

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-09-0038
)	
KDLO Enterprises, Inc.)	
)	Decision and Order by
Respondent)	Reason of Admissions

1. The Complaint, filed on December 2, 2008, initiated a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) (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 Jonathan D. Gordy, Esq. with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, South Building Room 2309, Stop 1413, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

3. The Complaint alleges that the Respondent, KDLO Enterprises, Inc. (herein frequently “KDLO” or “Respondent”), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to pay, during October 2006 through June 2007, 8 produce sellers for

more than \$450,000 in produce purchases. The Complaint alleges that KDLO willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. The Respondent is KDLO Enterprises, Inc., a Washington corporation. KDLO is represented by Kevin M. Pederson, KDLO owner and officer (President).

5. KDLO Enterprises, Inc. on February 27, 2009, filed an Answer to the Complaint.

Procedural History

6. The hearing was scheduled for September 2010, in Tacoma, Washington. AMS then filed, on August 3, 2010, its “Motion for Official Notice of Bankruptcy Pleadings and Motion for Decision without Hearing by Reason of Admissions.” *See* 7 C.F.R. § 1.139.

The hearing was rescheduled for November. KDLO filed its Response to the Motion on September 22, 2010. The hearing was then canceled, to be rescheduled if needed after my ruling on the Motion. KDLO filed its Supplement to its Response on October 13, 2010.

AMS filed its Reply on November 5, 2010. I now know that no hearing will be necessary.

“ . . . 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).¹

7. After careful consideration, and I commend both AMS and KDLO for excellent work, I find that AMS’s Motion must be and hereby is GRANTED. The admissions come not only from KDLO’s filings in this case, but also from the filings in the bankruptcy case of Kevin M. Pederson and his wife Donna M. Pederson. *See* paragraphs 9 and 10. I issue

¹

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

this Decision and Order by Reason of Admissions, pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139.

Discussion

8. 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).²

9. I take official notice of the bankruptcy pleadings of Kevin M. Pederson and his wife Donna M. Pederson. *See*, for example, the Discharge of Debtor, granted November 18, 2009. AMS Motion Exhibit B p.1. KDLO is included as an “fdba” (formerly doing business as) of Debtor Kevin M. Pederson. Kevin Pederson identified himself as formerly operating under the trade name “KDLO Enterprises, Inc.” In schedule F, “CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS,” Kevin and Donna Pederson admitted that they owed \$422,518.18 to the eight sellers listed in the Complaint, and they listed **\$348,026.18** of that amount as **undisputed**. Schedule F, *In re Kevin Pederson*, Case No. 09-45837-PHB in the Western District of Washington (August 11, 2009) (ECF Docket No. 1). KDLO is a corporation, and Kevin M. Pederson and his wife are individuals; nevertheless, in these circumstances, their admissions in the Chapter 7 bankruptcy suffice to admit, for the corporation KDLO, the material allegations in the Complaint. I agree with AMS, in its Reply filed November 5, 2010, that KDLO’s argument “has elevated the form of the corporation, while ignoring the substance of the bankruptcy.” AMS Reply pp. 2-3.

²

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

“ . . . KDLO’s owners admitted in their Chapter 7 bankruptcy pleadings that they *were* the corporation;” AMS Reply p. 3. KDLO’s business debts are clearly included in the Pedersons’ bankruptcy. AMS Reply p. 3.

10. A comparison of the Complaint with the bankruptcy filing shows the following:

Produce Seller	Amount Alleged in the Complaint	Amount Admitted in Bankruptcy Schedule F
California Oregon Seed, Inc.	\$4,216.00	\$4,216.00
Sunkist Growers	\$74,492.50	\$74,492.00
Gold Digger Apples	22,848.50	\$21,808.00
Evans Fruit	\$251,425.30	\$250,000.00
Salyer American Foods	\$8,063.50	\$7,447.50
Manson Growers Cooperative	\$43,692.47	\$18,000.00
C.M. Holzinger Fruit Co. (Holtzinger Fruit Co.)	\$37,098.50	\$38,141.50
Sterling Export	\$8,785.00	\$8,413.18
TOTALS:	\$450,621.77	\$422,518.18

Schedule F indicates that the amounts are undisputed with seven of the eight produce sellers; the amount of \$74,492.00 owed to Sunkist Growers was the only one listed as disputed on Schedule F. (AMS Motion, Exhibit A p. 31.) Respondent KDLO’s owners received a full discharge of this debt, as indicated in the Discharge of Debtor, *In re Kevin Pederson*, Case No. 09-45837-PHB.

11. 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).

12. KDLO cannot show full compliance with the PACA within 120 days after having been served with the Complaint. [The Complaint was served on December 11, 2008.] KDLO's inability to show 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.

13. KDLO's violations are "repeated" because repeated means more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. *See, In re Five Star Food Distributors*, 56 Agric. Dec. 880, 894-95 (1997). KDLO's violations of the PACA are also willful, as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)), because of "the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved." *See Scamcorp*, 57 Agric. Dec. at 553.³ KDLO intentionally, or with careless disregard for the payment requirements in

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Willfulness under the PACA does not require evil intent. Willfulness only requires intentional actions by Respondent or actions undertaken with careless disregard of the statutory requirements. *See, e.g. Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983).

section 2(4) of the PACA, “shifted the risk of nonpayment to sellers of the perishable agricultural commodities.” *See id.*, at 553.

14. KDLO indicates that Evans Fruit Co. is largely responsible for KDLO’s failures under the PACA. For purposes of this disciplinary case, I need not determine whether that is true. Where the licensee, such as KDLO, has failed to make full payment promptly to its produce suppliers, mitigating circumstances do not negate findings of “willful, flagrant and repeated violations.” *See* AMS Reply pp. 8-13.

Findings of Fact

15. KDLO Enterprises, Inc., which is no longer in business, is a corporation incorporated and existing under the laws of the State of Washington. KDLO’s business and mailing address are in Gig Harbor, Washington.

16. Pursuant to the licensing provisions of the PACA, KDLO Enterprises, Inc. was issued license number 1998-1922 on September 8, 1998. The license terminated on September 8, 2008, when KDLO failed to pay the annual renewal fee. Section 4(a) of the PACA (7 U.S.C. § 499a(a)).

17. KDLO Enterprises, Inc., during October 2006 through June 2007, failed to make full payment promptly to 7 of the 8 produce sellers listed in paragraph III of the Complaint of the agreed purchase prices, or the balance of those prices, in the amount of \$348,026.18 for 28 lots of fruits and vegetables, all being perishable agricultural commodities, which KDLO purchased, received, and accepted in the course of interstate commerce.

18. KDLO cannot show full compliance with the PACA within 120 days after having been served with the Complaint. [The Complaint was served on December 11, 2008.]

KDLO's inability to show full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case.

Conclusions

19. The Secretary of Agriculture has jurisdiction over KDLO Enterprises, Inc. and the subject matter involved herein.

20. KDLO Enterprises, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during October 2006 through June 2007, by failing to make full payment promptly of the agreed purchases prices, or the balance of those prices, in the amount of \$348,026.18 for 28 lots of fruits and vegetables, all being perishable agricultural commodities, which KDLO purchased, received, and accepted in the course of interstate commerce.

Order

21. KDLO Enterprises, 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 PACA violations shall be published.

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

Finality

23. 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.

Done at Washington, D.C.
this 30th day of December 2010

s/ Jill S. Clifton

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
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APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

....

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]