



lettuce and that the Final Judgment was not binding on county sealers pursuing violations through the civil administrative process.

On May 14, 2015, the Respondent sent the decision, adopting the position by the Hearing Officer, and imposed a penalty in the amount of one hundred dollars (\$100) specified in the original Notice, to the Appellant. Appellant filed a timely appeal with the Department of Food and Agriculture (hereinafter "the Department") mailed June 11, 2015 and which was received by the Department on June 16, 2015.

Appellant is appealing the Respondent's decision on the basis that the Respondent is bound by the terms of the Final Judgment in the Los Angeles court case, number SC122679, referenced above. Accordingly, Appellant contends that Respondent may not impose the penalty contemplated in the Notice of Decision and Order without first complying with the provisions of the Final Judgment.

## II STATEMENT OF FACTS

San Diego County Senior Agricultural Standards Inspector Lynn Gordon (hereinafter "Inspector Gordon") testified that she has been an agricultural inspector since 1999. Inspector Gordon testified that on November 10, 2014, she went to 711 University Avenue, San Diego, California, to follow up on allegations of wrongful acts by the business, Whole Foods Store #13. Inspector Gordon stated she received a consumer complaint that claimed the Appellant was not properly charging for products throughout the store and that this was a common occurrence for the complainant. The Respondent's procedure is to do a focused price verification inspection in these circumstances and document their findings.

Inspector Gordon testified that she followed standard procedure for conducting a price verification inspection based on a complaint. Inspector Gordon stated that she entered Appellant's premises and selected five items for the undercover test purchase. Inspector Gordon testified that she chose produce items because that was the subject of the complaint she received. Four items rang up correctly, but one overcharged. Romaine lettuce rang up at \$2.49, but should have only been \$1.99, causing a \$0.50 overcharge. Inspector Gordon documented her findings on a Price Verification Form and issued a Notice of Violation on November 10, 2014 which was signed by Lauren Lifari, Shift Manager for the store.

Appellant stated that the business takes care to have products accurately priced, and that human error is normal. Further, Appellant contends that the Final Judgment with the City Attorneys for Santa Monica, Los Angeles, and San Diego requires sealers to give notice and allow 15 days to make corrections. Respondent argues that this provision in the Final Judgment does not apply because statutory requirements in BPC Section 12015 require sealers to follow up and prosecute all violations of Division 5. Further, Respondent argued that the settlement was only binding to taking criminal or civil actions through the courts, not administrative actions.

### III STANDARD OF REVIEW

The Department addresses Appellant's contentions by adopting the standard utilized by the courts when reviewing administrative decisions on mandamus. It may not consider evidence outside the record, 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. 3d 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)

### IV DETERMINATION OF ISSUES

Preliminarily, the Department finds that sufficient evidence of the violation was presented during the course of the hearing and in fact, Appellant did not deny the violation occurred. The verbal and written testimony provided by the Respondent sufficiently established that proper procedures were followed in determining the overcharge of the product. BPC Section 12024.2 is a strict liability statute and there is no need to prove intent. It is immaterial that Appellant made a mistake and was unaware that the item was not charging correctly until such time as it was documented by Inspector Gordon.

Appellant argued during the hearing that the County could not take any action beyond issuing an NOV and that Respondent and all county sealers are required to have a "meet and confer" to allow Appellant an opportunity to correct problems within a 15-day time period without financial penalty. For the reasons that follow, the Department rejects Appellant's arguments.

According to testimony provided by Respondent at the hearing, there are approximately 4,300 point-of-sale locations registered in San Diego. Appellant's argument that they are not subject to the administrative process because of the Final Judgment would give them an unfair business advantage over their competitors by giving them an opportunity to correct the violation in a longer time frame of 15 days and without risk of penalty. No judgment has the authority to prevent the application of the law or create an unfair business advantage by excusing a non-compliant business from having penalties imposed on it, especially when its competitors would be liable for the similar violations.

