

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

REC'D - USDA/OALJ/HCO'  
2021 OCT 6 2:15 PM'

In re: )  
)  
Middlesex Livestock Auction, LLC, ) AHPA Docket No. 18-0034  
)  
Respondent. )  
)

**DECISION AND ORDER DENYING APPEAL PETITION AND AFFIRMING THE ADMINISTRATIVE LAW JUDGE’S AMENDED INITIAL DECISION AND ORDER**

Appearances:

*Lauren C. Axley, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave., S.W., Washington, D.C. 20250, for the Complainant, the Administrator of the Animal and Plant Health Inspection Service; and*

**(b) (6)**, *an owner and operator of the Respondent Middlesex Livestock Auction, LLC, a livestock market in Connecticut, representative of the Respondent.*

Order Issued by John Walk, Judicial Officer

**PRELIMINARY STATEMENT**

This is an administrative enforcement proceeding under the Animal Health Protection Act (“AHPA” or “Act”) (7 U.S.C. § 8301 *et seq.*); the regulations promulgated thereunder (9 C.F.R. § 79 *et seq.*) (“Regulations”); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*) and 9 C.F.R. § 70.1. On June 10, 2021, Administrative Law Judge (ALJ) Jill S. Clifton filed a Decision and Order Amended on Remand from the USDA Judicial Officer (“Amended Initial Decision and Order”). Middlesex Livestock Auction, LLC (“Respondent”), through its representative, **(b) (6)**, filed a timely appeal of the Amended Initial Decision and Order

on August 4, 2021 (“Second Appeal Petition”). For the reasons discussed herein, the Second Appeal Petition is **DENIED** and the ALJ’s Amended Initial Decision and Order is **AFFIRMED**.

## **BACKGROUND**

AHPA authorizes the Secretary of Agriculture (“Secretary”) to take measures to prevent, detect, control, and eradicate diseases and pests of livestock in the United States.<sup>1</sup> Scrapie is a fatal, degenerative transmissible spongiform encephalopathies (TSE’s) disease that affects the central nervous system of goats and sheep.<sup>2</sup> Endemic to the United States,<sup>3</sup> scrapie is complicated to control because of its long incubation period without clinical signs of the disease.<sup>4</sup> The Regulations, among other provisions, impose recordkeeping and identification requirements pertaining to certain sheep and goats in interstate commerce. These requirements, administered by the Animal and Plant Health Inspection Service (“APHIS” or “Complainant”), support the tracing of infected animals, which is important for controlling the potential spread of scrapie.<sup>5</sup> The Act authorizes both civil and criminal penalties for violations of AHPA.<sup>6</sup>

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<sup>1</sup> See 7 U.S.C. § 8301 *et seq.*

<sup>2</sup> See Scrapie in Sheep and Goats; Interstate Movement Restrictions and Indemnity Program, 66 Fed. Reg. 43964-01, 43964 (Aug. 21, 2001).

<sup>3</sup> 9 C.F.R. § 71.3(a).

<sup>4</sup> See Scrapie in Sheep and Goats; Interstate Movement Restrictions and Indemnity Program, 66 Fed. Reg. at 43964.

<sup>5</sup> See *Id.*

<sup>6</sup> 7 U.S.C. § 8313.

## PROCEDURAL HISTORY

The Administrator of APHIS initiated this Proceeding on May 21, 2018, by filing a Complaint alleging that Respondent violated the Regulations when it (1) sold a goat as a cash sale without keeping a record relating to the transfer of ownership, on November 17, 2014; (2) sold two goats as a cash sale without keeping a record relating to the transfer of ownership, on August 31, 2015; and (3) failed to make records available to United States Department of Agriculture (“USDA”) officials when requested on multiple dates in 2015 and 2016.

On July 3, 2018, Respondent filed an Answer admitting the record keeping violations and alleging factors in mitigation of a civil penalty.

On June 21, 2019, Complainant filed a Motion for Summary Judgment (“Motion for Summary Judgment”) and the Respondent filed a response to which APHIS replied. On December 15, 2020, the ALJ issued an Initial Decision and Order on the Written Record, granting in part and denying in part APHIS’s Motion for Summary Judgment (“Initial Decision and Order on Summary Judgment”). The ALJ found that Respondent violated the AHPA as alleged in the Complaint but denied the civil penalty sought by the Complainant. Concluding that Respondent “does not have the cash flow to withstand the \$17,500 civil penalty recommended by APHIS,”<sup>7</sup> the ALJ assessed on Respondent a \$7,000 civil penalty to be paid within 90 days after the Initial Decision and Order on Summary Judgment became final and effective.

On December 23, 2020, Respondent appealed the Initial Decision and Order on Summary Judgment, seeking relief from the \$7,000 civil penalty. In support of reducing the penalty amount, Respondent alleged an inability to pay, arguing that it was in debt and that its operations

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<sup>7</sup> Initial Decision and Order on Summary Judgment at 4.

had been impacted by the Coronavirus Pandemic (“the Pandemic” or “COVID-19”). On March 26, 2021, I remanded this Proceeding to the ALJ to take evidence on whether COVID-19 has impacted Respondent’s ability to pay the \$7,000 civil penalty, to determine what adjustment of the civil penalty, if any, is warranted based on the findings, and to consider whether Respondent should pay the civil penalty in installments because of its ability to pay (“Remand Order”).

On April 9, 2021, the ALJ issued Directions for Filing Responses to the Judicial Officer’s Remand Order (“Directions for Filing Responses”). The ALJ ordered Respondent to file any responses to the Remand Order by May 10, 2021, and to address specific questions related thereto. The ALJ also set a deadline for Complainant to file any response to Respondent’s filing. Respondent filed its response on May 10, 2021, and Complainant responded on June 10, 2021.

The ALJ filed her Amended Initial Decision and Order, the subject of the Second Appeal Petition, on June 10, 2021. Following further proceedings on remand, the ALJ found that the Pandemic has impacted Respondent’s ability to pay the \$7,000 civil penalty. Without reducing the amount, the ALJ adjusted the civil penalty to allow the Respondent to pay the \$7,000 in installments of not less than \$150 per month until paid in full.

Respondent timely filed the Second Appeal Petition on August 4, 2021. Complainant filed a response in opposition on August 20, 2021.

## **DISCUSSION**

Respondent’s Second Appeal Petition does not identify any error in the ALJ’s Amended Initial Decision and Order. That the Respondent violated the Act as alleged in the Complaint is not challenged in this appeal. Rather, the Respondent seeks a reduction in the amount of civil penalty, arguing that it cannot afford to pay \$7,000 in installments of not less than \$150 per month. The Respondent had the opportunity to submit evidence before the ALJ to support its

contention that it is unable to pay the civil penalty. I find insufficient evidence to warrant a further reduction of the civil penalty ordered by the ALJ in her Amended Initial Decision and Order.

The AHPA does not require the Secretary to consider a violator's ability to pay in determining an appropriate civil penalty. Instead, Congress made the ability to pay a factor that the Secretary may consider as an exercise of discretion.<sup>8</sup> The burden is on the party that asserts an inability to pay to come forward with evidence to substantiate its claim.<sup>9</sup> The reason for allocating the burden of production this way is because "only the respondent has such information."<sup>10</sup> Earlier in this Proceeding, the ALJ considered the Respondent's ability to pay and rejected Complainant's initial penalty recommendation.

Specifically, the ALJ's Initial Decision and Order on Summary Judgment found that Respondent violated AHPA as alleged in the Complaint but denied Complainant's recommendation to assess a civil penalty in the amount of \$17,500. Finding that Respondent "does not have the cash flow to withstand the \$17,500 civil penalty,"<sup>11</sup> the ALJ instead ordered a civil penalty of \$7,000, a 60% reduction from the amount Complainant recommended, to be paid

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<sup>8</sup> 7 U.S.C. § 8313(b)(2).

<sup>9</sup> See *A.P. "Sonny" Holt*, 49 Agric. Dec. 853, 865 (1990) ("[W]ith respect to ability to pay . . . it is the position of this Department that it is the responsibility of the respondents to come forward with some evidence indicating an inability to pay."; *Tracy Essary*, 75 Agric. Dec. 204, 209 (2016) ("[T]he burden is on the respondent to come forward with some evidence indicating an inability to pay the civil penalty." *Garland E. Samuel*, 57 Agric. Dec. 905, 912-13 (1998) (rejecting claim of inability to pay because respondent failed to produce necessary evidence); *Justin Jenne*, 74 Agric. Dec. 118, 128 (2015) (rejecting the claim of inability to pay because respondent failed to present evidence he was not able to pay the civil penalty).

<sup>10</sup> *A.P. "Sonny" Holt*, 49 Agric. Dec. 853, 866-67 (1990).

<sup>11</sup> Initial Decision and Order on Summary Judgment at 4.

within 90 days after the Initial Decision and Order on Summary Judgment became final and effective. After giving Respondent an additional opportunity to submit evidence on remand, the ALJ further adjusted the civil penalty, authorizing the payment of the \$7,000 civil penalty in installments of not less than \$150 per month until fully paid.

I find that the evidence is insufficient to warrant an adjustment of the civil penalty beyond what the ALJ ordered. On remand, the Respondent filed three documents as evidence in response to the ALJ's Directions for Filing Responses. First, the Respondent filed a letter from (b) (6), dated April 28, 2021 ("Cover Letter"), explaining that COVID-19 forced it to close the lunch counter, general merchandise sales, and all other special sales. While I accept as true the assertion in the Cover Letter that some of Respondent's operations closed because of the Pandemic, the evidence submitted does not adequately explain the impact of the closures on Respondent's financial condition. For example, there is insufficient information disclosed about the revenue and profits generated by the operations that closed before the disruptions attributed to the Pandemic or the length of the closures.<sup>12</sup> The evidence does not indicate the financial loss to Respondent from the closed operations nor does it provide information on what Respondent's finances would have been absent the closures. Moreover, the evidence does not provide adequate information on the financial resources available to the Respondent after accounting for the impact of the Pandemic to determine if further reduction of the civil penalty is warranted based on its ability to pay.

