

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-02-0024
Coosemans Specialties, Inc.,)	
)	
Respondent)	
	and	
In re:)	PACA Docket No. APP-03-0002
Eddy C. Creces,)	
)	
Petitioner)	
	and	
In re:)	PACA Docket No. APP-03-0003
Daniel F. Coosemans,)	
)	
Petitioner)	Decision and Order

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a Complaint on August 16, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); 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 Agricultural Marketing Service alleges Coosemans Specialties, Inc.:

(1) during the period April 1999 through August 1999, made illegal payments to a United States Department of Agriculture inspector in connection with 14 federal inspections of perishable agricultural commodities which Coosemans Specialties, Inc., purchased, received, and accepted from 13 sellers in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to April 1999, made illegal payments to United States Department of Agriculture inspectors on numerous occasions, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V). On October 1, 2002, Coosemans Specialties, Inc., filed an answer denying the material allegations of the Complaint and raising five affirmative defenses (Answer ¶¶ 3-6, A-E).

On January 6, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., during the period April 1, 1999, through August 12, 1999, when Coosemans Specialties, Inc., violated the PACA. On February 6, 2003, Eddy C. Creces and Daniel F. Coosemans each filed a Petition for Review pursuant to the PACA and the Rules of Practice seeking

reversal of the Chief's January 6, 2003, determinations that they were responsibly connected with Coosemans Specialties, Inc.

On March 21, 2003, Administrative Law Judge Jill S. Clifton consolidated the disciplinary proceeding, *In re Coosemans Specialties, Inc.*, PACA Docket No. D-02-0024, with the two responsibly connected proceedings, *In re Eddy C. Creces*, PACA Docket No. APP-03-0002, and *In re Daniel F. Coosemans*, PACA Docket No. APP-03-0003.

On October 27-29, 2003, Administrative Law Judge Leslie B. Holt presided over a hearing in New York, New York. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Stephen P. McCarron, McCarron & Diess, Washington, DC, represented Coosemans Specialties, Inc., and Eddy C. Creces. Martin Schulman, Schulman & Schulman, Woodside, New York, represented Daniel F. Coosemans. Subsequent to the hearing, Administrative Law Judge Leslie B. Holt became unavailable and the proceeding was reassigned to Administrative Law Judge Victor W. Palmer [hereinafter the ALJ]. Coosemans Specialties, Inc., and Eddy C. Creces initially moved for a new hearing, and on March 19, 2004, the ALJ issued an order granting the motion for a new hearing. Subsequently, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans waived their right to a new hearing and requested that the ALJ render a decision based upon the October 27-29, 2003, hearing. The ALJ scheduled briefing dates and the parties completed their post-hearing briefing on May 20, 2005.

On July 13, 2005, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ: (1) concluded Coosemans Specialties, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when Joe Faraci, Coosemans Specialties, Inc.'s vice president, director, and part owner, paid bribes to a United States Department of Agriculture inspector in connection with 14 federal inspections of perishable agricultural commodities which Coosemans Specialties, Inc., purchased, received, and accepted from 13 sellers in interstate and foreign commerce; (2) concluded Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA; and (3) revoked Coosemans Specialties, Inc.'s PACA license (Initial Decision at 8, 16-17).

On October 4, 2005, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans appealed to the Judicial Officer. On October 24, 2005, the Agricultural Marketing Service and the Chief filed a response to Coosemans Specialties, Inc.'s, Eddy C. Creces', and Daniel F. Coosemans' appeal petitions. On November 7, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision.

Agricultural Marketing Service exhibits are designated by “CX.” Coosemans Specialties, Inc.’s exhibits are designated by “RX.” Transcript references are designated by “Tr.”

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

....

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

.....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

.....

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required).

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

....

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by

the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount

of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b), (e), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

....

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

....

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act[.]

....

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

....

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A), (b)(2).

DECISION

Findings of Fact

1. On March 23, 1999, the Federal Bureau of Investigation arrested William J. Cashin, a produce inspector employed by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, for taking bribes in violation of 18 U.S.C. § 201(b)(2). After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, agreeing to assist the Federal Bureau

of Investigation with its investigation into payments to United States Department of Agriculture inspectors by PACA licensees at the Hunts Point Terminal Market. William Cashin participated by being wired by the Federal Bureau of Investigation with audio and audio/visual equipment he then used to tape the inspections he conducted at the Hunts Point Terminal Market. At the end of each day, William Cashin gave the tapes and the bribe money he received to the Federal Bureau of Investigation and was then de-briefed by Federal Bureau of Investigation agents who prepared FBI 302 reports that identified the person paying the cash bribe, the company that employed the person paying the bribe, the type of produce inspected, and the amount of the cash payment. For his cooperation, William Cashin plead guilty to one count of bribery for which he served no jail time and was not required to pay a fine. William Cashin was allowed to retain his future federal pension for serving as an inspector from July 1979 through August 1999, and the official reason given for his resignation from the United States Department of Agriculture was to “pursue a different career opportunity.” (CX 11-CX 19; Tr. 131-37, Tr. 181.)

