

BEFORE THE
STRUCTURAL PEST CONTROL BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Modification of
Probation of:

A.M.B.D., INC., dba
D & S TERMITE CONTROL,
Spring Valley, California

Petitioner.

OAH No. 2014060896

DECISION

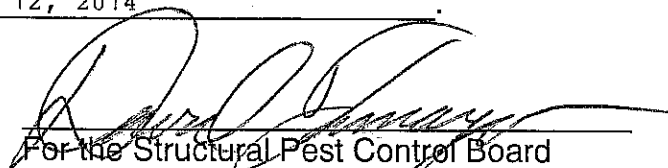
The Proposed Decision of Dian M. Vorters, Administrative Law Judge, in Sacramento, is attached hereto. Said decision is hereby amended, pursuant to Government Code section 11517(c)(2)(c) to correct technical or minor changes that do not affect the factual or legal basis of the proposed decision. The proposed decision is amended as follows:

1. On page 1, in the caption, "D & S TERMITE AND PEST CONTROL" is stricken and replaced with "D & S TERMITE CONTROL".
2. On page 2, paragraph number 4, "March 3, 2001" is stricken and replaced with "March 3, 2006".
3. On page 4, paragraph number 10, "D & S Pest Control" is stricken and replaced with "D & S Termite Control".

The Proposed Decision as amended is hereby accepted and adopted as the Decision and Order by the Structural Pest Control Board, Department of Consumer Affairs, State of California.

The Decision shall become effective on January 11, 2015.

IT IS SO ORDERED December 12, 2014



For the Structural Pest Control Board
Department of Consumer Affairs

BEFORE THE
STRUCTURAL PEST CONTROL BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Modification
of Probation of:

OAH No. 2014060896

A.M.B.D., INC., dba
D & S TERMITE AND PEST CONTROL,
Spring Valley, California

Petitioner.

DECISION

This matter was heard on October 16, 2014, in Sacramento, California, before a quorum of the Structural Pest Control Board comprised of Dave Tamayo, President, Curtis Good, Vice President, Clifford Utley, and Mike Duran. Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings, presided.

Carl Sonne, Deputy Attorney General appeared pursuant to Government Code section 11522.

Dawn Charrette (owner) was present and represented A.M.B.D., Inc., dba D & S Termite (petitioner corporation or petitioner).

The matter was submitted on October 16, 2014.

FACTUAL FINDINGS

Procedural History

1. On July 24, 1981, the Board issued to David Paul Dierolf, President and Qualifying Manager of A.M.B.D., Inc, dba D & S Termite Control, Operator's License No. OA 8044 (Branches 1 and 3).¹ This designation and operator's license remains in full force and effect. On February 6, 2004, Mr. Dierolf was reflected as C.E.O.²

¹ Licenses issued to operators, field representatives, or applicators shall be limited to the branch or branches of pest control for which the applicant has qualified by application and examination. The practice of pest control is classified into the following three branches:

2. On January 13, 1988, the Board issued Company Registration Certificate number PR 1164 (Branches 1 and 3) to petitioner corporation as A.M.B.D., Inc., dba D & S Termite Control, San Diego. The company address changed to Spring Valley in October 1996. On December 10, 2009, Kelly G. Hermann was reflected as Branch 2 Qualifying Manager.

3. On March 1, 2000, Dawn M. Charrette was reflected as Qualifying Manager (Branches 1 and 3). On February 6, 2004, Ms. Charrette was reflected as President, and Peter John Charrette and Michael Robert Saunders as Vice Presidents. On June 12, 2013, the D & S Company Registration Certificate No. PR 1164, reflected the disassociation of Ms. Charrette as Branch 1 and 3 Qualifying Manager. Her disassociation was a consequence of her license revocation by order of the Board effective June 12, 2013. (Factual Finding 6.)

4. The Board filed Accusation 2006-57 against Company Registration Certificate number PR 1164 on March 3, 2001; a First Amended Accusation on June 13, 2008; and a Second Amended Accusation on January 3, 2011. The Second Amended Accusation charged petitioner D & S Termite with negligence and numerous violations of law and regulation, as set forth below.

5. Effective June 12, 2013, after a hearing on remand from the Superior Court, San Diego, in Second Amended Accusation No. 2006-57, the Board placed petitioner's Company Registration Certificate number PR 1164, on three years' probation, with terms and conditions.

6. Also effective June 12, 2013, in its Decision on the Second Amended Accusation No. 2006-57, the Board revoked Dawn M. Charrette's operator license (No. OPR 9119, Branches 1 and 3) and licensing rights. Dawn M. Charrette was subsequently disassociated as Qualifying Manager (Branch 1 and 3) of D & S Termite Control.

