

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) PACA Docket No. D-99-0004  
)  
PMD Produce Brokerage Corp., ) **Order Denying Petition for**  
) **Reconsideration and Petition**  
Respondent ) **for New Hearing on Remand**

**PROCEDURAL HISTORY**

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on November 16, 1998. Complainant 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].

Complainant alleges that: (1) during the period February 1993 through September 1996, PMD Produce Brokerage Corp. [hereinafter Respondent] failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of

\$767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). Respondent filed an Answer on January 6, 1999, denying the material allegations of the Complaint (Answer ¶¶ 3-4).

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] scheduled a hearing for November 17, 1999 (Notice of Hearing filed September 7, 1999). On November 12, 1999, Complainant filed a Motion for Bench Decision and

Complainant's Proposed Findings of Fact, Conclusions, and Order, requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)). Respondent received a copy of Complainant's Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order on November 15, 1999 (Tr. 6).

On November 17, 1999, the ALJ presided over a hearing in New York, New York. Deborah Ben-David, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.<sup>1</sup> Paul T. Gentile, Gentile &

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<sup>1</sup>On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance). On August 3, 2001, Ruben D. Rudolph, Jr.,  
(continued...)

Dickler, New York, New York, represented Respondent. During the November 17, 1999, hearing, Respondent requested that the ALJ refrain from issuing a decision orally at the close of the hearing to provide Respondent additional time within which to submit proposed findings of fact, conclusions, order, and a brief in support of proposed findings of fact, conclusions, and order (Tr. 94).

The ALJ denied Respondent's request and issued a decision orally at the close of the November 17, 1999, hearing. The ALJ: (1) found, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) found a compliance review conducted between October 20, 1999, and November 1, 1999, revealed Respondent continued to owe approximately \$769,000 for purchases of perishable agricultural commodities from produce sellers listed in the Complaint; (3) concluded Respondent's failures to make full payment promptly of the agreed purchase prices for 600 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts

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<sup>1</sup>(...continued)

entered an appearance on behalf of Complainant and gave notice that he was replacing Jane McCavitt as counsel for Complainant (Notice of Substitution of Counsel).

and circumstances of Respondent s violations (Tr. 95-101). On November 30, 1999, the ALJ filed a Bench Decision, which is the written excerpt of the decision orally announced at the close of the November 17, 1999, hearing.

On January 7, 2000, Respondent filed a petition to reopen the hearing and appealed to the Judicial Officer. On February 14, 2000, Complainant filed Complainant s Response to Respondent s Appeal. On February 15, 2000, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent s petition to reopen the hearing and a decision. On February 18, 2000, I denied Respondent s January 7, 2000, appeal petition on the ground that it was late-filed. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal).

On March 15, 2000, Respondent filed Respondent s Petition for Reconsideration. On March 29, 2000, Complainant filed Complainant s Response to Respondent s Motion for Reconsideration. On March 30, 2000, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). On March 31, 2000, I denied Respondent s Petition for Reconsideration. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (Order Denying Pet. for Recons.).

Respondent sought judicial review of the Order Denying Late Appeal. The United States Court of Appeals for the District of Columbia Circuit reversed the Order Denying

Late Appeal. *PMD Produce Brokerage Corp. v. United States Dep t of Agric.*, 234 F.3d 48 (D.C. Cir. 2000).

On February 2, 2001, I held a telephone conference with counsel for Complainant and counsel for Respondent. Counsel informed me that neither Complainant nor Respondent would seek further judicial review of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). I informed counsel that I was troubled by the ALJ s denial of Respondent s request for an opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). Complainant and Respondent requested the opportunity to brief the issue of Respondent s opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). I granted Complainant s and Respondent s requests for the opportunity to brief the issue. On March 2, 2001, Complainant filed Complainant s Objection to Remanding Case to Administrative Law Judge for Further Procedures. On April 4, 2001, Respondent filed Respondent s Brief in Support of Judicial Officer Remanding to the Administrative Law Judge for Further Procedure.

On April 5, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent s January 7, 2000, petition to reopen the hearing and a ruling on the issue regarding remand to an administrative law judge. On April 6, 2001, I denied

Respondent's petition to reopen the hearing and remanded the proceeding to Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] to: (1) provide Respondent with an opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)); and (2) issue a decision. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. \_\_\_\_ (Apr. 6, 2001) (Order Denying Pet. to Reopen Hearing and Remand Order).

