

**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

Docket No. 15-0077 PACA-D

In re:

DUKE CITY PRODUCE, INC.

Respondent.

Appearances:

Christopher Young, Esq. for Complainant

No appearance by Respondent

Before:

Administrative Law Judge Janice K. Bullard

DECISION WITHOUT HEARING BY REASON OF DEFAULT

I. INTRODUCTION

This matter involves a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (PACA), Regulations promulgated pursuant to the PACA (7 C.F.R §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151)(Rules of Practice).

The Fruit and Vegetable Program, Agricultural Marketing Service of the United States Department of Agriculture (Complainant; AMS), initiated this proceeding against Duke City Produce, Inc. (Respondent) by filing a disciplinary Complaint, alleging that Respondent, while acting as a growers' agent, willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

II. ISSUE

1. Whether default should be entered in this matter.

II. STATEMENT OF THE CASE

1. Procedural History

On February 23, 2015, Complainant filed a complaint with the Hearing Clerk for USDA's Office of Administrative Law Judges. The Hearing Clerk sent a copy of the complaint to Respondent by certified mail through the United States Postal Service (USPS), and the certified mail return receipt was signed by Respondent's President and Owner. No answer to the complaint was filed, and by Order issued April 30, 2015, I directed Respondent to show cause why default should not be entered and directed Complainant to file an appropriate motion.

By motion filed May 19, 2015, Complainant requested entry of a Decision and Order by Reason of Default, which was mailed to Respondent by certified mail. The mailing of the motion was returned to the Office of the Hearing Clerk as "unclaimed", and in compliance with the Rules of Practice, the motion was sent to Respondent by regular mail. See, 7 C.F.R. § 1.147(c)(1). Respondent did not file a response to my Order or to Complainant's motion.

2. Statutory and Regulatory Authority

Pursuant to the Rules of Practice, a respondent is required to file an Answer within twenty (20) days after service of a Complaint. 7 C.F.R. § 1.136(a). The Rules of Practice also provide that an Answer "shall . . . [c]learly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent." 7 C.F.R. § 1.136(b)(1). The failure to timely file an Answer or failure to deny or otherwise respond to an allegation proffered in the Complaint shall be deemed admission of all the material allegations in the Complaint; in such situation, default shall be appropriate. 7 C.F.R. § 1.136(c).

Additionally, the Rules of Practice prescribe that, when computing the time permitted for a party to file a document or other paper, Saturdays, Sundays, and Federal holidays are to be

included except when the time expires on one of those days; should such situation occur, the time period shall be extended to include the next business day. 7 C.F.R. § 1.147(h). The Rules of Practice also state that a document sent by the Hearing Clerk “shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail. . .” 7 C.F.R. § 1.147(c)(1). Further, in the event that the certified mail is returned to the Office of the Hearing Clerk as “unclaimed”, the document shall be deemed to have been delivered on the date that it is sent by regular mail, in compliance with the Rules of Practice, 7 C.F.R. 1.147(c)(1).

The Rules of Practice further provide that “[t]he failure to file an answer . . . shall constitute a waiver of the hearing. Upon such. . . failure to file, complainant shall file a proposed decision along. . . Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto.” 7 C.F.R. § 1.139.

III. DISCUSSION

1. Whether Entry of Decision by Reason of Default Without Hearing Is Appropriate

The record here reflects that an individual bearing the name of Respondent’s principle officer acknowledged receipt of the certified mailing of the Complaint. No answer was filed, and regular mail was not returned. Respondent failed to respond to my Order to show cause why default should not be entered, and Respondent also failed to respond to Complainant’s motion for entry of a decision and Order by reason of default. Neither of the mailings of those documents to Respondent was returned as undeliverable. Accordingly, I find that the Complaint was served upon the Respondent, and Respondent failed to file an answer. Therefore, pursuant to 7 C.F.R. § 1.136(c), Respondent is deemed to have admitted the allegations set forth in the Complaint, and entry of default is appropriate. See 7 C.F.R. §§ 1.136(c), 1.139.

Accordingly, I find that Respondent has admitted the gravamen of Complainant’s allegations, thereby obviating the need for a hearing in this matter. The material allegations of

the Complaint are thus adopted as findings of fact. I further find it appropriate to enter a decision on the record by reason of default pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

2. Sanctions

I find that by failing to answer the complaint, failing to respond to my Order, and failing to object to Complainant's motion for default, Respondent has admitted to the allegations of the complaint. Accordingly, I find that Complainant's proposed sanctions in this case are warranted.

The Department's sanction policy is set forth in *In re: S.S. Farms Linn County, Inc.*, (Decision as to James Joseph Hickey & Shannon Hansen), 50 Agric. Dec. 476 (U.S.D.A. 1991), aff'd, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), and provides that appropriate weight should be given to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the Act. *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. "In assessing penalties, the Secretary is required to give due consideration to the size of the business involved, the gravity of the violation, the person's good faith, and the history of previous violations." *In re Roach*, 51 Agric. Dec. 252, 264 (U.S.D.A. 1992). The purpose of assessing sanctions is not to punish violators but to deter future similar behavior by the violator and others. *In re Zimmerman*, 57 Agric. Dec. 1038, 1998 WL 799196, at *16 (U.S.D.A. 1998).

IV. FINDINGS OF FACT

1. Respondent is a corporation organized and existing under the laws of the state of New Mexico, with a business address in that state.
2. At all times material herein, Respondent was licensed and operating subject to the

provisions of the PACA under license number 20080729, which was issued to Respondent on April 8, 2008.

3. The license terminated on April 8, 2014, when Respondent failed to pay the required license renewal fee.
4. During the period from August, 2011, through November, 2013, Respondent failed to make full payment promptly to three (3) sellers for 53 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$382,655.24, as identified in Appendix A to the complaint.
5. On October 9, 2013, Respondent filed a voluntary petition under Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 et seq.), together with schedules of debt in which Respondent admitted owing all or portions of the debt identified in Appendix A to the complaint.

V. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. Respondent failed to file a timely answer, and entry of default is appropriate, without a hearing.
3. Respondent's failure to remit net proceeds with respect to the transactions referenced above, and set forth in Appendix A to the Complaint, constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

Respondent Duke City Produce has committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations

shall be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceeding 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).

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

So ORDERED this 1st day of September, 2015, in Washington, DC.



Janice K. Bullard
Administrative Law Judge