BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Placer
County File No.: 015-ACP-PLA-15/16

Administrative Docket No. 205

DIRECTOR'S DECISION

Tim Martin, Property Owner
10343 Mt. Vernon Road
Auburn, California 95603
Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5, county agricultural commissioners may levy a civil penalty up to $5,000 for certain violations of California's pesticide laws and regulations. When levying fines, the commissioner follows the fine guidelines established in California Code of Regulations, Title 3, section 6130, and must designate each violation as Class A, Class B, or Class C. Each classification has a corresponding fine range.

After giving notice of the proposed action, providing a hearing on June 1, 2016, and reviewing the Hearing Officer's proposed decision, the Placer County Agricultural Commissioner (Commissioner) found that Appellant Tim Martin (Appellant Martin), a non-commercial, residential property owner, violated section 6602 of Title 3 of the California Code of Regulations and FAC section 12973. The Commissioner classified the violations in accordance with section 6130 of Title 3 of the California Code of Regulations, and levied a total fine in the amount of $500. (*See* Notice of Proposed Action (NOPA), File No. 015-ACP-PLA-15/16, dated April 1, 2016; *see also* Notice of Decision, Order and Right of Appeal for File No. 015-ACP-PLA-15/16, dated June 7, 2016 (Commissioner's Decision).)

Appellant Martin appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction to review the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using his independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the Commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the Commissioner's decision. If the Director finds substantial evidence in the record to support the Commissioner's decision, the Director affirms the decision.

Factual Background

On March 16, 2016, Placer County Supervising Agricultural Inspectors D. Mitani (Inspector Mitani) and Diefendorf conducted a pesticide use monitoring inspection at 10343 Mt. Vernon Road in Auburn, California, which is located in Placer County. (Testimony of D. Mitani (Mitani Testimony).) Upon arrival at the location, Inspector Mitani observed an individual dressed in short pants and a short-sleeved shirt making a pesticide application with a backpack sprayer along a private residence driveway. (Mitani Testimony.)

Inspector Mitani spoke with the individual applying the pesticide who identified himself as Adam Romero. (Mitani Testimony.) Mr. Romero stated that Appellant Martin hired him to apply the post emergent herbicide *Remuda Full Strength* (Registration Number 228-366-AA-54705) (*Remuda*) on the weeds surrounding Appellant Martin's vineyard. (*Id.*; Testimony of T. Martin (T. Martin Testimony).) During the inspection, Appellant Martin confirmed that he was the property owner, purchased *Remuda* from Home Depot, and that he hired and directed Mr. Romero to apply *Remuda* to his property. (Mitani Testimony; T. Martin Testimony.) The California registered label for *Remuda* states that "Applicators and other handlers must wear: Long-sleeved shirt and long pants." (Exhibit (Ex.) 3.) Appellant Martin was unable to locate a copy of the label for *Remuda* on the property during the inspection. (Mitani Testimony; T. Martin Testimony.) During the hearing, Appellant Martin stated that rats chewed the *Remuda* label off the container while stored in his barn and that after Inspector Mitani left, he found another bottle of *Remuda* with a label on it in his garage. (T. Martin Testimony.)

On April 1, 2016, the Commissioner issued a Notice of Proposed Action charging Appellant Martin with violating FAC section 12973 for using a pesticide in conflict with its labeling and California Code of Regulations, title 3, section 6602, for failing to have a copy of the registered labeling of the pesticide being used available at the use site. (Ex. 1.) The Commissioner proposed a civil penalty of $250 for each violation. (*Id.*) On April 19, 2016, Appellant Martin requested a hearing. (*Id.*) The Commissioner granted Appellant Martin's request and on June 1, 2016, Hearing Officer Lisa Brown (Hearing Officer) held a hearing on the matter at 2964 Richardson Drive, Auburn, California. (*See* Commissioner's Decision; *also refer to* Audio Recording of Hearing (Audio Recording).)

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Appellant Martin had the opportunity to present evidence and question witnesses. (*See* Proposed Decision of Hearing Officer in File No. 015-ACP-PLA-15/16, dated June 2, 2016 (Hearing Officer Decision).) The Hearing Officer determined that the county proved by a preponderance of the evidence that Appellant Martin violated California Code of Regulations, title 3, section 6602, by failing to have a copy of the registered labeling of the pesticide being used available at the use site. (Hearing Officer Decision at pp. 4-5.) The Hearing Officer also determined that there was sufficient evidence to show that Appellant Martin violated FAC section 12973, by allowing his employee to use *Remuda* without the personal protective equipment required by the registered label. (*Id.*) The Hearing Officer proposed a $250 fine for each violation and found that the fine imposed was properly classified as a Class B violation. (*Id.*) On June 7, 2016, the Commissioner adopted the Hearing Officer's Decision in its entirety.

Relevant Laws and Regulations

California FAC section 12973, states:

> **Use not to conflict with label**
> The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner.

California Code of Regulations, Title 3, section 6602, states:

> **Availability of Labeling**
> A copy of the registered labeling that allows the manner in which the pesticide is being used shall be available at each use site.