On May 17, 2001, Respondent filed Respondent's Proposed Findings of Fact, Conclusions and Order. On June 6, 2001, the Chief ALJ issued a Decision on Remand [hereinafter Initial Decision and Order on Remand] in which the Chief ALJ adopted the ALJ's November 30, 1999, Bench Decision.

On July 25, 2001, Respondent filed Respondent's Petition for Reconsideration requesting that the Chief ALJ reverse the Bench Decision and the Initial Decision and Order on Remand or order a new hearing. On September 7, 2001, Complainant filed Complainant's Reply to Respondent's Petition for Reconsideration. On September 12, 2001, the Chief ALJ issued Order Denying Petition for Reconsideration.

On October 22, 2001, Respondent filed a petition for a new hearing and appealed to the Judicial Officer. On November 9, 2001, Complainant filed Complainant's Response to Respondent's Appeal. On November 15, 2001, the Hearing Clerk

transmitted the record to the Judicial Officer for a ruling on Respondent's petition for a new hearing and a decision.

On November 26, 2001, I issued a Decision and Order on Remand: (1) finding that, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) finding that a compliance review conducted between October 20, 1999, and November 1, 1999, revealed Respondent continued to owe approximately \$769,000 for purchases of perishable agricultural commodities from produce sellers listed in the Complaint during the time period set forth in the Complaint; (3) concluding that Respondent's failures to make full payment promptly of the agreed purchase prices for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (4) ordering publication of the facts and circumstances set forth in the Decision and Order on Remand; and (5) denying Respondent's petition for a new hearing. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. \_\_\_\_, slip op. at 12, 25-26, 28 (Nov. 26, 2001) (Decision and Order on Remand).

On January 10, 2002, Respondent filed a Petition to Reconsider. On February 1, 2002, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration. On February 4, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the November 26, 2001, Decision and Order on Remand.

## **APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

7 U.S.C.:

### **TITLE 7 AGRICULTURE**

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### **CHAPTER 20A PERISHABLE AGRICULTURAL COMMODITIES**

. . . .

#### **§ 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[.]



**§ 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.

. . . .

**(e) Alternative civil penalties**

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in 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.

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

**TITLE 7 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).

## CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises three issues in Respondent's Petition to Reconsider. First, Respondent requests a new hearing. Respondent contends the November 17, 1999, hearing is flawed because the ALJ denied Respondent's request to submit proposed findings of fact and proposed conclusions of law prior to the ALJ's issuance of the oral decision, the ALJ ignored some of the evidence, and the ALJ issued an oral decision that was verbatim from Complainant's Proposed Findings of Fact, Conclusions, and Order. Respondent asserts [a] new hearing would permit the presentation of evidence that was generated by litigation in the Federal District Court case, including evidence that has been developed after the initial decision by the ALJ in 1999. (Respondent's Pet. to Reconsider at 1-2.)

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing prior to the issuance of the decision of the Judicial Officer, as follows:

**§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**

(a) *Petition requisite. . . .*

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

I issued the Decision and Order on Remand on November 26, 2001. Respondent did not file the Petition to Reconsider containing a petition for a new hearing until January 10, 2002, 1 month 15 days after I issued the Decision and Order on Remand. Therefore, Respondent's petition for a new hearing is untimely and is denied.<sup>2</sup>

Moreover, even if Respondent's petition for a new hearing had been timely filed, I would deny it because Respondent has not stated the nature and purpose of the evidence to be adduced, as required by section 1.146(a)(2) of the Regulations (7 C.F.R. § 1.146(a)(2)). Respondent merely states how the evidence to be adduced was generated and the date after which some of the evidence to be adduced was developed. Finally, the purported flaws in the initial hearing cited by Respondent do not provide a basis for reopening the hearing to adduce additional evidence.

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<sup>2</sup>*In re Judie Hansen*, 58 Agric. Dec. 390, 392 (1999) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 4 months 1 week after the Judicial Officer issued the decision); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 1704, 1709 (1998) (Order Denying Pet. for Recons. and for Reopening Hearing) (denying the respondent's petition to reopen hearing because the respondent filed the petition to reopen hearing 26 days after the Judicial Officer issued an order denying late appeal); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 718 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 57 days after the Judicial Officer issued the decision); *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing approximately 2 months after the Judicial Officer issued the decision); *In re King Meat Co.*, 40 Agric. Dec. 1910 (1981) (Order Denying Pet. for Recons., Rehearing and Reopening) (stating since the petition to reopen the hearing was filed after the issuance of the Judicial Officer's decision, it cannot be considered).

