

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA-APP Docket No. 03-0013
)
Glenn Mealman,)
)
Petitioner) **Order Denying Petition to Reconsider**

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. Following the hearing, Petitioner and Respondent filed post-hearing briefs.

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 (Initial Decision and Order at 17).

On March 9, 2005, Respondent appealed to the Judicial Officer, and on March 31, 2005, Petitioner filed a response to Respondent’s appeal petition. On April 11, 2005, the

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.)

Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On July 28, 2005, I issued a Decision and Order affirming 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, 2001.²

On September 2, 2005, Petitioner filed a petition to reconsider *In re Glenn Mealman*, 64 Agric. Dec. ____ (July 28, 2005). On September 23, 2005, Respondent filed a response to Petitioner's petition to reconsider. On September 27, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Petitioner's petition to reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Petitioner raises three issues in Petitioner's Petition to Reconsider the Decision of the Judicial Officer [hereinafter Petition to Reconsider]. First, Petitioner contends he could not be found to be responsibly connected with Furr's Supermarkets, Inc., prior to a determination that Furr's had violated the PACA (Petitioner's Pet. to Reconsider at second unnumbered page).

On February 6, 2003, former Chief Administrative Law Judge James W. Hunt filed a decision concluding that Furr's Supermarkets, Inc., violated the PACA during the period September 1998 through February 2001.³ The February 6, 2003, decision was not

²*In re Glenn Mealman*, 64 Agric. Dec. ____, slip op. at 26 (July 28, 2005).

³*In re Furr's Supermarkets, Inc.* (Decision Without Hearing Based on Admissions),
(continued...)

appealed and became final and effective. On April 3, 2003, almost 2 months after the former Chief Administrative Law Judge filed 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.

Petitioner correctly points out that, on October 23, 2002, well in advance of the February 6, 2003, decision that Furr's violated the PACA, Bruce W. Summers, Assistant Chief, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, issued an initial determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc. However, Mr. Summer's October 23, 2002, initial determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., did not become final. Instead, Petitioner, in accordance with section 47.49(c) of the Rules of Practice Under the Perishable Agricultural Commodities Act (7 C.F.R. § 47.49(c)), submitted reasons for his belief that he was not responsibly connected with Furr's Supermarkets, Inc., to Respondent, who did not issue a determination that Petitioner was responsibly connected

³(...continued)
62 Agric. Dec. 385 (2003).

with Furr's Supermarkets, Inc., until April 3, 2003. Therefore, I reject Petitioner's contention that Respondent determined Petitioner was responsibly connected with Furr's Supermarkets, Inc., prior to the determination that Furr's violated the PACA.

Second, Petitioner contends Respondent engaged in selective prosecution in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and the Administrative Procedure Act (Petitioner's Pet. to Reconsider at second and third unnumbered pages).

The due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;⁴ it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, as Petitioner contends.

Moreover, the Administrative Procedure Act does not prohibit selective prosecution, as Petitioner contends. To the contrary, an agency decision regarding enforcement is agency action generally committed to the agency's absolute discretion under the Administrative Procedure Act (5 U.S.C. § 701(a)(2)).⁵

⁴See 5 U.S.C. §§ 101, 551(1).

⁵*Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (stating the Court has recognized on (continued...))

Petitioner further asserts Respondent has advanced no justifiable standard by which he may properly issue a determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., and make a determination that another director was not responsibly connected with Furr's (Petitioner's Pet. to Reconsider at third unnumbered page).

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. 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

⁵(...continued)

several occasions that an agency's decision not to prosecute or enforce, whether civil or criminal process, is a decision generally committed to an agency's absolute discretion); *Sierra Club v. Whitman*, 268 F.3d 898, 902-03 (9th Cir. 2001) (citing *Heckler* for the proposition that the decision not to investigate or enforce is committed to agency discretion and unreviewable under the Administrative Procedure Act); *Massachusetts Public Interest Research Group v. United States Nuclear Regulatory Comm'n*, 852 F.2d 9, 14-19 (1st Cir. 1988) (holding the NRC's refusal to issue an order requiring the owner of a nuclear power plant to show cause why the plant should not remain closed or have its license suspended until alleged safety deficiencies are remedied is agency action committed to agency discretion under 5 U.S.C. § 701(a)(2) and not subject to judicial review).

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.

Third, Petitioner contends he was only a nominal director of Furr's Supermarkets, Inc., because he was placed on Furr's Supermarkets, Inc.'s board of directors by Fleming Companies, Inc., which paid him for attending board meetings (Petitioner's Pet. to Reconsider at fourth unnumbered page).

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

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).

actual, significant nexus with the violating company during the violation period. The record establishes that Fleming Companies, Inc., asked Petitioner to serve as a director on Furr's Supermarkets, Inc.'s board of directors and that Fleming paid Petitioner for attending board meetings, as Petitioner asserts. Nevertheless, these facts alone do not establish by a preponderance of the evidence that Petitioner did not have an actual, significant nexus with Furr's Supermarkets, Inc.

Petitioner also contends I erroneously concluded Petitioner was not a nominal director solely because of his business experience and education. Petitioner further states, under my approach, no director can be a nominal director if he or she is well-educated and experienced. (Petitioner's Pet. to Reconsider at fourth unnumbered page.)

I based my conclusion that Petitioner had an actual, significant nexus with Furr's Supermarkets, Inc., on a number of factors, in addition to Petitioner's education and experience. These factors are fully discussed in *In re Glenn Mealman*, 64 Agric. Dec. ___, slip op. at 19-20 (July 28, 2005). Therefore, I reject Petitioner's contention that I erroneously concluded Petitioner was not a nominal director solely because of his business experience and education.

For the foregoing reasons and the reasons set forth in *In re Glenn Mealman*, 64 Agric. Dec. ___ (July 28, 2005), Petitioner's petition to reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Petitioner's petition to reconsider was

timely-filed and automatically stayed *In re Glenn Mealman*, 64 Agric. Dec. ____ (July 28, 2005). Therefore, since Petitioner's petition to reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Glenn Mealman*, 64 Agric. Dec. ____ (July 28, 2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

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.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Petitioner must seek judicial review within 60 days after entry of this Order.⁷ The date of entry of this Order is October 3, 2005.

Done at Washington, DC

October 3, 2005

William G. Jenson
Judicial Officer

⁷See 28 U.S.C. § 2344.