

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-01-0032
)	
KOAM Produce, Inc.,)	
)	
Respondent)	Decision and Order

Decision Summary

[1] Respondent KOAM Produce, Inc. (hereinafter frequently “KOAM”) committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) during April through July 1999, at the Hunts Point Terminal Market in the Bronx, New York, New York, in connection with 42 illegal cash payments made by its employee Marvin Friedman to United States Department of Agriculture (hereinafter frequently “USDA”) produce inspector William Cashin in connection with federal inspections of perishable agricultural commodities received or accepted in interstate or foreign commerce from 11 sellers. KOAM is responsible under the Perishable Agricultural Commodities Act (hereinafter frequently “the PACA”) for the conduct of its employee Marvin Friedman, who, in the scope of his employment, paid the unlawful bribes or gratuities to the USDA produce inspector, notwithstanding any ignorance of the employee’s actions. Revocation of KOAM’s license is commensurate with the seriousness of KOAM’s violations of the PACA.

Procedural History

[2] The Complainant is the Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (frequently referred to herein as “AMS”). On May 3, 2002, AMS filed its Motion to Amend Complaint, together with the proposed Amended Complaint.

[3] KOAM opposed the Motion to Amend Complaint, in its Opposition filed June 18, 2002. By Order dated June 21, 2002, I granted the Motion to Amend Complaint. On July 29, 2002, KOAM filed its Answer to Amended Complaint.

[4] The hearing was held before me in New York, New York, on March 25, 2003, and on November 17 and 18, 2003. AMS was represented by Andrew Y. Stanton, Esq., Ann K. Parnes, Esq., and Christopher Young-Morales, Esq., each with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture. KOAM was represented by Paul T. Gentile, Esq., of the law firm of Gentile & Dickler, New York, New York.

[5] AMS called three witnesses and submitted 19 exhibits, marked CX 1 through CX 19. KOAM called one witness and submitted 4 exhibits, marked RX 1 through RX 4. All the exhibits were admitted into evidence. The transcript is referred to as Tr.

Findings Of Fact

[6] KOAM Produce, Inc. is a New York corporation, incorporated on or about June 18, 1996, holding PACA license no. 961890, with an address of 238-241 Hunts Point Terminal Market, Bronx, New York, New York 10474. CX1.

[7] KOAM Produce, Inc. was owned in equal shares (50% each) by Jung Yong “C.J.” Park

(frequently herein “Mr. Park”) and his wife, Kimberly S. Park (frequently herein “Mrs. Park”) at all times material herein and particularly in 1999. CX 1, Tr. 269, 283-84.

[8] KOAM’s Vice-President and Secretary were Mr. Park, KOAM’s President and Treasurer were Mrs. Park, and KOAM’s only two Directors were Mr. and Mrs. Park, at all times material herein and particularly in 1999. CX1, Tr. 269, 283-84.

[9] KOAM began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, in about January 1997. Tr. 270.

[10] KOAM hired Marvin Friedman, also known as Marvin Steven Friedman, in about May 1998 to work as night produce salesman. Tr. 270. Marvin Friedman became a produce buyer in October 1998. Tr. 270-71, 274. Marvin Friedman continued to work for KOAM at all times material herein, and particularly in 1999.

[11] Marvin Friedman was arrested on or about October 27, 1999. Tr. 271.

[12] On February 25, 2000, Marvin Friedman pled guilty to and was convicted of each count of the 10-count indictment in Case No. 99 Crim. 1095, in the United States District Court for the Southern District of New York. CX 3, CX 18.

[13] On September 20, 2000, Marvin Steven Friedman was found to have paid \$29,550¹ in bribes to USDA produce inspectors at the Hunts Point Terminal Market and was sentenced to the custody of the Bureau of Prisons for 12 months plus one day on each of the 10 counts, to run concurrently; followed by supervised release of 2 years on each count, to run concurrently; plus a

¹ The \$29,550 in bribes paid by Marvin Steven Friedman was determined through the sentencing process (CX 19 p.20; CX 4 p. 9); the bribes specified in the Indictment totaled \$2,100. CX 3.

\$300 fine on each counts, for a total of \$3,000; plus a \$100 special assessment on each count, for a total of \$1,000. CX 19, CX 4.

[14] The 10 counts of “Bribery of a Public Official” from April 6, 1999 through July 1, 1999, of which Marvin Friedman was convicted (CX 4), were based on the undercover work of William Cashin, a USDA produce inspector at the Hunts Point Terminal Market who had for many years accepted unlawful bribes or gratuities from many produce workers.

[15] William Cashin agreed, immediately after having been arrested himself on March 23, 1999, to cooperate with the Federal Bureau of Investigation (FBI) in its investigation by continuing to operate as he had in the past and reporting daily the payments he collected. Tr. 133-34, CX 16.

