

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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Docket No. 14-0067

In re:

ERNEST MILLER, doing business as
STONEY-M FARM.

Before: Janice K. Bullard
Administrative Law Judge

Appearances: Buren Kidd, Esq., for Complainant

Ernest Miller, Pro se Respondent

DECISION AND ORDER

The instant matter involves a complaint filed by the United States Department of Agriculture (Complainant; USDA) against Ernest Miller, d/b/a Stoney-M Farm (Respondent), alleging violations of the Organic Foods Production Act of 1990 (OFPA), 7 U.S.C. §§ 6501-6522 and regulations implementing the OFPA and the National Organic Program (NOP), set forth at 7 C.F.R. § 205.1 – 205.699.

I. ISSUES

1. Whether Respondent willfully violated OFPA and the NOP Regulations, and if so;
2. Whether sanctions should be issued, and if so, the nature of those sanctions.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Procedural History

On February 10, 2014, Complainant filed a complaint against Respondent alleging violations of the OFPA. On March 10, 2014, Respondent filed a general denial of the allegations. On August 14, 2014, Complainant filed a request to set a hearing date.

Following a telephone conference with counsel and Mr. Miller on January 20, 2015, I issued a pre-hearing Order setting deadlines for exchanging evidence, and filing witness and exhibit lists with the Office of the Hearing Clerk. I scheduled a hearing for the date agreed by counsel and Respondent. On that same day, counsel for Complainant filed a motion for summary judgment. On March 18, 2015, I denied the motion for summary judgment.

The parties exchanged evidence and filed lists of witnesses and exhibits. The hearing was held on April 28, 2015. Mr. Miller participated by telephone. Counsel for Complainant and Complainant's witnesses appeared in the hearing room for the Office of Administrative Law Judges in Washington, DC. I admitted to the record Complainant's exhibits numbered CX-1 through CX-5. I admitted to the record Respondent's exhibits numbered RX-1 through RX-3. I concluded that written closing argument was not necessary in this matter. The transcript of the hearing was received on May 19, 2015.

This Decision and Order is based upon the pleadings and arguments of the parties, and the documentary and testimonial evidence. The record is now closed and the matter is ripe for adjudication.¹

2. Statutory and Regulatory Authority

The Act allows persons to seek and obtain organic certification from certifying agents accredited by the Secretary of USDA to certify crops, livestock, wild crops, products, and handling operations as compliant with the National Organic Standards set forth at 7 C.F.R. part 205. Regulations were issued to implement the Act and ensure consumers that products labeled as "organic" meet the standards promulgated under the Act.

Procedures for non-compliance with the Act and NOP Regulations are set forth at

¹ In this Decision and Order, references to Complainant's evidence shall be denoted as "CX-#"; references to Respondent's evidence shall be denoted as "RX-#", and references to the transcript shall be denoted as "Tr. #".

7 C.F.R. § 205.662. The Act provides that the Secretary may find operators who violate the purposes of the organic certification period ineligible to participate in the program for a period of up to five years from the date of violation. 7 U.S.C. 6519 (c)(1)(C).

3. Summary of the Evidence

A. Documentary Evidence

CX-1 through CX-5

RX-1 through RX-3

B. Testamentary Evidence

In April, 2013, Allan Benjamin was employed as a contract Certification Coordinator for Quality Certification Services (QCS), which is a company accredited by the USDA National Organic Program to certify participants in the program. Tr. 11. Mr. Benjamin was trained by the International Organic Inspector's Association (IOIA), and has worked for a variety of certifiers in the Missouri Department of Agriculture Program, OCIA. Tr. 11-12.

On April 18, 2013, Respondent reported to QCS that a potentially non-organic material had been applied to some of his certified organic acres. Tr. 12. Mr. Miller later provided an invoice that identified the product and the location where it was used. Tr. 12-13. Mr. Benjamin concluded that the product was prohibited by the NOP, as it contained the prohibited materials urea and ammonium nitrate, "UAN". Tr. 13. QCS prepared a Notice of Non-Compliance with the NOP regulations and proposed suspension of the affected acreage from the NOP. Tr. 14; CX-1; CX-2.

Matthew Michael is the Director of the Compliance and Enforcement Division for USDA's Agricultural Market Service, NOP. Tr. 20. His staff investigates complaints alleging violations of the Organic Food Production Act and the NOP Regulations and cooperates with other federal and state agencies to enforce the program. Tr. 21. Mr. Michael explained that

enforcement of the NOP assures consumers that organic products meet a consistent standard and shows them that products that do not meet the standard will not be sold. Tr. 25. Enforcement also prevents non-compliant producers from gaining an unfair competitive advantage by profiting from using less expensive methods than organic farming. Tr. 26.

