses to vigorously pursue litigation which takes an enormous toll on *both* parties in cost and time, and the passage of time is inevitable. The Board also found that the passage of time does not mitigate the egregious conduct that resulted in the death of the occupant.

DISCUSSION AND CONCLUSION

The Second Amended Accusation seeks to discipline the license of D&S Termite Control under section 8641 for failing to follow all laws, and for failing to ensure the space to be fumigated was vacated, and that all entrances were secured against entry. D&S was also charged with failure to maintain an accurate fumigation log. D&S Termite Control's license is also subject to discipline under section 8646 for disregard and violation of pesticide use laws for

failing to remove all persons, and failing to remove or bag all opened food and medicines prior to fumigation. The license is also subject to discipline under section 8647 for failure to follow Food and Agricultural Code section 12973 by failing to remove all occupants, and food and medicines, and failure to secure all exterior doorways. The maximum penalty under each of these sections is revocation and optional condition 24. Because of the intentional nature of the violations as discussed above, the Board once again finds that more than the minimum penalty is appropriate and that the penalty of revocation, stayed, and three years' probation with standard terms and conditions in accordance with the Board's Manual of Disciplinary Guidelines, Terms 8 through 15, and Optional Term 16, including the payment of costs and a period of suspension is appropriate.

The Second Amended Accusation seeks to discipline the licenses of Dawn Charrette and Christopher Parish under sections 8641, 8642, 8646, and 8647, for the same violations as discussed as to D&S Termite. Violations under section 8642 for failing to remove the occupant are dropped. Dawn Charrette is the qualifying manager, was present at the fumigation and gave the order to remove food and medicines after the fumigation is a clear violation of law. As qualifying manager, she was responsible for all aspects of the fumigation. She is also charged with failure to properly maintain the fumigation log. Christopher Parish was the licensee in charge of the site and was responsible for the careful inspection of the premises, removal of all occupants, and the removal of food and drugs prior to fumigation, and for the securing of the exterior doors. As discussed above, the actions of these two licensees constitute disregard for the law, negligence and gross negligence in their failure to comply with the law. The licensees have not been found to be grossly negligent for failing to remove the occupant. The Board again finds that the maximum penalty of license revocation for these two Respondents is necessary to protect the public. The Board finds that the revocation of the license of Mr. Parish will be stayed and will be placed on 3 years' probation with standard terms and conditions in accordance with the Board's Manual of Disciplinary Guidelines, Terms 8 through 15. The Board does not impose optional condition 24.

Peter Charrette is charged under the First and Fifth Causes for Discipline for violating section 8641 for failing to ensure the space to be fumigated was vacated by all occupants, and that all entrances were secured, and for failure to maintain an accurate fumigation log. Mr. Charrette was on site during the fumigation, told Mr. Castaneda to secure the exterior doors but did not himself ensure the doors were secured and did not keep an accurate fumigation log. Because of his participation in the fumigation and in company policy, the Board again finds that more than minimum penalty is appropriate. The Board revokes Mr. Charrette's license, stays that revocation, and places his license on probation for three years with standard terms and conditions in accordance with the Board's Manual of Disciplinary Guidelines, Terms 8 through 15.

ORDER

Company Registration certificate no. PR 1164 issued in Branches 1 and 3 to A.M.B.D., Inc. dba D&S Termite Control is hereby revoked, the revocation is stayed and the Company Registration is placed on a three-year probation with standard terms and conditions in accordance with the Board's Manual of Disciplinary Guidelines, Terms 8 through 15, and Optional Term 16. The Company Registration certificate is actually suspended for 150 days during the three year probation. In lieu of 45 days of the suspension, D&S Termite Control may be assessed a civil penalty of $10,000.00. The suspension is to be completed and the penalty to be paid three months prior to the end of the probationary period.

Operator's License Number OPR 9119 issued in Branches 1 and 3 to Dawn Charrette is hereby revoked.

Field Representative's License No. FR 19144 issued in Branch 1 to Peter Charrette is hereby revoked, the revocation is stayed and the Field Representative's License is placed on a three-year probation with standard terms and conditions in accordance with the Board's Manual of Disciplinary Guidelines, Terms 8 through 15.

Field Representative's License No. FR 23237 issued in Branches 1 and 3 to Christopher Parish, is hereby revoked, the revocation is stayed and the Field Representative's license is placed on a three-year probation with standard terms and conditions in accordance with the Board's

Manual of Disciplinary Guidelines, Terms 8 through 15.

The Board is awarded costs of $100,000.00, to be paid three months prior to the end of the probationary period.

This Decision shall become effective on June 12, 2013.

It is so ORDERED May 13, 2013.

Curtis Good, President
Structural Pest Control Board