

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) PACA Docket No. D-01-0022  
)  
Nick Penachio Co., Inc., )  
)  
Respondent ) Decision and Order

Preliminary Statement

This is an administrative proceeding. It was initiated by a Notice to Show Cause and Complaint filed July 26, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930 as amended (7 U.S.C. §§ 499a *et seq.*), hereinafter sometimes referred to as the PACA, and the regulations issued pursuant thereto as well as the Rules of Practice Governing Former Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*).

The Complaint constituted a disciplinary proceeding against Respondent Nick Penachio Co., Inc., alleging that it had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). There is also a Notice to Show Cause why Respondent Nick Penachio Co., Inc. should not be denied a license pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)).

Among the allegations of the Complaint, are that, during the period October, 2000 [1999] through June, 2001, Respondent violated section 2(4) of the PACA by failing to make full payment promptly to 32 sellers of the agreed purchase prices or balances thereof, in the total

amount of \$268,915.00, for 162 lots of perishable agricultural commodities which were purchased, received and accepted in interstate and foreign commerce.

It is further alleged that on May 7, 2001, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1100 *et seq.*) in the United States Bankruptcy Court for the Southern District of New York, being designated Case No. 01-12668-CB.

Additionally, it is alleged that on February 20, 2001, Respondent and its president Nicholas A. Penachio waived indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and pled guilty to an eight count Superseding Information which charged them with participating in schemes to rig bids of frozen food, produce, dairy and other products supplied to the New York City Board of Education, the Department of Citywide Administrative Services, the Nassau County Department of General Services, and the Newark Public Schools. These charges included, among other things, conspiring to defraud through a kickback and fraud scheme using the United States Mail, conspiring to defraud the I.R.S. by filing false and fraudulent federal tax returns, and obstruction of justice by causing the destruction of incriminating documents that had been subpoenaed by the Grand Jury.

Respondent had a license pursuant to the provisions of the PACA [Number 741326] from March, 1974 until March 4, 2001 when it was terminated because Respondent failed to pay the required annual renewal fee.

An Answer to said Complaint was filed by Respondent on August 8, 2001.

The case was set for hearing to commence on March 6, 2002, in New York City. On February 20, 2002 the Judge was notified for the first time that a Petition for Review had been filed by Tony Penachio with respect to a determination dated January 4, 2002 by the PACA Branch Chief that Tony Penachio is responsibly connected with Nick Penachio Co., Inc. (the Respondent). As a result of a conference call it was agreed that there would be a consolidation of the cases and a postponement of the scheduled oral hearing date of March 6 and 7, 2002. Subsequently, the parties agreed that the oral hearing would take place on June 19, 2002. The case was subsequently rescheduled for hearing for June 20, 2002, in New York City.

On February 4, 2002, Tony Penachio filed a Petition for Review in regards to a letter of determination dated January 4, 2002 by the PACA Branch Chief that he was responsibly connected with Nick Penachio Co., Inc. during the period October, 2000 through June, 2001 during which period there was a failure to pay 32 vendors \$268,915.00 for perishable agricultural commodities.

The Petition for Review was consolidated with the present proceeding and an oral hearing on both cases was scheduled for June 20-21, 2002. Under date of June 12, 2002, Tony Penachio withdrew his Petition for Review and consented to the determination of the PACA Branch Chief. The Government accepted said withdrawal and the Judge granted the withdrawal and removed "Tony Penachio, Petitioner" from the caption of the proceeding. On October 15, 2002, a letter was filed by Tony Penachio which stated, in part:

I have received your letter to William A. Hrabsky, Esq. of October 1, 2002 today. Please be advised that Mr. Hrabsky, who had been representing me in the matter of PACA Docket No. APP-02-0003, passed away in late July, 2002 and therefore Mr. Hrabsky has not filed a brief on my behalf in this matter.

I will now be representing myself, pro se, in the remainder of this action.

In lieu of my requesting to file a brief on my behalf I am respectfully requesting the mercy of the court in the decision of my appeal in this matter; please be so kind as to advise the Administrative Law Judge accordingly.

The matter of Tony Penachio, PACA Docket No. APP-02-0003, was concluded with his withdrawal of his Petition for Review.

A hearing in this matter was held on June 20, 2002, in New York City, New York before Administrative Law Judge Dorothea A. Baker. Complainant was represented by Christopher Young-Morales, Esquire, Office of the General Counsel, Department of Agriculture. Respondent and its counsel failed to appear at the scheduled hearing on June 20, 2002. In all matters prior to the date of the hearing, Respondent was represented by Harry D. Jones, Esquire, of Gersten, Savage & Kaplowitz, New York, New York. The hearing was conducted in Respondent's absence pursuant to § 1.141(e)(1) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151; hereinafter the "Rules of Practice"). The Complainant presented its evidence in the absence of Respondent. The parties were given until November 6, 2002, within which to file simultaneous briefs. The Complainant did so, the Respondent did not.

