

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) **PACA Docket No. D-05-0023**
)
P. J. Produce, Inc.,)
) **Decision and Order**
Respondent) **by Reason of Default**

This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (herein frequently “the PACA” or “the Act”), by a complaint filed on September 23, 2005.

The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently “AMS” or “Complainant”), is represented by Andrew Y. Stanton, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

The complaint alleged, among other things, that during October 25, 2002 through October 3, 2003, the Respondent, P. J. Produce, Inc. (herein frequently “P. J. Produce” or “Respondent”), failed to make full payment promptly to 30 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$1,146,938.48 for 283 lots of perishable agricultural commodities, which the Respondent purchased, received, and accepted in

interstate and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The complaint requested that the Administrative Law Judge find that the Respondent P. J. Produce wilfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order that the facts and circumstances be published.

The Hearing Clerk was unsuccessful in attempting to serve the complaint upon the Respondent P. J. Produce, because certified mail to the Respondent's last known address was returned, indicating that the Respondent was no longer located there. The Complainant then attempted to serve the complaint upon the registered agent for the Respondent P. J. Produce who was noted in the records of the New York Department of State, but that individual refused to accept service, claiming that he was no longer the registered agent.

In order to obtain service of the complaint pursuant to section 306(b)(1) of the New York State Corporation Law, the Complainant filed, on April 11, 2007, his First Amended Complaint to include the necessary procedural elements for service through the New York Department of State. In all other respects, the First Amended Complaint was identical to the original complaint. The United States Marshal Service served the First Amended Complaint on the New York Department of State on April 24, 2007. The Complainant filed a Notice of Service of First Amended Complaint on Respondent on May 16, 2007.

According to section 1.136(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (hereinafter "Rules of Practice"), (7 C.F.R. § 1.136(a)), an answer is due within 20 days after service of

the complaint. No answer to the First Amended Complaint has been received from the Respondent P. J. Produce, Inc.

The Complainant's Motion for Decision Without Hearing by Reason of Default as to Respondent P. J. Produce, Inc., is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the complaint, which are admitted by P. J. Produce's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent P. J. Produce, Inc. is a corporation organized and existing under the laws of the State of New York. Respondent ceased operating in September 2003. The last known business mailing address of Respondent is Unit 337 Row C, Hunts Point Produce Market, Bronx, New York 10474.

2. At all times material to this decision, Respondent P. J. Produce, Inc. was licensed under the provisions of the PACA. License number 19991220 was issued to the Respondent on June 22, 1999. This license terminated on June 22, 2004, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when the Respondent failed to pay the required renewal fee.

3. As more fully set forth in paragraph III of the First Amended Complaint, Respondent P. J. Produce, Inc., during October 25, 2002 through October 3, 2003, failed to make full payment promptly to 30 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$1,146,938.48 for 283 lots of perishable agricultural commodities which the Respondent purchased, received and accepted in interstate and foreign commerce.

Conclusions

1. The Secretary of Agriculture has jurisdiction.
2. Respondent P. J. Produce, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by willfully failing to make full payment promptly to 30 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$1,146,938.48 for 283 lots of fruits and vegetables, all being perishable agricultural commodities, which the Respondent purchased, received and accepted in interstate and/or foreign commerce.

Order

1. The Respondent P. J. Produce, Inc. committed wilful, 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.
2. This Order shall take effect on the 11th day after this Decision becomes final.

Finality

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

Done at Washington, D.C.
this 12th day of October 2007

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Bldg Room 1031
1400 Independence Avenue, 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]

7 C.F.R. § 1.145