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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

DAN OLSON,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF PESTICIDE
REGULATION,

Defendant and Respondent.

F056118

(Super. Ct. No. VCU225541)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Lloyd L. Hicks, Judge.

Dan Olson, in pro. per., for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Sara J. Russell and Cecilia L. Dennis, Deputy Attorneys General, for Defendant and Respondent.

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Appellant Dan Olson appeals the denial of his petition for a writ of administrative mandamus. Olson's petition challenged a \$5,110 fine imposed against him by the Tulare County Agricultural Commissioner (commissioner) for violating Food and Agricultural Code section 12973 in connection with the application to his walnut orchard of an insecticide known as Whirlwind. Olson contends the administrative proceedings violated provisions of California's Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) as well as his constitutional right to due process.

We conclude the proceeding did not violate the APA because neither the formal hearing procedure contained in chapter 5 of the APA nor the informal hearing procedure contained in article 10 of chapter 4.5 of the APA applies to imposition of fines for pesticide misuse. Also, the proceeding did not violate Olson's right to procedural due process. The judgment will be affirmed.

FACTS AND PROCEEDINGS

In May 2006, Olson's employees used an air-blast sprayer to apply Whirlwind insecticide to his walnut orchard. The insecticide allegedly drifted onto an adjacent property and came into contact with three persons. They filed a complaint with the commissioner and he initiated an investigation.

After the investigation, the commissioner sent Olson a notice of proposed action, dated August 4, 2006, that stated the commissioner proposed to fine him \$7,225 for violating Food and Agricultural Code section 12973 and California Code of Regulations, title 3, section 6600, subdivision (c). The notice alleged that Olson failed to comply with the registered pesticide label during the application, the pesticide was applied in a way that allowed it to drift onto nontarget areas, and the failure to comply with the label resulted in pesticide exposure to two people and an actual pesticide hazard to a third.

The notice stated that it was given "pursuant to the provisions of sections 12999.5 and 12997.5 of the California Food and Agricultural Code," and the amount of the fines

was determined using fine guidelines set forth in the California Code of Regulations, a copy of which was attached to the notice.

The notice advised Olson that he was entitled to a hearing to review the commissioner's evidence and present any evidence, oral or written, concerning the alleged violations and proposed fines. The notice included a request for hearing form that Olson could use and a one-page document that explained the commissioner's administrative hearing process. The document stated that (1) the hearing was informal and would be recorded, (2) witnesses would testify under oath, (3) technical rules of evidence, such as the hearsay rule, would not apply, (4) each party could call witnesses, introduce exhibits, and examine opposing witnesses, and (5) a written decision would be issued based on the evidence presented.

In early November 2006, Olson sent the commissioner a document titled "Request For Clarification and Authority of Hearing Rules and Procedures." The document asked whether the APA's adjudication provisions applied to the matter and, if not, what authority supported that conclusion. In addition, he asked the commissioner to identify *all* of the rules that would be applied to the matter.

By letter dated November 29, 2006, the commissioner replied to Olson's request for clarification and authority. The letter stated that the authority for the hearing procedures was derived from Food and Agricultural Code sections 12999.5, 12997.5, and 12996.5, all of which were attached to the notice of proposed action sent to Olson in August. The commissioner responded to the question about the APA's applicability by stating:

"APA provisions do not apply in this hearing because the APA applies only to state agencies specified in the Act. Our authority, Food and Agricultural Code sections 12999.5, 12997.5 and 12996.5, do not refer to the APA so its provisions do not apply."

Olson requested a hearing, which was held in December 2006. The commissioner issued a notice of decision on April 5, 2007, that ordered Olson to pay a fine of \$5,110

and stated he had a right to appeal the decision to the Director of the Department of Pesticide Regulation. Olson filed such an appeal. In September 2007, the director issued a detailed written decision upholding the fine imposed by the commissioner.

Within 30 days, Olson filed a petition for writ of administrative mandamus in the Tulare Superior Court. The parties entered a stipulation regarding the briefing schedule and hearing date. On July 18, 2008, the superior court issued a two-page minute order explaining its decision to deny the writ. A judgment was entered and Olson filed a notice of appeal.

