

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
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)
Mark Smith) **Administrator's Decision**
East Otto, New York) **APL-054-19**
)
)

This Decision responds to an appeal (APL-054-19) of a Notice of Proposed Suspension under the National Organic Program (NOP) issued to Mark Smith (Smith) by Pennsylvania Certified Organic (PCO), a USDA accredited certifying agent. The operation has been deemed not in compliance with the Organic Foods Production Act of 1990 (Act)¹ and the U.S. Department of Agriculture (USDA) organic regulations.²

BACKGROUND

The Act authorizes the Secretary to accredit agents to certify crop, livestock, wild crop, and/or handling operations to the USDA organic regulations (7 C.F.R. Part 205). Certifying agents also initiate compliance actions to enforce program requirements, as described in section 205.662, Noncompliance procedure for certified operations. Persons subject to the Act who believe they are adversely affected by a noncompliance decision of a certifying agent may appeal such decision to the USDA Agricultural Marketing Service (AMS) pursuant to § 205.680

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

Adverse Action Appeals Process – General, and § 205.681, Appeals of the USDA organic regulations.

FINDINGS OF FACT

1. On April 27, 2017, Smith was certified organic in crops and livestock by PCO.
2. On October 5, 2018, PCO issued a Notice of Noncompliance to Smith.
3. On February 5, 2019, PCO issued a Notice of Proposed Suspension.
4. On March 18, 2019, PCO issued a Rejection of Mediation Notice.
5. On April 16, 2019, Smith filed an Appeal.
6. On November 12, 2019, PCO issued a Notice of Noncompliance.
7. On December 13, 2019, USDA/AMS entered into a Settlement Agreement with Smith pursuant to which Smith agreed to pay outstanding certification fees of \$721.12 to PCO within 60 days of execution of the Settlement Agreement.
8. On February 11, 2020, Smith failed to pay the agreed upon certification fees to PCO, thereby breaching the December 13, 2019 Settlement Agreement. However, it is noted that the amount had been reduced to \$289.38 due to Smith dropping his grass-fed certification, which is a separate certification from the livestock certification.

DISCUSSION

The USDA organic regulations at 7 C.F.R. §205.400, General requirements for certification, state that, “A person seeking to receive or maintain organic certification under the regulations in this part must: (a) Comply with the Act and applicable organic production and handling regulations in this part; ... (e) Submit the applicable fees charged by the certifying

agent...” Additionally, the organic regulations at §205.406, Continuation of certification, state that, “(a) To continue certification, a certified operation must annually pay the certification fees...”

PCO issued a Notice of Proposed Suspension citing to Smith’s failure to pay his certification fees despite having agreed to a payment plan in August 2018. Smith also failed to respond to the prior Notice of Noncompliance regarding the unpaid certification fees.

Smith stated in his Appeal that he has been plagued with problems since becoming certified organic, including the milk truck not starting pickups until 18 days after the planned start, resulting in Smith having to dump [REDACTED] pounds of organic Grade A grass-fed milk, which resulted in an [REDACTED] loss. Additionally, the milk truck increased its fee to [REDACTED] month. Bad weather affected the hay crop, which is used to feed the cows, and Smith needed to buy extra feed. Smith then planted [REDACTED] acres of organic corn and [REDACTED] acres of organic soybeans to recoup some of his losses. However, an extremely rainy season resulted in Smith filing an insurance claim for the failed crops, which the insurer denied. Smith states he then obtained a loan to pay PCO, but the lender failed to pay PCO directly and the funds were seized from his account by the bank for unpaid bills owed to the bank. Therefore, Smith filed bankruptcy on April 11, 2019, and hopes to restructure his operation by selling the organic grass-fed cows and only maintaining the organic crops.

A review of the evidence substantiates that Smith has a history of nonpayment or delinquent payment of his certification and other fees. PCO wrote Smith on August 4, 2017, less than 4 months after Smith’s initial certification, and proposed a payment plan for the outstanding [REDACTED] requiring [REDACTED] payments in August, September, October, and November 2017. PCO told Smith that a breach of the payment plan would result in PCO issuing a Notice of Proposed

Suspension. PCO issued a Notice of Noncompliance on September 11, 2017. Subsequently, Smith submitted a payment on January 11, 2018 completing payment of the 2017 fees. Smith hasn't made any payment to PCO since that date.

