USDA
OALJ/OHC

2016 SEP 12 AM 8: 46

RECEIVED

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	[PACA-D]
	)	Docket No. **16-0032**
Andrews Farming, Inc.,	)	
	)	**Decision and Order on**
Respondent	)	**the Written Record**

Appearances:

Shelton S. Smallwood, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C., for the Complainant (AMS); [1] and

Craig A. Stokes, Esq., Stokes Law Office LLP, San Antonio, Texas, for the Respondent Andrews Farming, Inc. (Andrews Farming). [2]

Decision Summary

1. Andrews Farming, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the purchase prices, or balances thereof, during December 2014 through June 2015, totaling $494,715.09 for fruits and vegetables from 7 of the 11 produce sellers listed in Appendix A to the

---

1. The Complainant is the Administrator, Specialty Crops Program (formerly Fruit and Vegetable Program), Agricultural Marketing Service, United States Department of Agriculture ("AMS" or "Complainant").

2. The Respondent is Andrews Farming, Inc., a corporation organized and existing under the laws of the Commonwealth of Virginia ("Andrews Farming" or "Respondent").

Complaint, all being perishable agricultural commodities that Andrews Farming, Inc. purchased, received, and accepted in the course of interstate or foreign commerce.

Background

2. AMS's "Motion for Decision on the Record", filed August 9, 2016, asks me to issue a decision based on the requirements of the PACA in light of Andrews Farming, Inc.'s admissions. AMS's Motion asserts that since there are no material issues of fact in dispute, there is no need to have a hearing. AMS's Motion includes two attachments: Appendix A to the Complaint; and Schedule F (Creditors Who Have Unsecured Claims) from Andrews Farming, Inc.'s Chapter 7 bankruptcy filing, Case No.: 7:16-bk-70627, filed on May 5, 2016 in the U.S. Bankruptcy Court, Western District of Virginia (Roanoke).

3. Andrews Farming, Inc. filed no opposition to the "Motion for Decision on the Record". Andrews Farming, Inc. was served with the Motion on August 15, 2016. Andrews Farming, Inc. also filed nothing in response to my order "File by August 10 (Wed) 2016". After filing its Answer on February 1, 2016, Andrews Farming, Inc. filed nothing in this case. The Answer denies that Andrews Farming, Inc. failed to pay promptly or that sums remain due; the Answer denies that Andrews Farming, Inc. willfully violated the PACA.

4. Following careful review of all documents filed, I agree with AMS that there is no need for an oral hearing. *See Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527 (U.S.D.A. 1998). I issue this Decision and Order based on the written record, finding that Andrews Farming, Inc. has committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4).

Findings of Fact

5. Andrews Farming, Inc., the Respondent, is a corporation organized and existing under the laws of the Commonwealth of Virginia, with a business address in Hillsville, Virginia.

6. Andrews Farming, Inc. was licensed under the provisions of the Perishable Agricultural Commodities Act (the PACA) on July 2, 2014, license number 20140892. The license terminated on July 2, 2016.

7. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires produce licensees such as Andrews Farming, Inc. to make "full payment promptly" for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 C.F.R. § 46.2(aa)(5) and (11) (defining "full payment promptly").

8. Andrews Farming, Inc. failed to comply with 7 C.F.R. § 46.2(aa) regarding making full payment promptly.

9. Andrews Farming, Inc. made admissions that certain produce sellers had not been paid. These admissions are contained in its Schedule F listing of creditors filed in its Chapter 7 bankruptcy case, Case No.: 7:16-bk-70627, filed on May 5, 2016 in the U.S. Bankruptcy Court, Western District of Virginia (Roanoke). I take official notice (7 C.F.R. § 1.141(h)(6)) of the bankruptcy filing, particularly Schedule F.

10. Andrews Farming, Inc. failed to achieve full compliance with the PACA within 120 days after the Complaint was served; the Complaint was served in January 2016.

11. Andrews Farming, Inc. failed during December 2014 through June 2015, to make full payment promptly of the purchase prices or balances thereof totaling $494,715.09 to 7 of the 11 produce sellers listed in Appendix A to the Complaint for fruits and vegetables, all being perishable agricultural commodities that Andrews Farming, Inc. purchased, received, and accepted in the course of interstate or foreign commerce.

Conclusions

12. The Secretary of Agriculture has jurisdiction over Andrews Farming, Inc. and the subject matter involved herein.

13. Even if Andrews Farming, Inc. were eventually to complete payment in full, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) regarding making full payment promptly, especially 7 C.F.R. § 46.2(aa)(5) and (11).

14. The grounds for revocation of a PACA license are found in 7 U.S.C. § 499h and include flagrant or repeated failures to comply with 7 U.S.C. § 499b(4), which requires full payment promptly.

15. Where there is no license to revoke, the appropriate sanction is a finding of willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding. *Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386-387 (U.S.D.A. 2003).

16. Andrews Farming, Inc.'s violations are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)). ['Though willfulness is not a prerequisite to the publication of the facts and circumstances of violations of 7 U.S.C. § 499b(4).]

17. Andrews Farming, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing during December 2014 through June 2015 to make full payment promptly to 7 of the 11 produce sellers listed in Appendix A to the Complaint, of the purchase prices or balances thereof totaling $494,715.09 for fruits and vegetables, all being perishable agricultural commodities that Andrews Farming, Inc. purchased, received, and accepted in the course of interstate or foreign commerce.

Order

18. The Respondent Andrews Farming, Inc. is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4). The facts and circumstances of the violations shall be published pursuant to section 8(a) of the PACA, 7 U.S.C. § 499h(a).

19. Any employment sanctions attendant to this Decision and Order pursuant to section 8(b) of the PACA, 7 U.S.C. § 499h(b), shall take effect on the 11th day after this Decision and Order becomes final.

20. This Order shall take effect on the 11th day after this Decision and Order becomes final. See next paragraph for when this Decision and Order becomes final.

Finality

21. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 12th day of September 2016

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
Stop 9203 South Building Room 1031
1400 Independence Ave SW
Washington, DC 20250-9203
202-720-4443
FAX 202-720-9776
OALJHearingClerks@ocio.usda.gov

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—RULES OF PRACTICE GOVERNING FORMAL ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument*. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument*. Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement*. The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument*. The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs*. By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal*. As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145