

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

PROCEDURAL HISTORY

Robert C. Keeney, Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 2, 2008. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated under the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges, during the period October 2006 through June 2007, KDLO Enterprises, Inc. [hereinafter KDLO], failed to make full payment promptly of the agreed purchase prices to eight produce sellers in the total amount of

\$450,621.77 for 33 lots of perishable agricultural commodities which KDLO purchased, received, and accepted in interstate commerce, in violation of 7 U.S.C. § 499b(4) and 7 C.F.R. § 46.2(aa) (Compl. ¶¶ III-IV). On February 27, 2009, KDLO filed a response to the Complaint in which KDLO denied the material allegations of the Complaint.

On August 3, 2010, the Deputy Administrator filed a Motion for Official Notice of Bankruptcy Pleadings and Motion for Decision without Hearing by Reason of Admissions [hereinafter Motion for Default Decision]. On September 22, 2010, KDLO filed a response to the Deputy Administrator's Motion for Default Decision; on October 13, 2010, KDLO supplemented its response to the Deputy Administrator's Motion for Default Decision; and on November 5, 2010, the Deputy Administrator filed a reply in support of his Motion for Default Decision.

On December 30, 2010, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order by Reason of Admissions in which the ALJ: (1) granted the Deputy Administrator's Motion for Default Decision; (2) found, during the period October 2006 through June 2007, KDLO failed to make full payment promptly to seven of the eight produce sellers listed in the Complaint of the agreed purchase prices, or balance of those prices, in the amount of \$348,026.18 for 28 lots of perishable agricultural commodities which KDLO purchased, received, and accepted in interstate commerce; (3) concluded KDLO willfully, flagrantly, and repeatedly violated 7 U.S.C.

§ 499b(4); and (4) ordered publication of the facts and circumstances of KDLO's PACA violations.

On March 7, 2011, KDLO appealed to, and requested oral argument before, the Judicial Officer. On March 25, 2011, the Deputy Administrator filed a Response to the Appeal Petition. On April 1, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon careful consideration of the record, I affirm the ALJ's December 30, 2010, Decision and Order by Reason of Admissions, and, with minor changes, I adopt the ALJ's December 30, 2010, Decision and Order by Reason of Admissions as the final Decision and Order.

DECISION

Discussion

The PACA requires licensed produce dealers to make full payment promptly for fruit and vegetable purchases, usually within 10 days of acceptance, unless the parties agreed to different terms prior to the purchase (7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa)(5), (11)).

The ALJ took official notice of the filings in *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009), a bankruptcy proceeding involving joint debtors, Kevin M. Pederson and Donna M. Pederson. The bankruptcy filings include KDLO as a "fdba" (formerly doing business as) of Mr. Pederson and identify Mr. Pederson as formerly operating under the trade name "KDLO Enterprises, Inc." In

Schedule F - Creditors Holding Unsecured Nonpriority Claims, Mr. and Mrs. Pederson admit that they owed \$422,518.18 to the eight produce sellers listed in the Complaint, and that \$348,026.18 of that amount was undisputed. KDLO is a corporation, and Mr. and Mrs. Pederson are individuals; nevertheless, in these circumstances, Mr. and Mrs. Pederson's admissions in *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009), suffice to admit the material allegations in the Complaint for KDLO.

A comparison of the Complaint with Schedule F - Creditors Holding Unsecured Nonpriority Claims shows the following:

Produce Seller	Amount Alleged in the Complaint	Amount Admitted in Bankruptcy Schedule F
California Oregon Seed, Inc.	\$4,216	\$4,216
Sunkist Growers	\$74,492.50	\$74,492
Gold Digger Apples	22,848.50	\$21,808
Evans Fruit	\$251,425.30	\$250,000
Salyer American Foods	\$8,063.50	\$7,447.50
Manson Growers Cooperative	\$43,692.47	\$18,000
C.M. Holzinger Fruit Co. (Holtzinger Fruit Co.)	\$37,098.50	\$38,141.50
Sterling Export	\$8,785	\$8,413.18
TOTALS:	\$450,621.77	\$422,518.18

(Motion for Default Decision, Ex. A at 21, 24, 26, 28, 31.) Schedule F - Creditors Holding Unsecured Nonpriority Claims indicates that the amounts are undisputed with seven of the eight produce sellers; the amount of \$74,492 owed to Sunkist Growers was

the only debt listed as disputed on Schedule F - Creditors Holding Unsecured Nonpriority Claims (Motion for Default Decision, Ex. A at 31). Mr. and Mrs. Pederson received a full discharge of these debts, as indicated in the Discharge of Debtor, *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009) (Motion for Default Decision, Ex. B at 1).

