

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

FCIA Docket No. 09-0120

In re: MILDRED PORTER,

Respondent

DECISION AND ORDER

Preliminary Statement

On May 21, 2009, William J. Murphy, the Acting Manager of the Federal Crop Insurance Corporation, United States Department of Agriculture, (“FCIC”) initiated this disciplinary proceeding against the Respondent by filing a complaint alleging violations of the Federal Crop Insurance Act, (7 U.S.C. § 1501, *et seq.*) (the “Act”). On June 11, 2009, Counsel for the Respondent filed an Answer which denied generally the material allegations of the Complaint and requested that an oral hearing be scheduled.

An oral hearing was held on October 27, 2009 in Abingdon, Virginia. The Complainant was represented by Mark R. Simpson, Esquire, Office of General Counsel, United States Department of Agriculture, Atlanta, Georgia and the Respondent was represented by Terry G. Kilgore, Esquire of Gate City, Virginia. Eleven witnesses testified and 69 exhibits were identified and received into evidence during the hearing.¹

¹ CX-1 through CX-53; RX 1-13 and RX 15-17. References to the Transcript of the proceedings will be to “Tr.” CX 55 was admitted post trial.

Discussion

The Complaint in this action alleges that Mildred Porter willfully misrepresented material facts in connection with a loss claim under a federally insured crop insurance policy on burley tobacco raised by her during the 2004 crop year and that she provided false and inaccurate information when she certified a November 22, 2004 Production Worksheet/Proof of Loss that her total burley tobacco production on a 14.2 acre tract on farm FSN 2017 was 4,738 pounds.

7 C.F.R. § 400.454(a) provides:

“any person who willfully and intentionally provides any materially false or inaccurate information to FCIC or to any approved insurance provider reinsured by FCIC with respect to an insurance plan or policy issued under the authority of the Federal Crop Insurance Act...may be subject to a civil fine...and disqualification from participation....”

Because of the alleged misrepresentation and false certification, the Complaint seeks disqualification of Mildred Porter from receiving monetary or nonmonetary gain under certain specified federal programs for up to two years and imposition of a civil fine or penalty of \$5,000.

On February 26, 2004, Ms. Porter made application to Rain and Hail LLC (Rain and Hail), a participating insurance provider for the Federal Crop Insurance Program for her 2004 tobacco crop insurance. CX-5. Crystal Porter Reesly’s (her daughter) crop which was also raised on the same farm was not insured. Under the terms of the common crop policy, growers are required to certify the type of crop, where it was planted, the number of acres planted, the date the crop was planted and to identify the applicant’s ownership share in the crop. CX-1. Ms. Porter’s acreage report signed on July 14, 2004 indicated that she had planted burley tobacco on 14.2 acres on Farm FSN 2017 with a

final planting date of May 18, 2004 and that her ownership interest was 100%. CX-11. Ms. Porter also completed an acreage report on Crystal Porter Reesly's behalf reflecting zero acres of burley being planted which she later acknowledged was false. CX-12, Tr. 235.

The disparity between Mildred Porter's burley tobacco yield per acre and that of her daughter became apparent as a result of Ms. Porter's application for a 2004 Crop Disaster payment. CX-33. Nelson Link, the Farm Programs Chief of the Farm Services Agency (FSA) for the Virginia state office in Richmond, Virginia testified that his duties included implementing the Disaster Program in Virginia. Tr. 12. In 2005, Ms. Porter's case had been referred to him following County Committee review of the significant disparity between her production and that of her daughter. Tr. 16, CX-33. Consistent with handbook provisions and the mandate contained in the Agriculture Risk Protection Act of 2000² requiring FSA and RMA to work together, a referral report was sent to the Risk Management Agency (RMA) in Raleigh, North Carolina. Tr. 24, CX-41.

Upon receipt of the referral from FSA, Johnnie Perdue, then the Director of the Eastern Regional Compliance Office of RMA,³ noted that Mildred Porter's insurance experience was considered statistically atypical in the basis of frequency of loss, severity of loss and amount of money collected over time,⁴ and indicated that he had assigned the case to Chola Richards for investigation. Tr. 46-47.

Amanda Bell, a FSA Program Technician, testified that she took Ms. Porter's Farm and Tract Detail Listing from Ms. Porter on July 13, 2004 which reflected her as

² 114 Stat. 358, Public Law 106-224 (June 20, 2000).

³ Mr. Perdue is currently the Assistant to the Deputy Administrator for Compliance. Tr. 41.

