

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA-APP Docket No. 03-0013
)
Glenn Mealman,)
)
Petitioner) **Decision and Order**

PROCEDURAL HISTORY

On April 3, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Glenn Mealman [hereinafter Petitioner] was responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001, when Furr's violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ On October 29, 2003, Petitioner filed Respondent [sic] Mealman's Petition

¹During the period September 29, 1998, through February 23, 2001, Furr's Supermarkets, Inc., failed to make full payment promptly to one seller of the agreed purchase prices in the total amount of \$174,105.05 for 910 lots of perishable agricultural commodities, which Furr's purchased, received, and accepted in interstate and foreign commerce. Former Chief Administrative Law Judge James W. Hunt concluded that Furr's Supermarkets, Inc.'s failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Furr's Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric.

(continued...)

For Review pursuant to the PACA 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] seeking reversal of Respondent's April 3, 2003, determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc.

Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted an oral hearing on June 8, 2004, in Kansas City, Missouri. James P. Tierney, Lathrop & Gage, L.C., Kansas City, Missouri, represented Petitioner. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On August 27, 2004, Respondent filed Respondent's Proposed Findings of Fact, Conclusions and Order, and on August 31, 2004, Petitioner filed Brief of Petitioner. On September 17, 2004, Petitioner filed Reply Brief of Petitioner, and Respondent filed Respondent's Reply Brief.

On February 8, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision and Order] concluding Petitioner was not responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001,

¹(...continued)

Dec. 385 (2003). (I infer, based on the record before me and the former Chief Administrative Law Judge's February 6, 2003, decision, that "Furrs Supermarkets, Inc.," referred to in *In re Furrs Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003), and "Furr's Supermarkets, Inc.," referred to in this proceeding, are the same entity.)

when Furr's willfully, flagrantly, and repeatedly violated the PACA (Initial Decision and Order at 17).

On March 9, 2005, Respondent appealed to the Judicial Officer, and on March 31, 2005, Petitioner filed Reply Brief of Petitioner. On April 11, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the Chief ALJ's conclusion that Petitioner was not responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001; therefore, I do not adopt the Initial Decision and Order as the final Decision and Order.

Petitioner's exhibits are designated by "PX"; Respondent's exhibits are designated by "RX"; exhibits included in the agency record, which is part of the record of this proceeding,² are designated by "RC"; and references to the transcript are designated by "Tr."

²See 7 C.F.R. § 1.136(a).

APPLICABLE STATUTORY AND REGULATORY 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

.....

(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.

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

7 C.F.R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

....

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

....

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms

whether used in the regulations, in the Act, or in the trade shall be construed as follows:

.....

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. “Full payment promptly,” for the purpose of determining violations of the Act, means:

.....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

.....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly”: *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

DECISION

Summary

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, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.³ The record establishes Petitioner was the director of Furr’s Supermarkets, Inc., during the period November 1997 to March 2002, a period during which Furr’s willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. §

³7 U.S.C. § 499a(b)(9).

499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Furr's Supermarkets, Inc., despite his being a director of Furr's.

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, officer, director, or 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.

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the

petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

I find Petitioner carried his burden of proof that he was not actively involved in the activities resulting in Furr's Supermarkets, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I find Petitioner failed to carry his burden of proof that he was only nominally a director of Furr's Supermarkets, Inc. Further, while Petitioner demonstrated that he was not an owner of Furr's Supermarkets, Inc., he did not demonstrate that Furr's was the alter ego of its owners.

Factual Background

Petitioner graduated from Emporia State University in 1957 with a degree in business administration. Following graduation, Petitioner worked for Fleming Companies, Inc., a food distribution company, in a variety of capacities for 39 years. By the time Petitioner left Fleming Companies, Inc., in 1996, he had worked as a merchandiser, manager, and eventually executive vice-president for Fleming's mid-America region. While Petitioner was executive vice-president for Fleming Companies, Inc.'s mid-America region, all of Fleming's operating divisions in the region reported to Petitioner. (Tr. 47-48.) Since Petitioner was only 63 when he retired and his full retirement benefits did not commence until he turned 65, Petitioner had a financial arrangement with Fleming Companies, Inc., to consult for and assist the company in various capacities (Tr. 49-50, 54-55, 65). Once Petitioner turned 65, he was paid by

Fleming Companies, Inc., at an hourly rate, plus expenses, to serve on Furr's Supermarkets, Inc.'s board of directors (Tr. 34, 68).

