

**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 Yuba
(County File No. 002-ACP-YUB-15/16)

Administrative Docket No. 207

DIRECTOR'S DECISION

Raj Kumar Sharma
P.O. Box 1107
Wheatland, CA 95692

Appellant/

Procedural Background

Under Food and Agricultural Code 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 must follow 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 and providing a hearing on September 12, 2016, the Yuba County Agricultural Commissioner (Commissioner) found that Appellant Raj Kumar Sharma (Appellant Sharma) violated California Code of Regulations, title 3, section 6734 by failing to assure that single use paper towels and soap were available to his employees as required. The Commissioner classified the violation as a Class B violation and levied a fine in the amount of \$250.

Appellant Sharma appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (Department). The Director has jurisdiction to review the appeal under Food and Agricultural Code 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 February 22, 2016, Yuba County Agricultural Inspector Steven Anderson (Inspector Anderson) conducted a pesticide use monitoring inspection at Site 1A on Appellant Sharma's property located in Yuba County. (Anderson Testimony; County Exhibit (Ex.) 2; Stipulations 1 and 3.) Upon his arrival, Inspector Anderson observed Appellant Sharma's employee, Mr. Raphael Santiago Orozco (Mr. Orozco), applying the pesticides *Vanguard WG* (Reg. No. 100-828-ZB) and *Vintre* (Reg. No. 72662-50004-AA). (Anderson Testimony; County Ex. 2; Stipulations 2 and 3.) During the inspection, Inspector Anderson asked Mr. Orozco if he had soap and paper towels. (Anderson Testimony; County Ex. 2.) Mr. Orozco responded, "No." (*Id.*) Inspector Anderson testified that although Mr. Orozco appeared to understand English fairly well, he asked Mr. Orozco numerous ways and times about the soap and paper towels to ensure that he understood his question. (Anderson Testimony.) Inspector Anderson testified that he asked Mr. Orozco in Spanish, "*¿Dónde está el jabón?*" [Translation: "Where is the soap?"], and Mr. Orozco replied in English, "No. I don't have soap." (*Id.*) Inspector Anderson further testified that he asked Mr. Orozco if he had soap and towels at his car located at the landing, and Mr. Orozco said that he did not. (*Id.*)

After the inspection on February 22, 2016, Inspector Anderson contacted Appellant Sharma to discuss the inspection and failure to have soap and single use towels available to his employees. (*Id.*) Appellant Sharma explained that he had problems with vandalism and theft in that area so he does not leave supplies at the mix/load site. (Sharma Testimony; Anderson Testimony.) Inspector Anderson then informed Appellant Sharma that he needed a good follow-up inspection to avoid a civil penalty on this issue. (Anderson Testimony.)

Seven days after the initial inspection, on February 29, 2016, Inspector Anderson conducted a follow-up pesticide use monitoring inspection at Site 1A on Appellant Sharma's property located in Yuba County. (Anderson Testimony; County Ex. 3.) Inspector Anderson observed another employee of Appellant Sharma, Mr. Jose Alcaraz (Mr. Alcaraz), applying the pesticides *Pristine Fungicide* (Reg. No. 7969-199-AA) and *Vintre* (Reg. No. 72662-50004-AA). (Anderson Testimony; County Ex. 2; Stipulations 2 and 3.) During the inspection, Inspector Anderson asked Mr. Alcaraz in Spanish, "*¿Dónde está el jabón?*" [Translation: "Where is the soap?"], and Mr. Alcaraz responded, "No. No está aquí." [Translation: No. It's not here.]

(Anderson Testimony; Hearing Officer's Proposed Decision, p. 3.) Inspector Anderson further testified that he asked Mr. Alcaraz about the soap and paper towels by making motions with his hands, and Mr. Alcaraz shook his head in the negative. (*Id.*) Inspector Anderson then followed Mr. Alcaraz back to his car to look for soap and paper towels and could not find it there. (*Id.*)

On April 4, 2016, the Commissioner issued a Notice of Proposed Action charging Appellant Sharma with violating California Code of Regulations, title 3, section 6734. (County Ex. 1.) Appellant Sharma requested a hearing on April 28, 2016. (Stipulation 5.) The Commissioner granted Appellant Sharma's request and on September 12, 2016, Hearing Officer Donald O. Cripe held a hearing on the matter in Marysville, in Yuba County, California. (*See* Stipulation 5 and Notice of Decision, Order and Right of Appeal for Appellant Sharma.)

Relevant Laws and Regulations

California Code of Regulations, title 3, section 6734 states in relevant part:

Handler Decontamination Facilities

- (a) The employer shall assure that sufficient water, soap and single use towels for routine washing of hands and face and for emergency eye flushing and washing of the entire body are available for employees as specified in this section.