⁴ One of the methods used by RMA to identify producers to monitor was to look at their loss or insurance experience to see if the experience was anomalous to the general area. Tr. 46.

having a 100% interest in 14.2 acres of burley tobacco being grown on Farm FSN 2017.⁵ CX-9. A later revision to that form completed the same day reported 2.0 acres of burley tobacco (tract 2AY) in Crystal Porter Reesly's name.⁶ CX-10.

Although the evidence established burley tobacco production by Ms. Porter of only a tenth of that purportedly raised on the same farm by her daughter, Ms. Porter expressly denied any wrongdoing, asserting that her production mirrored that of much of Russell County, Virginia and that adverse weather conditions were the cause of her loss.

The unlikelihood of Ms. Porter's reported production being accurate was further highlighted in the testimony of Jamie Dickenson, a Field Assistant with FSA and a life-long tobacco producer. Tr. 71-72. Mr. Dickenson conducted two visits to Farm 2017 in 2004 to conduct spot checks, the first on July 14, 2004 and the second in late August or early September of the same year. Tr. 72, 78. On the first visit, Dickenson's assessment was that the fields were in fair to good condition. Tr. 74. On the second visit however he found the field that was not insured (2AY) to be in poor condition as a result of heavy rains which had washed one-third to one half of the crop away. Tr. 80. By way of contrast, he felt that the insured crop was in fair to good condition. CX-38. By his estimate, the crop should have produced between 1,000 and 1,200 pounds per acre. Tr. 79. This "fair to good" assessment by an individual knowledgeable in local tobacco crop yield without evidence of any intervening natural cause to explain the crop loss is highly inconsistent with Ms. Porter's low crop yield claim.

⁵ Farm FSN 2017 has two adjoining subtracts, 4026 on the south and 4124 to the north. The fields on each are numbered as well and alphanumeric designations are used to identify what part of each field is devoted to a particular crop. *See*, CX-53 and RX-2. The original report included tract 2AY as belonging to Mildred Porter in the 14.2 acres that were reported.

⁶ The revised report also added an additional acre of production to each of two tracts (3BY and 4AY). CX-10, Tr. 64. Ms. Porter later attempted to increase the 2 acres to 4 acres,

Mr. Dickenson's estimate closely resembled that of Billy Gray Smith, in 2004 a staff adjuster for Rain and Hail Crop Insurance, who completed an Appraisal Worksheet Tobacco on August 25, 2004 and projected crop production in the three insured fields as ranging from a low of 1,004 pounds per acre to a high of 1,035 pounds per acre. CX-20, Tr. 91, 103. Although Ms. Porter disagreed with his estimates as being too high, she signed his forms containing the estimates. CX-20, Tr. 111-112, 118, 130-131, 138-139. Mr. Smith was accompanied on his visit to the Porter farm on August 25, 2004 by Washington Ramsey. Mr. Ramsey returned to the farm on November 22, 2004 and completed a Production Worksheet/Proof of Loss which he initially completed in usual fashion, but after reflection became uneasy about the accuracy of Ms. Porter's claim and went back and processed it with Ms. Porter as a "non-waiver."⁷ Tr. 141-142.

Chola Richards testified that as part of her investigation she prepared a comparison of Ms. Porter's production with that of farms adjacent to her. Tr. 165-170. She started with the five individuals Ms. Porter identified as being her closest neighbors and expanded the list to seven based upon proximity to the Porter farm, took the total production and divided it by the number of acres produced to calculate the pounds per acre for each individual. CX-51, Tr. 167-170. The average for those seven farms was 1,876 pounds per acre compared to Ms. Porter's production of 337 pounds per acre.⁸ Tr.

⁷ By submitting the claim as a "non-waiver," it signifies that the adjuster may not agree with what is submitted. Tr. 147.

⁸ While Mildred Porter claimed to have produced only 337 pounds per acre, Crystal Porter Reesly reported production of 3,349 pounds per acre. CX-49, Tr. 172. Although the reporting reflected only two acres, field 2AY is over 4 acres, all of which may have been in tobacco. CX-53. Chola Richmond's testimony indicated that Mildred Porter certified her daughter's production as being only two acres on at least three occasions. Tr. 182. Ms. Porter did attempt to get the report of her daughter's acreage increased to four acres, but was unsuccessful. Tr. 228. Had her daughter raised four rather than two acres of tobacco, her production would have been 1,674.5 pounds per acre, still well in excess of that of her mother. At the hearing, Ms. Porter testified that it had been four acres and the reporting was an acreage oversight. Tr. 226.

170. Ms. Richards also prepared a loss ratio comparison, comparing the county average for Russell County, Virginia with Ms. Porter's loss ratio. Tr. 171. That computation reflected a county average at 3.35 for 2004, with Ms. Porter's loss ratio at 7.17 for that year.⁹ CX-47, Tr. 171.