On January 11, 2018, PCO issued a Notice of Noncompliance for Smith's failure to pay invoiced fees. On May 11, 2018, PCO again issued a Notice of Noncompliance for failure to pay certification fees. On June 4, 2018, PCO wrote Smith setting forth a payment plan for the unpaid balance of [REDACTED], requiring [REDACTED] payments in June, July, August, and September 2018. PCO issued a Notice of Noncompliance on July 13, 2018 after Smith failed to make any payments. Then, PCO wrote Smith on August 29, 2018, proposing a payment plan for the unpaid increased [REDACTED] balance, over the course of September, October, November, and December 2018. PCO wrote Smith a reminder letter on August 8, 2018 after Smith failed to address the prior notice of noncompliance. Then after Smith failed to make the first payment, PCO again wrote Smith on September 25, 2018, reiterating the payment plan which Smith breached. Smith again failed to make a payment which led PCO to issue a Notice of Noncompliance on October 5, 2018. PCO again wrote Smith on November 16, 2018, after Smith again failed to make a payment. Subsequently, PCO issued a Notice of Proposed Suspension on February 5, 2019 for Smith's continued failure to pay his 2018 and 2019 invoiced certification-related fees. Smith hasn't made any payment to PCO since January 11, 2018, and currently has an unpaid balance of [REDACTED].

Smith states he has had many problems since his initial certification, including the failure of the milk truck to start pickups when planned, resulting in Smith dumping [REDACTED] worth of organic milk; increased hauling fees; and being cut from hauler Maple Hill Creamery's farm list. Smith states that this creamery 'cut off' 60 farms in the Upstate New York region and he was

‘cut off’ in January 2019 and hadn’t shipped any milk the first half of 2018. Smith was asked to provide documentation that it was cut from the creamery’s supplier list but didn’t provide this documentation. Smith also didn’t provide any documentation to substantiate his other claims regarding bad weather affecting the hay crop and the need to buy feed, the planting and failure of organic corn and soybean crops, and the loss of those crops and subsequent denial of coverage by the insurance company or seizure of another insurer’s payment by his bank.

AMS sympathizes with Smith’s difficulties; however, the organic regulations at 7 C.F.R. §205.400(e) require that an operation seeking to maintain organic certification must submit the applicable fees charged by the certifying agent. Further, the regulations at Section 406 state that, “to continue certification, a certified operation must annually pay the certification fees...to the certifying agent.” There is no hardship exemption for this requirement. It is noted that Smith’s only noncompliance is the failure to pay his certification fees on a timely basis. Inspection reports do not show any noncompliances or areas of concern other than a few missing Prior Land Use affidavits.

Smith asked to be given time to resolve the payment delinquencies and restructure his operation. Smith is considering selling the organic grass-fed cows and maintaining only the organic crops. Smith also stated that PCO is withholding his crop certification which he needs to be able to sell his crops. Once the crops are sold, Smith states he can make payment to PCO.

However, on April 11, 2019, Smith filed for bankruptcy in the U.S. Bankruptcy Court for the Western District of New York – Case No. 1-19-10735-CLB. The case was filed under the name of Zoar Valley Farm, LLC, and is a Chapter 12 case, which allows family farmers to restructure their finances and avoid liquidation or foreclosure. PCO received notification of the

filing and instructions that no efforts are to be made to collect any monies owed by Smith prior to July 1, 2019.

A bankruptcy court notice for Smith's case states that Smith's reorganization plan was filed with the court on July 30, 2019, and a hearing on the confirmation of the plan was held on September 16, 2019 at which time the plan was confirmed. The plan states that Smith will submit a portion of its future income to the control and supervision of the bankruptcy trustee for the next 5 years.

PCO confirmed it filed a Proof of Claim in the case as a creditor in the amount of [REDACTED]. PCO states that the other [REDACTED] owed by Smith is for fees generated after the bankruptcy claim. Specifically, the [REDACTED] was incurred prior to January 15, 2019, and the [REDACTED] was incurred after July 1, 2019.

Despite the bankruptcy filing, Smith is liable for fees incurred as part of his certification after the petition filing. The bankruptcy trustee was given a courtesy call and agreed that the [REDACTED] can be pursued. Therefore, NOP offered Smith a Settlement Agreement whereby he would agree to pay the outstanding certification fees of [REDACTED] within 60 days of execution of the Settlement Agreement. The Agreement also provided that Smith agree to pay future fees by the deadline set by PCO or pursuant to any payment plan entered into between Smith and PCO. The proposed settlement was mailed to Smith via regular and certified mail on October 24, 2019. The letter specifically stated that Smith had 10 days in which to consider and return the executed agreement. Pursuant a telephone conversation with Smith on November 1, 2019, he stated that he would accept the proposal and return the executed agreement. After not receiving the agreement back, NOP again contacted Smith on November 19, 2019, and was told that the agreement had been sent back. As it hadn't been received, copies of the agreement were again

sent to Smith via regular and certified mail on November 21, 2019. A letter was subsequently sent to Smith on December 9, 2019, stating that the executed agreement must be returned by December 16, 2019 or the case would proceed without a settlement. Smith had contacted NOP on December 11, 2019 when he received an invoice from PCO, but the executed settlement wasn't returned until December 12, 2019. The Settlement Agreement was fully executed on December 13, 2019. Therefore, February 11, 2020 was the deadline by which Smith needed to pay the agreed-upon [REDACTED].

On December 20, 2019, PCO contacted NOP, and stated that Smith had withdrawn the grass-fed portion of his certification. Therefore, the delinquent fees owed to PCO were reduced from [REDACTED] to [REDACTED]. PCO issued a new invoice to Smith, and since the reduced amount is technically a modification of the Settlement Agreement, a letter was written to Smith on December 23, 2019, asking for his written acknowledgment and agreement that the monies owed are reduced to [REDACTED]. The letter was sent via regular and certified mail to Smith. The December 23, 2019 letter also specifically stated, "Please ensure that you pay the revised amount of [REDACTED] to PCO by February 11, 2020. This must be paid in order to retain your organic certification." NOP spoke to Smith that day to discuss the modification of the agreement amount and reiterate the need to make timely payment.

After not receiving the 'modification letter' back from Smith, attempts were made on December 31, 2019; as well as January 10, 13, and 14, 2020 to reach Smith. Subsequently, on January 14, 2020, Smith stated that he hadn't received the letter regarding the modified settlement amount. It was resent again via regular and certified mail on January 14, 2020, and NOP specifically told Smith in the phone conversation that payment must be made by February 12, 2020. On February 7, 2020, having still not received the letter from Smith acknowledging

the reduced amount, a final letter was sent to Smith. This final letter reiterated all the numerous mailings to Smith, phone calls, and attempts to obtain payment from Smith. The letter specifically stated, “You must pay the [REDACTED] to PCO by February 11, 2020 in order to retain your organic certification. Failure to pay the amount on time will result in the suspension of your certificate...Therefore, this is effectively a last chance to resolve the proposed suspension.” However, on February 12, 2020, NOP contacted PCO and was informed that Smith hadn’t made any payment nor had Smith contacted PCO.

In conclusion, Smith is in breach of the December 13, 2019 Settlement Agreement between Smith and NOP, which he freely signed, thereby agreeing to pay the delinquent fees of [REDACTED] by February 11, 2020. A closure letter had also been sent to Smith on December 13, 2019, after the Settlement Agreement was fully executed, reiterating that he must pay the agreed-upon amount by February 11, 2020. Smith was reminded verbally and in writing on numerous occasions of the payment due date. Despite all the considerations given Smith, he has failed to abide by the terms of the Settlement Agreement.

Clause 3F of the December 13, 2019 Settlement Agreement states that, “Smith withdraws his appeal and waives further appeal rights in this matter. Failure to comply with the Settlement Agreement shall automatically void paragraph 2 above.” Paragraph 2 states, “USDA, AMS agrees not to issue a formal Administrator’s Decision charging Smith with alleged violations of the OFPA and the USDA organic regulations for any actions disclosed by the investigation which gave rise to this agreement.” The Settlement Agreement was entered into in resolution of a February 5, 2019 Notice of Proposed Suspension issued to Smith by its certifier, PCO. As Smith has not made the agreed-upon payment, Smith has breached the terms of the Settlement Agreement, and therefore, paragraph 2 of the agreement is voided. The February 5, 2019 Notice

of Proposed Suspension is ‘revived,’ and this Administrator’s Decision is hereby issued. As cited in the February 5, 2019 Notice of Proposed Suspension, Smith has violated the organic regulations at 7 CFR §205.400, which state that a person seeking to receive or maintain organic certification must submit the applicable fees charged by the certifying agent. Additionally, Smith has violated the organic regulations at §205.406, which state that an operation must annually pay its certification fees to continue its certification.

CONCLUSION

The USDA organic regulations assure consumers that products with the USDA organic seal meet consistent, uniform standards. Key to these standards is that products with the USDA organic seal are produced and handled in accordance with the organic regulations. However, Smith has been unable to comply with the organic regulations at 7 C.F.R. §205.400; and 7 C.F.R. §205.406, failing to pay the applicable certificate fees time after time despite payment plans with PCO, numerous Notices of Noncompliance, and a Settlement Agreement with NOP which Smith has breached despite numerous reminders of the payment due date. Therefore, Smith can’t remain certified at this time.

DECISION

Smith’s April 16, 2019 Appeal of the February 5, 2019 Notice of Proposed Suspension is denied, and Smith’s certification as to crops and livestock is suspended. The suspension is in effect until Smith has made full payment of all delinquent certification fees owed to PCO, with the exception of the [REDACTED] subject to Smith’s bankruptcy case. Pursuant to the organic regulations at 7 CFR §205.662(f), Smith may apply for reinstatement at any time after he has

made full payment of all delinquent certification fees. The request for reinstatement must be accompanied by evidence demonstrating that said full payment has been made, and that Smith is also in compliance with all other organic regulations. While under suspension, Smith may not sell, label, or represent any products as organic. Additionally, attached to this formal Administrator's Decision denying Smith's Appeal is a Request for Hearing form. Smith has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

Done at Washington, D.C., on this _____
day of _____, 2020.

**BRUCE
SUMMERS**

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Bruce Summers
Administrator
Agricultural Marketing Service