2. William Cashin was one of nine United States Department of Agriculture inspectors who were taking bribes for inspections they performed for Hunts Point Terminal Market wholesalers. United States Department of Agriculture supervisors assigned requested inspections so that the corrupt United States Department of Agriculture inspectors would perform the inspections for the bribe-paying wholesalers. For their participation, the United States Department of Agriculture supervisors received

kickbacks. The bribery practices at the Hunts Point Terminal Market had existed for approximately 20 years when William Cashin was arrested. (Tr. 174-77, 186-87.)

3. Coosemans Specialties, Inc., is a New York corporation doing business at the Hunts Point Terminal Market with a mailing address of 249 Row B, NYC Terminal Market, Bronx, New York 10474. Coosemans Specialties, Inc., has held PACA license number 861254 since May 28, 1986, and has renewed the PACA license annually through the present. (CX 1, CX 1A; Tr. 41-42.)

4. In 1999, the three principal officers of Coosemans Specialties, Inc., were Daniel F. Coosemans, president; Eddy C. Creces, secretary and treasurer; and Joe Faraci, vice president. In 1999, Daniel F. Coosemans, Eddy C. Creces, and Joe Faraci each owned 33 $\frac{1}{3}$ percent of the outstanding shares of stock in Coosemans Specialties, Inc., until July 1, 1999, when Joe Faraci sold most of his shares of stock to Daniel F. Coosemans and Eddy C. Creces for \$150,000 and reduced his ownership share to 9 percent. (CX 1 at 11, CX 4 at 1; Tr. 507.)

5. Since 1994, William Cashin dealt with Joe Faraci whenever Coosemans Specialties, Inc., requested an inspection of perishable agricultural commodities. Joe Faraci regularly made illegal payments of \$50 to William Cashin for each inspection he performed from 1994 through 1999. In exchange for the \$50 payments, William Cashin would “help” Coosemans Specialties, Inc., when needed, by preparing United States Department of Agriculture inspection certificates that he would falsify by (1) increasing the percentage of defects, (2) increasing the number of containers inspected, or

(3) changing the temperatures of the load. William Cashin gave such “help” on 75 percent to 80 percent of the inspections he conducted for Coosemans Specialties, Inc. (Tr. 124-30.)

6. After becoming a participant in the investigation conducted by the Federal Bureau of Investigation, William Cashin conducted 14 inspections in 1999 for Coosemans Specialties, Inc., for which Joe Faraci paid him \$60 for one inspection and \$50 for each of the others. On October 21, 1999, the United States District Court for the Southern District of New York filed an indictment in which the grand jury charged Joe Faraci with eight counts of bribery of a public official in violation of 18 U.S.C. § 201(b).

The indictment charges that Joe Faraci:

[U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, JOE FARACI, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Cooseman Specialties, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>AMOUNT OF BRIBE</u>
ONE	4/1/99	\$60
TWO	5/11/99	\$350
THREE	5/20/99	\$150
FOUR	5/26/99	\$50
FIVE	7/26/99	\$200
SIX	8/2/99	\$50
SEVEN	8/4/99	\$50
EIGHT	8/12/99	\$50

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 7 at 1-2.

The bribes charged in the indictment cover the payments Joe Faraci made to William Cashin in connection with the 14 inspections of perishable agricultural commodities identified in Finding of Fact 8 (CX 11-CX 18).

7. Joe Faraci was arrested on October 27, 1999. On June 22, 2001, Joe Faraci pled guilty to count one of the indictment that alleged his payment of a bribe on April 1, 1999, at Coosemans Specialties, Inc.'s Hunts Point place of business. Joe Faraci was sentenced to 15 months in prison, 3 years of supervised release, and a \$4,000 fine. Joe Faraci was also ordered to make restitution to victims pursuant to PACA proceedings. (CX 8.)

