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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0216

In re:

PAUL A. ROSBERG,
doing business as
ROSBERG FARM.

Appearances:

Buren Kidd, Esq.,
For Complainant

Paul A. Rosberg,
Pro se Respondent

Before:

Janice K. Bullard
Administrative Law Judge

AMENDED[1] DECISION AND ORDER ON SUMMARY JUDGMENT

The instant matter involves a complaint filed by the United States Department of Agriculture ("Complainant"; "USDA") against Paul A. Rosberg, d/b/a Rosberg Farm ("Respondent"), alleging violations of the Organic Foods Production Act of 1990 ("OFPA"), 7 U.S.C. §§ 6501-6522 and regulations implementing the OFPA and the National Organic Program ("NOP"), set forth at 7 C.F.R. § 205.1 – 205.699. The complaint alleged that Respondent failed to declare on two applications for certification under the NOP that he was previously certified under the NOP. The complaint further alleged that Respondent failed to provide with his applications to NOP copies of noncompliance letters, and failed to describe how compliance had been achieved.

[1] The parties were served with a Decision and Order in this matter on May 28, 2014, but clerical errors in that Decision required correction. Accordingly, on May 30, 2014, I vacated that Decision and Order and replaced it with the instant Amended Decision and Order.

This Decision and Order is issued on unopposed motion for summary judgment filed by Complainant.

I. PROCEDURAL HISTORY

On January 26, 2011, Complainant filed a complaint against Respondent alleging violations of the OFPA. On March 30, 2012, Respondent filed a general denial of the allegations and requested additional time to file an answer. By Order issued April 9, 2012, Chief Administrative Law Judge Peter M. Davenport extended the time within which an answer must be filed to May 9, 2012. On April 6, 2014, Respondent again requested additional time.[2] On May 9, 2014, Respondent filed a partial answer and supporting documentation and again requested additional time.

On May 14, 2012, Chief Administrative Law Judge Peter M. Davenport set deadlines for submissions and exchange of evidence. Complainant filed a list of exhibits and witnesses with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk") on June 6, 2012. On July 11, 2012, Respondent filed a document in which he stated that he was not able to comply with the Order for exchange and submissions because he was denied discovery, and requested an Order compelling discovery.[3] On July 12, 2012, Complainant filed a status report and request for teleconference.

The case was reassigned to me, and on November 2, 2012, I issued an Order staying proceedings in the matter pending the result of actions in federal district court involving Respondent. On May 7, 2013, Complainant filed a Status Report, Request for Hearing and Request for teleconference. By Order issued May 14, 2013, I renewed my stay in this matter

[2] It is likely that Respondent's second request for an extension of time and the Order granting the request crossed in the mail.

[3] The Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Initiated by the Secretary [of the United States Department of Agriculture] ("the Rules of Practice"), 7 C.F.R. §§ 1.130 et seq. apply to this proceeding and do not provide for discovery.

pending the results of criminal actions involving Respondent. In a status report filed on December 17, 2013, Complainant advised that Respondent had pled guilty to criminal charges. On December 27, 2013, Respondent was sentenced to imprisonment.

On January 30, 2014, Complainant filed a motion for summary judgment which was served upon Respondent by the Hearing Clerk. Respondent has failed to file a response to the motion.

On May 14, 2014, a motion filed in another administrative proceeding involving Respondent advised that Respondent's motion for habeas corpus and request to withdraw his guilty plea was denied by Senior United States District Court Judge Richard Kopf. Accordingly, this matter is ripe for adjudication.

I admit to the record the Attachments to Respondent's Answer, identified as RX-A through RX-Q and the Exhibits identified as CX-1, CX-7, CX-11, CX-14, CX-20, CX-21[4] and CX-22, attached to Complainant's motion.

II. ISSUE

The primary issue in controversy is whether, considering the record, summary judgment may be entered in favor of USDA.

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

A. Summary of the Evidence

USDA established national standards for the production and handling of organically produced agricultural products pursuant to the OFPA. USDA, through the Agricultural Marketing Service ("AMS") administers a program for certifying organic producers and handlers, whose practices are examined by State officials and/or authorized private agents for

[4] Complainant's Exhibits "A" and "B" have been renamed "CX-21" and CX-22", respectively, for purposes of consistency.

compliance with USDA standards. Once compliance is established, the producers and handlers may market their products with an official USDA organic label.

On June 27, 2005, Respondent was certified under NOP for soybeans and alfalfa by OCIA International, Inc. ("OCIA"), a certification agent that was accredited by USDA under NOP regulations on April 29, 2002. RX-C. On November 23, 2005, Respondent was certified for alfalfa under NOP by OCIA. CX-1; RX-F. On November 15, 2006, Respondent applied for certification with OneCert, which was accredited by USDA as a certifying agent under the NOP regulations on April 22, 2003. CX-7.