Fleming Companies, Inc., was a substantial investor in Furr's Supermarkets, Inc. (Tr. 70-71). As such, Fleming Companies, Inc., was entitled to two seats on Furr's Supermarkets, Inc.'s board of directors (Tr. 21). In 1997, Fleming Companies, Inc., asked Petitioner to serve as a director on Furr's Supermarkets, Inc.'s board of directors (Tr. 21-22). All fees and expenses associated with this appointment were paid by Fleming Companies, Inc. (Tr. 34). Petitioner had no ownership interest in Furr's Supermarkets, Inc., and no role in the day-to-day management of Furr's. Petitioner had no check-writing authority, had no role in the purchase of produce, and had no role regarding payment of Furr's creditors. (Tr. 26-27.)

As a director, Petitioner attended Furr's Supermarkets, Inc., board meetings. At the board meetings, Petitioner reviewed balance sheets and operating statements, discussed sales trends and finances, dealt with numerous corporate issues, and cast votes. Petitioner never attended a board meeting at which the failure to pay suppliers or individual accounts payable were discussed. (PX 1-PX 4, RC 5; Tr. 24-25.)

As a director, Petitioner was required to serve on at least one committee, and so he served on the real estate development committee. The real estate development committee met a few times during Petitioner's tenure. Petitioner evaluated possible supermarket sites, which evaluation required his reviewing reports and discussing the reports with other members of the real estate development committee and the full board of directors.

Petitioner personally visited a potential supermarket site on one occasion. (Tr. 23-24, 75-77.)

Petitioner also nominated an individual to be a board member. Petitioner was requested to make the nomination because he was told that members of the selection committee should not be making a nomination. (Tr. 32-33; PX 1.)

Petitioner remained on the board of directors even after Fleming Companies, Inc., ceased having an ownership interest in Furr's Supermarkets, Inc., in June 2000, and ceased compensating Petitioner; however, Petitioner became ill and was unable to attend board meetings after July 2000 (Tr. 36-39, 72-73; PX 8 at ¶ 4). Petitioner had no participatory role either in Furr's Supermarkets, Inc.'s decision to file for bankruptcy or in any subsequent actions of Furr's (Tr. 41).

The PACA action against Furr's Supermarkets, Inc., was based on its failure to make full payment promptly to a produce seller, Quality Fruit & Vegetable Co. On February 6, 2003, former Chief Administrative Law Judge James W. Hunt issued a decision concluding Furr's failures to make full payment promptly to Quality Fruit & Vegetable Co. constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Furr's Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003) (RX 3, PX 9, RC 4).

Findings of Fact

1. Petitioner graduated from Emporia State University in 1957 with a degree in business administration.

2. Following graduation from Emporia State University, Petitioner worked for Fleming Companies, Inc., a food distribution company, in a variety of capacities for 39 years. By the time Petitioner left the Fleming Companies, Inc., in 1996, he had worked as a merchandiser, manager, and eventually executive vice-president for Fleming's mid-America region. While Petitioner was executive-vice president of Fleming Companies, Inc.'s mid-America region, all of Fleming's operating divisions in the region reported to Petitioner.

3. Petitioner served as a director of Furr's Supermarkets, Inc., from November 1997 until March 2002.

4. Petitioner occupied one of the two seats on the board of directors that his long-term employer, Fleming Companies, Inc., was entitled to fill as a result of its significant ownership interest in Furr's Supermarkets, Inc.

5. Petitioner had no ownership or employment interest in Furr's Supermarkets, Inc., and was never paid anything by Furr's. Between the time of his initial appointment to the board of directors, and Fleming Companies, Inc.'s termination of its ownership interest in June 2000, Fleming paid Petitioner for his work on the board of directors and also paid his expenses.

6. Petitioner did not resign from the board of directors at the time that Fleming Companies, Inc.'s ownership interest terminated and Fleming ceased paying Petitioner for his work on the board of directors; however, Petitioner became ill and ceased attending board meetings in July 2000.

7. Petitioner attended numerous board meetings during the period 1998 through June 2000. As each board member had to serve on at least one committee, Petitioner served on the real estate development committee. Petitioner evaluated possible supermarket sites, which evaluation required his reviewing reports and discussing the reports with other members of the real estate development committee and the full board of directors. Petitioner viewed one potential supermarket site as part of his duties for the real estate development committee.