DISCUSSION

I. Standard of Review

The standard of review for an administrative decision is set forth in Code of Civil Procedure section 1094.5, subdivision (b):

“The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.”

II. Alleged Violations of the APA

A. Contentions

Olson contends that the commissioner’s proceeding that resulted in the fines against him violated the APA in three ways. First, the commissioner improperly denied Olson’s request for a formal hearing that would comply with chapter 5 of the APA. Second, the informal hearing conducted by the commissioner did not comply with the procedural guidelines set forth in chapter 4.5 of the APA. Third, the commissioner

violated the APA bill of rights¹ by failing to provide an explicit statement regarding the applicability of chapter 5.

The Attorney General contends that Olson's claimed violations of the APA are meritless. The Attorney General argues that two of Olson's asserted APA violations rely on law that is inapplicable to the commissioner and that the third asserted violation should fail on the merits.

B. Background

Olson bases his APA contentions on chapters 4.5 and 5, comprising the administrative adjudication provisions. Chapter 4.5 (Gov. Code, § 11400 et seq.) contains the bill of rights, found in article 6, and the informal hearing procedure, found in article 10. Chapter 5 (Gov. Code, § 11500 et seq.) contains the formal hearing provisions.

The application of these provisions of the APA to proceedings conducted by a county agricultural commissioner that result in civil penalties for pesticide misuse was addressed by this court in *Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 Cal.App.4th 411 (*Patterson*). In *Patterson*, the commissioner fined a flying service for misapplying pesticides and creating an actual health hazard. (*Id.* at p. 418.) The flying service filed a petition for writ of mandate, alleging that the commissioner failed to follow procedures contained in the APA. (*Patterson*, at p. 419.) We upheld the trial court's denial of the petition based on an interpretation of the APA and relevant sections from the Food and Agricultural Code.

Our interpretation of those statutory provisions produced the following conclusions. First, the formal hearing procedures contained in chapter 5 of the APA do not apply to the commissioner's proceeding because the Legislature did not make them

¹Article 6, titled "Administrative Adjudication Bill of Rights" (Gov. Code, § 11425.10 et seq.), sets forth mandatory procedures for administrative adjudication.

expressly applicable. (*Patterson, supra*, 161 Cal.App.4th at pp. 419-420.) Second, the mandatory provisions of chapter 4.5 of the APA apply to hearings conducted under the authority of a county agricultural commissioner. (*Patterson*, at p. 424.) Third, the informal hearing procedures contained in article 10 of chapter 4.5 of the APA are optional and, thus, do not apply to commissioner proceedings concerning the misuse of pesticides. (*Patterson*, at p. 423.)

C. The Denial of a Formal Hearing that Would Comply with Chapter 5

Olson's contention that he was entitled to a formal hearing that would comply with chapter 5 of the APA is based on the following logic: The APA says an agency may use an informal hearing where there is a disputed issue of material fact and the possible penalty does not exceed \$1,000. (Gov. Code, § 11445.20, subd. (b)(1).) Olson's case involved a disputed issue of material fact and a possible penalty exceeding \$1,000. Therefore, he concludes, an informal hearing was inappropriate and chapter 5's provisions regarding formal hearings necessarily applied.

Olson's conclusion is incorrect and directly contradicts our determination in *Patterson* that "a formal hearing pursuant to chapter 5 of the APA was not required." (*Patterson, supra*, 161 Cal.App.4th at p. 422.)

The reasoning underlying our determination involved two steps. First, we relied on Government Code section 11501, subdivision (a) for the proposition that "[t]he formal hearing procedures of chapter 5 of the APA apply only when the statutes relating to the agency so provide." (*Patterson, supra*, 161 Cal.App.4th at p. 422.) Second, we identified Food and Agricultural Code section 12999.5 as the statute that authorizes commissioners to levy fines for pesticide misuse and noted that it "did not require compliance with chapter 5 of the APA." (*Patterson, supra*, at p. 422.)

