

**BEFORE THE
DEPARTMENT OF FOOD AND AGRICULTURE
OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
)
Dennis and Mary Stowell)
Dba Tom King Farms)
2055 Orange Avenue)
Oxnard, CA 92065)
)
Appellant)
_____)

File No. 143-CMA-SD-13/14

**DECISION AND ORDER
ON APPEAL**

**I.
STATEMENT OF THE CASE**

On February 12, 2015, the San Diego County Agricultural Commissioner/Sealer of Weights and Measures (hereinafter “Respondent”), formally issued a Notice of Proposed Action, Nature of Violation, and Opportunity to Be Heard (hereinafter “Notice”) to Dennis and Mary Stowell, dba Tom King Farms, (hereinafter “Appellant”) for seven (7) alleged violations of the requirements of participation in the Direct Marketing program. The Notice set forth two (2) violations of Title 3, California Code of Regulations (CCR), Section 1392.4 subdivision (a), which prohibits certified farmers from selling produce not listed on their certified producer’s certificate (Violations 1 and 4); two (2) violations of Title 3, CCR Section 1392.4 subdivision (d), which requires certified farmers to conspicuously post the certified producer’s certificate at the point of sale (Violations 2 and 5); two (2) violations of California Food and Agriculture Code (FAC) 47002 subdivision (c), which requires that all fresh fruits, nuts, and vegetables sold in closed consumer containers shall be labeled with the name, address, and ZIP Code of the producer, and a declaration of identity and net quantity of the commodity in the package (Violations 3 and 6); and one (1) violation of Title 3 CCR, Section 1392.4 subsection (a), which prohibits certified farmers from selling produce not of their own production (Violation 7) Respondent sought to recover a civil penalty in the amount of seven hundred and one dollars (\$701). (Exhibit 1)

Hearing Officer Thomas L. Marshall conducted the hearing on June 18, 2015, with both parties in attendance. Hearing Officer Marshall determined that Appellant had committed the violation and upheld the proposed penalty payment of \$701. On June 24, 2015, Respondent adopted the decision as submitted. (Notice of Decision, Order and Right to Appeal (hereinafter “Notice of Decision”) On August 7, 2015, Appellant submitted an appeal to the Secretary of the Department of Food and Agriculture (hereinafter “Department”), requesting a reduction of the penalty imposed from seven hundred and one dollars (\$701) to five hundred dollars (\$500). Appellant did so on the ground that Violation 7, a violation for selling produce not of its own production, should not have been a serious violation as set forth in Title 3, California Code of Regulations, section 1392.4.1. Appellant has therefore requested that the violation be reclassified as a moderate one with the imposition of a lesser penalty for it.

II. STANDARD OF REVIEW

The Department may not consider evidence outside the records, but must consider the entire record, and deny the appeal if there is any substantial evidence to support the findings. (*Smith v. County of Los Angeles* (1989) 211 Cal.App.3rd 188, 198-199) Substantial evidence is defined as evidence of “ponderable legal significance” which is “reasonable in nature, credible and of solid value”, distinguishable from the lesser requirement of “any evidence.” (*Newman v. State Personnel Board* (1992) 10 Cal.App.4th 41, 47; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873) In other words, the Department cannot substitute its judgment for the judgment of the finder of fact if there is enough relevant and reliable information to establish a fair argument in support of the result, even if other results might have also been reached. (*Smith v. County of Los Angeles, supra; Bowers v. Bernards, supra*, 10 Cal.App. 4th at 873-874)

III. STATEMENT OF FACTS

On November 3, 2013, Inspector Janice Deguzman, Agricultural Standards Inspector, (hereinafter “Inspector Deguzman”) testified in support of Violations 1, 2 and 3 of the Notice. She inspected Appellant’s stall at the La Jolla CFM. Inspector Deguzman noticed that the certified producers’ certificate (hereinafter “certificate”) was not conspicuously posted. She asked Appellant for the certificate, which was eventually provided. (Exhibit 5; Hearing testimony of Inspector Deguzman) During the inspection, she observed pumpkins for sale that were not listed on the certificate. She also observed Appellant selling pomegranate seed in a closed container, and noticed they were not properly labeled with identity, responsibility, quantity (IRQ) statement required by FAC code 47002 (c). (Exhibit 3)

On March 15, 2014, Inspector Bonnie Wheeler, Agricultural Standards Inspector, (hereinafter “Inspector Wheeler”) testified in support of Violations 4 through 7 of the Notice. She performed an inspection of the Appellant’s stall at the Little Italy CFM. Inspector Wheeler requested to see the certificate, the Appellant’s employee, Frank Manfred, presented two certificates, one for Tom King Farm, and one for Constantino Medina. Inspector Wheeler observed that Constantino Medina was not listed on the Appellant’s certificate as a producer for whom they are authorized to sell. Upon review of both certificates, she observed lettuce and strawberries for sale that were not listed on either certificate. She also observed orange juice for sale in a closed container without proper IRQ labeling. She also took photographs of the lettuce, strawberries and orange juice which were entered into the record. (Exhibit 3; Hearing Testimony of Inspector Wheeler)