8. William Cashin testified that, in 1999, Joe Faraci paid him bribes in respect to 14 inspections of produce performed for Coosemans Specialties, Inc. There was no contradicting testimony. William Cashin's testimony, combined with the eight-count indictment filed against Joe Faraci, the FBI 302 reports, and the contemporaneous United States Department of Agriculture inspection certificates William Cashin prepared, establish that Joe Faraci paid bribes to William Cashin on behalf of Coosemans Specialties, Inc., in respect to the following 14 inspections William Cashin performed:

Inspection 1

On April 1, 1999, William Cashin performed one inspection of garlic at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$60 (CX 11).

Inspections 2 and 3

On May 11, 1999, William Cashin performed two inspections (one of mangoes and one of plantains) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$350 that included bribe money for five prior inspections (CX 12).

Inspections 4, 5, and 6

On May 17, 1999, William Cashin performed three inspections (one of snow peas and sugar snap peas, one of Haitian mangoes, and one of sweet peppers) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$150 (CX 13).

Inspection 7

On May 26, 1999, William Cashin performed one inspection of a load of radicchio at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$50 (CX 14).

Inspections 8, 9, 10, and 11

On July 23, 1999, William Cashin performed four inspections (one of radicchio, one of tomatoes, one of plum tomatoes, and one of mesculin) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$200 (CX 15).

Inspection 12

On August 2, 1999, William Cashin performed one inspection of sweet peppers at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$50 (CX 16).

Inspection 13

On August 2 or 3, 1999, William Cashin performed one inspection of tomatoes at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$50 (CX 17).

Inspection 14

On August 12, 1999, William Cashin performed one inspection of asparagus at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$50 (CX 18).

9. Coosemans Specialties, Inc., employs at its Hunts Point Terminal Market facilities approximately 40 people. Twenty-five of its employees are porters who load and unload produce and perform other warehouse duties. Eight or nine of Coosemans Specialties, Inc.'s employees are office workers and five are salespeople. (Tr. 428.)

10. There are 52 merchants at the Hunts Point Terminal Market. In comparison to the others, Coosemans Specialties, Inc., is medium-sized. Coosemans Specialties, Inc., owns four Hunts Point Terminal Market warehouse units and receives about 100 lots of produce on each of the 5 days per week it operates. Coosemans Specialties, Inc.'s 2002 gross revenue was just over \$24,000,000 with an annual payroll of \$2,100,000. (Tr. 427-29, 434.)

11. Daniel F. Coosemans, who principally resides in Miami, Florida, and Panama, came to the United States in the 1980's to introduce a marketing concept he started in Belgium for franchising the specialty fruit and vegetable business. He started his first company in Belgium. He then started businesses on a partnership basis in the United States. His method has been to identify a market, then start a new company in that market, and then find a partner who would run the company allowing Daniel F. Coosemans to start other companies elsewhere. Daniel F. Cooseman's first United States company was started in Los Angeles, California. He located his second company, which

Eddy C. Creces runs for him, at the Hunts Point Terminal Market in New York. There are now 27 such companies around the world and 20 of them are in the United States. After he set up these companies, Daniel F. Coosemans' involvement with each of them has been to be its financing entity and to check its monthly statements to determine whether it is achieving the profits he believes to be appropriate. Altogether Daniel F. Coosemans' companies have 550 employees in the United States with overall weekly revenues in the tens of thousands. (Tr. 619-29.)

Discussion

Coosemans Specialties, Inc., Violated the PACA When Joe Faraci Paid Bribes to a United States Department of Agriculture Inspector

The record establishes that Joe Faraci, Coosemans Specialties, Inc.'s vice president, director, and partial owner during 1999, paid bribes to a United States Department of Agriculture produce inspector in respect to 14 inspections of perishable agricultural commodities performed at Coosemans Specialties, Inc.'s request. The United States Department of Agriculture produce inspector who received the bribes so testified. Joe Faraci, who was charged with eight counts of bribing a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Coosemans Specialties, Inc., and pled guilty to one count of the indictment, was not called to testify.

Section 16 of the PACA (7 U.S.C. § 499p) provides that the act, omission, or failure of any agent, officer, or any other person acting for, or employed by, any

commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker. Officers and owners of a PACA licensee, other than the bribing officer or owner need not have actual knowledge of the illegal payments by one officer or agent, for the PACA licensee to be held to have committed knowing and willful violations of the PACA.¹

Coosemans Specialties, Inc., argues that the payment of a bribe to a United States Department of Agriculture inspector, though a reprehensible violation of other federal laws, is not a violation of the PACA. Even though *In re Post & Taback, Inc.*, has held otherwise, Coosemans Specialties, Inc., contends the case was wrongly decided and overstates the goals of the PACA.

Coosemans Specialties, Inc.’s argument is unpersuasive. First, *In re Post & Taback, Inc.*, as affirmed by the United States Court of Appeals for the District of Columbia Circuit, is binding in this proceeding. Second, Coosemans Specialties, Inc.’s premises are flawed.

