

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-10-0250
)
Meza Sierra Enterprises, Inc.,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Robert C. Keeney, Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on April 26, 2010. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges, during the period November 2008 through January 2009, Meza Sierra Enterprises, Inc. [hereinafter Meza Sierra], willfully violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to two produce sellers, Grande Produce LTD, Co., and Kingdom Fresh Produce, Inc., of the agreed purchase prices, or the balances of the agreed purchase prices, in the total amount of \$282,621.20 for 17 lots of perishable agricultural commodities (tomatoes) which Meza Sierra purchased, received, and accepted in interstate and foreign commerce.¹ On May 18, 2010, Meza Sierra filed Respondent's Original Answer requesting dismissal of this proceeding based upon a lack of jurisdiction and denying the allegations of the Complaint.

On April 26, 2012, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order on the Written Record: (1) dismissing the portion of the Complaint relating to Meza Sierra's failure to pay Grande Produce LTD, Co., \$49,724 for 5 lots of tomatoes in accordance with the PACA; (2) finding, during the period November 2008 through January 2009, Meza Sierra failed to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the amount of \$215,385 for tomatoes that Meza Sierra purchased, received, and accepted in interstate commerce; (3) concluding Meza Sierra willfully, flagrantly, and

¹Compl. at 2-3 ¶¶ III-IV and Appendix A.

repeatedly violated 7 U.S.C. § 499b(4); and (4) revoking Meza Sierra's PACA license or, in the alternative, ordering the publication of the facts and circumstances of Meza Sierra's PACA violations.²

On May 31, 2012, Meza Sierra filed an Appeal Petition. On June 25, 2012, the Deputy Administrator filed Complainant's Response to Respondent's Appeal Petition. On June 29, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the ALJ's conclusion that Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) and the ALJ's order revoking Meza Sierra's PACA license and dismissing the portion of the Complaint relating to Meza Sierra's failure to pay Grande Produce LTD, Co.

DECISION

Discussion

The PACA requires produce dealers to make full payment promptly for perishable agricultural commodity purchases, usually within 10 days after the day on which the produce is accepted, unless the parties agree to different terms prior to the purchase (7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa)(5), (11)).

²ALJ's Decision and Order on the Written Record at 4, 8, 10 ¶¶ 12, 26, 31-33.

The ALJ took official notice of filings in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010), and *Meza Sierra Enterprises, Inc. v. Kingdom Fresh Produce, Inc.*, No. 13-11-00184-CV (Tex. App.—Corpus Christi 2011).³ In addition, the ALJ ordered the Deputy Administrator to file the Final Summary Judgment issued in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010),⁴ and on May 1, 2012, the Deputy Administrator complied with the ALJ’s order.⁵ These Texas state court filings establish: (1) the tomatoes which are the subject of *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010), are the same tomatoes that Meza Sierra purchased from Kingdom Fresh Produce, Inc., that are the subject of the instant proceeding; (2) during the period November 2008 through January 2009, Meza Sierra, failed to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the amount of \$215,385 for tomatoes which Meza Sierra purchased, received,

³Specifically, the ALJ took official notice of the following: (1) Respondent’s Proposed Exhibits RX 1-RX 2; (2) Complainant’s Motion for Reconsideration of Second Ruling Concerning Complainant’s Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued Attach. A; and (3) Response to Ruling Attach. A.

⁴ALJ’s Decision and Order on the Written Record at 7, 11 ¶¶ 22, 35.

and accepted in interstate commerce; and (3) Meza Sierra did not achieve full compliance with the PACA within 120 days of having been served with the Complaint filed in this proceeding.

The United States Department of Agriculture's policy in a case in which a PACA licensee has failed to make full or prompt payment for produce and failed to be in full compliance with the PACA within 120 days of having been served with a complaint is to treat the case as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, is revoked. A civil penalty is not appropriate because limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA, and it would not be consistent with the congressional intent to require a PACA violator to pay the United States while produce sellers are left unpaid. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549, 570-71 (1998).

⁵Complainant's Response to Decision and Order Attach. A.

Meza Sierra cannot show full compliance with the PACA within 120 days after having been served with the Complaint. Meza Sierra's inability to show full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case.

Meza Sierra's violations are "repeated" because repeated means more than one. Meza Sierra's violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. *See In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997). Meza Sierra's violations of the PACA are also "willful," as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)).⁶ Willfulness is reflected by Meza Sierra's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and the number and dollar amount of Meza Sierra's violative transactions. Therefore, the appropriate sanction in this proceeding is the revocation of Meza Sierra's PACA license.

