USDA
RECEIVED
MAR 16 2015
OALJ / HCO
WASH, DC

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 15-0049

In re:

EMMANUEL H. COBLENTZ,

Respondent.

Before:

Janice K. Bullard, Administrative Law Judge

Appearances:

Buren W. Kidd, Esq. for Complainant

Emmanuel H. Coblentz, pro se

DECISION AND ORDER BY ENTRY OF DEFAULT AGAINST RESPONDENT

PRELIMINARY STATEMENT

The instant matter involves allegations by the USDA Administrator of the Agricultural Marketing Service (AMS; Complainant) that Emmanuel H. Coblentz (Respondent) violated the Organic Foods Production Act of 1990, 7 U.S.C. §§6501-6522 (OFPA) and its implementing regulations, the National Organic Program Regulations, 7 C.F.R. §§ 205.1-205.699 (NOP Regulations). The proceeding was initiated by the issuance to Respondent of a Notice to Show Cause why Respondent should not be denied privileges to engage in business pursuant to the OFPA and the NOP Regulations.

ISSUES

1. Whether default should be entered in this matter;

2. Whether a hearing is necessary in this matter;

3. Whether Respondent willfully violated the Act; and

4. Whether the sanctions recommended by Complainant should be imposed.

STATEMENT OF THE CASE

I. Procedural History

On January 8, 2015, Complainant filed with the Hearing Clerk, Office of Administrative Law Judges (OALJ; Hearing Clerk), a Notice to Show Cause (Notice) alleging willful violations of the OFPA, and NOP Regulations. On January 8, 2015, the Hearing Clerk sent to Respondent, via certified mail a copy of the Notice and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. § 1.130 *et seq.*) (Rules of Practice; Rules). The certified mail return receipt was returned to the Hearing Clerk, reflecting delivery of the Notice and enclosures on January 16, 2015. The delivery was signed for by Martha Coblentz.

Respondent did not file an answer to the Notice, and by Order issued February 12, 2015, I directed Respondent to show cause why default should not entered against him, and directed Complainant to file an appropriate motion. The Hearing Clerk sent the Order to Respondent by regular mail, which was not returned as "undeliverable" or "unable to forward". Respondent did not file a response to my Order, but on February 19, 2015, Complainant filed a motion for entry of a decision and Order by reason of default. The motion was sent to Respondent on February 19, 2015. Respondent has not filed a response.

II. Statutory and Regulatory Authority

Pursuant to the Rules of Practice, a respondent is required to file an Answer within twenty (20) days after service of a Complaint. 7 C.F.R. § 1.136(a). The Rules also provide that an Answer "shall . . . [c]learly admit, deny, or explain each of the allegations of the Complaint

and shall clearly set forth any defense asserted by the respondent." 7 C.F.R. § 1.136(b)(1). The failure to timely file an Answer or failure to deny or otherwise respond to an allegation proffered in the Complaint shall be deemed admission of all the material allegations in the Complaint; in such situation, default shall be appropriate.[1] 7 C.F.R. § 1.136(c).

Additionally, the Rules of Practice prescribe that, when computing the time permitted for a party to file a document or other paper, Saturdays, Sundays, and Federal holidays are to be included except when the time expires on one of those days; should such situation occur, the time period shall be extended to include the next business day. 7 C.F.R. § 1.147(h). The Rules also state that a document sent by the Hearing Clerk "shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail. . ." 7 C.F.R. § 1.147(c)(1).

III. **Discussion**

1. *Whether Entry of Decision by Reason of Default Without Hearing Is Appropriate*

The record here reflects that an individual bearing Respondent's last name acknowledged receipt of the certified mailing of the Complaint on January 16, 2015. No answer was filed, and regular mail was not returned. Respondent failed to respond to my Order to show cause why default should not be entered, and Respondent also failed to respond to Complainant's motion for entry of a decision and Order by reason of default. Neither of the mailings of those documents to Respondent was returned as undeliverable. Accordingly, I find that the Complaint was served upon the Respondent, and Respondent failed to file an answer. Therefore, pursuant to

[1] *See* Morrow v. Dep't of Agric., 65 F.3d (West) 168 (6th Cir. 1995) (per curiam) (unpublished disposition) ("7 C.F.R. Secs. 1.136(c) and 1.139 clearly describe the consequences of failing to answer a complaint in a timely fashion. These sections provide for default judgments to be entered [and] for admissions absent an answer . . . . Furthermore, the failure to answer constitutes the waiver of the right to a hearing.") (internal citations omitted).

7 C.F.R. § 1.136(c), Respondent is deemed to have admitted the allegations set forth in the Complaint, and entry of default is appropriate. *See* 7 C.F.R. §§ 1.136(c), 1.139.