Coosemans Specialties, Inc., argues that violations of the PACA are limited to “regulating conduct of licensees towards other merchants which results in some financial detriment on a specific transaction” (Brief of Respondent and Petitioner Creces at 21). Coosemans Specialties, Inc., further asserts the code of fair dealing between produce

¹See *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 820-21(2003), *aff’d*, 123 F. App’x 406 (D.C. Cir. 2005).

merchants, which the PACA was enacted to establish, was not violated by Joe Faraci's payments to a United States Department of Agriculture produce inspector (Brief of Respondent and Petitioner Creces at 22).

To support these propositions, Coosemans Specialties, Inc., contends Joe Faraci's payments to William Cashin were really nothing more than tips for prompt service. However, the only evidence as to the reason for the payments is the testimony of the United States Department of Agriculture produce inspector that he was being paid bribes to "help" Coosemans Specialties, Inc., with the inspections. The person who actually paid the bribes did not testify to contradict the United States Department of Agriculture inspector. Coosemans Specialties, Inc., can only point to the statement by Joe Faraci at the time he pled guilty to bribing a United States Department of Agriculture produce inspector that he paid the bribes in order to obtain prompt United States Department of Agriculture inspections, as follows:

[THE COURT:]

Q. All right, Mr. Faraci, before I accept your plea, I have to be satisfied that you are in fact guilty of the charge to which you have just pleaded guilty. So tell me in your own words what it is you did that makes you guilty of this charge.

[MR. FARACI:]

A. Whenever we need an inspection I gave or I asked to insure them to come faster, I gave them a \$50 gift. This way they will come faster to do the inspection.

Q. You gave --

A. The inspector, William Cashin.

Q. Excuse me?

A. I gave William Cashin \$50 to come quicker to do the inspection.

Q. And this was to do inspection of produce?

A. Yes.

Q. And this occurred at the Hunts Point Terminal Market?

A. Yes.

Q. On approximately how many occasions did you give him money to do these inspections?

MR. MORIARTY: May I interrupt for a half moment your Honor?

THE COURT: Sure.

MR. MORIARTY: Your Honor, under the terms discussed with the government, Mr. Faraci is prepared to admit that to each count of the indictment, to each inspection within that indictment that he had paid the \$50 for the same conduct as just elicited concerning Count 1.

THE COURT: There was a total indictment then of \$960.

MR. MORIARTY: I think that is correct.

Q. Did you pay \$960 to this inspector as is alleged in the indictment?

A. Yes.

Q. And did you know it was illegal to do so at the time you did it?

A. Yes, your Honor.

Q. And did this occur in the year of '99?

A. Yes.

RX 15 at 14-15.

However, Joe Faraci's statement that he only paid bribes in order to obtain prompt inspections of perishable agricultural commodities was a self-serving statement designed to de-emphasize the seriousness of his crime and possibly reduce his sentence. Joe Faraci's statement made during his allocution was contrary to his admission when he pled guilty to count one of the indictment that specified, as follows:

JOE FARACI, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Cooseman Specialties, Inc., Hunts Point Terminal Market, Bronx, New York.

CX 7 at 1.

In addition to Joe Faraci's admission, William Cashin identified the ways in which he would falsify United States Department of Agriculture inspection certificates to "help" Coosemans Specialties, Inc., in respect to 75 percent to 80 percent of the inspections he conducted for Coosemans Specialties, Inc. (Tr.130). Even if there were contradicting, credible evidence showing that Coosemans Specialties, Inc.'s bribes were not given to influence the outcome of the inspections, Coosemans Specialties, Inc.'s bribing a United States Department of Agriculture inspector gave Coosemans Specialties, Inc., an unfair competitive advantage over its shippers who supplied it with produce. Coosemans Specialties, Inc., also gained an unfair advantage over competing wholesalers.

The PACA is designed to protect producers of perishable agricultural products who in many instances send their products to a buyer or commission merchant who is thousands of miles away. PACA was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct.²

The PACA seeks to bring about fair dealing between members of the produce industry who conduct interstate and foreign commerce long-distance, where shipments must move quickly to avoid losses caused by rot and decay. When the receiver tells the shipper that the value of the shipment has been lowered because of rot and decay, the distant out-of-state or foreign shipper has only the receiver's word as verified by a United States Department of Agriculture inspection certificate. A United States Department of Agriculture inspection certificate that supports the receiver's claim that the produce has deteriorated can cause a shipper to accept a lower than anticipated price. A United States Department of Agriculture inspection certificate can also induce the shipper to continue to deal with the receiver in the future since a United States Department of Agriculture inspection certificate that supports the receiver's evaluation of the condition of perishable agricultural commodities on receipt makes the receiver appear to be reliable and trustworthy. Therefore, Coosemans Specialties, Inc.'s bribery of a United States

²See *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967).

