

**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 Ventura
(County File No. ACP-VEN-21/22-006)

Docket No. 227

**So-Cal Pest Control, Inc.
1363 Donlon Street, #4
Ventura, California 93003**

Appellant/

Procedural Background

Under California Food and Agricultural Code (FAC) section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for violations of California's pesticide laws and regulations. When levying fines, the Commissioner must follow fine guidelines established in California Code of Regulations (CCR), 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 February 23, 2022, the Ventura County Agricultural Commissioner (Commissioner or County) found So-Cal Pest Control, Inc. (Appellant) violated 3 CCR section 6141. The Commissioner classified the violation as Class A in accordance with 3 CCR section 6130. The Commissioner levied a \$1,000 fine for the violation.

So-Cal Pest Control appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (Director). The Director has jurisdiction to review the appeal under FAC section 12999.5.

Standard of Review

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

Appellant So-Cal Pest Control, Inc. is a licensed pest control business that operates in Ventura County, California. (County Exhibit (Ex.) F.) Sean Spiteri owns and operates Appellant So-Cal Pest Control, Inc. (*Id.* and Stipulated Fact No. 1 in Hearing Officer's Decision.) Mr. Spiteri has an Operator's License for So-Cal Pest Control, Inc. (OPR 10329) and a Structural Pest Control License (number 3796). (County Ex. E.)

On April 10, 2020, Appellant's employee made an application of the insecticide Bifen I/T (EPA Reg. No. 53883-118, active ingredient bifenthrin) around a client's house located in Ventura, California. (County Ex. E.) At 2:15 p.m. on the same day as Appellant's application, the County received a phone call complaint from a resident in the area who said that the pesticide application was being made while it was "drizzling," which they believed to be a violation of the law. (*Id.*) The County opened an investigation of the incident. (*Id.*) Bifen I/T's label states that "applying this product in calm weather, when rain is not predicted for the next 24 hours will help to ensure that wind or rain does not blow or wash pesticide off the treatment area." (*Id.*) California pesticide regulations also prohibit applications of products containing bifenthrin to any site (except to the underside of eaves) during precipitation. (Cal. Code of Regs., tit. 3, § 6970.) At 2:54 p.m. on the same day, Melonie Morgan, an investigator from the County, arrived at the application site. (*Id.*) Appellant's employee applicator was no longer present when Ms. Morgan arrived. (*Id.*)

On April 13, 2020, Ms. Morgan called Mr. Spiteri, the owner and operator of So-Cal Pest Control, Inc. (*Id.*) Ms. Morgan explained to Mr. Spiteri that the County had opened an investigation into its pesticide application on April 10, 2020, due to a complaint the County received from a resident. (*Id.*) On June 9, 2020, at 10:24 a.m., Ms. Morgan sent an email to Mr. Spiteri requesting the contact information for the applicator who performed the pesticide application on April 10, 2020, stating, "Could I get the name and contact information for the applicator that applied the Bifen I/T at [application site] on 10 April 2020 so I can interview him?" (*Id.*) At 10:38 a.m. on the same day, Mr. Spiteri sent an email response to Ms. Morgan alleging that the county was harassing him and failed to provide contact information for his employee, as requested. (*Id.*) At 11:30 a.m. on the same day, Ms. Morgan sent another email to Mr. Spiteri explaining that interviewing all people who were present during the application is the usual protocol for county pesticide investigations, and again requested contact information for his employee: "The Department of Pesticide Regulation advises us, that during investigations, all people that were present during the application are to be interviewed. The applicator that day was one of three people that were there at the time of the application that could give account of what transpired. I am requesting his contact information because his interview would make the investigation more complete." (*Id.*) Mr. Spiteri responded to Ms. Morgan's email at 11:42 a.m. on the same day, again refusing to provide contact information for his employee, stating, "Unless there is a violation for not complying to a personal interview we reject the request. We ask that

you prove something was done wrong from [sic] our applicator based on what information has already been provided.” (*Id.*)

On February 12, 2021, the County issued a Notice of Proposed Action (NOPA) (ACP-VEN-20/21-112) to Appellant that its April 10, 2020, application of Bifen I/T violated FAC section 12973, 3 CCR section 6970(e)(1), and Business and Professions Code section 8538(a)(1). (*See* Written Argument in Support of Appeal¹ (Written Argument).) On May 19, 2021, the County informed Mr. Spiteri that it was rescinding the February 12, 2021, NOPA. (*Id.*)