8. Petitioner nominated an individual to be a board member. Petitioner was requested to make the nomination because he was told that members of the selection committee should not be making a nomination.

9. At board meetings, Petitioner reviewed balance sheets and operating statements, discussed sales trends and finances, dealt with numerous corporate issues, and cast votes. Petitioner never attended a board meeting at which the failure to pay suppliers or individual accounts payable were discussed.

10. Petitioner was never involved in Furr's Supermarkets, Inc.'s day-to-day business activities, had no check-writing or document-issuing authority, had no role in deciding what bills were to be paid, and had no knowledge of, or relationship with, Furr's creditors.

11. At all times material to this proceeding, Furr's Supermarkets, Inc., was a PACA licensee.

12. During the period September 29, 1998, through February 23, 2001, Furr's Supermarkets, Inc., failed to make full payment promptly to one produce seller, Quality Fruit & Vegetable Co., of the agreed purchase prices, or balances thereof, in the total amount of \$174,105.05 for 910 lots of perishable agricultural commodities which Furr's purchased, received, and accepted in interstate commerce and foreign commerce. On February 6, 2003, former Chief Administrative Law Judge James W. Hunt issued a decision concluding Furr's Supermarkets, Inc.'s failures to make full payment promptly to Quality Fruit & Vegetable Co. constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

13. Petitioner did not know Furr's Supermarkets, Inc., was considering bankruptcy until Furr's actually filed for bankruptcy. Petitioner had no role in the decision to file for bankruptcy. Petitioner did not have any knowledge of individual accounts that were not paid.

Conclusions of Law

1. Furr's Supermarkets, Inc.'s failures to make full payment promptly with respect to the transactions described in finding of fact number 12 are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Petitioner proved by a preponderance of the evidence that he was not actively involved in the activities resulting in Furr's Supermarkets, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

3. Petitioner failed to prove by a preponderance of the evidence that he was only nominally a director of Furr's Supermarkets, Inc.

4. Petitioner proved by a preponderance of the evidence that he was not an owner of Furr's Supermarkets, Inc.

5. Petitioner failed to prove by a preponderance of the evidence that Furr's Supermarkets, Inc., was the alter ego of its owners.

6. Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Furr's Supermarkets, Inc., during the period when Furr's willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's Appeal Petition

Respondent raises three issues in Respondent's Appeal Petition. First, Respondent contends Petitioner should not have been permitted to introduce evidence contesting the PACA violations previously found in *In re Furr's Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003), to have been committed by Furr's Supermarkets, Inc. (Respondent's Appeal Pet. at 3-15).

The Chief ALJ permitted Petitioner to introduce evidence contesting the PACA violations previously found to have been committed by Furr's Supermarkets, Inc. (Initial Decision and Order at 2). However, the Chief ALJ concluded the issue of whether Petitioner should be allowed to introduce evidence to establish that Furr's Supermarkets, Inc., did not violate the PACA is largely moot, since Petitioner failed to introduce

evidence establishing that Furr's did not violate the PACA (Initial Decision and Order at 8). I agree with the Chief ALJ's conclusion that the issue is moot; therefore, I find no need to address the issue.

Second, Respondent contends Petitioner failed to establish that he was not actively involved in the activities resulting in Furr's Supermarkets, Inc.'s violations of the PACA (Respondent's Appeal Pet. at 17-21).

I agree with the Chief ALJ's conclusion that Petitioner demonstrated by a preponderance of the evidence that he was not actively involved in the activities that resulted in Furr's Supermarkets, Inc.'s violations of the PACA. The salient facts that demonstrate Petitioner's lack of active involvement in the activities that resulted in Furr's Supermarkets, Inc.'s violations of the PACA are set forth in the findings of fact.

Third, Respondent contends Petitioner failed to establish that he was only a nominal director of Furr's Supermarkets, Inc. (Respondent's Appeal Pet. at 21-24).

I agree with Respondent's contention that Petitioner failed to establish by a preponderance of the evidence that he was only nominally a director of Furr's Supermarkets, Inc. In order for a petitioner to show that he or she was only nominally a director, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and shareholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their

status with the company requires that they knew, or should have known, about the violations being committed and failed to counteract or obviate the fault of others.⁴ The record establishes Petitioner had an actual, significant nexus with Furr's Supermarkets, Inc., during the violation period.