Department of Agriculture inspector gave Coosemans Specialties, Inc., an unfair competitive advantage over the shippers and growers who supplied Coosemans Specialties, Inc., with produce as well as over competing wholesalers.

Even if the bribed inspector never falsified any United States Department of Agriculture inspection certificates, Coosemans Specialties, Inc.'s illegal payments to a United States Department of Agriculture inspector, standing alone, violated the PACA. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful for a PACA licensee in connection with any transaction involving any perishable agricultural commodity, which is received in interstate or foreign commerce to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with the transaction.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123 (2d Cir. 2003), upheld a reparation award rendered in favor of a shipper who accepted reduced prices from a receiver based on inspections by three of the United States Department of Agriculture inspectors at the Hunts Point Terminal Market who were convicted of accepting bribes. The Judicial Officer made a finding in the case that there was no showing that falsified inspections were issued as to the produce, but that nevertheless all of the price adjustments were voidable because of the shipper's mistake and the receiver's misrepresentation regarding the integrity of the inspection process. The United States Court of Appeals for the Second Circuit, in affirming the Judicial Officer, stated:

It is clear that, when the parties agreed to the price adjustments, DiMare [the shipper] was mistaken as to both whether Koam [the receiver] had paid bribes to USDA inspectors to influence the outcome of inspections and whether the USDA inspectors who examined the tomatoes had accepted the bribes.

.....

Koam's fault obviously caused DiMare's mistake, as Koam knew that its employee had bribed USDA inspectors, yet Koam neglected to inform DiMare of this fact. In addition, in light of Koam's involvement in bribery (as demonstrated by [its employee] Friedman's guilty plea), it would be unconscionable to enforce the price-adjustment agreements, which resulted from the work of inspectors who had accepted bribes.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 127-28 (2d Cir. 2003).

As was the case in *Koam*, when Coosemans Specialties, Inc., paid bribes in respect to inspections without informing the shippers, Coosemans Specialties, Inc., violated its duty to inform the shippers of that fact. Coosemans Specialties, Inc.'s duty to inform shippers of the bribes it pays is found in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and its failure to inform the shipper each time a bribe was paid in respect to an inspection of perishable agricultural commodities was a separate violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Coosemans Specialties, Inc., paid bribes in connection with 14 inspections of perishable agricultural commodities in 1999. Coosemans Specialties, Inc.'s PACA violations were therefore repeated.³ Coosemans Specialties, Inc.'s violations were also

³See *H.C. MacClaren v. United States Dep't of Agric.*, 342 F. 3d 584, 592 (6th Cir. 2003).

flagrant and willful.⁴ Accordingly, I conclude Coosemans Specialties, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

PACA License Revocation is the Appropriate Disciplinary Sanction

Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated a provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture may publish the facts and circumstances of the violation, suspend the violator's PACA license, or assess a civil penalty. Further, if the violation is flagrant or repeated, the Secretary of Agriculture may revoke the PACA license of the offender.⁵

Both Eddy C. Creces and Daniel F. Coosemans request, if Coosemans Specialties, Inc., is found to have violated the PACA, that I assess Coosemans Specialties, Inc., a civil penalty. They so request because, if they are determined to be "responsibly connected" to a PACA licensee that has had its license revoked, each will be barred from employment by PACA licensees for 1 year, and after 1 year, employment shall be conditioned upon the posting of a surety bond acceptable to the Secretary of Agriculture.⁶

⁴See *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828-30 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁵7 U.S.C. § 499h(a), (e).

⁶7 U.S.C. § 499h(b).

Bribery is such an egregious violation of the PACA that the only appropriate sanction is one that will deter Coosemans Specialties, Inc., and other PACA licensees from paying bribes to United States Department of Agriculture inspectors in the future.

Daniel F. Coosemans also argues that the restrictions that revocation will place upon his participation in the activities of the 20 other PACA licensed companies in which he has an ownership interest is excessive and a consequence never intended by Congress. However, the language of the PACA is clear and unambiguous. If the PACA requires amendment, the amendments must come from Congress and may not be made here.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

I have considered and discussed the nature of the violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate disciplinary sanction. My views accord with those of John Koller, the administrative official who testified at the hearing (Tr. 549-54).