Accordingly, I find that Respondent has admitted the gravamen of Complainant's allegations, thereby obviating the need for a hearing in this matter. The material allegations of the Complaint are thus adopted as findings of fact. I further find it appropriate to enter a decision on the record by reason of default. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

2. *Sanctions*

Complainant maintains that Respondent's alleged violations of the OFPA and the NOP Regulations are serious and merit the recommended sanction of denying him certification under the OFPA and disqualifying him from eligibility for certification for a period of three years. I find that by failing to answer the complaint, failing to respond to my Order, and failing to object to Complainant's motion for default, Respondent has admitted to using a substance prohibited by the NOP Regulations in the production of his food products. Accordingly, I find that Complainant's proposed sanctions in this case are warranted.

The Department's sanction policy is set forth in *In re: S.S. Farms Linn County, Inc.*, (Decision as to James Joseph Hickey & Shannon Hansen), 50 Agric. Dec. 476 (U.S.D.A. 1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> The sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

S.S. Farms Linn County, Inc., 50 Agric. Dec. at 497. "In assessing penalties, the Secretary is required to give due consideration to the size of the business involved, the gravity of the violation, the person's good faith, and the history of previous violations." *In re Roach*, 51 Agric. Dec. 252, 264 (U.S.D.A. 1992). The purpose of assessing sanctions is not to punish violators but to deter future similar behavior by the violator and others. *In re: Zimmerman*, 57 Agric. Dec. 1038, 1998 WL 799196, at *16 (U.S.D.A. 1998).

Additionally, "[t]he administrative recommendation as to the appropriate sanction is entitled to great weight, in view of the experience gained by the administrative officials during their day-to-day supervision of the regulated industry." *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. Nevertheless, an administrative official's recommendation is not controlling; in appropriate cases, the sanction imposed may be considerably less than or different from what is recommended. *In re: Shepherd*, 57 Agric. Dec. 242, 1998 WL 385884, at *29 (U.S.D.A. 1998).

FINDINGS OF FACT

1. Respondent Emmanuel H. Coblentz is an individual whose mailing address is in [redacted].
2. On October 7, 2013, Respondent applied for organic certification from the Quality Certification Services (QCS) to engage in business as a certified organic operation, as defined in the OFPA.
3. Quality Certification Services is an accredited organic certifying agent of the United States Department of Agriculture.
4. On December 28, 2013, QCS conducted an initial inspection of Respondent's organic operation.

5. QCS' inspection of Respondent's operation found that Respondent applied a substance, Shaklee Basic-H, which contains linear alcohol alkoxylates, in its organic crop production.
6. On January 2, 2014, QCS issued to Respondent a combined Notice of Noncompliance) and Denial of Certification.
7. On January 17, 2014, Respondent replied to QCS' Notice.
8. In correspondence dated January 31, 2014, QCS advised Respondent that his reply did not adequately address the noncompliant issues identified by QCS.
9. On February 24, 2014, Respondent timely filed an appeal of the QCS determination with the AMS Administrator.
10. On April 16, 2014, the AMS Associate Administrator issued a decision denying the Respondent's appeal and affirming QCS' denial of certification.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. Respondent is not eligible to be certified because he applied a substance prohibited under section 205.105(a) of the NOP Regulations (7 C.F.R. § 205.105(a)), Shaklee Basic-H, which contains linear alcohol alkoxylates, on fields from which harvested crops are intended to be sold, labeled, or represented as "organic", within a period of 3 years immediately preceding harvest of the crop, in violation of section 205.202(b) of the NOP Regulations (7 C.F.R. § 205.202(b)).
3. Respondent's request for certification is denied and the determination of QCS, as affirmed by AMS, is hereby upheld.

ORDER

Respondent's request for organic certification is hereby denied.

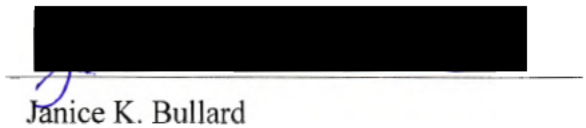
Respondent is disqualified from being eligible to seek organic certification for the fields in question for a period of three years from the date he last applied any prohibited substance to his field in accordance with sections 205.202(b) and 205.682(a)(2) of the NOP Regulations.

This Decision and Order shall have the same effect as if entered after a full hearing.

Pursuant to the Rules of Practice, this Decision and Order shall become final without further proceedings thirty-five (35) days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service pursuant to the Rules. 7 C.F.R. §§ 1.139, 1.145(a).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

So ORDERED this 13th day of March, 2015 at Washington, D.C.



Janice K. Bullard
Acting Chief Administrative Law Judge