⁶A violation is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *See, e.g., Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

Meza Sierra's Request for Oral Argument

Meza Sierra's request for oral argument (Appeal Pet. at 1), which the Judicial Officer may grant, refuse, or limit,⁷ is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Meza Sierra's Appeal Petition

Meza Sierra raises four issues in its Appeal Petition. First, Meza Sierra contends the ALJ erroneously concluded she had jurisdiction to hear this case and to issue a decision in this case (Appeal Pet. at 1-3 ¶ I).

The Secretary of Agriculture is authorized to cause a complaint to be issued for any violation of the PACA and must afford each alleged violator an opportunity for a hearing on the complaint before the Secretary of Agriculture's duly authorized examiner (7 U.S.C. § 499f(c)(2)). The Secretary of Agriculture has designated administrative law judges within the Office of Administrative Law Judges, United States Department of Agriculture [hereinafter OALJ], to hold hearings, to perform related functions, and to issue initial decisions in proceedings subject to 5 U.S.C. §§ 556 and 557 arising under the PACA (7 C.F.R. § 2.27(a)(1)). This PACA proceeding is subject to 5 U.S.C. §§ 556 and 557, and, at all times material to this proceeding, the ALJ was an administrative law judge employed by

⁷7 C.F.R. § 1.145(d).

OALJ; therefore, I reject Meza Sierra's contention that the ALJ did not have jurisdiction to hear this case and to issue an initial decision in this case.

Second, Meza Sierra contends the Rules of Practice are not applicable to this proceeding (Appeal Pet. at 1-3 ¶ D).

The Deputy Administrator instituted this disciplinary proceeding by filing the Complaint pursuant to the Secretary of Agriculture's authority in 7 U.S.C. § 499f(c)(2) to cause a complaint to be issued for any violation of the PACA. In the Complaint, the Deputy Administrator requests that, pursuant to 7 U.S.C. § 499h(a), the ALJ find Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) and order revocation of Meza Sierra's PACA license.⁸ The Rules of Practice are applicable to adjudicatory proceedings instituted under statutes listed in 7 C.F.R. § 1.131. Sections 6(c) and 8(a) of the PACA (7 U.S.C. §§ 499f(c), 499h(a)) are included in the list of statutes to which the Rules of Practice are applicable (7 C.F.R. § 1.131(a)).⁹ Therefore, I reject Meza Sierra's contention that the Rules of Practice are not applicable to this proceeding.

⁸Compl. at 4 ¶ 2.

⁹See *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1318-20 (1995) (holding the Rules of Practice are applicable to disciplinary adjudicatory proceedings instituted by a complaint that contains a request that an administrative law judge find, pursuant to 7 U.S.C. § 499h(a), a respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997).

Third, Meza Sierra asserts its debt to Kingdom Fresh Produce, Inc., for the tomatoes in question is still being litigated in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010); therefore, the ALJ erroneously concluded the officially noticed Texas state court documents establish that Meza Sierra violated 7 U.S.C. § 499b(4) (Appeal Pet. at 3-4 ¶ II 1).

The Texas state court documents filed in this proceeding establish that the litigation between Kingdom Fresh Produce, Inc., and Meza Sierra regarding Meza Sierra's failure to pay Kingdom Fresh Produce, Inc., for the tomatoes in question has concluded. On April 19, 2010, the Texas District Court ordered Meza Sierra and Valdemar Meza, jointly and severally, to pay Kingdom Fresh Produce, Inc., \$215,385 for the tomatoes in question.¹⁰ Meza Sierra filed a notice of appeal of the judgment entered by the Texas District Court, which the Texas Court of Appeals dismissed for want of jurisdiction.¹¹ The ALJ properly concluded Meza Sierra's appeal was dismissed and the judgment in *Kingdom Fresh Produce, Inc. v. Meza*

¹⁰*Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist., Final Summary Judgment Apr. 19, 2010) (Complainant's Response to Decision and Order Attach. A).

¹¹*Meza Sierra Enterprises, Inc. v. Kingdom Fresh Produce, Inc.*, No. 13-11-00184-CV (Tex. App.—Corpus Christi Memorandum Opinion Per Curiam June 16, 2011; Mandate September 8, 2011) (Complainant's Motion for Reconsideration of Second Ruling Concerning Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued Attach. A).

Sierra Enterprises, Inc., No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010), is final and effective.