John Koller stated that approximately 150,000 produce inspections are performed each year and if there is any suspicion that the inspections are tainted in any way, the entire industry is affected. Inasmuch as United States Department of Agriculture

inspection certificates are used to resolve hundreds of disputes each day, the objectivity of the United States Department of Agriculture inspector should not be compromised by payments he or she receives from wholesalers nor should other wholesalers be made to feel that they too should make such payments in order to be competitive. The Agricultural Marketing Service recommends PACA license revocation to deter Coosemans Specialties, Inc., and any future potential violators from making illegal payments to United States Department of Agriculture produce inspectors. The recommendation is consistent with prior case law.⁷ Accordingly, Coosemans Specialties, Inc.'s PACA license should be revoked.

Eddy C. Creces and Daniel F. Coosemans Were Responsibly Connected with Coosemans Specialties, Inc.

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.⁸ The record establishes that, in 1999, Eddy C. Creces was the secretary, the treasurer, and a holder of 33⅓ percent outstanding stock of Coosemans Specialties, Inc. On July 1, 1999, Eddy C. Creces increased the percentage of outstanding stock which he owned to

⁷*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. ____ (Sept. 27, 2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____ (Sept. 8, 2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁸7 U.S.C. § 499a(b)(9).

45½ percent. The record also establishes that, in 1999, Daniel F. Coosemans was the president and a holder of 33⅓ percent outstanding stock of Coosemans Specialties, Inc. On July 1, 1999, Daniel F. Coosemans increased the percentage of outstanding stock which he owned to 45½ percent. The burden is on Eddy C. Creces and Daniel F. Coosemans to demonstrate by a preponderance of the evidence that they were not responsibly connected with Coosemans Specialties, Inc., despite their positions at, and ownership of, Coosemans Specialties, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Neither Eddy C. Creces nor Daniel F. Coosemans proved by a preponderance of the evidence that he was merely a nominal officer or a nominal shareholder of Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA.

Nonetheless, Eddy C. Creces argues he should not be found to be responsibly connected with the Coosemans Specialties, Inc., because he did not willfully commit the bribery violations. But the payment of bribes by an employee of a PACA licensee is a willful violation of the PACA.⁹

Eddy C. Creces further argues that a determination of responsible connection would deprive him of his property, specifically his stock ownership, without due process in violation of the Fifth Amendment to the Constitution of the United States. A similar argument was advanced and rejected in *Zwick v. Freeman*, 373 F.2d 110, 118-19 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). *Zwick* was followed and other constitutional objections to the employment bar provisions of the PACA were raised and rejected in *Bama Tomato Co. v. United States Dep't of Agric.*, 112 F.3d 1542, 1546-47 (11th Cir. 1997).

Daniel F. Coosemans similarly argues that the application of the employment bar provisions to him constitutes a denial of his constitutional rights. He cites in support of his argument various cases concerning constitutional restrictions on governmental regulation of other trades and professions. However, the cited cases are inapposite. *Zwick* and *Bama Tomato Co.* considered such arguments in the specific context of the PACA's employment bar provisions and found the arguments unavailing. Therefore, the

⁹*In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828-29 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

argument that the PACA employment bar provisions are unconstitutional is again rejected as contrary to applicable case law.

For the foregoing reasons, I affirm the Chief's January 6, 2003, determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., during the period April 1, 1999, through August 12, 1999, when Coosemans Specialties, Inc., violated the PACA.

Appeal Petitions

Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans raise eight issues in Brief of Appellant-Petitioner Daniel F. Coosemans [hereinafter Appeal Petition of Daniel F. Coosemans] and Appeal Petition of Respondent and Petitioner Creces. First, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's conclusion that Coosemans Specialties, Inc.'s payments to a United States Department of Agriculture produce inspector in connection with inspections of perishable agricultural commodities constitute violations of the PACA, is error. Coosemans Specialties, Inc., and Eddy C. Creces assert the Agricultural Marketing Service did not allege that Coosemans Specialties, Inc.'s payments to William Cashin were designed to gain an unfair competitive advantage over shippers or wholesalers and the Agricultural Marketing Service did not prove that William Cashin falsified any United States Department of Agriculture inspection certificates issued in connection with the inspection of perishable agricultural commodities for Coosemans Specialties, Inc. (Appeal Pet. of Respondent and Petitioner Creces at 5-8.)

I disagree with Coosemans Specialties, Inc.'s and Eddy C. Creces' contentions that a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) may only be shown if Coosemans Specialties, Inc.'s payments to William Cashin were designed to gain an unfair competitive advantage over shippers or other wholesalers and that the Agricultural Marketing Service did not prove that William Cashin falsified any United States Department of Agriculture inspection certificates issued in connection with the inspection of perishable agricultural commodities for Coosemans Specialties, Inc.