Second Amended Accusation No. 2006-57

7. *Factual Allegations.* On March 7, 2005, D & S employees and officers fumigated a 30-unit condominium complex located at 4205 Ohio Street, San Diego (Ohio Street Project). The structure was tarped and Vikane gas was injected.³ It is the responsibility of the licensee in charge to make certain that the structure is properly prepared

Fumigation (Branch 1), General Pest Control (Branch 2), and Termite (Branch 3). (Bus. & Prof. Code, § 8560, subd. (a).)

² An Accusation (No. 2006-57) filed by the Board against Mr. Dierolf's Operator's License in 2006, and Amended on June 13, 2008 (First Amended) and January 3, 2011 (Second Amended), was dismissed on March 8, 2012.

³ Vikane is approved by the Environmental Protection Agency (EPA) for structural fumigation use and it is labeled as a "Toxic Air Contaminant (TAC)." It is colorless and odorless. Its application is highly regulated to avoid negative health effects in humans.

prior to introducing fumigant. This includes a duty to examine or instruct other employees to examine all units to determine if all persons have vacated the premises and to remove all food, drug, and medical items from all units. Approximately three hours after fumigant was introduced into the tarped structure, D & S employees heard cries and noticed movement beneath the tarps. Employees subsequently escorted a female resident of the property out from within the tarps covering the fumigated building. The woman was transported to a local hospital where she was subsequently pronounced dead.

Two days later, on March 9, 2005, an inspection of the victim's unit revealed a number of food, drug, and medical items, which had not been removed prior to fumigation. Investigators instructed petitioner not to remove any items from the units pending the investigation at the Ohio Street Project. However, on March 9, 2005, inspectors observed petitioner's employees in possession of five large garbage bags containing items that had been removed from the units after the fumigation. Inspectors determined that these items should have been removed from the units before fumigation. Inspectors identified preparation violations in 20 of the 30 units. On March 11, 2005, inspectors found violations in fumigation logs completed by an employee of D & S, Christopher Parish.

8. *Causes for Discipline.* The Board charged petitioner D & S Termite and its managers and responsible employees with failing to comply with laws regulating pest control. (Bus. & Prof. Code, § 8641.)⁴ Specifically, the Board alleged that petitioner and other parties:

- 1) Failed to perform the fumigation on the Ohio Street Project in the manner prescribed by law (Bus. & Prof. Code, § 8505.4)
- 2) Failed to ensure that the space to be fumigated was vacated by all occupants before starting the fumigation and all entrances were secured against entry while performing the work. (Bus. & Prof. Code, §§ 8505.6 & 8505.7.)
- 3) Failed to properly maintain a log of each fumigation job performed on the Ohio Street Project. (Bus. & Prof. Code, § 8505.13.)
- 4) Negligently handled or used poisonous exterminating agents on the Ohio Street Project. (Bus. & Prof. Code, § 8643.)
- 5) Violated fumigation laws in numerous aspects. (Bus. & Prof. Code, § 8646.)

⁴ Failure to comply with the provisions of this chapter, or any rule or regulation adopted by the board, or the furnishing of a report of inspection without the making of a bona fide inspection of the premises for wood-destroying pests or organisms, or furnishing a notice of work completed prior to the completion of the work specified in the contract, is a ground for disciplinary action. (Bus. & Prof. Code, § 8641.)

- 6) Failed to perform fumigation work in a careful manner. (Bus. & Prof. Code, § 8647; Food & Agri. Code, § 11791, subd. (b).) Used pesticides in conflict with the label. (Food & Agri. Code, § 12973.)
- 7) Violated numerous regulations by failing to properly prepare and retain a fumigation log regarding pesticide use on the Ohio Street Project (Cal. Code. Regs., tit. 16, § 1970, subd. (a)), failing to properly secure the property against entry prior to fumigation (Cal. Code. Regs., tit. 16, § 1970.3), and failing to perform pest control in a careful and effective manner. (Cal. Code. Regs., tit. 3, § 6600, subd. (b).)
- 8) Failed in their responsibility as managers and corporate officers of D & S, regardless of whether they had knowledge of or participated in the acts or omissions which constituted cause for discipline. (Bus. & Prof. Code, § 8624.)

Petition for Reinstatement

9. David Dierolf, Qualifying Manager (Branches 1 and 3), filed the instant Petition for Modification of Probation (Petition) on May 23, 2014, on behalf of D & S Termite. At hearing, Ms. Charrette, owner of D & S Termite, explained the facts and circumstances that she believes resulted in discipline of the Company Registration (No. 1164, Branches 1 and 3) and the rehabilitative efforts that she and other responsible parties have made.

10. The underlying incident took place in March 2005, with administrative and civil litigation ongoing since then. Though Ms. Charrette lost her operator's license in 2013, she is still owner of D & S Pest Control.