Petitioner was a highly experienced, well-educated manager, with 39 years of experience in the food industry at the time he became a director of Furr's Supermarkets, Inc. In 1957, Petitioner earned a bachelor's degree in business administration from Emporia State University. Petitioner worked for Fleming Companies, Inc., a food distribution company, for 39 years, and during at least the last 6 years of his employment with Fleming, Petitioner served as executive vice-president of the mid-America region. All of Fleming Companies, Inc.'s operating divisions in the region reported to Petitioner. (Tr. 47-48.) Based on Petitioner's education and experience, Petitioner knew, or should have known, about corporate structures, including the responsibility and authority that come with holding the position of director.

Initially, during Petitioner's tenure as a director of Furr's Supermarkets, Inc., the board of directors met every 2 months; the board eventually convened every 3 months. Petitioner attended all of the board meetings from the time of his appointment as director

⁴*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

until July 2000. (Tr. 78-79.) Fleming Companies, Inc., paid Petitioner \$100 per hour, plus expenses, to attend board meetings (Tr. 68-69).

Petitioner had significant responsibilities and authority as a director of Furr's Supermarkets, Inc. At the board meetings, Petitioner reviewed balance sheets and operating statements, dealt with numerous corporate issues, cast votes, and made a motion to elect Thomas Dahlen, president of Furr's Supermarkets, Inc., as a member of the board of directors (PX 1-PX 4; Tr. 24-25, 31-32). Further, in conjunction with Petitioner's position as director, he was a member of the real estate development committee and, in that capacity, Petitioner evaluated possible supermarket sites, which evaluation required his reviewing reports and discussing the reports with other members of the real estate development committee and the full board of directors (Tr. 23-24, 75-77). Petitioner personally visited a potential supermarket site on one occasion (Tr. 23).

In short, I find Petitioner had an actual, significant nexus with Furr's Supermarkets, Inc. Petitioner had the appropriate education and business experience to be a corporate director, received compensation for his services, and attended and actively participated in board meetings.

Reply Brief of Petitioner Filed March 31, 2005

On March 31, 2005, Petitioner filed Reply Brief of Petitioner in which Petitioner, contingent upon my reversing the Chief ALJ, appeals three of the Chief ALJ's rulings (March 31, 2005, Reply Brief of Petitioner at 18). Since I reverse the Chief ALJ's

conclusion that Petitioner was not responsibly connected with Furr's Supermarkets, Inc., Petitioner's appeal petition becomes operative.

First, Petitioner contends he was deprived of due process of law when he was not permitted to contest the determination in *In re Furr's Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003), that Furr's Supermarkets, Inc., violated the PACA (March 31, 2005, Reply Brief of Petitioner at 4-6).

Petitioner's assertion that he was not permitted to contest the prior determination that Furr's Supermarkets, Inc., violated the PACA is not supported by the record. Instead, the record reveals the Chief ALJ permitted Petitioner to contest the determination that Furr's Supermarkets, Inc., violated the PACA (Initial Decision and Order at 2). Therefore, even if I were to find that a failure to permit a petitioner to contest a prior determination that a commission merchant, dealer, or broker violated the PACA deprives that petitioner of due process (which I do not so find), I would not conclude Petitioner was deprived of due process of law.

Second, Petitioner contends Respondent exceeded statutory authority by prematurely determining that Petitioner was responsibly connected with a PACA violator. Specifically, Petitioner contends Respondent had no statutory authority to issue a determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., before Furr's was found to have violated the PACA. (March 31, 2005, Reply Brief of Petitioner at 6-7, Appendix A.)

On February 6, 2003, former Chief Administrative Law Judge James W. Hunt issued a decision concluding that Furr's Supermarkets, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period September 1998 through February 2001 (RC 4).⁵ The February 6, 2003, decision was not appealed and became final and effective. On April 3, 2003, almost 2 months after the former Chief Administrative Law Judge issued the decision concluding Furr's Supermarkets, Inc., had violated the PACA, Respondent issued a determination that Petitioner was responsibly connected with Furr's during the period September 29, 1998, through February 23, 2001. Therefore, Petitioner's assertion that Respondent's determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., preceded a final determination that Furr's violated the PACA is not supported by the record.

However, an initial determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., did precede the February 6, 2003, decision that Furr's violated the PACA. By letter dated October 23, 2002, Bruce W. Summers, Assistant Chief, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, informed Petitioner that a complaint had been filed against Furr's Supermarkets, Inc., alleging that Furr's had violated the PACA and that he (Bruce W. Summers) had made an initial determination that Petitioner

⁵*In re Furrs Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003).

was responsibly connected with Furr's at the time Furr's was alleged to have violated the PACA (RC 3). Mr. Summer's October 23, 2002, letter expressly states that a sanction would be imposed on Petitioner only following a determination that Furr's Supermarkets, Inc., violated the PACA, as follows:

If you do not respond to this letter within 30 days from receipt, this initial determination will become the Department's final determination that you were responsibly connected with Furr's Supermarket's Inc., at the time of the alleged violations, and you will waive any further procedure or hearing regarding your responsibly connected status. If it is then determined that Furr's Supermarket's Inc., did violate the PACA and its license is suspended or revoked, you will be notified of the exact date when your PACA license and employment restrictions will begin.

RC 3 at 2. Moreover, while Mr. Summer's October 23, 2002, letter does not expressly address the effect of a final determination that Furr's Supermarkets, Inc., did not violate the PACA, based on the letter, I infer that no sanction would have been imposed upon Petitioner and Mr. Summer's October 23, 2002, initial responsibly connected determination would have been a nullity.

Petitioner, citing sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), argues the PACA provides an express sequence that the United States Department of Agriculture must follow when determining a person's responsibly connected status; namely, a final decision concluding that a commission merchant, dealer, or broker violated the PACA must precede the initial determination that a person was responsibly connected with that commission merchant, dealer, or broker (March 31, 2005, Reply Brief of Petitioner at 6-7, Appendix A).

I disagree with Petitioner. I find nothing in section 4(b) or section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)) that dictates the sequence urged by Petitioner. Section 4(b) of the PACA (7 U.S.C. § 499d(b)) sets forth circumstances under which the Secretary of Agriculture is statutorily required to refuse to issue a PACA license to a PACA license applicant. Section 8(b) of the PACA (7 U.S.C. § 499h(b)) identifies persons who a PACA licensee may not employ, except with the approval of the Secretary of Agriculture, and provides sanctions for a PACA licensee's employment of persons in violation of the section. Sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)) do not support Petitioner's argument that an initial determination that a person was responsibly connected with a commission merchant, dealer, or broker may not be issued until there has been a final determination that the commission merchant, dealer, or broker has committed a violation of the PACA.

Third, Petitioner contends Respondent's disparate treatment of Furr's Supermarkets, Inc.'s directors constitutes arbitrary and capricious action as to Petitioner (March 31, 2005, Reply Brief of Petitioner at 7-12).

The issue in this proceeding is whether Petitioner was responsibly connected with Furr's Supermarkets, Inc., during the period when Furr's violated the PACA. The status of Furr's Supermarkets, Inc.'s other directors during the period when Furr's violated the PACA is irrelevant to Petitioner's status. Even if other directors were responsibly connected with Furr's Supermarkets, Inc., during the period when Furr's violated the

PACA and Respondent did not issue a determination that they were responsibly connected, those facts would not affect Petitioner's status.

I agree with the Chief ALJ that Respondent is entitled to exercise prosecutorial discretion. Respondent neither is prevented from issuing a responsibly connected determination as to Petitioner when not issuing the same determination as to others who are similarly situated nor is constrained to issue responsibly connected determinations as to all similarly situated persons. Petitioner has no right to have the PACA go unenforced against him, even if Petitioner can demonstrate that he is not as culpable as others who have not had responsibly connected determinations issued against them. PACA does not need to be enforced everywhere to be enforced somewhere; and agency officials have broad discretion in deciding against whom to issue responsibly connected determinations.

Although prosecutorial discretion is broad, it is not unbounded. The Supreme Court of the United States has long held that the decision to prosecute may not be based upon an unjustifiable standard such as race, religion, gender, or the exercise of protected statutory or constitutional rights.⁶ However, the record is devoid of any indication that Respondent used an unjustifiable standard to identify persons against whom to issue responsibly connected determinations.

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

⁶See *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996); *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

ORDER

I affirm Respondent's April 3, 2003, determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001, when Furr's willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner 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)).

This Order shall become effective 60 days after service of this Order on Petitioner.

Done at Washington, DC

July 28, 2005

William G. Jenson
Judicial Officer