

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) **PACA Docket No. D-09-0016**
)
J & M Produce Sales, Inc.,)
) **Decision and Order by**
Respondent) **Reason of Admissions**

1. The Complaint, filed on October 29, 2008, initiated a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a -§499t) (herein frequently the “PACA”).

Parties, Counsel, and Allegations

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently “AMS” or “Complainant”). AMS is represented by Charles E. Spicknall, Esq. with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, South Building Room 2318, Stop 1413, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

3. Respondent J & M Produce Sales, Inc., is a Texas corporation. J & M Produce is represented by James L. Odom, J & M Produce’s principal and its registered agent.

4. The Complaint alleges that the Respondent, J & M Produce Sales, Inc. (herein frequently “J & M Produce” or “Respondent”), violated section 2(4) of the PACA (7 U.S.C.

§ 499b(4)), by failing to pay 19 produce sellers for \$424,346.60 in produce purchases during the period of November 28, 2007, through February 23, 2008. The Complaint alleges that J & M Produce willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA. 7 U.S.C. § 499b(4).

5. Respondent J & M Produce Sales, Inc. filed an Answer to the Complaint on December 12, 2008.

Discussion

6. AMS filed a Motion for Decision Based on Admissions, on November 23, 2009. *See* 7 C.F.R. § 1.139. J & M Produce had through January 19, 2010 to respond to AMS's Motion and failed to respond. Based upon careful consideration, AMS's Motion is granted, and I issue this Decision and Order without hearing or further procedure.

7. Section 2(4) of the PACA requires licensed produce dealers to make "full payment promptly" for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4).¹ A respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held." *See In re: H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (1998).²

¹

See also 7 C.F.R. § 46.2(aa)(5) and (11) (defining "full payment promptly").

²

See also, In re: Five Star Food Distributors, Inc., 56 Agric. Dec. 880, 894 (1997) (decision without hearing by reason of admissions).

8. The Department's policy in cases where PACA licensees have failed to make full or prompt payment for produce is straightforward:

In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

In re: Scamcorp, Inc., 57 Agric. Dec. 527, 549 (1998).

9. J & M Produce's inability to assert that it has achieved full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. *See Scamcorp*, 57 Agric. Dec. at 549. The appropriate sanction in a "no-pay" case where the violations are flagrant and repeated is license revocation. *See id.* A civil penalty is not appropriate because "limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA", and it would not be consistent with the Congressional intent to require a PACA violator to pay the Government while produce sellers are left unpaid. *See id.*, at 570-71.

10. J & M Produce intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, "shifted the risk of nonpayment to sellers of the perishable agricultural commodities." *See id.*, at 553.

11. Where there is no longer a valid license to revoke, the appropriate sanction in lieu of revocation is a finding of repeated and flagrant violation of the PACA and publication of the facts and circumstances of the violations. *See In re: Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386-387 (2003).

Findings of Fact

12. Respondent J & M Produce Sales, Inc. is a corporation incorporated and existing under the laws of the State of Texas, which ceased operations on or about February 6, 2008.

13. J & M Produce's business and mailing address is Mr. James L. Odom, for J & M Produce Sales, Inc., 8125 Western Hills Boulevard, Fort Worth, Texas 76108-3529; AND J & M Produce Sales, Inc., c/o James L. Odom, 3095 Bellaire Ranch Dr. Apt 227, Fort Worth, Texas 76109-1819.

14. Pursuant to the licensing provisions of the PACA, J & M Produce Sales, Inc. was issued license number 1993-0927 on March 30, 1993. The license terminated on March 30, 2008.

15. Official notice is taken of the PACA trust action brought against J & M Produce by produce sellers in the United States District Court for the Northern District of Texas, Case No. 4:08-cv-00177-Y. In that case, Respondent J & M Produce Sales, Inc. and the company's principal, James L. Odom, stipulated and admitted to having failed to pay nine produce sellers for \$438,239.98 in produce purchases.

16. Respondent J & M Produce failed to make full payment promptly to nine of the 19 produce sellers listed in paragraph III of the Complaint for \$438,239.98 of perishable

agricultural commodities that J & M Produce purchased, received, and accepted in interstate commerce in late 2007 and early 2008.

17. J & M Produce makes no assertion that the produce sellers listed in the Complaint have been paid in full or that the company has achieved full compliance with the PACA within 120 days after having been served with the Complaint.

Conclusions

18. The Secretary of Agriculture has jurisdiction over Respondent J & M Produce Sales, Inc. and the subject matter involved herein.

19. J & M Produce Sales, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during late 2007 and early 2008, by failing to make full payment promptly of the purchase prices, or balances thereof, for \$438,239.98 in fruits and vegetables, all being perishable agricultural commodities, that J & M Produce purchased, received, and accepted in interstate commerce.

Order

20. J & M Produce Sales, Inc. is found to have committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4). The facts and circumstances of the violations shall be published pursuant to section 8(a) of the PACA, 7 U.S.C. § 499h(a).

21. This Order shall take effect on the 11th day after this Decision becomes final.

Finality

22. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30

days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, using BOTH mailing address for J & M Produce shown in paragraph 13.

Done at Washington, D.C.
this 22nd day of March 2010

/s/

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Bldg Room 1031
1400 Independence Ave SW
Washington DC 20250-9203
202-720-4443
Fax: 202-720-9776

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

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SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]