When levying fines, the Commissioner must follow the fine guidelines set forth 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 law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as Class A." (Cal. Code Regs., tit. 3, § 6130, subd. (b)(2).) The fine range for a Class B violation is \$250 to \$1,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(2).)

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 of Regs., tit. 3, § 6130, subd. (d).)

Appellant's Contentions on Appeal

Appellant Sharma makes a number of arguments on appeal:

1. Appellant Sharma contends that because the County Inspector did not identify himself and had no clear identifying decals on his vehicle, his employees did not appropriately respond to the Inspector's questions. (*See* Notice of Appeal, dated November 28, 2016 (Notice of Appeal).)

2. Appellant Sharma contends that the County Inspector overstepped his bounds and illegally searched his Hispanic workers' personal vehicle. (*Id.*)
3. Appellant Sharma contends that soap and single use towels were indeed available to his employees in a bathroom chained to a tree at the work site, as required. (*Id.*; *see also* Written Argument in Support of Appeal, dated December 26, 2016 (Written Argument).)
4. Appellant Sharma contends that the Caucasian Hearing Officer improperly believed the testimony of the Caucasian inspector over his Hispanic workers. (*Id.*)
5. Appellant Sharma contends that there was a language barrier between the County Inspector and his employees that negatively impacted the outcome of the inspections on February 22 and February 29, 2016. (*See* Written Argument.)

The Hearing Officer's Proposed Decision

At the hearing, the County and Appellant Sharma had the opportunity to present oral and documentary evidence. The Hearing Officer determined that the County presented sufficient evidence to show that on February 22 and 29, 2016, Appellant Sharma violated California Code of Regulations, title 3, section 6734 by failing to have soap and single use towels available for his employees. (Hearing Officer's Proposed Decision, p. 5.)

The parties presented conflicting testimony at the hearing regarding whether or not there was soap and single use towels available to Appellant Sharma's employees and whether or not Appellant Sharma's employees adequately understood Inspector Anderson's questions due to a potential language barrier at the time of the inspection. (Audio Recording of Hearing.) The Hearing Officer found Inspector Anderson's testimony to be consistent, persuasive, and supported by official documents. (Hearing Officer's Proposed Decision, p. 5.) In contrast, the Hearing Officer found that the evidence presented by Appellant Sharma was inconsistent or contradictory at times. (*Id.* at p. 6.)

Based on the evidence presented, the Hearing Officer upheld the violation and found that the Commissioner's proposed fine of \$250 was appropriate and properly classified within the Class B category. On November 26, 2016, the Commissioner adopted the Hearing Officer's decision in its entirety. (*See* Notice of Decision, Order and Right of Appeal.)

The Director's Analysis

- A. Substantial evidence supports the Commissioner's decision that Appellant Sharma failed to have soap and single use towels available for his employees, as required by California Code of Regulations, title 3, section 6734.

Appellant Sharma puts forth a litany of arguments in support of his appeal. After reviewing the evidence and testimony presented, the Director finds that there is substantial evidence in the record to support the Commissioner's decision that Appellant Sharma violated California Code of Regulations, title 3, section 6734¹ by failing to have soap or single use towels available for his employees during either the February 22, 2016 or February 29, 2016 inspection.

Section 6734 requires that an employer assure that pesticide handler decontamination facilities are available to their employees. Specifically, section 6734 requires that "sufficient water, soap and single use towels for routine washing of hands and face and for emergency eye flushing and washing of the entire body are available for employees as specified in this section." (Cal. Code of Regs., tit. 3, § 6734(a).)

The Commissioner presented substantial evidence to support his decision that Appellant Sharma violated section 6734. At the hearing, the County presented evidence that Inspector Anderson conducted two separate inspections at Appellant Sharma's property on February 22 and 29, 2016, and both inspections revealed that soap and single use towels were not available to Appellant Sharma's employees. (Anderson Testimony; County Exs. 2-3.) Inspector Anderson testified that during both inspections, he asked in English and Spanish and even used physical motions on February 29 to mimic hand washing, to ask "Where is the soap?" and each time, Appellant Sharma's employees responded that they did not have soap or single use towels and further did not show Inspector Anderson the location of soap or single use towels. (Anderson Testimony.) Inspector Anderson testified that on February 22, 2016 Mr. Orozco appeared to understand English fairly well. (*Id.*) Inspector Anderson further testified that although communicating with Mr. Alcaraz during the second inspection on February 29, 2016 was more difficult, he felt that Mr. Alcaraz understood his questions and was able to communicate well enough with Mr. Alcaraz to obtain application rates and other relevant information in order to complete the inspection. (*Id.*; County Ex. 3.) Although not physically present at either inspection, Appellant's witness and foreman, Sergio Campos, confirmed in his testimony that if Inspector Anderson asked Mr. Alcaraz in Spanish, "Where is the soap?" Mr. Alcaraz would have understood and known what that meant. (Campos Testimony.)