Mr. Miller's case began with a letter from Mr. Miller reporting the use of a prohibited additive, UAN, in his fertilizer. Tr. 21; 26-27. Participants in the NOP are required to self-report any non-compliant actions they take. Tr. 33. Mr. Miller again admitted using the substance in his appeals letters. Tr. 22; CX-2; CX-4. On July 12, 2013, the Administrator of AMS denied Mr. Miller's appeal of USDA's April 24, 2013, determination of non-compliance and proposed suspension of Respondent's organic certification. CX-5; CX-1. Mr. Michael testified that NOP recommended that Respondent's land be suspended from participation in the NOP for three years because his use of the prohibited product was serious and because Mr. Miller has continued to use the adulterated land to grow hay and sell it as organically grown. Tr. 27-28. He explained that by doing so, Respondent realized an unfair competitive advantage and also put buyers at risk of non-compliance with the program if those buyers used the hay in their organic production. Tr. 28. Mr. Michael was not aware how long it would take the non-compliant product to dissipate or otherwise be removed from the soil. Tr. 34.

Respondent Ernest Miller testified that he operates a small family farm that has been in the family for three generations. Tr. 37. He became involved in organic farming because he could not expand his acreage, which is framed by an urban area with lots of commercial activity, and because he liked the concept of organic farming. Tr. 38. Respondent started organically farming a small section of the farm and expanded to have approximately 100 hundred acres certified. Tr. 38.

Mr. Miller used the UAN product because it is a nitrogen and nutrient stabilizer that has been shown that it helps to prevent nutrients from leeching out or evaporating, as it adheres to the organic matter in the soil. Tr. 39. Mr. Miller explained that the product helped reduce the odor of manure, which was important to him because of the proximity of houses to his farm. Tr. 38-39. Mr. Miller believed the product was all natural, as it is derived from calcium and coal, with UAN added to activate it. Tr. 39. He purchased an application of the product for his non-organic fields, but learned as it was being spread that it had been applied inadvertently to 30 acres of his organic land. Tr. 40. He estimated that the percentage of actual product in a tanker load of manure was .0003, or a very small amount. Tr. As soon as it happened, Mr. Miller immediately called QCS to report it. Tr. 40.

4. Discussion

The unrefuted evidence establishes that Respondent used and sold a product that was grown on soil which had been treated by a substance prohibited by NOP. I credit Mr. Miller's testimony that he did not intentionally apply the prohibited product to his organic acreage, and that the amount of the substance was small. However, the Act and Regulations strictly prohibit certain substances, and no allowances are made for the mistaken use of such substances, no matter how minimal. Accordingly, Complainant has established Respondent's violation of the NOP.

USDA has proposed that Respondent be suspended from using the land affected by the prohibited substance for three years. The evidence demonstrates that Respondent continued to use the land after being advised of the proposed suspension because he was under the impression that he could continue to use the land while appeals were pending. I credit Mr. Miller's explanation that he used the land to grow hay to help neighboring Amish farmers and not to gain

a market advantage. I also accept his testimony that he did not use the affected land to grow corn because of concerns about its use by the corn buyer.

Although Mr. Michael considered Respondent's continued use of the land when determining the proposed sanction, he also credibly testified that the initial use of the substance warranted the imposition of the sanction. Mr. Michael explained that Respondent shall remain a certified organic producer, but product grown on the affected 30 acres may not be sold or labeled organic.

I accord weight to NOP's position and conclude that Complainant has established that the appropriate sanction in this matter is the suspension of the affected land for three years. I note that Complainant has not sought the imposition of a civil money penalty, and has not sought to prohibit Respondent from otherwise participating in the NOP.

III. FINDINGS OF FACT

1. Respondent Ernest Miller, doing business as Stoney-M Farm, was at all times material hereto engaged in business as a certified organic operator and was certified to participate in the National Organic Program (NOP).
2. On March 23, 2013, Respondent applied a prohibited substance, UAN, to 30 acres of that portion of his farm certified as organic.
3. Respondent timely reported his use of the substance to his certification organization, Quality Certification Services (QCS).
4. QCS recommended the suspension of the affected 30 acres from participation in the NOP for three years.
5. Respondent appealed that recommendation to USDA's Agriculture Marketing Service (AMS).
6. AMS denied the appeal and upheld the suspension of Respondent's acreage.

IV. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. Respondent violated 7 C.F.R. §§ 205.105 and 205.202(b) by using a prohibited substance.
3. The recommended suspension from use of the affected acreage did not affect Respondent's organic certification, and therefore that suspension was not stayed.

ORDER

Respondent Ernest Miller's organic certification with respect to the 30 acres of his land that was subject to the application of a prohibited substance is hereby suspended for a period not to exceed three years.

The effective date of the suspension shall be the date of receipt by Respondent of this Decision or Order.

Pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Initiated by the Secretary, this Decision and Order shall become final and effective without further proceedings 35 days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service. 7 C.F.R. §§ 1.139 and 1.145.

Copies of this Decision and Order shall be sent to the parties by the Hearing Clerk.

The Hearing Clerk shall file the attached exhibits hard copies with the official record; the exhibits are already included in the electronic version of the official record.

So ORDERED this 3rd day of August, 2015, in Washington, D.C.


Janice K. Bullard
Administrative Law Judge