Fourth, Meza Sierra contends the Secretary of Agriculture, by his failure to advise Kingdom Fresh Produce, Inc., to file a formal reparation complaint against Meza Sierra, has concluded that Meza Sierra did not violate the PACA (Appeal Pet. at 3-4 ¶ II 2-4).

As an initial matter, Meza Sierra does not cite any support for its contention that the Secretary of Agriculture failed to advise Kingdom Fresh Produce, Inc., to file a formal reparation complaint against Meza Sierra. The Deputy Administrator asserts the Secretary of Agriculture did afford Kingdom Fresh Produce, Inc., an opportunity to file a formal reparation complaint against Meza Sierra, but Kingdom Fresh Produce, Inc., abandoned its reparation complaint before the Secretary of Agriculture and, instead, pursued its claim against Meza Sierra in state court (Complainant's Response to Respondent's Appeal Petition at the fourth and fifth unnumbered pages). In support of this assertion, the Deputy Administrator cites Plaintiff's Verified Response to Defendant's Motion to Abate and Motion for Protective Order, filed September 30, 2009, in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010); however, I am unable to locate Kingdom Fresh Produce, Inc.'s verified response in the record before me.

Even if I were to find the Secretary of Agriculture failed to advise Kingdom Fresh Produce, Inc., to file a formal reparation complaint against Meza Sierra (which I do not so

find), I would not infer that the Secretary of Agriculture must have concluded Meza Sierra did not violate the PACA. Whether the Secretary of Agriculture advises an unpaid produce seller to pursue a private cause of action against a produce dealer has no bearing on whether the Secretary of Agriculture has concluded that the produce dealer has violated the PACA. A PACA disciplinary proceeding does not deal with the relationship of a PACA violator to its produce sellers for the purpose of seeking compensation for the produce sellers but, instead, involves the relationship of the PACA violator to the public, at least that part of the public in the business of selling and buying perishable agricultural commodities.¹²

The ALJ's Alternative Sanctions

¹²*In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 840 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005); *In re Edward M. Hall*, 12 Agric. Dec. 725, 733 (1953); *In re James L. (Lonnie) Cecil*, 7 Agric. Dec. 1105, 1112 (1948).

The ALJ found Meza Sierra was a PACA licensee and ordered: (1) revocation of Meza Sierra's PACA license or (2) if Meza Sierra's PACA license was no longer in effect, publication of the facts and circumstances of Meza Sierra's PACA violations.¹³ The ALJ's order is consistent with the practice of the Agricultural Marketing Service which does not generally request a suspension or revocation order when a PACA license is no longer in effect, but requests, instead, publication of the facts and circumstances of the violations. The ALJ's order is also consistent with my prior view that a PACA license no longer in effect cannot be revoked and, in lieu of revocation, the appropriate sanction would be publication of the facts and circumstances of the violations.¹⁴

In many PACA disciplinary proceedings, the record does not include evidence of the status of the PACA violator's PACA license at the time the administrative law judge issues a decision often leaving the administrative law judge with some doubt as to appropriate sanction. In this proceeding, the ALJ resolved that quandary by issuing an order with alternative sanctions which alternatives were dependent upon the then-current status of Meza Sierra's PACA license.¹⁵

¹³ALJ's Decision and Order on the Written Record at 5, 10 ¶¶ 16, 32-33.

¹⁴*In re KOAM Produce, Inc.*, 65 Agric. Dec. 589, 621 (2006), *aff'd*, 269 F. App'x 35 (2d Cir. 2008).

¹⁵ALJ's Decision and Order on the Written Record at 10 ¶¶ 32-33.

I have revisited the issue of the appropriate sanction to be applied when a PACA license is in effect and when a PACA license is not in effect. While some of the legislative history of the PACA suggests suspension and revocation orders cannot be issued as to PACA licenses that are no longer in effect,¹⁶ I find the plain language of the PACA authorizes publication of the facts and circumstances of a violation “and/or” suspension or revocation of a PACA license both when the PACA license is in effect and when the PACA license is not in effect:

§ 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, . . . 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.

