

**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 Santa Barbara
(County File No. 024-ACP-SB-00/01)

Administrative Docket No.104

DECISION

**GREEN VALLEY FARMS
P.O. Box 646
Santa Maria, California 93456**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Santa Barbara County Agricultural Commissioner found that the appellant, Green Valley Farms (GVF), violated FAC section 12973. The commissioner imposed a penalty of \$151 for the violation.

GVF appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in 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 them on the record before the Hearing Officer. In reviewing the record, 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 findings and decision, the Director affirms the decision.

Appellant's Contentions Regarding the Hearing Officer

The Appellant contended that the Hearing Officer was biased against GVF due to her position as Deputy Agricultural Commissioner for Ventura County. The Appellant contended that since the Hearing Officer is an employee of the [Santa Barbara] Agricultural Commissioner, this relationship created an inherent bias in favor of the commissioner.

Under California law, it is a well-settled principle that due process in the case of an administrative hearing requires only a reasonably impartial, noninvolved reviewer, McIntyre v. Santa Barbara County Employees' Retirement System, 91 Cal.App. 4th 730 (2001); Linney v. Turpin, 42 Cal.App. 4th 763 (1996). Also, the mere fact that the decisionmaker or his/her staff is a more active participant in the fact-finding process will not render the administrative procedure unconstitutional, Howitt v. Superior Court, County of Imperial, 3 Cal.App. 4th 1575 (1992).

The Appellant's argument is based, in part, on its assertion that there was an inherent bias in the "structure, location, and manner [sic]" of the hearing. After the county granted the Appellant four date changes for the hearing, the hearing for this administrative civil penalty action was held on June 27, 2001, at the Santa Barbara County Agricultural Commissioner's office in Santa Maria. In 1998 (Case No. 023-SB-ACP-97/98), the Santa Barbara County Agricultural Commissioner proposed a civil penalty against GVF of \$1,812. GVF requested and received a hearing in that matter. That hearing, on July 31, 1998, was also held at the Santa Barbara County Agricultural Commissioner's office in Santa Maria. The Hearing Officer's decision, which the Santa Barbara County Agricultural Commissioner adopted as his own decision, dismissed the 1998 case. According to the commissioner's office, the "structure, location, and manner" of both hearings were exactly the same, and, in regard to the hearing in 1998, GVF did not assert bias of the Hearing Officer although that Hearing Officer was the Chief Deputy Sealer of Weights and Measures from San Luis Obispo County.

In the case at hand, the Hearing Officer was not part of the investigatory process. Also, she is an employee of the agricultural commissioner in another county, Ventura County, not Santa Barbara County. These facts show that the Hearing Officer was a reasonably impartial decisionmaker.

The burden is on the Appellant to produce facts to show that the Hearing Officer was actually biased against it. The Appellant did not meet that burden. Due process requirements in regard to this hearing were not offended.

Appellant's Other Allegations

- The Appellant alleged that “the Agricultural Commissioners [sic] primary evidence of the alleged incident was modified after the fact and under CCP ‘Rules of Evidence’ should be considered hearsay and inadmissible.” The Appellant did not specify which evidence was supposedly modified. The Appellant may have been referring to a sample analysis sheet on which an incorrect sampling date was changed to the correct date. The date change was fully explained at the hearing, and such a change would not make the sample analysis sheet inadmissible. The Appellant did not cite any particular section of the CCP to support its allegation that hearsay evidence is inadmissible in this type of administrative hearing, and this allegation is without merit.
- The Appellant alleged that “the samples reportedly take [sic] at the field site were not identified and were mixed with other samples taken elsewhere.” The Appellant did not provide any evidence to support this allegation, and it is without merit.
- The Appellant alleged that “there is no other logical reason other than sampling error to explain the gross difference between the field inspectors [sic] test sample result and the test sample results as measured by Primus Laboratories, a fully licensed and accredited agricultural chemical testing organization.” Appellant offered no evidence to support its allegation of “sampling error.” Also, it is not clear whether the Appellant is alleging sampling error by the county inspectors or by Primus staff who took the samples tested by Primus Laboratories. The laboratory test results for the samples, taken and tested by Primus Laboratories, do not refute the laboratory test results of the tank mix and the broccoli samples tested by the California Department of Food and Agriculture laboratory. The Appellant also alleged that “the county employee that took the samples . . . did not record the tractor number from which the reported sample was taken and could not identify the tractor from the photographs submitted by GVF as evidence at the hearing.” Not being able to identify a particular tractor from a photograph and not recording the tractor number does not show “sampling error” by the county.
- The Appellant complained that “both county employees, Debra Trupe and Mike Champion, testified for the record that they individually, and the county, had singled out GVF as a malicious offender of chemical application protocols and this fact alone had caused for excessive amounts of time being spent by county employees in monitoring GVF in an attempt to catch GVF undertaking “suspicious activities.” Both Debra Trupe and Mike Champion testified that the county had targeted GVF for surveillance due to the fact that it suspected that oxyfluorfen was being used as a growth enhancer on broccoli in conflict with the registered labeling.