The ALJ's failure to permit Respondent to submit proposed findings of fact and proposed conclusions of law would not be corrected by holding a new hearing to adduce evidence, but instead would be corrected by providing Respondent with the opportunity to file proposed findings of fact and proposed conclusions of law. On April 6, 2001, I remanded the proceeding to the Chief ALJ with an instruction that he was to provide Respondent with an opportunity to submit for consideration proposed findings of fact, proposed conclusions, a proposed order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. \_\_\_ (Apr. 6, 2001) (Order Denying Pet. to Reopen Hearing and Remand Order). The Chief ALJ provided Respondent with the opportunity to make such a filing, and on May 17, 2001, Respondent took advantage of that opportunity. Therefore, I find no basis for holding a new hearing, as Respondent requests, to provide Respondent with another opportunity to file proposed findings of fact and proposed conclusions of law.

The ALJ's purported failure to consider some of the evidence would not be corrected by holding a new hearing, as Respondent requests, but instead could be corrected by Respondent's appeal to the Judicial Officer requesting consideration of the evidence that the ALJ purportedly ignored. In this proceeding, after the ALJ issued a decision orally at the close of the November 17, 1999, hearing, the Chief ALJ reviewed the record (Initial Decision and Order on Remand at 2) and adopted the ALJ's November 30, 1999, Bench Decision, which is the written excerpt of the ALJ's decision

orally announced at the close of the November 17, 1999, hearing. Moreover, after Respondent's October 22, 2001, appeal, I carefully considered the evidence in the record and I adopted, except for minor, non-substantive changes, the Chief ALJ's Initial Decision and Order on Remand. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. \_\_\_\_ (Nov. 26, 2001) (Decision and Order on Remand). Therefore, I find no basis for holding a new hearing, as Respondent requests, because the ALJ purportedly ignored some of the evidence.

The ALJ's issuance of an oral decision that was verbatim from Complainant's Proposed Findings of Fact, Conclusions, and Order would not be corrected by holding a new hearing, as Respondent requests, but instead any error in the ALJ's oral decision could be corrected on appeal to the Judicial Officer. In this proceeding, after the ALJ issued a decision orally at the close of the November 17, 1999, hearing, the Chief ALJ reviewed the record (Initial Decision and Order on Remand at 2) and adopted the ALJ's November 30, 1999, Bench Decision, which is the written excerpt of the ALJ's decision orally announced at the close of the November 17, 1999, hearing. Moreover, after Respondent's October 22, 2001, appeal, I carefully considered the record and I adopted, except for minor, non-substantive changes, the Chief ALJ's Initial Decision and Order on Remand. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. \_\_\_\_ (Nov. 26, 2001) (Decision and Order on Remand). Therefore, I find no basis for holding a new hearing,

as Respondent requests, because the ALJ issued an oral decision that was verbatim from Complainant s Proposed Findings of Fact, Conclusions, and Order.

Second, Respondent contends the ALJ should not have received the benefit of the presumption that he considered the record prior to the issuance of the November 17, 1999, oral decision. Respondent bases this contention on the similarity between the ALJ s November 17, 1999, oral decision and Complainant s Proposed Findings of Fact, Conclusions, and Order. (Respondent s Pet. to Reconsider at 2.)

In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.<sup>3</sup> Administrative law judges must consider

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<sup>3</sup>See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant s request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of

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<sup>3</sup>(...continued)

clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity, which attaches to official acts, can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. \_\_\_, slip op. at 37-40 (Aug. 16, 2001) (stating, in the absence of clear evidence to the contrary, administrative law judges are presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision in the proceeding), *appeal docketed*, No. 01C0890 (E.D. Wis. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff d in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal docketed*, No. 01-6214 (2d Cir. Oct. 9, 2001); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff d*, A2-00-84 (D.N.D. July 18, 2001), *appeal docketed*, No. 01-3257 (8th Cir. Sept. 17, 2001); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating, instead of presuming United States Department of Agriculture

(continued...)



the record in a proceeding prior to the issuance of a decision in that proceeding.<sup>4</sup> An administrative law judge is presumed to have considered the record prior to the issuance of his or her decision. I draw no inference from a similarity between a party's filing and an administrative law judge's decision that the administrative law judge failed to properly

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<sup>3</sup>(...continued)

attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid), *aff d*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff d*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff d*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff d*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff d*, No. 78-3134 (D.N.J. May 25, 1979), *aff d mem.*, 614 F.2d 770 (3d Cir. 1980).