7 U.S.C. § 499h(a) (emphasis added). Numerous cases support my conclusion that the Secretary of Agriculture is authorized under 7 U.S.C. § 499h(a) to issue a suspension or

¹⁶Donald A. Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, 1 Davidson, Agricultural Law § 4.19 n. 169 (1981 and 1989 Cum. Supp). See also *Marvin Tragash Co. v. U.S. Dep’t of Agric.*, 524 F.2d 1255, 1258 (5th Cir. 1975) (indicating a revocation order is not available to the Secretary of Agriculture if the PACA violator’s license has previously been terminated).

revocation order and (or) to publish the facts and circumstances of PACA violations whether the PACA violator's PACA license is in effect or not.¹⁷

¹⁷*In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1150-52 (1981) (stating a suspension or revocation order can be issued notwithstanding the termination of the PACA license prior to the issuance of the order); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 686 (1980) (stating the expiration of a PACA license after the violations occurred does not preclude an order of suspension of the lapsed or expired license), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633 (1976) (stating a PACA license can be suspended or revoked for a past violation even though the license terminates before the order is issued; similarly, the facts and circumstances of a firm's violation of the PACA can be published even though the firm's PACA license terminates before the order is issued), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750 (1975) (indicating a PACA license can be revoked notwithstanding the previous expiration of the license), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 138-40 (1975) (holding there is no requirement in the PACA that a license be currently in effect at the time a suspension or revocation order is issued), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 252 (1973) (concluding the PACA authorizes the suspension of a PACA license that has lapsed or expired; stating it is irrelevant whether a PACA license expires before or after the complaint is issued and cases holding to the contrary will no longer be followed), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *In re Reese Sales Co.*, 28 Agric. Dec. 1150, 1155 (1969) (revoking the respondent's PACA license and publishing the facts and circumstances of the respondent's violations), *aff'd*, 458 F.2d 183 (9th Cir. 1972); *In re Cloud and Hatton Brokerage*, 18 Agric. Dec. 547, 550 (1959) (holding termination of a PACA license after a disciplinary proceeding has commenced, but before a decision is issued, does not render moot the issue of revocation; the Secretary of Agriculture has authority to enter an order of revocation under these circumstances); *In re Raymond Klein*, 15 Agric. Dec. 1152, 1160 (1956) (revoking the respondent's PACA license and publishing the facts and circumstances of the respondent's violations); *In re Nate Rosenthal*, 15 Agric. Dec. 441, 442 (1956) (same); *In re John P. Rotton, Jr.*, 12 Agric. Dec. 743, 745 (1953) (same).

Therefore, as the Secretary of Agriculture is authorized under the circumstance in this proceeding to revoke Meza Sierra's PACA license, and the Deputy Administrator has only requested revocation of Meza Sierra's PACA license,¹⁸ I revoke Meza Sierra's PACA license and I do not publish the facts and circumstances of Meza Sierra's violations.

Findings of Fact

1. Meza Sierra is a corporation registered in the State of Texas.
2. Meza Sierra's mailing address is in care of its attorney, Ricardo A. Rodriguez, Esq., 7001 N. 10th Street, Suite 302, McAllen, Texas 78504.
3. Meza Sierra was issued PACA license number 20070589 on March 15, 2007.
4. Meza Sierra, during the period November 2008 through January 2009, failed to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the total amount of \$215,385 for perishable agricultural commodities that Meza Sierra purchased, received, and accepted in interstate commerce.
5. Meza Sierra was not in full compliance with the PACA within 120 days after the Hearing Clerk served Meza Sierra with the Complaint.

Conclusions of Law

¹⁸Compl. at 4 ¶ 2.

1. The Secretary of Agriculture has jurisdiction over Meza Sierra and the subject matter involved in this proceeding.

2. The ALJ had jurisdiction to hear this case and to issue the ALJ's April 26, 2012, Decision and Order on the Written Record (7 C.F.R. § 2.27(a)(1)).

3. The Rules of Practice are applicable to this proceeding (7 C.F.R. § 1.131(a)).

4. Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), during the period November 2008 through January 2009, by failing to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the total amount of \$215,385 for perishable agricultural commodities that Meza Sierra purchased, received, and accepted in interstate commerce.

For the foregoing reasons, the following Order is issued.

ORDER

1. Meza Sierra Enterprises, Inc.'s PACA license is revoked. Paragraph 1 of this Order shall become effective 60 days after service of this Order on Meza Sierra Enterprises, Inc.

2. The portion of the Complaint relating to Meza Sierra Enterprises, Inc.'s failure to pay Grande Produce LTD, Co., is dismissed.

RIGHT TO JUDICIAL REVIEW

Meza Sierra Enterprises, Inc., has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §_ 2341-2350. Meza Sierra Enterprises, Inc., must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹⁹ The date of entry of the Order in this Decision and Order is August 17, 2012.

Done at Washington, DC

August 17, 2012

William G. Jenson
Judicial Officer

¹⁹28 U.S.C. § 2344.