

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-04-0004
)	
FRESH SOLUTIONS, INC.,)	
)	Decision Without Hearing
Respondent)	By Reason of Default

[1] This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) [hereinafter often referred to as "the PACA"], instituted by the Notice to Show Cause and Complaint filed on December 3, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter often referred to as "Complainant"].

[2] The Notice to Show Cause and Complaint [hereinafter often referred to as "Complaint"] alleges that during the period of August 16, 2002, through April 29, 2003, Respondent Fresh Solutions, Inc. [hereinafter often referred to as "Respondent"] failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$351,968.50 for 1,483 lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

[3] A copy of the Complaint filed on December 3, 2003 was sent to Respondent at 3850 Holcombe Bridge Road, Suite 210, Norcross, Georgia 30093, by certified mail on December 4, 2003, and was received by Respondent on December 15, 2003.

[4] Respondent failed to file an answer to the Notice to Show Cause and Complaint within 10 days, the time prescribed in the Rules of Practice, 7 C.F.R. § 1.136(a); to date, Respondent has still not filed an answer.

[5] 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 are adopted and set forth in this Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 et seq.

Findings of Fact

[6] Respondent Fresh Solutions, Inc. is a corporation organized and existing under the laws of Georgia with a business address of 3850 Holcombe Bridge Road, Suite 210, Norcross, Georgia 30093.

[7] Pursuant to the licensing provision of the PACA, license number 20020211 was issued to Respondent on October 26, 2001. This license terminated on October 26, 2002, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

[8] As more fully set forth in paragraph III of the Notice to Show Cause and Complaint, during the period August 16, 2002, through April 29, 2003, Respondent Fresh Solutions, Inc. purchased, received and accepted in interstate commerce, from eight sellers, 1,483 lots of fruits

and vegetables, all being perishable agricultural commodities, but willfully failed to make full payment promptly of the agreed purchase prices in the total amount of \$351,968.50.

[9] On November 5, 2003, Complainant received a completed application for a PACA license from Respondent. Pursuant to Section 4(d) of the PACA (7 U.S.C. § 499d(d)), Complainant withheld the issuance of a PACA license to Respondent, pending an investigation, which revealed that Respondent had willfully failed to make full payment promptly for perishable agricultural commodities, as set forth in paragraph [8] above, and that Respondent was not in full compliance with the PACA at the time of Respondent's licensing application.

Conclusions

[10] Respondent's failure to make full payment promptly with respect to the 1,483 transactions described in paragraph [8] above, constitutes willful, repeated and flagrant violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

[11] The acts of Respondent in failing to make full payment promptly of the agreed purchase prices, or balances thereof, as described in paragraph [8] above, for the perishable agricultural commodities that it purchased, received and accepted, constitute practices of the character prohibited by the PACA.

Order

[12] Respondent Fresh Solutions, Inc. has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

[13] Respondent Fresh Solutions, Inc. has engaged in practices of a character prohibited by the PACA and, pursuant to Section 4 of the PACA (7 U.S.C. § 499d(d)), is unfit to be licensed. Respondent's application for a PACA license is, therefore, refused.

[14] This Order shall take effect on the 11th day after this Decision becomes final. This Decision becomes final without further proceedings 35 days after service, unless an appeal to the Judicial Officer is filed 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 shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 12th day of April 2004

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 1081, South Building
Washington, D.C. 20250-9200
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

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