<sup>4</sup>See 5 U.S.C. § 556(d).

discharge his or her duty to consider the record prior to the issuance of a decision.

Therefore, I reject Respondent's contention that I should not presume the ALJ properly discharged his duty to consider the record before he issued the November 17, 1999, oral decision because the ALJ's oral decision is similar to Complainant's Proposed Findings of Fact, Conclusions, and Order.

Moreover, the record establishes the ALJ presided at the reception of the evidence during the November 17, 1999, hearing. Further still, the ALJ's oral decision at the close of the hearing is supported by evidence in the record. The ALJ's presence during the reception of the evidence and the support in the record for the ALJ's oral decision belies Respondent's assertion that the ALJ did not consider the record prior to the issuance of the oral decision. Therefore, I reject Respondent's assertion that the ALJ did not consider the record before issuing the oral decision at the close of the November 17, 1999, hearing.

Third, Respondent contends I incorrectly determined that Respondent failed to prove that Respondent and its creditors entered into an agreement for payment that precludes Complainant from a statutory interest in the transactions that are the subject of the Complaint. Respondent states: (1) I misconstrued the Regulations regarding extension of payment terms which permits the parties to extend the time for payment by written agreement; (2) it introduced credible evidence of an agreement; and (3) Complainant had the burden to identify and prove the non-existence of an agreement or set forth the true nature of the agreement that would permit Complainant to retain an

interest in the transactions that are the subject of the Complaint. (Respondent's Pet. to Reconsider at 2-3.)

Generally, the burden of proof rests with the party having the best knowledge of the particular disputed facts.<sup>5</sup> Further, generally, the burden of proof rests with the party

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<sup>5</sup>See *United States v. New York, New Haven & Hartford R.R.*, 355 U.S. 253, 256 n.5 (1957) (stating the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary); *Greenleaf's Lessee v. Birth*, 31 U.S. (6 Pet.) 302, 312 (Jan. Term 1832) (stating, while the rule is not universal, in many cases the burden of proof is on the party within whose peculiar knowledge and means of information the fact lies); *National Communications Ass'n v. AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) (stating, all else being equal, the burden of proof is better placed on the party with easier access to the relevant information); *United States v. 194 Quaker Farms Road*, 85 F.3d 985, 990 (2d Cir.) (stating burden shifting where one party has superior access to evidence on a particular issue is a common feature of our law), *cert. denied sub nom. Scianna v. United States*, 519 U.S. 932 (1996); *Lindahl v. OPM*, 776 F.2d 276, 280 (Fed. Cir. 1985) (stating one factor that is usually considered in the allocation of the burden of proof between parties is which side has the best knowledge of the particular disputed facts); *Browzin v. Catholic University of America*, 527 F.2d 843, 849 (D.C. Cir. 1975) (stating ordinarily a litigant does not have the burden of establishing facts peculiarly within the knowledge of the opposing party); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643 (D.C. Cir. 1973) (stating when certain material lies particularly within the knowledge of a party he is ordinarily assigned the burden of adducing the pertinent information and this assignment of burden to a party is fully appropriate when the other party is confronted with the often formidable task of establishing a negative averment); *United States v. Hayes*, 369 F.2d 671, 676 (9th Cir. 1966) (stating it is well-settled that in the interest of fairness the burden of proof ordinarily resting upon one party as to a disputed issue may shift to his adversary when the true facts relating to the disputed issue lie peculiarly within the knowledge of the latter); *Mangaoang v. Boyd*, 186 F.2d 191, 195 (9th Cir. 1950) (stating the burden of showing a fact falls upon the one who has peculiar knowledge thereof); *Fleming v. Harrison*, 162 F.2d 789, 792 (8th Cir. 1947) (stating it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge or of which he is supposed to be cognizant); *Miller v. Lykes*

(continued...)

asserting the affirmative of an issue.<sup>6</sup> Respondent has better knowledge than Complainant of any agreement Respondent has with its creditors and Respondent affirmatively asserts that it has an agreement with its creditors. Moreover, while section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a transaction involving perishable agricultural commodities may elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)), the agreement must be reduced to writing before the parties enter the transaction and the party claiming the existence of the agreement has the burden of

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<sup>5</sup>(...continued)

*Bros.-Ripley S.S. Co.*, 98 F.2d 185, 186 (5th Cir.) (stating the litigant who has control of the proof must produce it), *cert. denied*, 305 U.S. 641 (1938).