On the basis of all of the evidence before me, including the entire record, including the testimony at the oral hearing and all of the exhibits admitted, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Mildred Porter is an individual currently residing in Castlewood, Virginia. She was a participant in the Federal Crop Insurance Program in the crop year 2004, insuring her burley tobacco crop of 14.2 acres which was raised in Russell County, Virginia on Farm FS 2017. CX-5, 6.
2. Mildred Porter applied for and obtained a federal crop insurance policy on burley tobacco from Ace Property and Casualty Insurance Company on a policy serviced by Rain and Hail LLC, an approved insurance provider under the federal crop insurance program, which policy was reinsured by FCIC. CX-11, 12.
3. The Common Crop Insurance Policy for the 2004 crop year required growers to certify the type of crop, where it was planted, the number of acres planted, the date the crop was planted and the applicant's share of the crop. CX-1, Tr. 10.
4. On July 14, 2004, Respondent Mildred Porter completed the Rain and Hail Acreage Report indicating that she had planted burley tobacco on 14.2 acres on Farm FS

Ms. Porter also admitted falsely submitting a report indicating that her daughter Crystal Porter Reesly had planted zero acres of tobacco. Tr. 235.

⁹ The loss ratio reflects the indemnity divided by the premium. Tr. 172.

2017 with a final planting date of May 18, 2004 and that her ownership interest in the crop was 100%. CX-11.

5. On July 14, 2004, using a Power of Attorney granted to her, Mildred Porter falsely completed the Rain and Hail Acreage Report on her daughter Crystal Porter Reesly's behalf indicating that her daughter had zero acres of tobacco. CX-5, 12.

6. Respondent Mildred Porter submitted a crop loss claim under her federally insured crop insurance policy for the insured tobacco grown for the 2004 crop year as well as a claim for a crop disaster payment. CX-29, 33.

7. Although tobacco yields for the year were lower than average throughout the Russell County, Virginia as a result of adverse weather, the pound per acre burley tobacco yield of Mildred Porter for the crop year 2004 of was significantly less than that for her daughter's uninsured tobacco grown on the same farm (FSN 2017) or that grown in the same general area by other growers in Russell County, Virginia. CX-49 (6 of 8).

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The Respondent Mildred Porter willfully provided false and incorrect information concerning the amount of her production of burley tobacco crop grown on Farm FS 2017 to Rain and Hail and to Farm Services Agency in violation of 7 C.F.R. § 400.454(a).

3. Ms. Porter also falsely certified her daughter as growing zero pounds of burley tobacco when in fact she grew two, if not four acres of burley tobacco. Tr. 235.

4. The reporting of false or incorrect acreage or production represents a material misrepresentation of fact under the Federal Crop Insurance program.

Order

1. Pursuant to section 515(h)(3)(B) of the Act (7 U.S.C. § 1515(h)(3)(B)) and FCIC's regulations (7 C.F.R. part 400, subpart R), the Respondent Mildred Porter is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of two years:

- (a) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524);
- (b) The Agricultural Market Transition Act (7 U.S.C. § 7201 *et seq.*), including the non-insured crop disaster assistance program under section 196 of the Act (7 U.S.C. § 7333);
- (c) The Agricultural Act of 1949 (7 U.S.C. §§ 1421 *et seq.*);
- (d) The Commodity Credit Corporation Charter Act (15 U.S.C. §§ 714 *et seq.*);
- (e) The Agricultural Adjustment Act of 1938 (7 U.S.C. §§ 1281 *et seq.*);
- (f) Title XII of the Food Security Act of 1985 (16 U.S.C. §§ 3801 *et seq.*);
- (g) The Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921 *et seq.*); and
- (h) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

2. Unless this Decision and Order is appealed as set out below, the period of ineligibility for all programs offered under the above listed Acts shall commence 35 days after this decision is served. As a disqualified individual, the Respondent will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505.

GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

3. A civil fine of \$5,000 is imposed upon the Respondent pursuant to sections 515(h)(3)(A) and (h)(4) of the Act (7 U.S.C. §1515(h)(3)(A) and (4)). This civil fine shall be paid by cashier's check or money order or certified check, made payable to the order of the "**Federal Crop Insurance Corporation**" and sent to:

Federal Crop Insurance Corporation
Fiscal Operations Branch
6501 Beacon Road, Room 271
Kansas City, Missouri 64133

4. This Decision and Order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

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

Done at Washington, D.C.
February 4, 2010

PETER M. DAVENPORT
Acting Chief Administrative Law Judge

Copies to: Mark R. Simpson, Esquire
Terry G. Kilgore, Esquire

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