On February 2, 2007, OCIA issued a Notice of Noncompliance to Respondent. RX-I. On February 8, 2007, Respondent surrendered his organic certification with OCIA. CX-11. On May 24, 2007, OneCert issued to Respondent a Notice of Noncompliance and Denial of Certification for failing to disclose prior certifications and noncompliances, misrepresenting previous certifications, failing to maintain a record-keeping system, and withholding records. CX-11.

On August 28, 2007, Respondent applied for certification with International Certification Services, Inc. ("ICS"), which was accredited by USDA as a certifying agent under NOP regulations on April 29, 2002. CX-14. On October 30, 2007, ICS denied certification to Respondent because it determined that Respondent had provided contradictory information to ICS and USDA about his prior certifications. RX-P.

On September 10, 2007, Respondent applied for organic certification by the Ohio Ecological Food and Farm Association ("OEFFA"), which was accredited by USDA as a certifying agent under NOP regulations on April 29, 2002. CX-20; RX-O. Respondent was issued an organic certificate by OEFFA in 2007. Admission of Respondent, last sentence of Affidavit dated April 6, 2010, in partial Answer.

On March 8, 2010, the NOP issued Respondent a Notice of Noncompliance and Proposed Revocation (RX-A) for failing to disclose prior certifications, notice of non-compliance and notices of denial of application for organic certification, pursuant to 7 C.F.R. § 205.401(c), which provides:

> A person seeking certification of a production or handling operation under this subpart must submit an application for certification to a certifying agent. The application must include the following information:
> (c) The name(s) of any organic certifying agent(s) to which application has previously been made; the year(s) of application; the outcome of the application(s) submission, including, when available a copy of any notification of noncompliance or denial of certification issued to the applicant for certification; and a description of the actions taken by the applicant to correct the noncompliances noted in the notification of noncompliance, including evidence of such correction…

On February 13, 2012, Respondent filed a civil action in the District Court of Lancaster, Nebraska against Everett Lunquist, an inspector of organic producers and growers, alleging defamation of character. On May 7, 2012, Mr. Lunquist's attorney moved for summary judgment, which was granted by District Judge Paul D. Merritt, Jr. on August 5, 2013. CX-22.

Discussion

Pursuant to the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. §1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. §1.139) and further provide that "an opposing party may file a response to [a] motion" within twenty days after service (7 C.F.R. §1.143(d)).

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact. Veg-Mix, Inc. v. United States Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. Alder v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. Schwartz v. Brotherhood of Maintenance Way Employees, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Muck v. United States, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. Adler, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. Conaway v. Smith, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for

summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 262 (1986).

Respondent failed to file a timely Answer that specifically addressed the allegations in the complaint. His first filing with the Hearing Clerk asserted a general denial of the allegations. The documentation accompanying Respondent's partial Answer addressed the allegations to some degree. In affidavits that Respondent submitted during the course of investigation into his NOP practices, he lodged complaints that representatives and agents tasked with issuing NOP certification had lied, had not acted timely, and had failed to properly interpret his responses to questions about non-compliance. Respondent suggests that error and not fraud caused investigators to conclude that he had failed to truthfully respond to questions regarding whether he had been previously certified on subsequent applications. Respondent failed to respond to the motion for summary judgment.

Respondent's assertions of fraud and dishonesty have been rejected by Judge Merritt of the District Court of Nebraska, who granted summary judgment against Respondent in his civil action against Mr. Lunquist. CX-22. Judge Merritt found that "reasonable minds can draw but one conclusion from all of the evidence-Rosberg failed to comply with § 205.401(c)." Id.

I agree with Judge Merritt's determination and find that none of Respondent's statements support his compliance with regulations controlling applications for organic certification. There is nothing vague or ambiguous about the requirement that applicants identify all information about prior applications for certification, including the outcome of those applications. Respondent's applications reveal that he failed to comply with those requirements. He applied for organic certification with OneCert while still holding certification by OCIA. On his application to OneCert, Respondent did not disclose that information and instead wrote

"unknown" when required to identify other certifying agents to which he had applied. Respondent also wrote "none" when required to list the years in which he had applied for certification. Respondent wrote "unknown" when required to respond to questions regarding the outcome of previous applications. See, CX-7 at page 2. On his application to ICS, Respondent denied having previous certifications. Respondent failed to include any required documentation with his applications.