Respondent presented evidence and case law (*People v. Hy-Lond Enterprises, Inc.*, (1979) 93 Cal.App.3d 734, 752-53) to support their position that the Final Judgment

was not binding on them. Appellant, in their appeal, presented opposing case law (*People v. Mendez* (1991) 234 Cal.App.3d 1773, 1782-83) which they assert required the Respondent to raise their objections to the Final Judgment within thirty (30) days and supports the proposition that the Respondent is subject to the terms of the Final Agreement. Upon review of the two cases, the Department finds that *Hy-Lond* is on point and supports the Respondent's argument that they are not bound by the Final Judgment. 93 Cal.App.3d 752-53. Furthermore, even if the Respondent was bound by the Final Judgment, the Department finds that Respondent's objection is not barred because thirty (30) days have passed since the Final Judgment was entered. See *Id.* at 749, 752-53. The Department is convinced that there is no authority to prevent the Respondent from enforcing their statutory obligations in this case. Additionally, the Department disagrees with Appellant's assertion that administrative proceedings are court actions subject to the Final Judgment's Meet and Confer provision simply because the appeal statutes at issue here may lead to filings with the court. Court action if taken would either be writ against the Department or an ex parte recording of the judgment in this case and is outside the scope of the provision at issue. Accordingly, the Department finds that the Final Judgment's Meet and Confer provision is not applicable to these administrative proceedings.

BPC Section 12015 states "Any sealer having knowledge of a violation of any of the provisions of any law relating to weights and measures shall cause the violator to be prosecuted." This makes it mandatory for any sealer to take action when a violation is observed. It would be inappropriate to construe that a court document such as the Final Judgment would contradict the law and allow a business to be in violation for 15 days while going through the "meet and confer" process, thus binding a sealer from fulfilling their mandates and allowing the business to break the law. Furthermore, the language in the Settlement of SC122679 only mentions taking an action in court regarding a violation or breach of injunction, not an administrative civil penalty.

BPC Section 12015.3 allows the county sealer to take an administrative action which is not the same as a criminal or civil prosecution handled through the judicial branch of government. Administrative civil proceedings are not part of court record and are separate. Section 8 of the Settlement is, in our opinion, referencing a judicial action and therefore does not apply in this case.

The Department does not agree with the Appellant's argument that the County Sealer is "having it both ways." Monies received directly from the settlement were for cost recovery to reimburse the jurisdiction for its investigative work performed on behalf of the San Diego City Attorney. While the investigative work product was used by the City Attorneys' Offices, these officials are not working directly for, nor are they controlled by, these entities. Monies paid into the CACASA trust fund as *cy pres*, are available by all county sealers to use through a formal request; they are not automatically guaranteed to be made available. Therefore the San Diego County Sealer does not have direct control or access to those funds which are managed by a special board.

The Department finds that Table A found in the California Code of Regulations, Title 4, Division 9, Chapter 12, Article 2, Weights and Measures Penalty Guidelines, dictates that a violation of BPC Section 12024.2 where the percent overcharge is

greater than 15% of the correct price would be considered a Category 1 violation, and generally, the fine level is from four hundred dollars to one thousand dollars (\$400 to \$1000). However, in this circumstance statutory language in BPC Section 12024.2 considers overcharges up to one dollar (\$1) as an infraction and limits the penalty to a maximum of one hundred dollars (\$100). Respondent demonstrated a history of such violations by the Appellant with the presentation into the record of a previous Notice of Proposed Action issued within the same fiscal year. The fine level was set at the highest amount allowed under the statute and is within legal guidelines.

###

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

In the Matter of the Appeal of: )  
 )  
Mrs. Gooch's Natural Foods Markets, Inc.)  
dba Whole Foods Market #13 )  
711 University Avenue )  
San Diego, CA 92103 )  
 )  
Appellant )  
\_\_\_\_\_ )

File No. 111-PVN-SD-14/15

**DECISION AND ORDER  
ON APPEAL**

**V  
DECISION**

For the foregoing reasons, the Respondent's decision is affirmed and the civil penalty of one hundred dollars (\$100) is upheld in this matter. Appellant is required to pay the civil penalty in the amount of \$100 to the San Diego County Department of Weights and Measures.

This Decision and Order shall be effective August 26, 2015.

IT IS SO ORDERED this 27<sup>TH</sup> day of July, 2015.

Crystal D'Souza  
CRYSTAL D'SOUZA  
Staff Counsel  
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 Code of Civil Procedure.