

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) PACA Docket No. D-09-0038  
 )  
KDLO Enterprises, Inc., )  
 )  
Respondent ) **Order Denying Petition to Reconsider**

**PROCEDURAL HISTORY**

On September 28, 2011, KDLO Enterprises, Inc. [hereinafter KDLO], filed a petition for reconsideration of *In re KDLO Enterprises, Inc.*, \_\_ Agric. Dec. \_\_ (Aug. 3, 2011) [hereinafter Petition to Reconsider]. On October 14, 2011, Robert C. Keeney, Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], filed a response to KDLO's Petition to Reconsider. On October 18, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, KDLO's Petition to Reconsider.

**CONCLUSIONS ON RECONSIDERATION**

KDLO raises three issues in its Petition to Reconsider. First, KDLO asserts I deprived KDLO of its right under the Due Process Clause of the Fifth Amendment to the Constitution of the United States to be heard in person. KDLO asserts "[u]nder the

constitution in the 5th amendment, it states that all person's [sic] have a right to be heard in person, by hearing and that the Supreme court has upheld this right." (Pet. to Reconsider at 1 ¶ 1.)

In *In re KDLO Enterprises, Inc.*, \_\_\_ Agric. Dec. \_\_\_ (Aug. 3, 2011), I concluded that, as KDLO admitted the material allegations of fact in the Complaint, there are no issues of fact on which a meaningful hearing could be held and issuance of a decision by reason of admissions and without hearing does not deprive KDLO of its rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States. While KDLO asserts the Supreme Court of the United States supports KDLO's position that all persons have a right to be heard in person, KDLO fails to cite the cases upon which it relies, and I cannot locate any cases which support KDLO's position. On the other hand, a number of courts have held that, when there is no issue of material fact in dispute, as in the instant proceeding, an in-person administrative hearing is generally not required.<sup>1</sup> Therefore, I reject KDLO's assertion that it has a right under the Due Process

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<sup>1</sup>See, e.g., *Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (stating agencies no less than courts can grant summary judgment, and the due process clause does not require a hearing where there is no disputed issue of material fact to resolve); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (stating an agency may ordinarily dispense with a hearing when no genuine dispute exists); *The Louisiana Land and Exploration Co. v. FERC*, 788 F.2d 1132, 1137-38 (5th Cir. 1986) (stating, where there are no issues of material fact presented, an agency hearing is not required); *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971) (stating it is settled law that, when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding is not obligatory even though a pertinent statute prescribes a hearing).

Clause of the Fifth Amendment to the Constitution of the United States to an in-person hearing in the instant proceeding.

Second, KDLO asserts Kevin Pederson was responsibly connected with KDLO and the employment bar in 7 U.S.C. § 499h(b) is applicable to Mr. Pederson. KDLO contends the employment bar in the PACA is overly broad, not specific, punitive, and unconstitutional and application of the employment bar to Mr. Pederson would deprive Mr. Pederson of his ability to make a living and provide for his family. (Pet. to Reconsider at 1 ¶ 2.)

KDLO and the Deputy Administrator are the only parties in the instant proceeding. Mr. Pederson is not a party in the instant proceeding and no employment bar has been imposed on Mr. Pederson in the instant proceeding. The collateral consequences of the order against KDLO in *In re KDLO Enterprises, Inc.*, \_\_\_ Agric. Dec. \_\_\_ (Aug. 3, 2011), on an individual responsibly connected with KDLO are irrelevant to this proceeding, which involves only KDLO. Therefore, I decline to address KDLO's challenges to the employment bar in 7 U.S.C. § 499h(b) or KDLO's concerns regarding the affect of an employment bar on Mr. Pederson's ability to make a living and provide for his family.

Third, KDLO asserts the Secretary of Agriculture cannot impose sanctions on KDLO for failure to pay Evans Fruit Co. because Evans Fruit Co. failed to preserve its trust rights (Pet. to Reconsider at 1 ¶ 3).

When a produce buyer defaults on payment for produce, the buyer has committed a violation of 7 U.S.C. § 499b(4). The defaulting produce buyer is then subject to a sanction under the PACA. The produce buyer's violation of the PACA is not negated merely because the produce seller, who has perfected its trust rights under the PACA, enters into a post-default payment agreement with the defaulting buyer, even if the post-default agreement causes the produce seller to forfeit the trust protection provided in 7 U.S.C. § 499e(c).<sup>2</sup> The trust is a means to protect the produce seller's right to payment for produce; it is not a means to enforce the prompt payment provisions of the PACA in 7 U.S.C. § 499b(4). The Secretary of Agriculture can initiate an enforcement action against a defaulting buyer for a violation of 7 U.S.C. § 499b(4) without regard to any post-default agreement between the unpaid seller and the defaulting buyer.<sup>3</sup> Therefore, I reject KDLO's assertion that the Secretary of Agriculture cannot impose sanctions on KDLO for failure to pay Evans Fruit Co. because Evans Fruit Co. failed to preserve its trust rights.

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<sup>2</sup>*American Banana Co. v. Republic Nat'l Bank of N.Y.*, 362 F.3d 33, 47 (2d Cir. 2004) (stating produce sellers who agree to payment periods exceeding 30 days forfeit the trust protection in 7 U.S.C. § 499e(c)).

<sup>3</sup>*Baiardi Food Chain v. United States*, 482 F.3d 238, 243-44 (3d Cir.) (holding the loss of an individual produce seller's trust protection in 7 U.S.C. § 499e(c) does not operate to divest the Secretary of Agriculture of his power to enforce the PACA), *cert. denied*, 552 U.S. 890 (2007).

KDLO also requests that I stay the Order issued in *In re KDLO Enterprises, Inc.*, \_\_\_ Agric. Dec. \_\_\_ (Aug. 3, 2011), until I rule on KDLO's Petition to Reconsider (Pet. to Reconsider at 1).

The rules of practice applicable to the instant proceeding<sup>4</sup> provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider (7 C.F.R. § 1.146(b)). KDLO's Petition to Reconsider was timely-filed and automatically stayed *In re KDLO Enterprises, Inc.*, \_\_\_ Agric. Dec. \_\_\_ (Aug. 3, 2011). Therefore, since KDLO's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re KDLO Enterprises, Inc.*, \_\_\_ Agric. Dec. \_\_\_ (Aug. 3, 2011), is reinstated.

For the foregoing reasons, the following Order is issued.

### **ORDER**

KDLO's Petition to Reconsider, filed September 28, 2011, is denied. This Order shall become effective upon service on KDLO.

Done at Washington, DC

October 21, 2011

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William G. Jenson  
Judicial Officer

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<sup>4</sup>The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).