

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY

Docket No. 12-0563

In re:

CHARLES HELMICK,

Respondent.

DECISION AND ORDER ON THE RECORD

I. INTRODUCTION

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture (“USDA”; “Complainant”) against Charles Helmick (“Respondent”) alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. (“the Act”). The Complaint alleges that Respondent failed to comply with the Act and its implementing regulations, administered by the Packers and Stockyards Program, Grain Inspection Service, Packers and Stockyards Administration (“GIPSA”).

II. ISSUES

1. Whether a hearing is necessary in this matter;
2. Whether Respondent failed to timely pay sellers for the purchase of livestock in willful violation of the Act; and
3. If Respondent willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural History

On August 1, 2012 Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”). On August 29, 2012, Respondent filed correspondence, acting *pro se*, which I construe to be a timely filed Answer. References to the Answer in this Decision and Order shall be denoted as “RX-1”. By Order issued March 22, 2012, I set deadlines for the parties’ submissions in advance of setting a hearing date.

On October 10, 2012, Complainant filed a motion for a Decision and Order on the Record. On November 14, 2012, Respondent filed correspondence in which he did not deny the complaint allegations, and asserted that he was attempting to make restitution for unpaid sales of livestock. This document is hereby designated “RX-2”. On November 20, 2012, I deferred ruling on Complainant’s motion, and allowed additional time for Respondent and Complainant to file evidence. On December 13, 2012, Complainant filed documentary evidence identified as CX-1 through CX-8, and also filed sworn declarations by two individuals, hereby identified as CX-9 and CX-10. Complainant’s evidence is hereby admitted to the record. Respondent has not filed any evidence other than his two letters, which are hereby admitted to the record.

The matter is ripe for adjudication and the record is closed.

1. Statutory and Regulatory Authority

7 C.F.R. § 1.1.39 provides, in pertinent part:

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have

been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing...

7 C.F.R. § 1.1.39.

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of possession of livestock by paying by check to the seller or authorized representative at the point where the livestock is transferred or by paying through a wire transfer. Id. The deadline for making payment in full by the next business day can only be circumvented by express written agreement between the buyer and the seller. Id. Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a).

The Act allows for the assessment of civil money penalties in an amount of up to \$11,000.00 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. See, S.S. Farms Linn County, 50 Agric. Dec. 476 (1991). One of the primary purposes of the Act is to assure fair trade practices and safeguard farmers and ranchers from being paid less than the fair market value of their livestock. Bruhn's Freezer Meats v. United States Dep't of Agric., 438 F. 2d 1332, 1337 (8th Circ. 1971).

B. Summary of the Facts

Respondent is registered with USDA as a livestock dealer. On September 19, 2009, Complainant GIPSA sent to Respondent a Notice of Violation regarding Respondent's insolvency as of December 31, 2008.

During the period from June 23, 2009 through May 26, 2011, Respondent failed to make timely payment for 100 head of livestock purchased from Virginia Cattle Company, South Branch Valley Livestock Exchange and Harry “Buck” Hamborsky for the aggregate amount of \$52,147.88. CX-5 through CX-8. To the knowledge of GIPSA Resident Agent James Cannon, an amount of \$29,504.20 remains due to those livestock sellers. CX-10. Agent Cannon documented the failure to pay the full amounts due to sellers. CX-5 through CX-8; CX-10.

In his written correspondence, Respondent admitted that he had failed to fully pay sellers for livestock that he purchased. Respondent explained that his accountant had passed away, and review of the accountant’s books revealed that Respondent had not made proper tax payments. The additional financial burden of resolving his tax deficits led to problems with making prompt payment. Respondent freely admitted that he had violated the Act, but he believed that he had made payments to one seller for which he has not received credit.

Jeanna Harbison is an Investigative/Enforcement Attorney for GIPSA whose duties include reviewing investigations and making recommendations regarding the propriety of sanctions. CX-9. Ms. Harbison reviewed Respondent’s file and concluded that he had willfully violated the Act by purchasing livestock and failing to pay the full amount within the time period required by the Act. She concluded that a civil penalty of \$29,504.26 should be assessed against the Respondent, with set-offs for proof of payment to sellers. In addition, Ms. Harbison believed that a five year suspension of Respondent’s registration to act as a dealer under the Act should be imposed, with the proviso that the suspension could be reduced to one year upon proof of full payment to the sellers, particularly in consideration of Respondent’s assertion that he had paid one seller an additional \$10,000.00. In the alternative, Ms. Harbison believed that Respondent could be employed by another dealer, after one year suspension of his own registration.

