

UNITD STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)
)
Middlesex Livestock Auction, LLC,) AHPA Docket No. 18-0034
)
Respondent.)
)

Order Remanding for Further Proceedings

Appearances:

Lauren C. Axley, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave., S.W., Washington, D.C. 20250, for the Complainant, the Administrator of the Animal and Plant Health Inspection Service; and

Ms. Lisa Scirpo, an owner and operator of the Respondent Middlesex Livestock Auction, LLC, a livestock market in Connecticut, representative of the Respondent.

Order Issued by John Walk, Judicial Officer

Relevant Procedural History

This is a proceeding under the Animal Health Protection Act (“AHPA” or “Act”) (7 U.S.C. § 8301 *et seq.*); the regulations promulgated thereunder (9 C.F.R. § 79 *et seq.*) (“Regulations”); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) and 9 C.F.R. § 70.1. The Administrator of the Animal and Plant Health Inspection Service (“APHIS” or “Complainant”) initiated this administrative enforcement proceeding on May 21, 2018 by filing a Complaint alleging that Middlesex Livestock Auction, LLC (“Respondent”) (1) sold a goat as a cash sale without keeping a record relating to the transfer of ownership, in violation of 9 C.F.R. § 79.2(d), on November 17, 2014; (2) sold two goats as a cash sale without keeping a record

relating to the transfer of ownership, in violation of 9 C.F.R. § 79.2(d) on August 31, 2015; and (3) failed to make records available to United States Department of Agriculture (“USDA”) officials when requested on multiple dates in 2015 and 2016, in violation of 9 C.F.R. § 79.2(d)(3).

On July 3, 2018, Respondent, through its representative, Lisa Scirpo (“Ms. Scirpo”), filed an Answer admitting the record keeping violations and alleging factors in mitigation of a fine.

On June 21, 2019, Complainant filed a Motion for Summary Judgment and Proposed Decision and Order. Complainant’s Motion for Summary Judgment (“Motion for Summary Judgment”) recommended the assessment of a civil penalty in the amount of \$17,500 against the Respondent.

On July 1, 2019 Respondent sent an email to the Hearing Clerk’s Office alleging that it could not pay the fine recommended in the Motion for Summary Judgment.

On July 10, 2019, the parties participated in a telephone conference with Administrative Law Judge Jill S. Clifton (“ALJ”), wherein Respondent contested the proposed penalty which Respondent asserted that it could not pay.¹

On August 8, 2019 the Hearing Clerk’s Office served Respondent’s response to Complainant’s Motion for Summary Judgment (“Response to Motion for Summary Judgment”) on the parties. Respondent challenged the assessment of the recommended fine and alleged an inability to pay the civil penalty. Complainant filed a reply thereto on September 6, 2019.

On December 15, 2020, the ALJ issued a Decision and Order on the Written Record, granting in part and denying in part APHIS’s Motion for Summary Judgment (“Decision and

¹ See Confirmation that Time is Extended to August 14, 2019, by 4:30 pm, as Ordered During Dial-in Telephone Conference.

Order”). The Decision and Order found that Respondent violated the AHPA as alleged in the Complaint. However, the ALJ concluded that Respondent “does not have the cash flow to withstand the \$17,500 civil penalty recommended by APHIS.”² The Decision and Order assessed on Respondent a \$7,000 civil penalty to be paid within 90 days after the Decision and Order became final and effective.

On December 23, 2020, Respondent filed a timely appeal of the Decision and Order to the Judicial Officer (“Appeal Petition”). Complainant filed a response thereto on January 15, 2021 (“Response to Appeal Petition”).

Discussion

The Appeal Petition seeks relief from the assessment of the \$7,000 civil penalty.³ In support of reducing the civil penalty, Respondent alleges that it is unable to pay, arguing that it is in debt and that its operations have been impacted by the Coronavirus pandemic.⁴

AHPA, as adjusted in 2010 by 7 C.F.R. § 3.91(b)(2)(vi), permits the Secretary to impose a civil penalty of up to \$300,000 for each violation committed by any business, but not more

² Decision and Order at 4.

³ See Appeal Petition (“We are asking to forgive this fine because we cannot possibly pay this.”).

⁴ Respondent raises two additional allegations in its Appeal Petition. First, Respondent alleges that the record keeping violations involved only two goats because “the 3rd goat was purchased by Fred Robinson of Mass.” Appeal Petition. In his declaration made under penalty of perjury, USDA Investigator James J. Finn stated that he reviewed Respondent’s records for the relevant dates that reflected “a goat identified as 313 was . . . sold to Freddy Robinson of Rhode Island.” Motion for Summary Judgment CX 27 at 1. Goat 313 is not at issue in the Complaint and not relevant to this proceeding. The goats subject to the Complaint are identified by the numbers 886, 887, and 1831. See Complaint at 3. Second, Respondent also states in the Appeal Petition that “[a]s far as the fine goes . . . new Holland sales stable . . . sells 3000 to 4000 goats an [sic] lambs weekly an [sic] more then [sic] half are not tagged!” Appeal Petition. This allegation which purports to relate to another establishment not at issue in the Complaint is not relevant to this proceeding.

than \$500,000 in any single adjudication. 7 U.S.C. § 8313(b)(1)(A). Therefore, the total maximum civil penalty Respondent can be assessed for its violations adjudicated in this proceeding is \$500,000. The Act provides both mandatory and discretionary factors to determine a civil penalty as follow:

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator –

- (A) the ability to pay;
- (B) the effect on ability to continue to do business;
- (C) any history of prior violations;
- (D) the degree of culpability; and
- (E) such other factors as the Secretary considers to be appropriate.

7 U.S.C. § 8313(b)(2).

Complainant recommended the assessment of a \$17,500 civil penalty against Respondent. In support of this recommendation, Complainant submitted the declaration of Koren Moore Custer, Doctor of Veterinary Medicine, and New England Area Veterinarian in Charge for Veterinary Service for APHIS at USDA (“Dr. Custer”).⁵ Dr. Custer’s declaration addressed the application of each of the mandatory factors to Respondent’s violations and considered the discretionary factor that Respondent had no prior history of violations that resulted in a civil penalty.⁶

The ALJ concluded in the Decision and Order that Respondent “does not have the cash flow to withstand the \$17,500 civil penalty recommended by APHIS” and denied summary judgment as to the recommended civil penalty amount.⁷ Respondent was

⁵ Declaration of Koren Moore Custer.

⁶ *Id.* at 5-7.

⁷ Decision and Order at 4-5.

ordered to pay \$7,000 in civil penalty – a 60% reduction from Complainant’s recommended amount – within 90 days after the Decision and Order becomes final and effective.⁸ The Appeal Petition seeks relief from the civil penalty, alleging that Respondent is unable to pay even the amount assessed by the ALJ. Complainant opposes any reduction of the \$7,000 civil penalty assessed in the Decision and Order but does not appeal it.⁹

A violator’s ability to pay is a discretionary factor that may be considered to determine the amount of a civil penalty. The burden is on the party that asserts an inability to pay to come forward with evidence to substantiate its claim.¹⁰ Respondent makes several new claims for the first time on appeal to support its contention that it is unable to pay, including that Respondent is in debt and Respondent’s business operations have been impacted by the Coronavirus pandemic. Respondent offers to provide new evidence about its debt. However, it is well settled that factual allegations cannot be raised for the first time on appeal that could have been raised in proceedings before the

⁸ *Id.* at 5.

⁹ Response to Appeal Petition at 7 n.2.

¹⁰ See *A.P. “Sonny” Holt*, 49 Agric. Dec. 853, 865 (U.S.D.A. 1990), 1990 WL 322149, at *9 (“[W]ith respect to ability to pay . . . it is the position of this Department that it is the responsibility of the respondents to come forward with some evidence indicating an inability to pay.”); *Garland E. Samuel*, 57 Agric. Dec. 905, 912-913 (U.S.D.A. 1998), 1998 WL 556345, at *4 (rejecting claim of inability to pay because respondent failed to produce necessary evidence); *Tracy Essary*, 75 Agric. Dec. 204, 209-10 (U.S.D.A. 2016), 2016 WL 3434034, at *4 (“[T]he burden is on the respondent to come forward with some evidence indicating an inability to pay the civil penalty.”); *Justin Jenne*, 74 Agric. Dec. 118, 128 (U.S.D.A. 2015), 2015 WL 1776433, at *6 (rejecting the claim of inability to pay because respondent failed to present evidence he was not able to pay the civil penalty).