Pertinent Statutory Provisions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides in part:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce--

\* \* \* \*

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 5(c). However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.

#### **§ 499h. Grounds for suspension or revocation of license**

##### **(a) Authority of Secretary**

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides:

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act or was convicted of a felony in any State or Federal Court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee of the applicant. If after investigation, the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show

cause why the license should not be refused. If after the hearing, the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer or broker because the applicant or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by the Act or was convicted of a felony in any State or Federal Court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

7 C.F.R. 1.141(e)(1) of the Rules of Practice provides in part:

A [R]espondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the [R]espondent shall also constitute an admission of all the material allegations of fact contained in the complaint.

Pursuant to 7 C.F.R. § 1.141(e)(1), Respondent's failure to appear at the hearing constitutes an admission of all the material allegations of fact in the Complaint. In addition, the Respondent did not file any brief in this matter. A careful consideration of the evidence adduced by the Government indicates that the Complainant has borne its burden of proof by more than a preponderance of the evidence and that the following findings of fact are justified thereby.

#### Findings of Fact

1. Nick Penachio Co., Inc., is a corporation organized and existing under the laws of the State of New York. Its business and mailing address is 240 Food Center Drive, Bronx, New York.

2. Pursuant to the licensing provisions of the PACA, license number 741326 was issued to Respondent on March 4, 1974. Respondent's license was renewed annually until

March 4, 2001, when it was terminated pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) because Respondent failed to pay the required annual renewal fee.

3. Nicholas A. Penachio is the president and thirty-five percent stockholder of Respondent. (CX 1; Tr. 60).

4. During the period of October, 2000 through June, 2001, Respondent Nick Penachio Co., Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when it failed to make full payment promptly to 32 sellers of the agreed purchase prices in the total amount of \$268,915.00 for 162 lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate commerce. (CX 11-44; Tr. 6, 32).

5. Follow-up investigation revealed that as of June 7, 2002, more than 120 days after the Complaint was served, Respondent still owed over \$62,000.00 to at least 6 sellers listed in the Complaint. (Tr. 37-38, 44, 57).

6. On February 20, 2001, Respondent and its president, Nicholas A Penachio, waived indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and pled guilty to an eight count Superseding Information which charged them with participating in schemes to rig bids of frozen food, produce, dairy and other products supplied to the New York City Board of Education, the Department of Citywide Administrative Services, the Nassau County Department of General Services, and the Newark Public Schools. These charges included, *inter alia*, conspiring to defraud through a kickback and fraud scheme using the U.S. Mail; conspiring to defraud the I.R.S. by filing false and fraudulent tax returns; and obstruction

of justice by causing the destruction of incriminating documents that had been subpoenaed by the Grand Jury. (CX 6-7; Tr. 61-74).

7. Respondent has engaged in practices of a character prohibited by the PACA and is therefore unfit to engage in the business of a commission merchant, dealer, or broker pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)). (CX 5-7; Tr. 61-74).

#### Conclusions

The PACA requires full payment promptly, and persons subject to the provisions of the PACA as commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times. *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547. As the Judicial Officer held in *Scamcorp*: "In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a 'no-pay' case." *Scamcorp* at 548-549. In the case at hand, Respondent failed to pay in accordance with the PACA, and was not in full compliance as of the date of the hearing on June 20, 2002, well over 120 days after the Complaint was served on Respondent. Evidence presented at hearing established that Respondent had not made full payment over 330 days after the Complaint was served.

Marketing Specialist Josephine Jenkins testified at the hearing that between June 5 and June 7, 2002, she conducted a follow-up investigation to ascertain whether or not the unpaid creditors listed in the Complaint had been paid any monies since the initial investigation had

been conducted. At the hearing, Ms. Jenkins testified that after detailed investigation conducted in June of 2001, she was able to document from Nick Penachio Co., Inc.'s own records that between October, 2000 and June, 2001, Respondent failed to pay 32 sellers \$268,915.00 for produce sold in interstate and foreign commerce. That follow-up investigation revealed that as of June 7, 2002, Respondent still owed over \$62,000.00 to at least 6 sellers listed in the Complaint. (Tr. 37-38). Further, two industry witnesses, creditor produce suppliers listed in the Complaint, corroborated Ms. Jenkins' findings. Juana Landestoy, credit manager for Doral Finest, stated that as of the date of the hearing, 30 percent of the debt listed in the Complaint as owed by Respondent to Doral Finest was still owed; Joel Fierman, owner of Fierman Produce Exchange, stated that as of the date of the hearing, Respondent still owed Fierman Produce Exchange over \$9,000.00. Accordingly, this case should be treated as a "no-pay" case, pursuant to the policy set forth in *Scamcorp*.