The PACA does not expressly provide that a payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.¹⁰

¹⁰7 U.S.C. § 499b(4).

Bribery of a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of unlawful gratuities and bribes to United States Department of Agriculture produce inspectors.¹¹

¹¹*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. ____ (Sept. 27, 2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____ (Sept. 8, 2005), *appeal docketed*, No. 05-5634

(continued...)

Second, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's finding that Coosemans Specialties, Inc.'s payments to a United States Department of Agriculture inspector are willful, is error. Coosemans Specialties, Inc., and Eddy C. Creces argue that, since Coosemans Specialties, Inc.'s violations were not willful, the ALJ erred by failing to dismiss the Complaint because the Agricultural Marketing Service did not comply with the notice and opportunity to demonstrate or achieve compliance provisions in the Administrative Procedure Act (5 U.S.C. § 558(c)). (Appeal Pet. of Respondent and Petitioner Creces at 7.)

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to achieve compliance, except in cases of willfulness, as follows:

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

. . . .

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal,

¹¹(...continued)
(2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c).

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.¹² The record clearly establishes that Joe Faraci intentionally made unlawful

¹²*See, e.g., Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___, slip op. at 28 (Apr. 5, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 430 (2002); *In re PMD Produce Brokerage Corp.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001), *aff'd*, No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, (continued...)

payments to William Cashin in connection with produce inspections, and thereby acted willfully. Therefore, the notice and opportunity to demonstrate or achieve compliance provisions in the Administrative Procedure Act (5 U.S.C. § 558(c)) are not applicable to this proceeding.

¹²(...continued)

925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) (“‘Wilfully’ could refer to either intentional conduct or conduct that was merely careless or negligent.”); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) (“In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’”)

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word “willfulness,” as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep’t of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Coosemans Specialties, Inc.’s violations were willful.

Third, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans contend the ALJ's finding that William Cashin falsified United States Department of Agriculture inspection certificates, is error (Appeal Pet. of Respondent and Petitioner Creces at 8-12; Appeal Pet. of Daniel F. Coosemans at 7-8).

Even if I were to find William Cashin's testimony lacked credibility and insufficient evidence to establish that William Cashin falsified any of the United States Department of Agriculture inspection certificates he provided to Coosemans Specialties, Inc., those findings would not change the disposition of this proceeding. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities, even if the payment does not result in a United States Department of Agriculture inspector's falsification of a United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of

unlawful gratuities and bribes to United States Department of Agriculture produce inspectors.¹³

Fourth, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's failure to impose a civil money penalty, is error (Appeal Pet. of Respondent and Petitioner Creces at 13-16).

I find Joe Faraci's payment of bribes to a United States Department of Agriculture produce inspector within the scope of his employment are deemed to be the actions of Coosemans Specialties, Inc., and those bribes were so egregious that nothing less than PACA license revocation is an adequate sanction. Bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary to deter Coosemans Specialties, Inc., from future similar violations of the PACA and to deter other PACA licensees from similar violations of the PACA. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the

¹³*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. ____ (Sept. 27, 2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____ (Sept. 8, 2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

facts and circumstances of the violations.¹⁴ While sanctions in similar cases are not required to be uniform,¹⁵ I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

Fifth, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans contend Eddy C. Creces and Daniel F. Coosemans should not be found responsibly connected with Coosemans Specialties, Inc., because their actions were not willful and they received no notice and opportunity to demonstrate or achieve compliance as provided in the Administrative Procedure Act (5 U.S.C. § 558(c)) (Appeal Pet. of Respondent and Petitioner Creces at 16-17; Appeal Pet. of Daniel F. Coosemans at 17-18).

The Administrative Procedure Act provides, before institution of agency proceedings for the withdrawal, suspension, revocation, or annulment of a license, the licensee must given notice of facts warranting revocation and an opportunity to demonstrate or achieve compliance, except in cases of willfulness (5 U.S.C. § 558(c)).

¹⁴*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. ____ (Sept. 27, 2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____ (Sept. 8, 2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

¹⁵*Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____, slip op. at 35 (Apr. 5, 2006); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999).