11. Ms. Charrette, Mr. Dierolf, Peter Charrette, and Mike Saunders, serve as board members of the corporation. These board members and other employees have taken numerous continuing education courses since the corporation's Company Registration Certificate (No. PR 1164) was placed on Board probation. Courses include a Bed Bug Symposium, Target Fumigation School, Fumigation CAP Update, EPA Lead Safe Training, DOT Drug Abuse Training, Target San Marcos Workshop, University of California Irvine Pest Management Conference, and Human Resources Management. They provide ongoing training for employees to ensure each is highly educated and knowledgeable on all aspects of pest control.

12. In the Petition for Modification, Mr. Dierolf acknowledged the basis for the company's Board discipline. Specifically, "We performed the fumigation without the food/medicine in 20 out of 30 units being bagged or removed prior to injecting the fumigant. A secondary lock was missed by a Branch 1 licensee on the job. Fumigation log was not properly maintained."

13. The company policy has since been to remove or bag food and medicine that was not properly bagged by the occupants prior to commencement of the fumigation. This is done even if it means keeping occupants out additional days. Workers also double check all secondary locks prior to injection of fumigant. Finally, fumigation logs now go through a triple check system to ensure accuracy.

14. In the Petition, Mr. Dierolf explained that he is seeking modification of the Board's order of a 150 day suspension on Branch 1 and 3 operations. He claimed grounds of hardship on company employees in that the suspension would "in effect, put 32 people out of work and put our company out of business." He further explained that the company pays 100 percent of the medical insurance for employees and their families. Employees would not be able to afford to pay their own health insurance premiums during a suspension period of five months. The company also contributes 100 percent to a profit sharing program for employees' retirement. A suspension of this duration would cause a substantial loss of income and foreseeably result in many employees losing their homes. Finally, D & S customers rely on the services provided. The company works with hundreds of real estate professionals who would be devastated if the suspension were maintained. At hearing, Ms. Charrette testified to the same.

15. The underlying incident occurred in 2005. There have been no subsequent serious infractions. D & S has performed over 12,000 fumigations since then with only two minor violations in nine years. The company has been inspected by the Agriculture Department 136 times with no violations found. They have also been inspected by the Board with no violations found.

16. Mr. Dierolf requested the suspension be waived or reduced to a maximum of 45 days in order maintain a majority of their workforce and save 28 out of 32 jobs. He is also willing to surrender their Branch 1 license if this will allow them to keep their Branch 3 operating without the 150-day suspension.

Conclusion

17. Cause exists to grant the Petition for Modification submitted by petitioner Mr. Dierolf, under the terms and conditions stated in this ORDER. Petitioner D & S Termite Control established clear and convincing evidence of rehabilitation and reduced risk to the public. (Cal. Code Regs., tit. 16, § 1937.2, subds. (b) & (c).)

LEGAL CONCLUSIONS

1. Government Code section 11522 states:

A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a

similar petition. The agency shall give notice to the Attorney General of the filing of the petition and the Attorney General and the petitioner shall be afforded an opportunity to present either oral or written argument before the agency itself. The agency itself shall decide the petition, and the decision shall include the reasons therefore, and any terms and conditions that the agency reasonably deems appropriate to impose as a condition of reinstatement. This section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

2. Petitioner bears the burden of establishing that D & S Termite Control is sufficiently rehabilitated such that the terms of probation can be safely modified. The Board has evaluated the evidence submitted by petitioner. Petitioner has satisfied the Board that the company will continue to comply with the laws regulating pest control. As such, good cause exists to modify the terms of petitioner's probation without posing risk of harm to the public. (Cal. Code Regs., tit. 16, § 1937.2, subd. (b) & (c).)

ORDER

The Petition for Modification of Probation for Company Registration Certificate No. PR 1164 (Branches 1 and 3), and licensing rights of A.M.B.D., Inc., dba D & S Termite Control, filed by petitioner David Dierolf, is GRANTED. The original probationary terms and conditions remain in full force and effect, with the exception of the following modifications:

1. The Branch 3 suspension of 150 days imposed in the original order is removed and vacated.
2. The Branch 1 suspension of 150 days imposed in the original order is reduced by 45 days to an actual suspension of 105 days. In lieu of 45 days of the new 105 day suspension, D & S Termite has the option to pay a civil penalty of \$10,000, thereby reducing the actual Branch 1 suspension to 60 days.
3. The remaining terms and conditions of the original Order in Second Amended Accusation No. 2006-57, effective June 12, 2013, remain in full force and effect.⁵

⁵ The Board's original ORDER effective June 12, 2013, provided:

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


DECISION

This Decision is hereby adopted by the Structural Pest Control Board.

This Decision shall become effective on January 11, 2015

IT IS SO ORDERED.

Dated: December 12, 2014


DAVID TAMAYO
President
Structural Pest Control Board

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.