C. Discussion

The record is undisputed that Respondent failed to make timely payments within the mandates of the Act. Respondent has admitted that he failed to make timely payments. Although Respondent asserted that he made more payments than GIPSA credits him, he did not provide any specific information about the payments. Further, Respondent did not comply with the payment provisions of the Act despite being given notice by GIPSA that he was in violation of the Act. The Secretary has found that "...once a licensee has been adequately warned, if he subsequently violated the Act the agency may proceed to suspend his license without any further warning, notice or opportunity to demonstrate informally that he did not violate the Act". In re: Jeff Palmer, 50 Agric. Dec. 1762 at 17802(1991). Accordingly, I find that a hearing in this matter is not necessary, and further find it appropriate to issue this Decision and Order on the record, pursuant to 7 C.F.R. §1.139.

I find that Respondent has willfully violated the Act by failing to make payments when due. The Secretary has concluded that the failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. In re: Great American Veal, Inc., 48 Agric. Dec. 183, 202-203 (1989). Respondent failed to make timely payments despite receiving a notice from GIPSA advising him of the need to comply with the Act. I conclude that Mr. Helmick's continued practice of making late or incomplete payments despite notice constitutes substantial evidence of willfulness.

I credit Respondent's explanation that his cash flow suffered due to tax deficiencies that needed to be addressed, and I sympathize with his position. Nevertheless, Respondent's financial problems are not a meritorious defense to his failure to make payments. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the

same damage regardless of the reasons for the late payments. In re: Great American Veal Inc., supra. at 211. Moreover, the Secretary has concluded that a Respondent who admits to the allegations in a complaint is in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondent. In re: Hardin County Stockyards, Inc., 53 Agric. Dec. 654, 656 (1994).

I accord substantial weight to Ms. Harbison's recommendations, considering the number of years and transactions that disclose Respondent's failure to comply with the Act. GIPSA's notice to Respondent failed to serve as a suitable deterrent to his practice of making late payments. I agree with GIPSA's assessment of penalties, and find that a cease and desist Order, a suspension, and monetary penalties should persuade Respondent to comply with the prompt payment requirements of the Act in the future. However, I decline to adopt wholesale the recommendations proposed by Complainant regarding the timeframe for making full payment, considering that the proposed date has passed. I also find that the period of suspension should be reduced to correlate with the number of years that Respondent failed to comply with the Act.

D. Findings of Fact

1. Respondent is an individual whose current address is in the State of West Virginia.
2. At all times material herein, Respondent was engaged in the business of buying livestock in commerce and acted as a dealer within the meaning of the Act.
3. On September 19, 2009, GIPSA sent Respondent written notification advising him that he had violated the Act.
4. During the period from June 23, 2009 through May 26, 2011, Respondent was involved in five transactions to purchase a total of 100 head of livestock from Virginia Cattle Company, South Branch Valley Livestock Exchange, and Harry "Buck" Hamborsky for a total price of

\$52,147.88 and failed to pay the full amount of the purchase prices within the time period required by the Act.

5. During the period from April 1, 2011 through May 27, 2011, Respondent was involved in fourteen transactions to purchase a total of 144 head of livestock from five different livestock sellers for a total purchase price of \$91,583.29, which Respondent failed to fully pay when due.

6. Respondent failed to make timely payments after being notified by GIPSA that he had violated the Act.

E. Conclusions of Law

Respondent willfully violated 7 U.S.C. § 192(a) and § 228b of the Act by failing to pay the full amount of the purchase price for livestock within the time period required by the Act.

Sanctions are appropriate to deter Respondent and others from willfully failing to make prompt payments, pursuant to 7 U.S.C. §193(b).

ORDER

Respondent Charles R. Helmick, shall cease and desist from failing to pay when due the full purchase price of livestock in transactions subject to the Act and regulations monitored by GIPSA.

Pursuant to 7 U.S.C. §193(b), Respondent is assessed a civil penalty of not more than \$29,504.26, with full credit for all payments that Respondent can establish by written proof provided to counsel for Complainant not later than December 31, 2012. In addition, the penalty shall be suspended if Complainant makes all payments due on the outstanding balances owed to sellers as the result of transactions involved in this adjudication so long as those payments are made by not later than December 31, 2012. If Respondent fails to fully satisfy the outstanding balances, the amount of the final penalty shall be made by check to "U.S. Department of

Agriculture” and sent to USDA-GIPSA, P.O. Box 790335, St. Louis Missouri, 63179-0335.

Respondent shall include on the payment instrument a reference to this matter, Docket No. 12-0563.

Respondent is hereby suspended from registering under the Act for a period of not to exceed **three years**, which is the time period equivalent to the period during which violations arose. If Respondent can demonstrate through written proof that he has satisfied the outstanding balance by December 31, 2012, the suspension shall be reduced to six months. If Respondent fails to meet the deadline imposed herein, but makes restitution in full within six months, he may be employed by another dealer within the meaning of the Act.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

So ORDERED this 19th day of December, 2012 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge