

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)
)
Nicholas Allen,) PACA-APP Docket No. 15-0085
) (15-J-0169)
Petitioner)

REC'D - USDA/OALJ/DHC
2019 SEP 25 PM12:41

**ORDER DENYING NICHOLAS ALLEN'S PETITION FOR RECONSIDERATION OF
THE JUDICIAL OFFICER'S AUGUST 1, 2019 DECISION AND ORDER**

Appearances:

*Jeffrey M. Chebot, Esq., and Grant E. Fortson, Esq., representing Petitioner, Nicholas Allen; and
Charles L. Kendall, Esq., Office of the General Counsel, representing Respondent, PACA Division,
Agricultural Marketing Service ("AMS"), United States Department of Agriculture.
Order issued by Judge Bobbie J. McCartney, Judicial Officer.*

Preliminary Statement

On August 1, 2019, in my capacity as USDA's Judicial Officer (JO), I issued a Decision and Order Reversing Initial Decision and Affirming Director's "Responsibly Connected" Determination (D&O) regarding the Petition for Review of Petitioner Nicholas Allen. In this responsibly connected proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), Nicholas Allen's Petition for Review sought to reverse the determination of the Director of the PACA Division, Fair Trade Practices Program, Agricultural Marketing Service (Respondent) that he was "responsibly connected" with Allens, Inc., during the period of time Allens violated section 2 of the PACA by failing to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312

lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of \$9,759,843.86.1

My August 1, 2019, D&O affirmed the Director's determination, reversing the [Initial] Decision and Order of the Administrative Law Judge below.

On August 12, 2019, Nicholas Allen, by counsel, filed his Petition for Reconsideration of my August 1, 2019 Decision and Order (PR). The PR incorporated earlier filings: Petitioner's Initial Brief; Petitioner's Brief in Reply to Respondent's Brief; Petitioner's Response to Respondent's Appeal Petition and Brief in Support; and in most regards, the [Initial] Decision and Order issued by current Chief Administrative Law Judge Channing D. Strother (IDO). Respondent filed its Reply on September 6, 2019 and similarly incorporated the entire file in this matter (Reply), all of which is now before me for consideration and adjudication of the PR.

After a full review of the record, the subject filings, and full consideration of the PR and Reply, it is my determination that Petitioner's Petition for Reconsideration must be *denied*. Accordingly, my August 1, 2019, D&O is hereby *affirmed* in its entirety.

While the Petition for Reconsideration is forcefully and persuasively written, upon closer scrutiny it is clear the Petitioner is simply either re-arguing the same points which he has made throughout these proceedings and which have already been fully addressed in my D&O or raising arguments which Respondent's Reply has fully demonstrated are not supported by the authorities cited therein. For example, I have fully addressed Petitioner's argument regarding a

1 See Complaint at 2, as affirmed and adopted in the October 8, 2015 Default Decision and Order entered against Allens, Inc.

limited “Violations Period” inquiry and have rejected it. D&O, pp. 14-19. Nevertheless, in his PR, Petitioner contends that “Historically, the time frame for analysis of determinative responsible connection has been the period defined in the disciplinary complaint when produce vendors were not being paid, with a definitive beginning and end date.” PR, pg.2. Petitioner asserts that the D&O ignores numerous authority upholding this contention; however, Respondent’s Reply addresses each cited “authority” and demonstrates that Petitioner’s contention has not been supported: In re Finch and Honeycutt, 73 Agric. Dec. 302,318, 2014 WL 4311062 at *10 (U.S.D.A. June 6, 2014) [The holding here rejected the petitioner’s argument that a previous arrangement by a third party was relevant to the petitioner’s responsibly connected status.]; In re Beucke, In re Keyeski ("Beucke II"), 65 Agric. Dec. 1372, 1380; 2006 WL 3326080 at *6 (U.S.D.A. Nov. 8, 2006) [This citation simply notes that Mr. Keyeski was a shareholder during the specified period of the subject transactions (as Nicholas Allen was with Allens, Inc)]; In re Margiotta, 65 Agric. Dec. 622, 633, 639, 2006 WL 20066164 at *8, *12 (U.S.D.A. June 21, 2006) [Simply finds that the petitioner was responsibly connected to M. Trombetta & Sons at “all times material” and “during the violation period” when Joseph Auricchio bribed a produce inspector.]; In re Mealman, 64 Agric. Dec. 1987, 1991, 2005 WL 2994267 at *3 (U.S.D.A. Oct. 3 2005) [Does not address the time period of violations; it only serves to rebut Nicholas Allen’s ‘selective prosecution’ argument in his PR.]; In re [Joel] Taback, 63 Agric. Dec. 434,445, 2004 WL 909530 at *5 (U.S.D.A. Apr. 28, 2004) [Only states that Mark Alfisi bribed a USDA inspector while Joel Taback was responsibly connected—does not address any time limitation on assessing Joel Taback’s status.]; In re Farley & Calfee, Inc., 49 Agric. Dec. 576, 584, 1990 WL 320370 at *6 (U.S.D.A. Feb. 21,1990) [Deals only with the effective date of sanctions, not of violations].” *Id.*

As fully analyzed and discussed in the D&O, Petitioner Allen has failed to rebut the presumption that he was responsibly connected to Allens when it committed willful, repeated and flagrant violations of section 2(4) of the PACA. The record shows that Petitioner was actively involved in the activities that resulted in Allens violations of the PACA. The record also supports a finding that Petitioner was not a nominal officer, director or shareholder of Allens when it violated the PACA. Accordingly, Petitioner Nicholas Allen's Petition for Reconsideration is hereby **denied** and the D&O issued on August 1, 2019 is hereby **affirmed** in its entirety.

Conclusions

Petitioner Nicholas Allen has failed to rebut the presumption that he was responsibly connected to Allens Produce LLC as an officer, director, and shareholder of the firm when Allens committed willful, flagrant and repeated violations of section 2(4) of the PACA by failing to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of \$9,759,843.86.

Order

The determination by the Director of the PACA Division that Petitioner Nicholas Allen was responsibly connected with Allens at the time of its violations is *affirmed*. Consequently, Petitioner Nicholas Allen is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. 499d(b)), and the employment sanctions in section 8(b) of the PACA (7 U.S.C. 499d(b)) of the PACA.

Copies of this Order shall be served by the Hearing Clerk upon each party, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 25th day of September, 2019



Judge Bobby J. McCartney
Judicial Officer

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