The United States Department of Agriculture's policy in cases in which PACA licensees have failed to make full or prompt payment for produce 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. 527, 549 (1998).

The Hearing Clerk served the Complaint on KDLO on December 11, 2008.¹ KDLO cannot show full compliance with the PACA within 120 days after having been served with the Complaint. 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. The appropriate sanction in a "no-pay" case in which the violations are flagrant or repeated is license revocation. A civil penalty is not appropriate because "limiting

¹United States Postal Service Domestic Return Receipt for article number 7004 2510 0003 7022 8258.

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 United States while produce sellers are left unpaid. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 570-71 (1998).

KDLO’s violations are “repeated” because repeated means more than one.

KDLO’s 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, Inc.*, 56 Agric. Dec. 880, 895 (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)).² Willfulness is reflected by KDLO’s violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which KDLO committed the violations and the number and dollar amount of KDLO’s violative transactions.

Findings of Fact

1. KDLO is a corporation incorporated and existing under the laws of the State of Washington. KDLO’s business and mailing addresses are in Gig Harbor, Washington.

²A violation is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of 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, 777-78 (D.C. Cir. 1983).

2. Pursuant to the licensing provisions of the PACA, KDLO was issued license number 1998-1922 on September 8, 1998. Pursuant to 7 U.S.C. § 499d(a), KDLO's PACA license terminated on September 8, 2008, when KDLO failed to pay the annual renewal fee.

3. KDLO, during the period October 2006 through June 2007, failed to make full payment promptly to seven of the eight produce sellers listed in the Complaint of the agreed purchase prices, or the balance of those prices, in the amount of \$348,026.18 for 28 lots of perishable agricultural commodities which KDLO purchased, received, and accepted in interstate commerce.

4. The Hearing Clerk served the Complaint on KDLO on December 11, 2008. KDLO cannot show full compliance with the PACA within 120 days after having been served with the Complaint. 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 of Law

1. The Secretary of Agriculture has jurisdiction over KDLO and the subject matter involved in the instant proceeding.

2. KDLO willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), during the period October 2006 through June 2007, by failing to make full payment promptly to seven produce sellers of the agreed purchases prices, or the balance of those

prices, in the amount of \$348,026.18 for 28 lots of perishable agricultural commodities which KDLO purchased, received, and accepted in interstate commerce.

3. The appropriate sanction for KDLO, since KDLO no longer has a PACA license, is publication of the facts and circumstances of KDLO's violations of the PACA.

KDLO's Request for Oral Argument

KDLO's request for oral argument before the Judicial Officer (Appeal Pet. at 2 ¶ 5), which the Judicial Officer may grant, refuse, or limit,³ is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

KDLO's Appeal Petition

KDLO raises four issues in its Appeal Petition. First, KDLO contends the ALJ erroneously denied KDLO the opportunity for hearing, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States (Appeal Pet. at 1 ¶ 1).

The Administrative Procedure Act authorizes official notice in adjudicative proceedings⁴ and the Rules of Practice provide that official notice may be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character.⁵ Federal courts may

³7 C.F.R. § 1.145(d).

⁴5 U.S.C. § 556(e).

⁵7 C.F.R. § 1.141(h)(6).

take judicial notice of proceedings in other courts if those proceedings have a direct relation to matters at issue.⁶ Therefore, under 7 C.F.R. § 1.141(h)(6), an administrative law judge presiding over a PACA disciplinary proceeding may take official notice of proceedings in a United States bankruptcy court that have a direct relation to the PACA disciplinary proceeding. Documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings.⁷ The documents filed in *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009), have a direct relation to the matters at issue in the instant proceeding. Therefore, I conclude the ALJ properly took

⁶*Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987).

⁷*In re Judith's Fine Foods Int'l, Inc.*, 66 Agric. Dec. 758, 764 (2007); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 827, 893 (1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (1993); *In re Allsweet Produce Co.*, 51 Agric. Dec. 1455, 1457 n.1 (1992); *In re Magnolia Fruit & Produce Co.*, 49 Agric. Dec. 1156, 1158 (1990), *aff'd*, 930 F.2d 916 (5th Cir. 1991) (Table), *printed in* 50 Agric. Dec. 854 (1991); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 627 (1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 615 (1987); *In re Anthony Tamaro, Inc.*, 46 Agric. Dec. 173, 175-76 (1987); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 731 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1587 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987), *remanded*, 47 Agric. Dec. 1486 (1988), *final decision*, 48 Agric. Dec. 595 (1989).

official notice of the filings in *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009).