[16] In response to William Cashin’s daily reports to the FBI, the FBI prepared FD-302s as a summary. See CX 17. The portions of the FD-302s which correlate to the unlawful bribes or gratuities Cashin received from Marvin (Friedman) are organized for each count of the Indictment, together with applicable inspection certificates, which show KOAM as having applied for the inspections. Tr. 136-97, CX 6 through CX 16.

[17] Marvin Friedman was acting within the scope of his employment as a produce salesman or buyer for KOAM each time he paid an unlawful bribe or gratuity to William Cashin as reported in CX 6 through CX 16, and as reflected in each of the 10 counts of which he was convicted, regardless of whether anyone at KOAM directed him to make the unlawful payments, provided him the money to make the unlawful payments, or was even aware that he was making the unlawful payments.

[18] After careful consideration of all the evidence before me, I accept as credible the

testimony of William J. Cashin, Sherry Thackeray, Basil W. Coale, Jr., and Jung Yong “C.J.” Park.

Discussion

[19] Here, there is no question whether KOAM’s employee Marvin Friedman paid unlawful bribes or gratuities to USDA produce inspector William Cashin during April 6, 1999 through July 1, 1999, in connection with produce inspections requested by KOAM. He did.

Unquestionably. The only question is whether what Marvin Friedman did, causes his employer KOAM to suffer the consequences under the Perishable Agricultural Commodities Act, the PACA.

[20] KOAM argues that such criminal activity of an employee should not be imputed to his employer; that Marvin Friedman’s criminal activity here cannot have been within the scope of his employment and cannot become KOAM’s violation of the PACA.

[21] The PACA, section 16, incorporates principal-agent common law, making no exception for criminal activity of the agent:

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. § 499p.

Both the D.C. Circuit² and the 6th Circuit³ have affirmed the PACA’s use of its principal-agency

² *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 120 Fed. Appx. ---- (D.C. Cir. 2005), 2005 WL 348466.

provision under circumstances like those here. Marvin Friedman did pay the unlawful bribes and gratuities within the scope of his employment as KOAM's produce buyer or salesman. Tr. 307.

[22] Even if Marvin Friedman was not authorized or directed by KOAM to do so, and even if KOAM was unaware of his doing so, KOAM is indeed responsible under the PACA for the unlawful bribes and gratuities Marvin Friedman paid in connection with the produce inspections ordered by KOAM. 7 U.S.C. § 499p. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication⁴ in the Federal Reporter, February 11, 2005, 120 Fed. Appx. ---- (D.C. Cir. 2005), 2005 WL 348466, a copy of which is attached as Appendix A. *H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003). Thus, whether Marvin Friedman was directed by his employer KOAM to pay the unlawful bribes and gratuities does not affect the outcome here.

[23] After careful review of the evidence as a whole, I am unable to determine whether anyone at KOAM besides Marvin Friedman was involved in making the unlawful payments. Yet the evidence on that subject, together with the six years of experience AMS has had with KOAM since the unlawful payments were made in 1999, may impact the future course of AMS's interaction with KOAM and KOAM's principals.

[24] It is difficult to believe that Marvin Friedman paid the unlawful bribes and gratuities out

³ *H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003).

⁴ Unpublished judgments of the United States Court of Appeals for the D.C. Circuit entered on or after January 1, 2002, may be cited as precedent. Circuit Rule 28(c)(1)(B). A panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition. Circuit Rule 36(c)(2).

of his own pocket, even if he was the most highly compensated employee at KOAM, at about \$50,000 per year. CX 5. He apparently received no bonuses in addition. Tr. 274-75. The evidence fails to prove whether the money Marvin Friedman gave unlawfully to USDA inspectors was his own money, KOAM's money, Mr. or Mrs. Park's money, or money from some other source.

[25] Mr. Park testified that neither he, nor Mrs. Park to his knowledge, at any time, authorized, directed, or had knowledge that Marvin Friedman was paying money to inspectors. Tr. 286. Mr. Park testified that he had not known that Marvin Friedman was giving money to the USDA produce inspectors until after Mr. Friedman was arrested; that he was not present on June 28, 1999 when Marvin Friedman paid William Cashin, despite a notation to the contrary in the FBI form FD-302 (*see* CX 14); and that he was unaware that Marvin Friedman's attorney represented to the Court during sentencing, that Marvin Friedman's letter to the Court said that his employer directed him to pay bribes. Tr. 271-72, 278-79, 283. The letter is not in evidence, as access to it is apparently restricted. Tr. 339. Perhaps, as KOAM argues, Marvin Friedman implicated his employer in an attempt to be sentenced more leniently. The prosecutor in the criminal case asserted to the Court that there was no factual support in the record that the employer directed this scheme. Tr. 329. CX 19 pp. 15-16.