The same reasoning applies to this case. Chapter 5 of the APA did not apply to the commissioner's hearing concerning Olson's misuse of pesticides because the statute governing that hearing did not require a formal hearing pursuant to chapter 5. (*Patterson*,

supra, 161 Cal.App.4th at p. 422.) Accordingly, Olson’s argument regarding chapter 5 has failed to show the commissioner “has not proceeded in the manner required by law.” (Code Civ. Proc., § 1094.5, subd. (b).)

D. The Applicability of Chapter 4.5, Article 10: Informal Hearing

Olson further contends that his hearing violated the APA’s informal hearing procedures, found in chapter 4.5, article 10. He asserts violations of Government Code sections 11445.20, which discusses the circumstances under which an informal hearing is appropriate, and 11445.30, which discusses how to handle an objection to an informal hearing. Olson advances these arguments despite acknowledging our statement in *Patterson* that “[s]ome provisions of chapter 4.5, such as its informal hearing procedures (Gov. Code, § 11445.10), are optional; they do not replace other agency procedures that serve the same purpose.” (*Patterson, supra*, 161 Cal.App.4th at p. 423.) By simultaneously acknowledging *Patterson* and asking the court to find a violation of Government Code sections 11445.20 and 11445.30, Olson seems to be arguing that *Patterson*’s optional-provision language refers only to section 11445.10 and that the subsequent sections in article 10 were mandatory in his case.

We reject this interpretation of our statement in *Patterson*. That statement concluded the informal hearing procedures of chapter 4.5 of the APA were optional, referenced Government Code section 11445.10, and relied upon a citation to a Law Revision Commission comment. (*Patterson, supra*, 161 Cal.App.4th at p. 423.) The supporting citation implicated all subsequent sections of article 10, including Government Code sections 11445.20 and 11445.30, despite the absence of a specific mention of sections 11445.20 and 11445.30. (*Patterson, supra*, at p. 423.) The Law Revision Commission comment explicitly stated the provisions in article 10 were optional: “Some provisions of [chapter 4.5] are optional, e.g., the informal hearing procedure (Article 10 (commencing with Section 11445.10))...” (Cal. Law Revision Com. com., 32D West’s Ann. Gov. Code (2005 ed.) foll. § 11415.10, p. 277.)

The legislative intent disclosed in the comments to the statute compel us to reject Olson's contention that Government Code sections 11445.20 and 11445.30 were mandatory and applied to his proceeding. We make explicit our implied conclusion in *Patterson*: All of the sections concerning informal hearings contained in article 10 are optional provisions of chapter 4.5 of the APA.

The optional provisions in chapter 4.5 of the APA do not apply to Olson's proceeding because an alternate procedure has been designated by the Legislature. Food and Agricultural Code sections 12999.5, subdivision (c) governs the hearing concerning the commissioner's proposed penalty. (*Patterson, supra*, 161 Cal.App.4th at p. 424.) Furthermore, as in *Patterson*, those procedures are supplemented only by the mandatory provisions contained in chapter 4.5 of the APA, not the optional provisions. (*Patterson*, at p. 424.)

Consequently, Olson's claims that the commissioner's procedures for his hearing deviated from the informal hearing procedures set forth in article 10 of chapter 4.5 of the APA are irrelevant because those procedures are not "required by law." (Code Civ. Proc., § 1094.5, subd. (b).)

E. Notification Whether Chapter 5 Applies

Olson also contends that the commissioner was required by Government Code section 11425.10, subdivision (a)(2)² to state explicitly whether or not chapter 5 of the APA applied to the proceeding. This provision is part of the bill of rights in article 6 of chapter 4.5 of the APA and, thus, is mandatory. (See fn. 1, *ante*.) Olson argues the commissioner failed to comply with this provision because the commissioner's statement that the APA did not apply failed to specifically address chapter 5 and because the commissioner's statement relied on incorrect reasoning.

²This provision states in full: "The agency shall make available to the person to which the agency action is directed a copy of the governing procedure, including a statement whether Chapter 5 (commencing with Section 11500) is applicable to the proceeding." (Gov. Code, § 11425.10, subd. (a)(2).)