When levying fines, the Commissioner must follow the fine guidelines in California Code of Regulations, Title 3, section 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. A Class B violation is a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as a Class A. The fine range for a Class B violation is $250 to $1,000. The Commissioner shall use relevant facts, including severity of actual or potential effects and the respondent's compliance history, when determining the fine amount within the fine range, and include those relevant facts in the Notice of Proposed Action. (Cal. Code Regs., tit. 3, § 6130.)

Appellant's Contention on Appeal

At no time during the hearing or in his written appeal does Appellant Martin dispute the facts surrounding the alleged violations. Appellant Martin's sole contention on appeal is that the hearing officer was biased against him. (Letters of appeal received by DPR on July 5, 2016 and August 5, 2016.)

The Director's Analysis

A. There is not sufficient evidence in the record to support Appellant Martin's claim that the Hearing Officer was biased.

Appellant Martin's sole contention on appeal to the Director is that the Hearing Officer was biased. (*See* Appeal Letter dated July 31, 2016 (Appeal), at 1; Audio Recording.) Specifically, Appellant Martin argues that the Hearing Officer was biased against him because she "was an ex-assistant district attorney and had played a critical role in writing the rules and regulations that she was now deciding upon." (*Id.*) He further argues that the hearing officer showed her bias by improperly inserting her personal opinion that he was not a credible witness. (*Id.*) Appellant Martin's claims are without merit.

It is well-established under California law that Appellant Martin is entitled to a reasonably impartial and non-involved hearing officer at an administrative hearing. (*See McIntyre v. Santa Barbara Employee's Retirement System* (2001) 91 Cal.App.4th 730, 735.) A hearing officer is presumed to be unbiased and impartial. (*Id.*) The burden is on the challenging party to prove bias. (*Id.*) In order to prevail on a claim of bias, the party claiming bias must produce concrete facts that demonstrate actual bias or an unacceptable probability of bias. (*See Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781,792-793.) Bias and prejudice will not be implied. (*Id.*)

Here, Appellant Martin's allegations of bias fall short of what is required to overcome the presumption of impartiality and integrity of the Hearing Officer. Appellant Martin's arguments that Hearing Officer Brown could not be impartial merely because she had prior knowledge of the regulations at issue and was previously a prosecutor, do not by themselves demonstrate bias. In fact, California courts have held that even in circumstances where hearing officers have actively participated in a fact-finding process or have advance knowledge of adjudicative facts that are in dispute, will not automatically disqualify them from being a proper hearing officer. (*See Howitt v. Superior Court, County of Imperial* (1992) 3 Cal.App.4th 1575, 1581; *see also State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 841, citing *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236.) Further, Appellant Martin's claim that the Hearing Officer improperly inserted her personal opinion that he lacked credibility is also without support. It is the hearing officer's province to weigh the credibility of witnesses in an administrative hearing. (*See Absmeier v. Simi Valley Unified School Dist.* (2011) 196 Cal.App.4th

311, 318.) Finally, Appellant Martin indirectly implies that the Hearing Officer improperly excluded evidence based on relevance, when she did not allow a witness to answer questions relating to how many times the county inspected residential properties. (*See* Appeal, pg. 1.) This claim is also without merit, as the Hearing Officer stated that she was not allowing the line of questioning on the basis that it was not relevant to whether or not Appellant Martin violated the pesticide laws and regulations at issue. Hearing officers are granted "wide latitude" to determine the manner in which a hearing will proceed, including making evidentiary rulings regarding relevancy. (*See Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 560-561, disapproved on another ground in *Mileikowsky v. West Hills Hosp. and Medical Center* (2009) 45 Cal.4th 1259.)

In sum, Appellant Martin fails to meet his burden to present concrete evidence demonstrating the Hearing Officer's actual bias, and as a result, the presumption that she is reasonable, impartial, and unbiased stands. Accordingly, the Director finds that Hearing Officer Brown was a proper Hearing Officer.

B. Substantial evidence in the record supports the Commissioner's Decision that Appellant Martin violated FAC section 12973 by using a pesticide in conflict with its labeling.

Although not addressed in his appeal, the Director has reviewed the whole record and finds that substantial evidence exists in the record to support the Commissioner's Decision that Appellant Martin violated FAC section 12973 by using a pesticide in conflict with its labeling. By law, before a pesticide or product represented to be a pesticide can be sold or delivered into or within California, the product's label must be registered with both the U.S. Environmental Protection Agency (U.S. EPA) and DPR. (Food & Agr. Code, § 12993.) The purpose of registering a pesticide is to allow the agency to review the product and its directions for use to ensure that it will be safe and effective for consumers and the environment when used according to its label. FAC section 12973 states, "The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide ..." The label for *Remuda* also states, "[i]t is a violation of Federal law to use this product in a manner inconsistent with its labeling. READ ENTIRE LABEL BEFORE USING THIS PRODUCT." Any person who uses a pesticide illegally can be fined or criminally prosecuted—even people using pesticides in their own homes or gardens. In short, the label is the law.