¹ Unless otherwise specified, all subsequent section references shall be to Title 3 of the California Code of Regulations.

Based on the evidence presented, the Director finds that there is substantial evidence to support the Commissioner's Decision that Appellant Sharma violated section 6734. Accordingly, the Director affirms the Commissioner's Decision.

B. Appellant Sharma's other arguments on appeal are without merit.

1. The record is devoid of evidence that the Hearing Officer made improper credibility determinations based on racial bias.

On appeal to the Director, Appellant Sharma specifically alleges that the "Caucasian hearing officer choose [sic] to believe the credibility of the Caucasian inspector over the Hispanic workers." (See Notice of Appeal, No. 3; Written Argument at p. 2.) This argument is two-pronged. First, by including the race of the hearing officer, inspector, and workers in his grounds for appeal, Appellant Sharma is arguably alleging that the Hearing Officer was racially biased against his witnesses solely because they were of Hispanic descent. (*Id.*) Secondly, Appellant Sharma is arguing that the Hearing Officer made an improper credibility determination. (*Id.*) As a preliminary matter, Appellant Sharma has waived his right to argue bias on appeal. Notwithstanding Appellant Sharma's waiver of this issue, both arguments are unsupported by the record.

a. Appellant Sharma waived his right to argue that the Hearing Officer was racially biased against him.

In accordance with the California Food and Agricultural Code, "the director shall decide the appeal *on the record of the hearing...*" (Food & Agr. Code § 12999.5, subd. (d)(5) (emphasis added).) Generally, the issue of bias must be raised at the administrative hearing. (See *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549.) A party must allege concrete facts that demonstrate that the decision-maker is biased or prejudiced. (See *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781,792-793.) Failure to raise the issue of bias at the administrative hearing may prevent the claim from being raised later. (*Southern Cal. Underground Contractors, Inc., supra*, at p. 549.) Here, Appellant Sharma failed to raise, address, or present any argument or point to any concrete facts from the administrative hearing demonstrating that the Hearing Officer was improperly biased—racial or otherwise—against him. Accordingly, Appellant Sharma has waived his right to present this argument on appeal.

b. There is no evidence in the record to support Appellant Sharma's claim that the Hearing Officer was racially biased against him.

Notwithstanding Appellant Sharma's waiver of this issue, there is no evidence in the record to support Appellant Sharma's contention that Hearing Officer Cripe was racially biased

against him or his witnesses. It is well-established under California law that Appellant Sharma 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.) However, 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, supra*, at pp. 792-793.) Bias and prejudice will not be implied. (*Id.*)

Here, Appellant Sharma's bald assertion of racial bias, without concrete facts demonstrating actual racial bias or a probability of racial bias, falls far short of what is required to overcome the presumption of impartiality and integrity of the Hearing Officer. Appellant Sharma fails to point to a single concrete fact supporting his claim and the record is devoid of evidence demonstrating even the appearance of bias. Accordingly, the Director finds that there is no evidence indicating that Hearing Officer Cripe was anything other than an impartial and unbiased Hearing Officer.

- c. The record demonstrates that the Hearing Officer based his credibility determination on the evidence presented at the hearing.

Finally, it is well-established that it is the administrative hearing officer's province to weigh the credibility of witnesses in an administrative hearing because of his or her opportunity to observe the witnesses and weigh their testimony in light of their demeanor. (*See Absmeier v. Simi Valley Unified School Dist.* (2011) 196 Cal.App.4th 311, 318.) This is because, "credibility determinations require a personal presence that a cold transcript cannot convey." (*Id.*, citing *Abbott v. Mandiola* (1999) 70 Cal.App.4th 676, 683.)

In his Proposed Decision, the Hearing Officer found that Appellant Sharma's evidence and witness testimony were inconsistent or contradictory at times, and pointed to specific examples that weighed on his credibility determination. (*See* Hearing Officer's Proposed Decision, p. 6.) For example, the Hearing Officer found Sergio Campos's testimony to be inconsistent. First, Mr. Campos initially testified that Inspector Anderson did not speak with Jose Alcaraz on February 29, 2016, but only spoke with the pruner on site. (Campos Testimony; Hearing Officer's Proposed Decision, p. 6.) However, when cross-examined about Mr. Alcaraz's signature on the bottom of the Inspection Report, Mr. Campos then testified that Mr. Alcaraz must have spoken to the Inspector after he finished spraying. (*Id.*) Mr. Alcaraz's subsequent testimony confirmed that he indeed spoke with Inspector Anderson. (Alcaraz Testimony; Hearing Officer's Proposed Decision, p. 6.) Secondly, both Appellant Sharma and Mr. Campos testified that neither Mr. Orozco or Mr. Alcaraz were capable of understanding the Inspector's questions in English and therefore did not show Inspector Anderson where the soap and single use towels were located. (Sharma Testimony; Campos Testimony.) However, Mr. Orozco testified, "I showed [the Inspector] everything. It was all there." (Orozco Testimony; Hearing