The Rules of Practice set forth the procedure to be followed when a respondent admits the material allegations of fact contained in the complaint. As KDLO has admitted the material allegations of fact in the Complaint, there are no issues of fact on which a meaningful hearing could be held in the instant proceeding, and the ALJ properly issued the December 30, 2010, Decision and Order by Reason of Admissions under the default provisions in the Rules of Practice (7 C.F.R. § 1.139). The application of the default provisions in the Rules of Practice do not deprive KDLO of its rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.⁸

Second, KDLO asserts the issue in the instant proceeding has been previously litigated in *Evans Fruit Co. v. KDLO Enterprises, Inc.*, No. C07-5301RBL (W.D. Wash. Oct. 9, 2007), and in *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009). KDLO contends, in light of this previous litigation, the instant

⁸*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

administrative proceeding subjects KDLO to double jeopardy, in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

(Appeal Pet. at 1 ¶ 2.)

The Double Jeopardy Clause provides that no “person [shall] be subject for the same offence to be twice put in jeopardy of life or limb[.]” (U.S. Const. amend. V.) The Double Jeopardy Clause protects against successive punishments for the same criminal offense.⁹ Neither *Evans Fruit Co. v. KDLO Enterprises, Inc.*, No. C07-5301RBL (W.D. Wash. Oct. 9, 2007), nor *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009), was a criminal proceeding that resulted in KDLO’s punishment.

Moreover, the instant disciplinary administrative proceeding is not a criminal proceeding.¹⁰ Therefore, jeopardy attaches neither to the proceedings referenced by

⁹*Hudson v. United States*, 522 U.S. 93, 98-99 (1997); *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *United States v. Dintz*, 424 U.S. 600, 606 (1976); *Breed v. Jones*, 421 U.S. 519, 528 (1975); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235-36 (1972); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

¹⁰*In re Field Market Produce, Inc.* (Order Denying Late Appeal), 55 Agric. Dec. 1418, 1432 (1996) (holding a disciplinary administrative proceeding instituted under the PACA is not a criminal proceeding). *See generally United States v. Bizzell*, 921 F.2d 263, 266 (10th Cir. 1990) (stating administrative proceedings in which defendants were debarred from Department of Housing and Urban Development programs were not prosecutions within the meaning of the Double Jeopardy Clause); *In re Terry Horton*, 50 Agric. Dec. 430, 440 (1991) (stating double jeopardy is not applicable to administrative proceedings for the assessment of a civil monetary penalty); *In re Leonard McDaniel*, 45 Agric. Dec. 2255, 2264 (1986) (stating an administrative proceeding to assess a civil monetary penalty is civil in nature and not subject to the Double Jeopardy

(continued...)

KDLO in its Appeal Petition nor to the instant proceeding, and the Double Jeopardy Clause cannot be interposed to bar the instant proceeding.

Third, KDLO contends the employment sanction as applied to Mr. Pederson is too severe and deprives Mr. Pederson of his right to work and provide for his family (Appeal Pet. at 1 ¶ 3).

Mr. Pederson is not a party to the instant proceeding, and no employment sanction is imposed on Mr. Pederson in the instant proceeding. Moreover, any employment restriction on Mr. Pederson which may result from the disposition of the instant proceeding is irrelevant to the disposition of the instant proceeding. Therefore, I decline to address KDLO's contention regarding the severity of any employment restriction imposed on Mr. Pederson.

Fourth, KDLO contends the Deputy Administrator should not have filed the Complaint because Evans Fruit Company was not eligible for trust protection under the PACA (Appeal Pet. at 2 ¶ 4).

KDLO cites no basis for its contention that, as a condition of the Deputy Administrator's filing a complaint against a respondent that has allegedly violated the prompt payment provisions of 7 U.S.C. § 499b(4), all of the alleged unpaid produce sellers must be eligible for trust protection under the PACA. I cannot locate any provision of the PACA or the Rules of Practice that supports KDLO's contention;

¹⁰(...continued)
Clause).

therefore, I reject KDLO's contention that the Deputy Administrator should not have filed the Complaint.

ORDER

KDLO has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)). The facts and circumstances of KDLO's violations of the PACA shall be published. The publication of the facts and circumstances of KDLO's violations of the PACA shall be effective 60 days after service of this Order on KDLO.

RIGHT TO JUDICIAL REVIEW

KDLO has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial review must be sought within 60 days after entry of the Order in this Decision and Order.¹¹ The date of entry of the Order in this Decision and Order is August 3, 2011.

Done at Washington, DC

August 3, 2011

William G. Jenson
Judicial Officer

¹¹28 U.S.C. § 2344.