The Attorney General does not dispute the applicability of the bill of rights. Rather, the Attorney General argues that the commissioner's statement regarding the general applicability of the APA satisfies the requirement and that any errors were harmless.

1. *Lack of reference to chapter 5*

Here, the commissioner's November 29, 2006, letter informed Olson that, "APA provisions do not apply in this hearing because the APA applies only to state agencies specified in the Act. Our authority, Food and Agricultural Code sections 12999.5, 12997.5 and 12996.5, do not refer to the APA so its provisions do not apply." Although the statement did not use the words "chapter 5," it told Olson that (1) the hearing would follow the procedure in the Food and Agricultural Code and (2) the procedure in the APA did not apply. The necessary implication of these two points is that chapter 5, a subset of the APA, would not apply to the proceeding. While we agree that the commissioner could have been more specific, we reject the contention that the absence of a separate, explicit reference to chapter 5 violates Government Code section 11425.10, subdivision (a)(2) and amounts to a failure to proceed in a manner required by law. (Cf. *Tabory v. State Personnel Board* (1962) 208 Cal.App.2d 543, 546 [agency's decision affirmed when it made the requisite findings, even though the phrasing was imperfect].)

2. *Inaccurate reasoning*

The second part of Olson's contention concerns the commissioner's reasoning. That reasoning—"the APA applies only to state agencies specified in the Act"—was inaccurate because some provisions of the APA did apply to the commissioner's hearing. For instance, in *Patterson* we stated that the procedures governing the commissioner's hearing were contained in Food and Agricultural Code section 12999.5, subdivision (c), as supplemented by the mandatory provisions in chapter 4.5 of the APA. (*Patterson, supra*, 161 Cal.App.4th at p. 424.)

Olson correctly claims that the commissioner erred in stating that the entire APA was inapplicable, not just subsets of the APA, such as chapter 5. To establish this error was *reversible*, however, Olson must show that the inaccurate statement amounted to a prejudicial abuse of discretion.

The applicable standard of review limits a reviewing court's authority to reverse an administrative agency's decision. (Code Civ. Proc., § 1094.5, subd. (b).) We must affirm unless (1) the commissioner failed to proceed in a manner required by law and (2) the error was prejudicial. (See *ibid.*) An error is prejudicial if there is a reasonable probability it affected the outcome. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 271, fn. 32.) A minor technical defect in the commissioner's actions is not enough to warrant reversal. (Cf. *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 691 [remand not required if the requisite findings are reasonably implied]; *Tabory v. State Personnel Board, supra*, 208 Cal.App.2d at p. 546 [administrative findings "need not be stated with the formality and precision required in judicial proceedings"].)

Olson never claims he relied on the commissioner's reasoning to his detriment, that he could have benefited from a correct statement of reasons, or that the inaccurate statement affected the end result in any way. Further, as chapter 5 of the APA did not, in fact, apply, this court cannot see how the result would have been any different had the commissioner's reasons been accurate. Consequently, Olson has not met his burden to show a prejudicial abuse of discretion, and we reject his contention. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 ["burden is on the party complaining"].)

III. Due Process Claim

Olson contends that the commissioner's actions violated his constitutional right to due process. Specifically, Olson argues that Food and Agricultural Code section 12999.5, which discusses the commissioner's ability to levy fines, led to a due process violation because it provided insufficient safeguards and guidance regarding the hearing procedure.

The Attorney General argues that Olson was given due process because Olson was apprised of the hearing style and procedure, and Olson had the opportunity to mount a defense.

We conclude that the notice of proposed action, which included copies of applicable code sections and a one-page document that explained the commissioner's administrative hearing process, adequately notified Olson of the procedures that would be applied to the hearing. Based on those documents and our conclusion that Government Code section 11425.10, subdivision (a)(2) was not violated, we conclude that the minimum standard of procedural due process was met in this case. Olson received adequate notice of the hearing and the procedures that would be applied by the commissioner.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

DAWSON, J.

WE CONCUR:

CORNELL, Acting P.J.

KANE, J.