During the hearing, the Appellant asked that its compliance history be admitted into the record to refute the county testimony that the county had a legitimate obligation to target those growers who had a past history of violations. The county offered to provide the compliance history, but the Appellant decided it did not want the evidence introduced into the record. The Hearing Officer found that the Appellant did not provide credible evidence to establish that GVF did not have a history of violating the FAC or that the county was treating GVF unfairly.

Investigating suspected violations of the FAC and its corresponding regulations is a good enforcement practice. It enables the Santa Barbara County Agricultural Commissioner's office to coordinate its pesticide enforcement program, and best utilize its limited resources.

- The Appellant alleged that “as has been extensively proved by scientific studies, including the Marcroff study, oxyfluorfen leaves a perpetual residue in tanks and its attachments where this chemical has once been used. The equipment inquestion [sic] had been used the prior year for oxyfluorfen applications.” The Appellant did not submit copies of any study for the Hearing Officer's consideration, and the Hearing Officer found the Appellant's testimony in this regard not to be credible. Witness credibility is the province of the Hearing Officer.
- The Appellant disputed “the authority of the Ag [sic] Commissioners [sic] Office to validly issue a citation two months after the alleged fact.” FAC section 13000 provides that a commissioner must bring this type of civil penalty action within two years of the occurrence of the violation. The Santa Barbara County Agricultural Commissioner issued the Notice of Proposed Action on December 7, 2000, well within the two-year time period allowed by law.

FAC Section 12973

FAC section 12973 provides, in relevant part, that the use of any pesticide shall not conflict with the registered labeling that is delivered with the pesticide.

The Appellant was charged with violating FAC section 12973 for applying Goal 2XL to broccoli. The label for Goal 2XL states, “Do not apply Goal 2XL herbicide post-transplant or postemergence (over the top) to broccoli, cabbage or cauliflower.” The active ingredient in Goal 2XL is oxyfluorfen.

There is information in the record that on the night of October 6, 2000, Santa Barbara County Agricultural Inspector Mike Champion took a sample of tank mix from the Appellant's Ranch 2 site 02000401. On October 9, 2000, Inspector Champion took a sample of broccoli from a field on Ranch 2 site 02000401.

The record indicates that the California Department of Food and Agriculture Laboratory analyses of the tank mix sample and the broccoli sample taken by Inspector Champion tested positive for the presence of oxyfluorfen. The tank mix sample, taken on October 6, 2000, showed 99 parts per million (ppm) of oxyfluorfen, which is the active ingredient in Goal 2XL. The sample of broccoli, taken on October 9, 2000, showed 2.9 ppm of oxyfluorfen. The sample of broccoli was taken from the same location as was the tank mix sample.

A reasonable inference from the information in the record is that the Appellant applied Goal 2XL to broccoli in conflict with the directions on the registered pesticide label.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence, and there is no cause to reverse or modify the decision.

Disposition

The Appellant's request for a new hearing and oral argument is denied. The commissioner's decision is affirmed.

The commissioner shall notify the appellant how and when to pay the \$151 penalty for its violation of FAC section 12973.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION

By: _____
Paul E. Helliker
Director

Dated: _____