Officer's Proposed Decision, p. 6.) Next, in his closing statement, Appellant Sharma specifically stated that his employees testified that Inspector Anderson failed to identify himself. (Audio Recording of Hearing.) However, the Hearing Officer pointed out that there was no such testimony in the record. (Audio Recording of Hearing; Hearing Officer's Proposed Decision, p. 6.) Finally, the Hearing Officer found that Appellant Sharma's argument that Inspector Anderson knew of bathrooms being at his property in prior years to be unpersuasive. (Audio Recording of Hearing; Hearing Officer's Proposed Decision, p. 6.) In the Hearing Officer's words, "This shows Inspector Anderson would recognize these bathrooms if he saw them. [Inspector Anderson] testified he did not see them." (*Id.*)

In sum, it is the hearing officer's province to weigh the credibility of witnesses in an administrative hearing. The Hearing Officer provided specific reasons in his written decision supporting his credibility determination. Accordingly, the Director will not disturb the Hearing Officer's findings of credibility.

2. Appellant Sharma's contention that the County Inspector's alleged failure to identify himself to his employees negatively impacted their response to his questions, is without evidentiary support.

In his Notice of Appeal, dated November 28, 2016, Appellant Sharma states that, "The County Inspector did not identify himself to the Employees and had no clear identifying decals on his vehicle. The workers have been harassed before in this location and did not respond proper[ly] due to lack of identification." (*See* Notice of Appeal, No. 1.) At the hearing, Appellant Sharma raised this argument for the very first time in his closing statement. (Audio Recording of Hearing.) Appellant Sharma failed to present any evidence on this issue during the hearing. (*Id.*) Accordingly, the Director finds that this particular argument is without evidentiary support.

3. Appellant Sharma's claim that the County Inspector illegally searched his employees' personal vehicle is waived and irrelevant to this appeal.

For the first time in his Notice of Appeal, dated November 28, 2016, Appellant Sharma alleges that "The County Inspector overstepped his bounds and illegally searched the Hispanic workers personal vehicle." (*See* Notice of Appeal, No. 4.) Not only did the alleged "illegal search" yield any evidence, but this criminal law concept is wholly irrelevant to the issues in this appeal. Moreover, Appellant Sharma failed to raise, address, or present any evidence relating to this claim at the administrative hearing and therefore waived his right to argue it on appeal.

4. The Director cannot consider new evidence presented on appeal.

In both his November 28, 2016 Notice of Appeal and December 28, 2016 Written Argument, Appellant Sharma includes pictures of the bathroom facilities that he states are permanently affixed to a tree on his property that is "chained up about 50 yards away from the mix load site." (See Written Argument.) In accordance with the California Food and Agricultural Code, "the director shall *decide the appeal on the record of the hearing...*" (Food & Agr. Code § 12999.5, subd. (d)(5) (emphasis added).) In other words, on appeal, the Director can only consider evidence presented at the administrative hearing below. Appellant Sharma did not present these pictures or the specific location of the pictured bathroom he states was located on Site 1A at the county administrative hearing below. Accordingly, the Director cannot consider Appellant Sharma's newly presented evidence on appeal.

C. The Commissioner's decision to classify the violation as a Class B violation and fine Appellant Sharma \$250 was appropriate.

When levying fines, the Commissioner must follow the fine guidelines contained in section 6130. A Class B violation is a violation of law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as Class A. (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(2).) Ensuring that employees who handle pesticides have decontamination facilities available to them is a regulation that mitigates the risk of adverse health effects. The fine range for a Class B violation is \$250 to \$1,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(2).) The Commissioner fined Appellant Sharma \$250, at the lowest end of the fine range because this was Appellant Sharma's first violation in Yuba County. (See County Ex. 1.) The Director finds that the violation was appropriately charged as a Class B violation and that the \$250 fine levied was not excessive, and was a reasonable exercise of the Commissioner's discretion.

Conclusion

The Commissioner's decision that Appellant Sharma violated California Code of Regulations, title 3, section 6734 and that the violation qualified as a Class B violation is affirmed. The fine of \$250 is upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify Appellant Sharma of how and when to pay the \$250 fine.

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Judicial Review

Under Food and Agricultural Code, section 12999.5, Appellant Sharma 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: FEB 01 2017

By: 
Brian Leahy, Director