administrative law judge.¹¹ The Appeal Petition suggests that Ms. Scirpo may not have fully appreciated the extent of Respondent's debt. However, as its representative, Ms. Scirpo was responsible to know Respondent's financial condition, including information about its debts and to raise evidence thereof to support its claim about the ability to pay during proceedings before the ALJ. It is now too late for Respondent to offer new evidence about its debt for the first time on appeal when it had the opportunity to raise it earlier in the proceeding.¹²

Respondent also alleges for the first time on appeal that the Coronavirus pandemic ("Coronavirus pandemic" or "COVID-19") has impacted its ability to pay the \$7,000 civil penalty. The national emergency concerning COVID-19 was declared on March 13, 2020.¹³ Complainant points out that Respondent had time to raise the impact

¹¹ See *Barry Glick*, 55 Agric. Dec. 275, 282 (U.S.D.A. 1996), 1996 WL 119673, at *6 ("The Respondent had an opportunity to raise the facts set forth in his Appeal Petition earlier in this proceeding. It is well settled that Respondent cannot raise new issues on appeal or present new facts for the first time on appeal to the Judicial Officer.") (citations omitted); See also *Burnette Foods, Inc.*, 74 Agric. Dec. 413, 424 (U.S.D.A. 2015), 2015 WL 9500722, at *8 ("It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.")

¹² See *Barry Glick*, 55 Agric. Dec. 275, 282 (U.S.D.A. 1996), 1996 WL 119673, at *6 ("The facts concerning Respondent's assets and financial condition and his ability to pay a civil penalty, which are set forth for the first time on appeal, come too late."); *Dean Daul*, 45 Agric. Dec. 556, 565 (U.S.D.A. 1986), 1986 WL 74680, at *6 ("These facts, which are set forth for the first time on appeal, come much too late."); *Justin Jenne*, 74 Agric. Dec. 156, 158-60 (U.S.D.A. 2015) (Order Denying Pet. to Reopen Hearing) (denying petition to reopen hearing to offer new evidence that could have been adduced earlier in the proceeding before the administrative law judge).

¹³ Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337 (Mar. 18, 2020). The World Health Organization declared COVID-19 a pandemic two days before the national emergency declaration on March 11, 2020. See WHO-Director General's Opening Remarks at the Media Briefing on COVID-19-11 March 2020, World Health Organization (Mar. 11, 2020),

of the Coronavirus pandemic on its business because the ALJ did not issue the Decision and Order until December 15, 2020. However, just because “the pandemic began to affect daily life in the United States beginning in March 2020”¹⁴ does not mean that the financial impact on Respondent had materialized or was immediately felt at that time. Based on the unique circumstances involving the Coronavirus pandemic, I find that Respondent had good reason why it could not raise evidence of the impact of COVID-19 on its ability to pay during proceedings before the ALJ. Although this is a close question, I note that Complainant does not object to a limited remand to consider this issue.

Therefore, I find that a remand to the ALJ to take evidence on whether the Coronavirus pandemic impacted Respondent’s ability to pay and to determine what adjustment of the civil penalty, if any, is warranted based on the findings is appropriate. Further, I find it is also appropriate on remand to consider whether the civil penalty should be paid in installments based on Respondent’s ability to pay.

<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

¹⁴ Response to Appeal Petition at 8 (emphasis added).

Order

This proceeding is remanded to the ALJ to take evidence on whether the Coronavirus pandemic has impacted Respondent's ability to pay the \$7,000 civil penalty, to determine what adjustment of the civil penalty, if any, is warranted based on the findings, and to consider whether Respondent should pay the civil penalty in installments because of its ability to pay.

Done at Washington, D.C.,

this 26th day of March 2021

John Walk
Judicial Officer

Hearing Clerk's Office
United States Department of Agriculture
South Building, Room 1031
1400 Independence Avenue, SW
Washington, DC 20250-9203
Tel.: 202-720-4443
Fax: 844-325-6940
SM.OHA.HearingClerks@USDA.GOV