On August 27, 2021, the County issued a second NOPA (ACP-VEN-21/22-006) to Appellant. (County Ex. C.) The NOPA charged Appellant with violating 3 CCR section 6141 by refusing to allow the County to interview Appellant’s applicator employee as part of the County’s investigation into the pesticide application that occurred on April 10, 2020. (*Id.*) The County classified the violation as a Class A violation due to the aggravating circumstances of Appellant’s compliance history and Appellant’s failure to cooperate in the investigation of the incident and proposed a fine of \$1,000. (*Id.*) Appellant requested a hearing. (County Ex. A.) On February 23, 2022, the hearing was held in Camarillo, California before Hearing Officer Susan Johnson (Hearing Officer). (*See* Proposed Decision of Hearing Officer in File No. ACP-VEN-21/22-006, dated March 18, 2022 (Hearing Officer’s Decision).)

Relevant California Laws and Regulations

3 CCR section 6141 states, “The director or commissioner may confidentially interview any employee during work hours when reasonably necessary for an investigation of employee illness(es) suspected of having been caused by a pesticide or to investigate a suspected pesticide related safety violation.”

California Government Code section 11425.30 (Presiding officer; disqualification) states the following:

- (a) A person may not serve as presiding officer in an adjudicative proceeding in any of the following circumstances:
 - (1) The person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.
 - (2) The person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.

When levying fines, the Commissioner must follow the fine guidelines set forth in 3 CCR section 6130. Under section 6130, violations shall be designated as a Class A, Class B, or Class C. A Class A violation is “[a] violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the commissioner determines that one of the following aggravating circumstances support elevation to Class A. 1. The respondent has a

¹ Appellant submitted two separate letters to assert its arguments on appeal. The letters are dated April 11, 2022, and May 17, 2022. The letters are referred to collectively as “Written Argument.”

history of violations; 2. The respondent failed to cooperate in the investigation of the incident or allow a lawful inspection; or, 3. The respondent demonstrated a disregard for specific hazards of the pesticide used.” (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1).) The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(1).)

The Commissioner shall use relevant facts, including severity of actual or potential effects and 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, subd. (d).)

The Hearing Officer’s Proposed Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Appellant had the opportunity to present evidence and question witnesses. The Hearing Officer found Appellant violated 3 CCR section 6141 by refusing to allow the County to interview Appellant’s employee who made the pesticide application on April 10, 2020, which was under investigation. Appellant argued at the hearing that the County failed to advise him that it was violation of regulation to refuse to allow the County to interview his employee because it interfered with the investigation. (Testimony of Sean Spiteri (Spiteri Testimony).) The Hearing Officer found that “[c]redible testimony was presented that Sean Spiteri refused to allow Inspector Melonie Morgan to interview his employee regarding an application of Bifen” on April 10, 2020, as part of the County’s investigation into the incident. (See Hearing Officer’s Proposed Decision, p. 3.)

The Hearing Officer found Appellant violated 3 CCR section 6141 and the Commissioner’s proposed fine of \$1,000 was appropriate and properly classified within the Class A category based on Appellant’s refusal to cooperate in the investigation of the incident. On April 1, 2022, the Commissioner adopted the Hearing Officer’s proposed decision in its entirety. (See Notice of Decision, Order and Right of Appeal.)

Appellant’s Allegations

On appeal, Appellant argues the Commissioner’s decision to fine it \$1,000 for violating 3 CCR section 6141 was incorrect for two reasons. (See Written Argument.) First, Appellant asks that the Director “please determine whether [DPR] believe[s] I was given correct information from the [County] my regulatory enforcement department and advisor to make an aware decision to comply with my pest control laws and regulations or not.” (*Id.*) Appellant argues that he was “misinformed and misguided” by the County because the County did not notify Appellant that it was a violation of law if he refused to allow the County to interview his employee, “even after Appellant asked if it was a citable violation.” (*Id.*) Second, Appellant argues for the first time on appeal that the Hearing Officer had a conflict of interest because she worked for the Ventura County Agricultural Commissioner’s Office and supervised Deputy Agricultural Commissioner Calderwood for many years. (*Id.*) It was Appellant’s understanding that the Hearing Officer would be a retired commissioner from another county to prevent any

conflict of interest. (*Id.*) As a result, Appellant asserts the Director should reverse the Commissioner's decision that Appellant violated 3 CCR section 6141.

