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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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In re:) P. & S. Docket No. D-08-0035
)
R. Robert Lamb,)
)
)
)
Respondent)

DECISION WITHOUT HEARING BASED ON ADMISSIONS

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 et seq.), (hereinafter "the Act"). On December 18, 2007, a Complaint was issued against Respondent. On January 16, 2008, Respondent filed an Answer, wherein it admitted the allegations contained in paragraphs I through III of the Complaint.

Paragraph I of the Complaint stated that Respondent, during the periods alleged in the Complaint, was an individual engaged in the business of a dealer, buying and selling livestock for his own account and the account of others, who was registered as such with the Secretary of Agriculture. Paragraph II of the Complaint stated that on June 12, 2006, a Consent Decision was issued in the case of In Re: R. Robert Lamb, P&S Docket No. D-04-0014, in which Respondent agreed to an order requiring it to cease and desist from failing to pay, when due, the purchase price of livestock and suspending Respondent as a registrant under the Act for a period of five years. Paragraph II of the Complaint also stated that the Consent Decision became effective on June 27, 2006, and that Respondent never demonstrated circumstances warranting any modification of the order as set forth in the Consent Decision. Paragraph III of the Complaint

stated that Respondent, in connection with his operations subject to the Act on September 18th and 21st, 2006, purchased feeder pigs in the amount of \$117,407.04, and failed to make full payment for the pigs within the time period required by the Act. Paragraph III of the Complaint also stated that as of December 2006, Respondent owed the Pig Exchange d/b/a ProPig LLC, \$60,794.34 for the pigs purchased in September 2006.

Respondent specifically stated in its Answer that "Respondent admits the allegations contained in Paragraphs One, Two, and Three of Petitioner's¹ Complaint". Based on the admissions contained in Respondent's Answer, Complainant moved for a decision without hearing or further procedure in this case. Complainant requested that a decision and order be entered against Respondent pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (the "Rules of Practice"). See 7 C.F.R. § 1.130 et seq.

Respondent has admitted in the answer all of the material allegations of fact contained in the complaint, specifically, that Respondent violated the terms of the June 12, 2006 Consent Decision, which required Respondent to cease and desist from failing to pay, when due, the purchase price of livestock, and that in September 2006, Respondent purchased livestock and failed to pay for that livestock within the time period required by the Act. Accordingly, I issue the following Decision Without Hearing and Order pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

- (1) R. Robert Lamb (hereinafter, "Respondent"), is an individual whose

¹ Throughout the Answer, Respondent refers to Complainant as "Petitioner".

mailing address is 337 South 1450 East, Burnettsville, Indiana 47926

(2) Respondent, at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock for his own account and the account of others; and

(b) Registered with the Secretary of Agriculture as a dealer, buying and selling livestock for his own account and the account of others.

(3) On June 12, 2006, a Consent Decision was issued in the case of In re: R. Robert Lamb, P.& S. Docket No. D-04-0014, and signed by Respondent, in which Respondent agreed to an order requiring it to cease and desist from failing to pay, when due, the purchase price of livestock and was suspended as a registrant under the Act for a period of five years. The Consent Decision provided that, upon application to the Packers and Stockyards Program, a supplemental order might be issued terminating the suspension at any time after 120 days upon demonstration by Respondent of circumstances warranting modification of the order. The Consent Decision further provided that the order might be modified, upon application to the Packers and Stockyards Program, to permit the salaried employment of Respondent by another registrant or packer after the initial 120 days of suspension and upon demonstration of circumstances warranting modification of the order. The Consent Decision was served upon Respondent on June 21, 2006, and became effective on June 27, 2006. Respondent never demonstrated circumstances warranting modification of the order as set forth in the Consent Decision.

(4) As set forth in paragraph III of the Complaint against Respondent, during the period between September 18th and 21st, 2006, Respondent purchased livestock in the amount of \$117, 407.04 and failed to pay for that livestock within the time period required by the

Act.