"In any no pay case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked." In the case at hand, as Respondent's PACA license has terminated, publication of the facts and circumstances surrounding Respondent's PACA violation would be the appropriate sanction. *Scamcorp* at 549. Here, Respondent's violations of section 2(4) of the PACA are willful, flagrant and repeated, as a matter of law. Willfulness is reflected by a Respondent's violations of express requirements of the PACA, the length of time during which the violations occurred, and the number and dollar amount of violative transactions involved. *Scamcorp* at 553; *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *See, Finer Foods Sales Co., Inc. v.*

*Block*, 708 F.2d 774,781-82 (D.C. Cir. 1983). Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred." *Scamcorp* at 551; *See, Farley & Calfee v. U. S. Department of Agriculture*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025,1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000.00 to be frequent and flagrant violations of the payment provisions of the PACA).

Further, in the case at hand, Senior Marketing Specialist Basil Coale testified that the violations committed by Nick Penachio Co., Inc. were willful, flagrant, and repeated, as Respondent "actively went out and incurred this debt over this time period, that they had failed to pay . . . and there was more than one violation . . . over this time period . . . [s]pecifically . . . between October, 2000 and June of 2001". (Tr. 71). Mr. Coale testified that Respondent's failure to pay 32 suppliers over \$268,000.00 over this time period adversely affected both the individual suppliers listed in the Complaint as well as on the industry as a whole." (Tr. 71). Both industry witnesses called at the hearing corroborated Mr. Coale's testimony.

Juana Landestoy, credit manager of Doral Finest, testified that: "we were very affected because those particular invoices were very high." (TR 57). Joel Fierman, owner of Fierman Produce Exchange, testified that Respondent's failure to pay: "obviously is a financial burden on our business that can hinder us in our payment of our own shippers in a prompt fashion." (Tr. 43).

Here, as when such factors are present, the only appropriate sanction is revocation, or publication

in the case at hand, where Respondent's license terminated on March 4, 2001 for failure to pay the required annual renewal fee.

Respondent has been shown to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA, and is deemed to have admitted those violations by failing to appear at hearing. Further, Respondent has been shown to be unfit to be licensed under the PACA. Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides that a PACA license can be refused an applicant if it is shown that: the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in the case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than ten per centum of the stock, prior to the date of the filing of the application engaged in any practices of the character prohibited by this Act or was convicted of a felony in any State or Federal Court.

On February 20, 2001, Respondent and its president, Nicholas A Penachio, waived indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and pled guilty to an eight count Superseding Information which charged them with participating in schemes to rig bids of frozen food, produce, dairy and other products supplied to the New York City Board of Education, the Department of Citywide Administrative Services, the Nassu County Department of General Services, and the Newark Public Schools. These charges included, *inter alia*, conspiring to defraud through a kickback and fraud scheme using the U.S. Mail; conspiring to defraud the I.R.S. by filing false and fraudulent tax returns; and obstruction of justice for causing the destruction of incriminating documents that had been subpoenaed by the Grand Jury. (CX

6-7; Tr. 61-74). Such fraudulent activity constitutes acts of a character prohibited by the Act. Further, conspiracy to defraud and obstruction of justice, to which Respondent and its president pled guilty, are felonies under the United States Code.

For the foregoing reasons, this case warrants: (1) a finding that Respondent engaged in willful, flagrant and repeated violations of section 2(4) of the PACA and publication of the facts and circumstances surrounding that violation and (2) a finding that Respondent is unfit to be licensed under the PACA pursuant to section 4(d) of the PACA.

#### Order

1. Respondent Nicholas Penachio Co., Inc. committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period of October, 2000 through June, 2001, by failing to make full payment promptly to 32 sellers of the agreed purchase prices in the total amount of \$268,915.00 for 162 lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate commerce; and

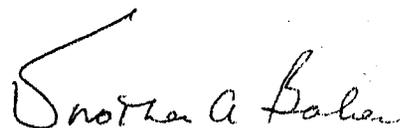
2. The facts and circumstances surrounding this violation shall be published; and

3. Respondent Nicholas Penachio Co., Inc. is unfit to be licensed under the PACA pursuant to section 4(d) of the PACA because Respondent engaged in practices of a character prohibited under section 4(d) of the PACA (7 U.S.C. § 499(d)), and because Respondent was convicted of a felony in Federal Court on February 20, 2001. (CX 6-7; Tr. 61-74). Respondent's application for a PACA license is denied.

This Decision and Order will become final and effective thirty-five (35) days after service upon the Respondent unless appealed within thirty (30) days as provided by the Rules of Practice and Procedure, 7 C.F.R. § 1.145.

Copies hereof shall be served upon the parties.

Done at Washington, D.C.  
this 22<sup>nd</sup> day of November, 2002



Dorothea A. Baker  
Administrative Law Judge