

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-05-0014
)	
Dennis E. Hutchins, d/b/a)	
Hutchins Distributing Company)	
)	Decision Without Hearing by
Respondent)	Reason of Admissions

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.; hereinafter “PACA”) and the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-46.45), instituted by a Complaint filed on June 6, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service (hereinafter “Complainant”).

Complainant alleged that Respondent Dennis E. Hutchins, an individual doing business as Hutchins Distributing Company (hereinafter “Respondent”), committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 46 sellers in the amount of \$317,520.55 for 175 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period October 2003 through February 2004. Since Respondent’s license had terminated due to Respondent’s failure to pay the required annual renewal fee, Complainant requested the issuance of a finding that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances be published. Complainant has filed a Motion for a Decision Without Hearing by Reason of Admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.139;

hereinafter “Rules of Practice”).

On August 5, 2005, Respondent, acting through counsel, filed an Answer to Complaint admitting that Respondent failed to make full payment promptly to the 46 sellers listed in the Complaint for produce purchases. (Answer ¶ 4.) Respondent set forth no defenses to the nonpayment allegations in the Complaint, nor did he make any assertion that he had achieved compliance with the PACA. However, Respondent did deny that his failures to pay were intentional, willful, or flagrant. (Id.)

Respondent’s failures to pay are willful, flagrant, and repeated as a matter of law. A finding of repeated violations is warranted when there are multiple, non-simultaneous violations of the PACA. See Zwick v. Freeman, 373 F.2d 110, 115 (2d Cir. 1967); In re: Scarpaci Bros., 60 Agric. 874, 882 (2001); In re: Five Star Food Distribs., Inc., 56 Agric. Dec. 880, 895 (1997). Whether a violation is flagrant is determined by looking at “the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred.” In re: Five Star Food Distribs., Inc., 56 Agric. Dec. at 895; see also Reese Sales Co. v. Hardin, 458 F.2d 183, 185, 187 (9th Cir. 1972) (finding that a respondent who failed to pay \$19,059.08 to nine sellers involving 26 separate transactions over two and one-half months committed repeated and flagrant violations of the PACA). Decisions have held “that whenever the total amount due and owing for produce exceeds \$5,000, an order should be entered finding the indebted produce dealer to have committed a flagrant violation of the Act.” In re: Veg-Mix., Inc., 48 Agric. Dec. 595, 599 (1989) (citing Fava & Co., 46 Agric. Dec. 79, 81 (1984)). By failing to pay \$317,520.55, a sum well over \$5,000, to 46 sellers in 175 separate transactions over a five month period, Respondent committed repeated and flagrant violations of the PACA.

The Department’s policy regarding willfulness is that “[a] violation is willful under the

Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.” In re: Hogan Distrib., Inc., 55 Agric. Dec. 622, 629 (1996). Willfulness is determined by looking at a respondent’s violations of PACA provisions and the Regulations, the length of the time period in which the violations occurred, and the number and total dollar amount of the transactions at issue. In re: Scamcorp, Inc., 57 Agric. Dec. 527, 552-53 (1998). Based on the large number of transactions, the size of the debt, and the continuation of these violations over a five month period, Respondent knew or should have known that he could not make full payment promptly for the large amount of produce that he ordered. As a licensee under the PACA since 1989 (Compl. ¶ II(b); Answer ¶ 3.), “Respondent was aware of the requirements of the PACA, or should have been aware of the requirements of the PACA, yet [he] continued to buy, knowing that each purchase would result in another violation.” In re: PMD Produce Brokerage Corp., 60 Agric. Dec. 780, 789 (1991); see also 7 C.F.R. § 46.26 (“The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.”). Under these circumstances, Respondent intentionally violated the PACA and operated in careless disregard of the payment requirements of the PACA. See In re: Tolar Farms and/or Tolar Sales, Inc., 57 Agric. Dec. 775, 782-83 (1998) (finding that a respondent who failed to pay seven sellers for 46 lots of produce totaling \$192,089.03 over a three month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of its payment requirements); In re: Five Star Food Distribs., Inc., 56 Agric. Dec. at 896-97 (finding that a respondent who failed to pay 14 sellers for 174 lots of produce totaling \$238,374.08 over an 11 month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of its payment requirements).

The Secretary's policy with respect to admissions in PACA disciplinary cases in which a respondent is alleged to have failed to make full payment promptly for produce purchases is as follows:

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. at 562 n.13. In this instance, Respondent has admitted in his Answer that he has failed to pay the 46 sellers referenced in the Complaint for the produce that he purchased, and over 120 days have elapsed since the service of this Complaint without any assertion from Respondent that he has achieved compliance with the requirements of the PACA. Therefore, this case must be treated as a "no-pay" case, which warrants the revocation of Respondent's license. See id. However, since Respondent's license was terminated due to his failure to pay the required annual renewal fee, the appropriate sanction is a finding that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the publication of the facts and circumstances of the violations. E.g., In re: D & C Produce, Inc., 62 Agric. Dec. 373, 379 (2002); In re: Scarpaci Bros., 60 Agric. Dec. at 886; In re: Hogan Distrib., Inc., 55 Agric. Dec. at 633.

Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant's Motion for a Decision Without Hearing by Reason of Admissions is granted and the following Decision and Order is issued in the disciplinary case against Respondent without

further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R § 1.139).

Findings of Fact

1. Dennis E. Hutchins is an individual doing business as Hutchins Distributing Company (hereinafter “Respondent”), a company organized and existing under the laws of the state of Oklahoma. Respondent’s business mailing address for Hutchins Distributing Company was 3632 NW 51st Street, Suite 208, Oklahoma City, Oklahoma 73112-5672. Respondent’s mailing address, through counsel, is c/o Gary D. Hammond, Hammond & Associates, P.L.L.C., 1320 E. 9th Street, Suite 4, Edmond, Oklahoma 73034.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 19891585 was issued to Respondent on July 18, 1989. This license was suspended on February 6, 2004, when Respondent failed to satisfy a reparation order. This license subsequently terminated on July 18, 2004, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. Respondent failed to make full payment promptly to 46 sellers in the amount of \$317,520.55 for 175 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period October 2003 through February 2004.

Conclusions

Respondent’s failure to make full payment promptly with respect to the transactions referred to in Findings of Fact 3 above constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

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

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.

this 24 day of November, 2006

s/ Jill S. Clifton

Administrative Law Judge