

**In re: BERT SMITH, III, AND EDDIE MCNALLY.
P&S Docket No. D-00-0013.
Decision and Order as to Bert Smith, III filed April 6, 2001.**

Kimberly D. Hart, for Complainant.
C. Christopher Raines, Jr., Mt. Carmel, TN, for Respondent.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

P&S - Default - Untimely answer - Bad checks - Failure to maintain records.

This disciplinary proceeding brought pursuant to the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*), hereinafter the P&S Act, and the regulations promulgated thereunder (9 C.F.R. §201.1 *et seq.*), hereinafter the regulations, was instituted on September 28, 2000, by the Deputy Administrator, Packers and Stockyards Programs, Grain, Inspection, Packers and Stockyards Administration, United States Department of Agriculture, by a Complaint alleging that Respondents wilfully violated the P&S Act. The Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq.*), hereinafter the Rules of Practice, were served upon Respondent Bert Smith, III by certified mail on October 2, 2000. Respondent Bert Smith, III was notified, in a cover letter accompanying the Complaint, that an Answer must be filed within twenty (20) days of service and that failure to file an Answer would constitute an admission of all of the material allegations of fact in the Complaint and a waiver of the right to an oral hearing.

Respondent Bert Smith, III did not file an answer within the time period required by section 1.136 of the Rules of Practice (7 C.F.R. §1.136), which constitutes an admission to all of the material allegations of fact in the Complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default as to Respondent Bert Smith, III pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139). Accordingly, this decision is entered without hearing or further procedure.

Findings of Fact

1. Bert Smith, III (hereinafter referred to as Respondent Smith) is an individual whose mailing address is P.O. Box 725, Church Hill, Tennessee 37642.
2. Respondent Smith is and at all times material herein was:
 - a. Engaged in the business of a dealer buying and selling livestock in commerce for his own account and as a market agency buying livestock in commerce on a commission basis; and
 - b. Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.
3. As set forth in section II of the Complaint, Respondent Smith continued to engage in the business of a market agency and a dealer without maintaining an adequate bond or its equivalent after being notified by the Agency that it was necessary for him to obtain a new bond or bond equivalent in the amount of \$10,000.
4. As set forth in section III of the Complaint, Respondent misrepresented the nature of its livestock transactions for the purpose of misleading the sellers, their agents, and/or buyers of cattle into believing that Respondent Smith purchased the cattle for Respondent McNally and not for himself or as the agent of someone other than Respondent McNally. In addition, as set forth in section III(b) of the Complaint, Respondent Smith knowingly accepted, caused or authorized the preparation of misleading purchase invoices and/or other documents indicating that Respondent Smith purchased livestock on behalf of Respondent McNally when this was not the case.
5. As set forth in section IV(a) and IV(b) of the Complaint, Respondent Smith issued insufficient funds checks and failed to pay, when due and failed to pay the full purchase price of livestock totaling \$192,015.00.
6. As set forth in section V of the Complaint, Respondent Smith's current liabilities exceed his current assets.
7. As set forth in section VI of the Complaint, Respondent Smith failed to keep and maintain accounts, records and memoranda which fully and accurately disclose all transactions.

Conclusions

1. By reason of the facts set forth above in Findings of Fact number 3, Respondent Smith willfully violated section 312(a) of the Act (7 U.S.C. §213(a)) and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §201.29, 201.30).

2. By reason of the facts set forth above in Findings of Fact number 4, Respondent Smith willfully violated section 312(a) and 401 of the Act (7 U.S.C. §213(a), 221).

3. By reason of the facts set forth above in Findings of Fact number 5, Respondent Smith willfully violated sections 312(a) and 409 of the Act (7 U.S.C. § 213(a), 228b).

4. By reason of the facts set forth above in Findings of Fact number 6, the financial condition of Respondent Smith does not meet the requirements of the Act (7 U.S.C. §204).

5. By reason of the facts set forth above in Findings of Fact number 7, Respondent Smith wilfully violated section 401 of the P&S Act (7 U.S.C. §204). Accordingly, the following order is issued.

Order

Respondent Bert Smith, III, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;

2. Purchasing livestock while his financial condition does not meet the requirements of the Act;

3. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented;

4. Failing to pay, when due, the full purchase price of livestock;

5. Failing to pay the full purchase price of livestock;

6. Misleading sellers, their agents, and/or other buyers of cattle into believing that Respondent Smith is purchasing cattle for another and not for himself when, in fact, Respondent Smith is purchasing cattle for himself; and

7. Knowingly accepting, causing or authorizing the preparation of purchase invoices and/or other documents representing that Respondent Smith is purchasing cattle for another and not for himself when, in fact, Respondent Smith is purchasing cattle for himself.

Respondent Bert Smith, III shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his operations subject to the Act, including, but not limited to check book registers, check numbers, returned, canceled, voided and reissued checks and bank statements.

Respondent Bert Smith, III is suspended as a registrant under the Act for a period of ten (10) years and thereafter until solvency is demonstrated, *provided*, however, that upon application to the Packers and Stockyards Programs and demonstration that current liabilities no longer exceed current assets and that all unpaid livestock sellers identified in the complaint have been paid in full, a supplemental order may be issued terminating the suspension in this proceeding at any time after the expiration of two (2) years of this suspension. *Provided further*, that upon application to the Packers and Stockyards Programs and demonstration of circumstances warranting modification of this order, this order may be modified to permit the salaried employment of Respondent Bert Smith, III by another registrant or packer after the expiration of two (2) years of the suspension in this proceeding.

This decision shall become final and effective without further proceedings 35¹ days after the date of service upon the Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 29, 2001.-Editor]

¹ This Decision supercedes the Decision issued on December 26, 2000 and corrects the effective date to 35 days after the date of service. - Editor.