Conclusions

Respondent admitted in the answer that it failed to pay full amount of the purchase price of livestock within the time period required by the Act. The Secretary has consistently held that the failure to pay promptly and fully for the purchase price of livestock constitutes an unfair and deceptive practice in willful violation of sections 312(a) and 409 of the Act. In re: George O. Purflinger, Jr., 58 Agric. Dec. 940 (September 9, 1999); Van Wyk v. Bergland, 570 F.2d 701 (1978); Bowman v. United States Dep't Of Agriculture, 363 F.2d. 81 (1966).

Respondent has contended that its violations of the Act were not willful. Under the Administrative Procedure Act (APA) when license suspension or termination is a sanction, the violator must have notice and an opportunity to cure except in cases in which the violating action is willful. 5 U.S.C. § 558(c). However, a showing of willfulness is not required in this proceeding because Complainant does not seek the suspension or termination of Respondent's registration (in this case, Respondent has no registration, as it was suspended for a period of 5 years by Consent Decision and Order of June 12, 2006, yet Respondent continued to operate during this period, in violation of the Order).

Even assuming, *arguendo*, that Complainant did seek suspension or termination of Respondent's registration in this case, willfulness is not required here because Respondent received prior notice in writing of the violations, with opportunity to demonstrate or achieve compliance. *See* 5 U.S.C. § 558(c); In re: Jeff Palmer, 50 Agric. Dec. 1762, 1780 (1991). The Judicial Officer has held concerning prior notice:

It is clear that only one notice is required by section 9(b) of the Administrative Procedure Act [(5 U.S.C. § 558(c)], that is, once a licensee has been adequately warned, if he subsequently violates the Act, the agency may proceed to suspend

his license without any further warning, notice, or opportunity to demonstrate informally that he did not violate the Act.

In re: Jeff Palmer 50 Agric. Dec. at 1782.

Respondent consented to the entry of a cease and desist order that restrained Respondent from purchasing and failing to pay for livestock within the time period required by the Act. See In re: R. Robert Lamb, P&S Docket No. D-04-0014 (June 12, 2006). This prior order serves as notice to Respondent of the violation.² Since Respondent was given notice of the violations and has been “adequately warned”, even if Complainant sought to suspend Respondent’s registration at this time, there would be no need for proof of willfulness.

In any event, I find that in this case Respondent’s violations are willful within the meaning of that term in USDA precedent. In re: D.W. Produce, 53 Agric. Dec. at 1678 (a violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute). “It is the Secretary’s position that any prohibited conduct in which a person intentionally engages is willful, even though the person may not have known that the conduct was prohibited or even if he did not intend to do anything wrong”. In re: Hardin County Stockyards, Inc., 53 Agric. Dec. 654 (1994). Here, Respondent knew that failing to pay promptly for livestock was a violation of the Act, yet purchased livestock on September 18th in the amount of \$29,246.40, and again on September 21st in the amount of \$88,160.64, and in each instance failed to pay for that livestock within the time period required by the Act (section 409 states, *inter alia*, that each dealer purchasing livestock shall, before the close of the next business day following the purchase of

² The Judicial Officer stated in In re: Jeff Palmer, “For example, if an agency issues a cease and desist order against a licensee, that is adequate notice under section 9(b).” In re Jeff Palmer, 50 Agric. Dec. at 1782 .

livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price). Respondent's actions in this case constitute violations that were willful. See In re: D.W. Produce, 53 Agric. Dec. at 1678.

Complainant requested the penalty of an order requiring Respondent to cease and desist from failing to pay, when due, the purchase price of livestock. Complainant further requested an assessment of a ten thousand dollar civil penalty (\$10,000.00) against Respondent jointly and severally. The policy of the Secretary is to base sanctions on the circumstances of each case. In re: Middlebury Packing Co., 53 Agric. Dec. 639, 652 (1993); In re: S.S. Farms Linn County, Inc., 50 Agric. Dec. 476 (1991). This policy is to deter the violator and the current members of the industry from future violations of the Act. Id. As the Judicial Officer explained in S.S. Farms Linn County:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

S.S. Farms Linn County, 50 Agric. Dec. at 497.