The Director's Analysis

- A. There is substantial evidence in the record to support the Commissioner's decision that Appellant violated 3 CCR section 6141 when Mr. Spiteri denied the County the opportunity to interview his company's employee as part of the County's investigation of a suspected pesticide related safety violation.**

Appellant violated 3 CCR section 6141 when Mr. Spiteri denied the County the opportunity to interview his company's employee as part of the County's investigation into the April 10, 2020, Bifen I/T application. On appeal, Mr. Spiteri does not deny that his company denied the County the opportunity to interview its employee who made the application under investigation. (*See* Written Argument; *see also* Spiteri Testimony.) Instead, Appellant argues it did not intend to violate 3 CCR section 6141 and was misled by the County because the County did not notify Appellant that it was a violation of law to refuse to allow the County to interview his employee. (Written Argument.)

- 1. The County was investigating whether Appellant violated pesticide related safety regulations when the County requested Appellant's employee contact information.**

There is substantial evidence in the record to support the Commissioner's decision that Appellant violated 3 CCR section 6141 because Appellant denied the County an opportunity to interview its employee as part of the County's investigation of a suspected pesticide safety violation. Section 6141 states in relevant part, the County "may confidentially interview any employee during work hours when reasonably necessary...to investigate a suspected pesticide related safety violation." (Cal. Code Regs., tit. 3, § 6141.)

Here, it is undisputed that the County was investigating whether Appellant's application of Bifen I/T on April 10, 2020, violated California pesticide laws and regulations, specifically FAC section 12973 (use in conflict with the label) and 3 CCR 6970 (surface water protection). The County initiated its investigation because it received a complaint from a Ventura resident that Appellant was making a pesticide application during a precipitation event, which the complainant believed to be a violation of the law. (*Id.*) It was reasonably necessary and normal investigation protocol for the County to interview all people that were present during the application, including the applicator who applied the pesticide. Appellant's employee applicator was present at the time of the application and could give account of what happened, including the weather conditions. Therefore, it was reasonable that the County requested to interview Appellant's employee.

- 2. Appellant denied the County the opportunity to confidentially interview his company's employee who made the application of Bifen I/T.**

There is substantial evidence in the record, and it is undisputed, that Appellant denied the County the opportunity to interview its employee as part of the County's investigation into the incident. Ms. Morgan requested the employee's contact information twice from the Appellant, but each time, Appellant refused to provide the employee's contact information to Ms. Morgan. On June 9, 2020, Ms. Morgan sent an email to Mr. Spiteri stating, "Could I get the name and contact information for the applicator that applied the Bifen I/T at [application site] on 10 April 2020 so I can interview him?" (County Ex. E.) On the same day, Mr. Spiteri sent an email response to Ms. Morgan alleging that the county was harassing him and failed to provide the contact information for his employee that Ms. Morgan requested. (*Id.*) In response, Ms. Morgan sent an email to Mr. Spiteri that requested the employee's contact information for a second time: "The applicator that day was one of three people that were there at the time of the application that could give account of what transpired. I am requesting his contact information because his interview would make the investigation more complete." (*Id.*) In response, Mr. Spiteri sent an email to Ms. Morgan that refused to provide the contact information, stating, "Unless there is a violation for not complying to a personal interview we reject the request. We ask that you prove something was done wrong from [sic] our applicator based on what information has already been provided." (*Id.*)

Ms. Morgan requested the employee's contact information in writing on two separate occasions. Mr. Spiteri never provided the employee's contact information to Ms. Morgan. Therefore, there is substantial evidence in the record to support the Commissioner's decision that Appellant violated 3 CCR section 6141 when it denied the County the opportunity to interview its employee for the County's investigation of a suspected pesticide related safety violation.

3. The County was not required to notify Appellant that denying the County the opportunity to interview its employee was a violation of 3 CCR section 6141.

On appeal, Appellant argues that it did not intend to violate 3 CCR section 6141 and was misled by the County because the County did not notify Appellant that it was a violation of law if it refused to allow the County to interview its employee. (*See Written Argument.*) 3 CCR section 6141 states that the County "may confidentially interview any employee during work hours when reasonably necessary...to investigate a suspected pesticide related safety violation." (Cal. Code Regs., tit. 3, § 6141.) 3 CCR section 6141 does not require that the County notify the employer that it may interview employees as part of an investigation. Further, Mr. Spiteri has an Operator's License for So-Cal Pest Control, Inc. (OPR 10329) and a Structural Pest Control License (number 3796) and is responsible for knowing and following all the laws and regulations regarding pesticide use that pertains to the company's activities. (County Ex. E.) The County was not required to notify Appellant of all potential violations prior to issuing a notice of violation.