Neither Eddy C. Creces nor Daniel F. Coosemans is a PACA licensee. The responsibly connected proceedings, *In re Eddy C. Creces*, PACA Docket No. APP-03-0002, and *In re Daniel F. Coosemans*, PACA Docket No. APP-03-0003, concern merely the determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA; they do not concern the withdrawal, suspension, revocation, or annulment of a PACA license held by Eddy C. Creces or Daniel F. Coosemans. Therefore, with respect to the responsibly connected proceedings, *In re Eddy C. Creces*, PACA Docket No. APP-03-0002, and *In re Daniel F. Coosemans*, PACA Docket No. APP-03-0003, I find the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance in 5 U.S.C. § 558(c), inapposite.

Sixth, Daniel F. Coosemans contends the ALJ erroneously ignores the fact that Congress did not intend to prevent a person such as Daniel F. Coosemans, who is involved with the ownership of 21 PACA licensees, from continuing as an employee and shareholder of those PACA licensees notwithstanding the fact that he is found responsibly connected with another PACA licensee, the license of which has been revoked or suspended (Appeal Pet. of Daniel F. Coosemans at 8-13).

The PACA defines the term responsibly connected as affiliated or connected with a commission merchant, dealer, or broker as partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or

association.¹⁶ The PACA bars all PACA licensees from employing persons who have been responsibly connected with any PACA licensee whose license has been revoked by the Secretary of Agriculture.¹⁷ The PACA contains no provision limiting the employment bar based upon the number of PACA licensees by whom the responsibly connected person is employed, as Daniel F. Coosemans contends.

Seventh, Daniel F. Coosemans contends preventing him from continuing employment in PACA licensee companies by finding him responsibly connected violates his substantive due process rights (Appeal Pet. of Daniel F. Coosemans at 13-15).

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.¹⁸

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.¹⁹ Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions

¹⁶7 U.S.C. § 499a(b)(9).

¹⁷7 U.S.C. § 499h(b).

¹⁸*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

¹⁹H.R. Rep. No. 1041 (1930).

on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent of the outstanding stock of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to employment sanctions in the PACA.²⁰ Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Daniel F. Coosemans' due process rights by arbitrarily interfering with his chosen occupation.

Contrary to Daniel F. Coosemans' position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.²¹ A number of courts have rejected constitutional challenges to

²⁰*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

²¹*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.²²

Eighth, Daniel F. Coosemans contends conducting a proceeding to determine whether he was responsibly connected with Coosemans Specialties, Inc., simultaneously with the proceeding to determine whether Coosemans Specialties, Inc., violated the PACA, violates Daniel F. Coosemans' procedural due process rights. Daniel F. Coosemans takes the position the disciplinary proceeding to determine whether Coosemans Specialties, Inc., violated the PACA must be concluded before beginning the responsibly connected proceeding to determine whether he was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA. (Appeal Pet. of Daniel F. Coosemans at 15-17.)

²²*Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee who has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee, who failed to pay a reparation award, from employment in the field of marketing perishable agricultural commodities, is not unconstitutional).

None of the cases cited by Daniel F. Coosemans support his contention that conducting a disciplinary proceeding to determine whether a PACA licensee violated the PACA simultaneously with a related responsibly connected proceeding, violates the procedural due process rights of the person determined to be responsibly connected. Moreover, I cannot locate any case supporting Daniel F. Coosemans' contention. Further still, both Daniel F. Coosemans and Coosemans Specialties, Inc., have been provided notice and an opportunity to be heard. I find no violation of their due process rights merely because the disciplinary proceeding regarding the allegations of Coosemans Specialties, Inc.'s violations of the PACA and the responsibly connected proceeding regarding Daniel F. Coosemans' relationship to Coosemans Specialties, Inc., are conducted simultaneously.

Conclusions of Law

1. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), Joe Faraci's payments of bribes to a United States Department of Agriculture produce inspector are deemed the acts of Coosemans Specialties, Inc.
2. Coosemans Specialties, Inc., engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.

3. Daniel F. Coosemans was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. Eddy C. Creces was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

For the foregoing reasons, the following Order should be issued.

ORDER

1. Coosemans Specialties, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Coosemans Specialties, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Coosemans Specialties, Inc.

2. I affirm the Chief's January 6, 2003, determination that Eddy C. Creces was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Eddy C. Creces is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Eddy C. Creces.

3. I affirm the Chief's January 6, 2003, determination that Daniel F. Coosemans was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Daniel F. Coosemans is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Daniel F. Coosemans.

RIGHT TO JUDICIAL REVIEW

Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans have 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, 2343-2350. Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans must seek judicial review within 60 days after entry of the Order in this Decision and Order.²³ The date of entry of the Order in this Decision and Order is April 20, 2006.

Done at Washington, DC

April 20, 2006

William G. Jenson
Judicial Officer

²³See 28 U.S.C. § 2344.