Second, the Respondent also submitted a letter from (b) (6) ("Hyde's Dairy") demonstrating that it borrowed \$20,000 from Hyde's Dairy sometime after (b) (6) mother

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<sup>12</sup> I accept as true the assertion that some unspecified parts of the auction remained closed as of April 28, 2021.

passed away in July 2020. The loan was still outstanding as of May 5, 2021. The terms of the loan, including the terms of payment are not disclosed. Even if the loan was necessitated by the impact of the Pandemic, the mere fact of a \$20,000 loan to a business does not provide adequate evidence of Respondent's ability to pay the civil penalty to warrant further reduction.

Third, the Respondent attached to its Cover Letter what appears to be a photograph of a two-page document which contains the header, "Estate of (b) (6), Date of Death: 07/12/2020, Last 4 of (b) (6)" The document is cut-off in the photograph. Several of the rows that appear and the note at the bottom of the second page are missing words. There is also no indication who prepared the document or when it was created. The face of the document appears to show total individual claims against (b) (6) estate in the amount of \$206,894.61 and total business claims of \$12,130.85. It is not apparent from the document whether the Pandemic has any relationship to these claims. However, even if the claims are connected to the Pandemic, the disclosures in the document do not provide sufficient evidence to find that an adjustment of the civil penalty is warranted because of Respondent's ability to pay.

In addition to the \$20,000 loan from Hyde's Dairy, the Second Appeal Petition also asserts, without pointing to corroborating evidence in the record, that "we were over \$70,000 in debt just at the sale barn," and references taxes and mortgage payments but does not disclose the amounts.<sup>13</sup> Respondent also makes other general statements about its financial difficulties. These additional assertions, even if accepted as true, and even if connected to the Pandemic, do

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<sup>13</sup> Respondent also asserts that there are other establishments that sell goats without scrapie tags and that goats and sheep are sold on social media sites that are not regulated. Additionally, respondent argues against a civil penalty because the goats at issue were allegedly euthanized. These allegations fall well beyond the scope of the remand to be considered at this stage of the Proceeding.

not provide sufficient evidence to warrant a further reduction of the civil penalty because of Respondent's ability to pay.

Although its extent is elusive in pecuniary terms, Respondent has demonstrated by the evidence submitted that the Pandemic impacted its operations and that it carries financial liabilities and other financial obligations. However, the evidence does not provide adequate insight into Respondent's current financial condition even after accounting for the impact of the Pandemic. The evidence is insufficient to show the financial resources that are available to Respondent and that can be directed towards payment of the civil penalty to obtain necessary insight into its ability to pay.<sup>14</sup> For example, the evidence does not adequately reflect Respondent's present assets, net worth, revenue, income, or debt capacity to evaluate whether it has available resources, after accounting for the financial impact of the Pandemic, that can be used to satisfy the civil penalty. On the basis of the record before me, I cannot conclude that the evidence supports a finding that the Respondent's ability to pay warrants a further reduction of the civil penalty ordered by the ALJ in her Amended Initial Decision and Order.

For the reasons discussed herein, the Second Appeal Petition filed on August 4, 2021, is **DENIED** and the ALJ's Amended Initial Decision and Order filed on June 10, 2021, is **AFFIRMED**.

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<sup>14</sup> See *Robert L. Heywood*, 52 Agric. Dec. 1315, 1322 (1993) (discussing examples of the kinds of documents that respondent should be required to submit to prove whether he has the present ability to pay and listing both documentation that discloses financial liabilities as well as financial resources); *Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty amount because documentation was insufficient to show inability to pay despite respondent's submission of evidence that suggested financial problems but authorizing installment payments over time) (Order Den. Pet. for Recons.).



## **ORDER**

Respondent Middlesex Livestock Auction, LLC shall pay a civil penalty totaling \$7,000 (seven thousand dollars) in installments of not less than \$150 per month until paid in full, beginning within 60 days after this Decision and Order is served upon the Respondent. The payment(s) shall be paid by certified checks, cashier's checks, or money orders, marked Docket No. 18-0034, payable to the order of "U.S. Dept. of Agriculture" and delivered to the address as follows:


U.S. Department of Agriculture  
APHIS, U.S. Bank  
PO Box 979043  
St. Louis, MO 63197-9000

Prepayment may be made without penalty. Failure to keep current on the amount that would have been paid if installments had been paid when due, may result in the entire balance becoming payable at once.

## RIGHT TO JUDICIAL REVIEW

This Order is a final order reviewable under 28 U.S.C. §§ 2341-2351.<sup>15</sup> The Respondent must seek judicial review in the appropriate United States Court of Appeals within 60 days after entry of the Order.<sup>16</sup> The date of entry of the Order is October 6, 2021.

Done at Washington, D.C.,  
this 6th day of October 2021

**JOHN  
WALK**  Digitally signed  
by JOHN WALK  
Date: 2021.10.06  
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John Walk  
Judicial Officer

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<sup>15</sup> 7 U.S.C. § 8313(b)(4)(A).

<sup>16</sup> 28 U.S.C. § 2344.