Further, although Appellant Martin was not the individual making the actual pesticide application, the record demonstrates that Appellant Martin hired and directed Mr. Romero to apply the herbicide *Remuda* to his property on March 16, 2016. (Mitani Testimony; T. Martin Testimony.) Under the doctrine of respondeat superior, Appellant Martin can be held responsible for the action or negligence of an individual he hired, if acting within the scope of his employment. (*See Yamaguchi v. Harnsmut* (2003) 106 Cal.App.4th 472, 481-482 [discussion of doctrine of respondeat superior].)

Here, Appellant Martin does not dispute the facts surrounding his alleged violation of FAC section 12973. The evidence presented at the hearing demonstrated that Appellant Martin hired Mr. Romero to apply *Remuda* on his property on March 16, 2016. (Mitani Testimony; T. Martin Testimony.) The record also shows that the product label for *Remuda* specifically required that applicators and other handlers must wear a long-sleeved shirt and long pants as personal protective equipment. (Ex. 3, pg. 3.) Mrs. Martin, who is the wife of Appellant Martin and co-owner of the property, further testified that on the date of the inspection, Mr. Romero was wearing short pants and a short sleeved shirt. (Testimony of T. Martin (T. Martin Testimony).) Accordingly, the Director finds that there is substantial evidence in the record to support the Commissioner's Decision that Appellant Martin violated FAC section 12973 by using a pesticide in conflict with its labeling and therefore affirms this charge.

C. Based on the specific facts of this case, it is unfair to hold a non-commercial, residential homeowner responsible for violating California Code of Regulations, Title 3, section 6602.

In his appeal, Appellant Martin does not dispute the fact that during the March 16, 2016 inspection, he was unable to locate a copy of the registered labeling for *Remuda.* Instead, he peripherally attacks the violation by arguing that it is unfair for the Commissioner to penalize a non-commercial, residential homeowner for failing to follow a pesticide regulation for which he has no knowledge even exists. (Audio Recording.) For the reasons that follow, the Director reverses the Commissioner's decision as to this violation.

The Director decides matters of law, including the interpretation and application of laws and regulations, using his independent judgment. Section 6602 specifically requires that, "A copy of the registered labeling that allows the manner in which the pesticide is being used shall be available at each use site." Here, the record shows that on March 16, 2016, Appellant Martin was using *Remuda* on his own property but was unable to locate a copy of the *Remuda* label at the time of the inspection. (Mitani Testimony; T. Martin Testimony.) The record further shows that Appellant Martin is not a commercial grower, does not have a business license or sell his grapes for economic gain, does not hold an agriculture-related license from the county or DPR, and only grows grapes on his property for his own personal use. (T. Martin Testimony.) While it is true that Appellant Martin was admittedly unaware of the regulation requiring a copy of the registered pesticide labeling of *Remuda* be available at the use site (T. Martin Testimony), he was likewise unaware that he could have simply pulled up a copy of the *Remuda* label from the registrant's Web site to show compliance. (*See* DPR Enforcement Letter dated May 19, 2006 (ENF 06-13), available at <http://www.cdpr.ca.gov/docs/county/cacltrs/penfltrs/penf2006/2006013.htm>.)

The Director finds that based on the specific facts of this case, although it is reasonable to hold a homeowner responsible for following the instructions and warnings on the label attached to the pesticide product when purchased, it is not reasonable or fair to hold a non-commercial, residential homeowner liable for violating a regulation that he does not know even exists, and could have likely complied with at the time of the inspection had he been aware of DPR's legal interpretation. Moreover, it appears that Appellant Martin cooperated during the inspection and this is his first violation of California's pesticide laws and regulations. Accordingly, the Director reverses the Commissioner's Decision as to this charge.

D. Appellant Martin's violation of FAC section 12973 was properly classified as a Class B violation and the fine was appropriate.

The Director finds that the Commissioner's Decision to classify Appellant Martin's violation of FAC section 12973 for failing to wear proper personal protective equipment as a Class B violation and levy a fine of $250, is appropriate. A Class B violation is defined as "a violation of a law or regulation that was intended to mitigate the risk of adverse health, property, or environmental effects..." (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(2).) Failing to wear the proper personal protective equipment required by the pesticide label could result in injury to the pesticide applicator or handler. This requirement is a prime example of a law that was intended to mitigate the risk of adverse health, property, or environmental effects. The fine range for a Class B violation is $250 to $1,000 depending on relevant facts, including the severity of actual or potential effects and the respondent's compliance history. Due to the fact that this appears to be Mr. Martin's first violation, the Commissioner's decision to set the fine at the lowest level of a Class B, was not excessive and was a reasonable exercise of the Commissioner's discretion.

Conclusion and Disposition

The Commissioner's decision that Appellant Martin violated California FAC section 12973, a Class B violation, and fine for $250, is AFFIRMED.

The Commissioner's decision that Appellant Martin violated Section 6602 of Title 3 of the California Code of Regulations, and fine of $250, is REVERSED.

The Commissioner shall notify Appellant Martin of how and when to pay the $250 fine.

Judicial Review

Under Food and Agricultural Code, section 12999.5, Appellant Martin may seek court review of the Director's decision within 30 days of the date of the decision. Appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION

Dated: OCT 24 2016

By: Brian Leahy
Brian Leahy, Director