<sup>6</sup>*Lilienthal s Tobacco v. United States*, 97 U.S. 237, 266 (1878) (stating, beyond question, the general rule is that the burden of proof in civil cases lies on the party who substantially asserts the affirmative of the issue); *United States v. Linn*, 42 U.S. (1 How.) 104, 111 (Jan. Term 1843) (stating the general rule is that he who holds the affirmative must prove it); *National Communications Ass n v. AT&T Corp.*, 238 F.3d 124, 131 (2d Cir. 2001) (stating, all else being equal, courts should avoid requiring a party to shoulder the more difficult burden of proving a negative; the general rule is that the party that asserts the affirmative of an issue has the burden of proving the facts essential to its claim); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 589 (1st Cir.) (stating normally the party asserting the affirmative of a proposition should bear the burden of proving that proposition), *cert. denied*, 444 U.S. 866 (1979); *Marcum v. United States*, 452 F.2d 36, 39 (5th Cir. 1971) (stating the burden of proving disputed facts rests on the one affirming their existence and claiming rights and benefits therefrom); *Joseph A. Bass Co. v. United States*, 340 F.2d 842, 844 (8th Cir. 1965) (stating it is fundamental that the burden of proof in any cause rests upon the party who, as determined by the pleadings or nature of the case, asserts the affirmative of an issue and remains there until the termination of the action); *Florida Fruit Canners, Inc. v. Walker*, 90 F.2d 753, 758 (5th Cir.) (stating the burden of proof rests primarily on him who has the affirmative of the issue), *cert. denied*, 302 U.S. 738 (1937); *Barnett v. Kunkel*, 259 F. 394, 401 (8th Cir. 1919) (stating an affirmative claim must be proven by the party who seeks its benefit).

proving it. Therefore, I reject Respondent's contention that Complainant has the burden of proving the non-existence of an agreement Respondent purportedly has with its creditors. Instead, I hold that Respondent has the burden of proving the existence of any agreement that it has with its creditors.

Respondent did not carry its burden of proving that it has an agreement with its produce sellers that was reduced to writing before Respondent and its produce sellers entered the transactions that are the subject of the Complaint. Mark Werner, Respondent's principal owner, testified that in 1996, after Respondent stopped doing business, Respondent entered into an agreement with its creditors in accordance with which Respondent was to pay its debts over an extended period of time (Tr. 90-93). However, neither Mr. Werner nor any other witness testified that Respondent entered into written agreements electing to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)) before entering into the perishable agricultural commodities transactions that are the subject of this proceeding. To the contrary, Mr. Werner's testimony establishes that the agreement Respondent made with its creditors to extend the time for payment was made in 1996 after Respondent entered the transactions that are the subject of this proceeding. Further, Michael Saunders, the United States Department of Agriculture investigator who investigated Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), testified that, during his review of Respondent's records, he did not find any evidence of

written agreements between Respondent and any of its produce sellers in which the parties elected to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)) (Tr. 27).

Finally, while Respondent did introduce evidence that in 1996, after Respondent stopped doing business, Respondent entered into an agreement with its creditors in accordance with which Respondent was to pay its debts over an extended period of time (Tr. 90-93), Respondent provides no basis for its contention that such an agreement precludes the Complainant from having a statutory interest in the transactions that are the subject of the Complain[']t. Moreover, I cannot find any basis in the PACA, the Regulations, or case law that supports Respondent's position that such an agreement precludes Complainant from a statutory interest in the transactions that are the subject of the Complaint.

For the foregoing reasons and the reasons set forth in *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. \_\_\_\_ (Nov. 26, 2001) (Decision and Order on Remand), Respondent'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 for reconsideration.<sup>7</sup> Respondent's Petition to

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<sup>7</sup>*In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying  
(continued...)

Reconsider was timely filed and automatically stayed the November 26, 2001, Decision and Order on Remand. Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in the Decision and Order on Remand filed November 26, 2001, is reinstated: except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration and Petition for New Hearing on Remand.

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

### ORDER

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances set forth in *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. \_\_\_\_ (Nov. 26, 2001) (Decision and Order on Remand) and this Order Denying Petition for Reconsideration and Petition for New

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<sup>7</sup>(...continued)

Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Hearing on Remand shall be published, effective 60 days after service of this Order on Respondent.

Done at Washington, DC

February 14, 2002

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William G. Jenson  
Judicial Officer