On March 17, 2014, Inspector Wheeler received the most recently amended certificate for Appellant, via fax, which lists Appellant as an authorized seller for Constantino Medina. (Exhibit 5) In a conversation with Dennis Stovall, she inquired about the lettuce and strawberries in question. Stovall responded that he did grow lettuce, but did not grow strawberries; they were purchased from Carlsbad Strawberry Company and intended to be picked up by a representative of Sandrock Market. The representative did not arrive, and an employee, Mr. Manfred, sold the strawberries at the Little Italy CFM. (Exhibit 5)

On March 19, 2014, Inspector Wheeler visited Appellant’s growing location to perform an inspection to amend the certificate to include lettuce. On this visit, she verified production of

the lettuce that was sold at the Little Italy CFM on March 15, 2014. Subsequently, Stowell testified at the June 18, 2015 hearing, that the lettuce sold at the CFM on March 15, 2014 was lettuce he produced. (Hearing testimony of Dennis Stowell)

Title 3, California Code of Regulations, section 1392.4.1 classifies violations of the requirements of the Direct Marketing program as minor, moderate and serious. Within each classification, there is a range within which a civil penalty can be imposed. In this proceeding, Respondent determined that Violations 1 through 6 were within the minor category, while Violation 7 was a serious one. (Pages 2-3 of the Notice) Priscilla Yeane, a Supervising Agricultural Inspector, testified that Respondent sought the lowest civil penalty amount allowable for each violation because of Appellant's lack of violations prior to this proceeding. Accordingly, she stated that Respondent sought only three hundred dollars (\$300) for Violations 1 through 6 by seeking only fifty dollars (\$50) for each. She characterized Violation 7 as a serious one because selling produce not of one's own production undermines the integrity of the Direct Marketing program, thus justifying its classification as a serious one. Again, she sought a civil penalty at the lowest level within the range for this violation, four hundred and one dollars (\$401). (Hearing Testimony of Priscilla Yeane)

Appellant testified that the violations at the Little Italy CFM were made by an employee, Mr. Manfred, and that his employment was terminated immediately after his fraudulent behavior was discovered. Appellant therefore maintained that the penalty for Violation 7 should be reduced. Hearing Officer Marshall concluded, however, that Appellant was responsible for the conduct of Manfred. He further acknowledged that the penalty had been set at the lowest possible level, and that it would serve as a deterrent without causing undue hardship. (Pg. 5, Notice of Decision)

IV. DETERMINATION OF ISSUES

Preliminarily, the Department has reviewed the record and found sufficient evidence in support of all of the violations set forth in the Notice of Decision. Appellant has appealed the imposition of a four hundred and one dollar (\$401) civil penalty for Violation 7, selling produce not of its own production. It seeks a downgrading of the violation to the moderate range, thus permitting a reduction of the penalty to two hundred dollars (\$200).

The Department declines to order a reduction in the penalty amount as requested. Selling produce not of one's own production is considered a serious violation because it undermines the integrity of the Direct Marketing program. (Tit. 3, Cal. Code Regs. sec. 1392.4.1) Respondent sought a penalty at the lowest end of the range for such a violation, and the Hearing Officer concluded that such a penalty served as a deterrent without imposing undue hardship. Both acted within their discretion, and the Department should not infringe upon it.

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**DECISION AND ORDER
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**V.
DECISION**

Considering all of the evidence in the record, the Department denies Appellant's appeal of the San Diego County Agricultural Commissioner/Sealer of Weights and Measures' Decision and Order. Appellant is ordered to pay a fine of seven hundred and one dollars (\$701) for two (2) minor violations of Title 3 CCR 1392.4 subsection (a); two (2) minor violations of Title 3 CCR 1392.4 subsection (d), for not having posted an embossed copy of their certificate; two (2) minor violations of FAC 47002 subsection (c); and one (1) serious violation of Title 3 CCR 1392.4 subsection (a).

This Decision and Order shall be effective September 25, 2015.

IT IS SO ORDERED this 25th day of September, 2015.



RICHARD ESTES
Staff Counsel
California Department of Food and Agriculture

APPELLANT'S RIGHT TO SEEK JUDICIAL REVIEW

Judicial review of the decision of the Department may be sought within thirty (30) days of the effective date of this decision pursuant to Section 1094.5 of the California Code of Civil Procedure.