In his partial Answer, Respondent submitted affidavits and supporting documents[5] that summarize his efforts to secure organic certification for various agricultural products. Respondent charged inspectors with failing to make timely inspections, with falsifying information, and with failing to properly interpret his applications for certification. Respondent contended that he told inspectors about his applications, and therefore, his status with previous certifying agents should have been apparent. However Respondent admitted that he "did not necessarily follow ICS paper". See, partial Answer. Respondent included documents pertaining to inspections in which non-compliant procedures had been identified. He explained that his attention was diverted by the illness of his son, and that he had little time to devote to paperwork.

I credit Respondent's contention that the process for organic certification is lengthy and complicated. However, the scope of the instant adjudication is limited to whether Respondent's applications for organic certification met the requirements set forth at 7 C.F.R. § 401(c). Regardless of what Mr. Rosberg told individuals representing certifying agents, the onus was on him to complete the applications accurately, and the evidence establishes, prima facie, that he failed to do so. I find that there is no genuine dispute of material fact. Accordingly, Complainant's motion for summary judgment is GRANTED.

[5] Respondent expressed concerns that I would not read his affidavit or documents because "it is so long". I hereby assure Respondent that I have assiduously read every word of his, and the government's, submissions.

Two additional assertions were made by Complainant, but not substantiated by documentary evidence. Complainant alleged that on March 16, 2010, OEFFA issued Respondent a Notice of Noncompliance and Denial of Certification for Livestock. The record does not contain supporting documentation in the form of a copy of that notice. However, because the record does not allege that Respondent made additional applications for organic certification after this date, this assertion is not material to my findings.

Complainant additionally alleged that on July 29, 2011, the AMS Administrator issued a decision denying the Respondent's appeal and proposed to revoke Respondent's organic certification under 7 C.F.R. § 205.662(f)(2) of the prevailing NOP regulations for a period of five (5) years. Although a copy of this decision is not in evidence, it is not crucial to my determinations, as I infer that the Administrator's decision was the basis for the complaint that initiated the instant adjudication.

B. Findings of Fact

1. Respondent Paul A. Rosberg is an individual doing business as Rosberg Farm, with a mailing address in Wausau, Nebraska.
2. At all times material hereto, Respondent was engaged in business as a certified organic producer, crop operation, as defined in the OFPA.
3. On June 27, 2005, Respondent was certified under NOP for soybeans and alfalfa by OCIA International, Inc. ("OCIA").
4. On November 23, 2005, Respondent was issued another organic certificate by Organic Crop Improvement Association ("OCIA").
5. OCIA was accredited by USDA as a certifying agent under NOP Regulations on April 29, 2002.

6. On February 2, 2007, OCIA issued a Notice of Noncompliance to Respondent.
7. On February 8, 2007, Respondent surrendered his organic certificate with OCIA.
8. On November 15, 2006, Respondent applied for certification with OneCert.
9. OneCert was accredited by USDA as a certifying agent on April 23, 2003.
10. On May 24, 2007, OneCert issued to Respondent a Notice of Noncompliance and Denial of Certification for failing to disclose prior certifications and noncompliances; misrepresenting previous certifications; failing to maintain records; and withholding records.
11. On August 28, 2007, Respondent applied for certification with Internal Certification Services, Inc. ("ICS").
12. On April 29, 2002, ICS was accredited by USDA as a certifying agent under the NOP.
13. On October 30, 2007, ICS issued to Respondent a Notice of Denial because of contradictory information that Respondent provided to ICS and USDA regarding prior certification applications.
14. On September 10, 2007, Respondent applied for organic certification by the Ohio Ecological Food and Farm Association ("OEFFA").
15. OEFFA was accredited by USDA as a certifying agent under NOP regulations on April 29, 2002.
16. On November 12, 2007, Respondent was issued an organic certificate by OEFFA.
17. On March 8, 2010, the NOP issued Respondent a Notice of Noncompliance and Proposed Revocation for failing to disclose prior certifications and noncompliance notice and failing to disclose notices of denial of application for organic certification.

C. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. There are no genuine issues of material fact presented in this adjudication.
3. Entry of summary judgment in favor of Complainant is appropriate.
4. Respondent violated 7 C.F.R. § 401(c) by failing to disclose prior organic certification applications and designations; by failing to disclose notices of non-compliances; and by failing to maintain records; and by failing to produce records on other applications for certification under the NOP.

ORDER

Respondent Paul A. Rosberg, doing business as Rosberg Farm, shall cease and desist from violating the NOP regulations. Respondent's certification under NOP is hereby revoked for a period of five (5) years, pursuant to 7 C.F.R. § 205.681(a)(2). Respondent is hereby disqualified from being eligible to be certified as an organic operation under the OFPA for a period of five (5) years.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

So ORDERED this 30th day of May, 2014, in Washington, D.C.

[redacted]

Janice K. Bullard
Administrative Law Judge