B. The Hearing Officer did not have a conflict of interest and was not biased.

There is a lack of evidence in the record to support Appellant's argument that the Hearing Officer had a conflict of interest or was biased. Appellant argues for the first time on appeal that

the Hearing Officer had a conflict of interest because she worked for the Ventura County Agricultural Commissioner's Office and supervised Deputy Agricultural Commissioner Calderwood for many years. (*See* Written Argument.) Appellant stated that it was his understanding that the Hearing Officer would be a retired commissioner from another county to prevent any conflict of interest. (*Id.*) Under the law, a person may not serve as a presiding officer if "[t]he person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage," or "[t]he person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage." (Cal. Gov. Code §11425.30.) However, there is no legal requirement that a Hearing Officer be a retired commissioner from another county to prevent any conflict of interest. Here, there is no evidence in the record demonstrating that that Hearing Officer served as an investigator, prosecutor, or advocate in this proceeding or its preadjudicative stage, acted in a supervisory capacity over the County's investigation relative to this matter. As a result, there is no evidence in the record that the Hearing Officer had a conflict of interest in this matter.

There is also a lack of evidence in the record that the Hearing Officer was biased. It is well-established under California law that Appellant is entitled to a reasonably impartial 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.*) To prevail on a claim of bias, the party claiming bias must allege 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.) An implication of bias and prejudice is insufficient. (*Id.*) Here, the record is devoid of evidence, and Appellant fails to point to concrete facts, showing even the appearance of bias. Accordingly, the Director finds that there is no evidence indicating that the Hearing Officer had a conflict of interest or was biased.

C. The Commissioner's decision to classify the violation as a Class A violation and issue a \$1,000 fine was appropriate.

On appeal, Appellant does not challenge the class or fine amount set by the Commissioner. However, the Director finds that there is substantial evidence in the record to support the Commissioner's decision that this was a Class A violation and that the fine of \$1,000 is appropriate. When levying fines, the Commissioner must follow the fine guidelines set forth in 3 CCR section 6130. Under section 6130, violations shall be designated as a Class A, Class B, or Class C. A Class A violation is "[a] violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the commissioner determines that one of the following aggravating circumstances support elevation to Class A... 1. The respondent has a history of violations, 2. The respondent failed to cooperate in the investigation of the incident or allow a lawful inspection; or, 3. The respondent demonstrated a disregard for specific hazards of the pesticide used." (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1).) The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(1).)

3 CCR section 6141 states that the County "may confidentially interview any employee during work hours when reasonably necessary...to investigate a suspected pesticide related safety violation." (Cal. Code Regs., tit. 3, § 6141.) The purpose of this regulation is to ensure

that pesticide applicators cooperate with the County's investigations of suspected violations of pesticide law that mitigate the risk of pesticide safety violations. As a result, 3 CCR section 6141 is a regulation that "mitigates the risk of adverse health, property, or environmental effects." The Commissioner also elevated this violation to a Class A violation due to the aggravating factors of Appellant's violation history and Appellant's failure to cooperate in the investigation of the incident. The record in this matter shows that on November 8, 2019, Appellant was previously issued a NOPA for violating FAC section 11732. (County Ex. E) The record in the matter also shows that Appellant failed to cooperate in the investigation by refusing to allow his employee to be interviewed by the County during its investigation. (See Section A, above). Therefore, there is substantial evidence in the record to support the Commissioner's decision that Appellant's violation of 3 CCR section 6141 was a Class A violation.

The fine range for Class A violations is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(1).) The Commissioner fined Appellant \$1,000, the lower end of the Class A fine range. The Director finds the \$1,000 fine is a reasonable exercise of the Commissioner's discretion.

Conclusion

The Director affirms the Commissioner's decision that Appellant violated California Code of Regulations, title 3, section 6141 and the violation qualified as a Class A violation. The total fine of \$1,000 is upheld.

Disposition

The Director affirms the Commissioner's decision and levy of fines. The Commissioner shall notify Appellant of how and when to pay the \$1,000 in total fines.

Judicial Review

Under Food and Agricultural Code section 12999.5, Appellant 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: SEP 06 2022

By: 
Julie Henderson, Director