The Act provides for a civil penalty of up to \$11,000 for each violation of the Act. 7 U.S.C. § 213; 7 C.F.R. § 3.91. When assessing a civil penalty, the Act requires consideration of the gravity of the offense, the size of the business, and the effect of the penalty on the person's ability to continue in business (here, the latter two factors cannot be considered, since by June 12, 2006 Consent Decision, Respondent was suspended as a registrant for a period of 5 years). 7 U.S.C. § 213. As for the first factor, under the admitted facts of this case, Respondent has committed serious violations of the Act by failing to pay, when due, the amount of the purchase price of livestock in two transactions. See In re: Joshua L. Martin d/b/a Martin Livestock, 64

Agric. Dec. 919 (January 11, 2005); In re: Sarcoxie Community Sales, Inc., 47 Agric. Dec. 1290, 1300 (1988); In re: C.J. Edwards, 37 Agric. Dec. 1880 (1978). Moreover, Respondent has committed these acts in flagrant violation of a previous Order by the Secretary. Respondent not only operated during the 5 year suspension period, but *again* violated the Act during that period, committing the very acts which Respondent was ordered to cease and desist in the prior Order.

Respondent was not deterred adequately by the prior order to cease and desist, or the suspension of Respondent as a registrant for a five year period. Therefore, a monetary penalty is required to effectuate the Secretary's policies of deterrence in this case. Under section 312 of the Act, Respondent could be liable for up to \$22,000 of civil penalties for failing to pay, when due, for livestock.³ Complainant requests \$10,000.00 in this case. Considering that the requested penalty is less than half of that maximum amount, this is a reasonable penalty under these circumstances where Respondent has violated a prior order of the Secretary, and has committed serious violations of the Act.

In light of Respondent's admissions of all factual allegations of the Complaint, and Respondent's failure to assert valid defenses⁴ to the Complaint, an entry of a decision without hearing by reason of admissions is appropriate. Under section 1.139 of the Rules of Practice, "[t]he failure to file an answer, or the admission by the answer of all the material allegations of

³ Two violations x \$11,000 per violation = \$22,000 in total penalties.

⁴ In addition to claiming that Respondent's violations were not willful, Respondent states in its Answer that ProPig LLC, the seller to whom Respondent failed to make full payment when due, "elected its remedy by filing suit in White County, Indiana". However, the government is the Complainant in the instant disciplinary action against Respondent, not ProPig, LLC. ProPig, LLC is not a party in this case, and the separate action initiated by ProPig, LLC in Indiana has no bearing on this disciplinary case against Respondent. See Han Yang Trade Co., Inc., d/b/a H.Y. Produce Company v. A.F. and Sons Produce, Inc., 52 Agric. Dec. 765, 769 (1993)(stating that one factor in deciding whether an election of remedies has been made is whether the parties in both actions are the same).

“[t]he failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing.” Respondent has admitted all the factual allegations of the Complaint, and those admissions constitute a waiver of hearing in this case. (See Answer ; see also Complaint).

Respondent’s admissions in the Answer demonstrate that there is no real factual dispute in this proceeding, and that a hearing is unnecessary. Because Respondent’s admissions prove that it violated the Act, and because of the gravity of the current offense, I find that it is appropriate to assess a civil penalty of Ten thousand dollars (\$10,000) and to order Respondent to cease and desist from failing to pay, when due, the purchase price of livestock.

Order

Respondent R. Robert Lamb, his agents and employees, directly or through any corporate or other device, in connection with all his activities subject to the Act, shall cease and desist from failing to pay the full amount of the purchase price for livestock within the time period required by the Act and the regulations promulgated under it.

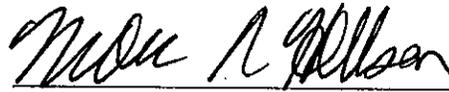
Pursuant to section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is assessed a civil penalty in the amount of ten thousand dollars, (\$10,000.00), payable to the United States Treasury within 60 days of the effective date of this order.

The provisions of this order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this order on the Respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.,

this 30th day of October, 2008.



Administrative Law Judge