[26] Marvin Friedman was not a witness before me. Neither KOAM nor I had the opportunity to see Marvin Friedman confronted or cross-examined. The hearsay evidence suggesting that someone at KOAM besides Marvin Friedman may have involved in paying the unlawful bribes and gratuities is not sufficiently reliable. The evidence fails to prove that Mr. or Mrs. Park or anyone else at KOAM knew Marvin Friedman was illegally giving money to USDA inspectors.

The most valuable information on this topic, in my opinion, was the prosecutor's statement at Marvin Friedman's sentencing on September 20, 2000, which includes, in part, the following:

THE COURT: I will listen to you for anything the government would like to tell me in connection with sentence.

MR. BARR: Thank you, your Honor, and I will be brief because most of my arguments have been set forth in some detail already in our memorandum.

With respect to the minor role issue, your Honor, essentially Mr. Krantz's argument hinges on the way that he is framing the issue and the people involved. The government views it differently. This is really a two-person crime. There is a briber, mainly (sic) the businessman wholesaler, and a bribee, namely the produce inspector.

The inclusion of Mr. Friedman's employer in the context here I think is inappropriate based on the record before your Honor. While Mr. Krantz has asserted it to the court there is no factual support in the record that the employer directed this scheme. Mr. Friedman did not provide the government or probation with any details on that allegation. So I think that is not really properly before the court. There is no factual foundation for it.

It may be true but it is not something that has ever been set forth. And so we find ourselves at a loss to be able to reply to something like that.

With respect to the relative culpability of the remaining players, namely, the inspector and the wholesaler, while it is certainly true that the public official has abused his or her trust when he or she commits bribery, that is an inherent component of the offense and under Mr. Krantz's logic essentially every bribe payer would be entitled to the inference of being less culpable than every bribe recipient. And I don't think that is the law and I don't think that it's even a fair inference.

In this case the inspectors got \$50 per inspection. The wholesaler got, we believe based on our efforts, something more than \$50. Putting our finger on the exact amount, as we told probation and the court, is difficult, but it is surely in a magnitude far greater than \$50.

While it is true, as Mr. Krantz points out, that the primary beneficiary is the company that Mr. Friedman works for, it is quite clear to us that the individual salesman who helps the company make money looks better in the company's eyes and in a competitive atmosphere such as the Hunt Point Market that is a significant advantage for any salesman.

CX 19, pp. 15-17.

Conclusions

[27] Marvin Friedman, an employee of Respondent KOAM Produce, Inc., paid unlawful bribes and gratuities to a United States Department of Agriculture (USDA) inspector, during April through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities from 11 sellers received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[28] Marvin Friedman was acting as KOAM Produce, Inc.'s agent, when he did what is described in paragraph [27]. 7 U.S.C. § 499p.

[29] Marvin Friedman's willful violations of the PACA are deemed to be KOAM's willful violations of the PACA. *In re: H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

[30] KOAM Produce, Inc., through its employee and agent Marvin Friedman, paid unlawful bribes and gratuities to a USDA inspector, during April through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities from 11 sellers received or

accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA. 7 U.S.C. § 499b(4).

[31] KOAM is responsible under the PACA for the conduct of its employee Marvin Friedman, who paid the unlawful bribes or gratuities to the USDA produce inspector in connection with the federal inspections, notwithstanding any ignorance of the employee's actions. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 120 Fed. Appx. ---- (D.C. Cir. 2005), 2005 WL 348466, *see* Appendix A.

[32] KOAM willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[33] KOAM's violations of the PACA were egregious, requiring a remedy of suspension or revocation. *In re Geo. A. Heimos Produce Company, Inc.*, 62 Agric. Dec. 763, 780-781 (2003).

[34] Revocation of KOAM's license is commensurate with the seriousness of KOAM's violations of the PACA. Tr. 309-12.

[35] Any lesser remedy than revocation would not be commensurate with the seriousness of KOAM's violations, even though many of KOAM's competitors were committing like violations, and even though USDA inspectors who took the unlawful bribes and gratuities were arguably more culpable than those that paid them. Tr. 309-12.

Order

[36] Respondent KOAM Produce, Inc. committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

[37] Respondent KOAM Produce, Inc.'s PACA license shall be revoked.

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

Finality

[39] This Decision becomes final without further proceedings 35 days after service unless appealed to the Judicial Officer within 30 days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

Done at Washington, D.C.
this 18th day of April 2005

Jill S. Clifton
Administrative Law Judge

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