

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
)
)
Lucky Elephant Foods SPC)
dba Paunchy Elephant) **Administrator's Decision**
) **APL-047-23**
Renton, Washington)
)

This Decision responds to an Appeal (APL-047-23) of a Notice of Proposed Suspension under the National Organic Program (NOP) issued to Lucky Elephant Foods SPC, dba Paunchy Elephant (Lucky) of Renton, Washington by Quality Assurance International (QAI), 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

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

such decision to the USDA Agricultural Marketing Service (AMS) pursuant to § 205.680 Adverse Action Appeals Process – General, and § 205.681, Appeals of the USDA organic regulations.

FINDINGS OF FACT

1. Lucky was certified organic for handling on July 16, 2021.
2. On September 26, 2022, QAI issued a Notice of Noncompliance to Lucky for failure to pay overdue certification-related fees.
3. On December 5, 2022, QAI issued a second Notice of Noncompliance for failure to pay overdue certification-related fees.
4. On January 20, 2023, QAI issued a Notice of Proposed Suspension after Lucky failed to respond to the December 5, 2022 noncompliance notice.
5. On March 3, 2023, QAI accepted Lucky's mediation request and offered Lucky a settlement agreement which would have required Lucky to make full payment of overdue fees within 7 days of execution of the agreement.
6. On May 3, 2023, QAI re-issued the Notice of Proposed Suspension after Lucky rejected QAI's settlement offer.
7. On June 1, 2023, Lucky filed an Appeal.
8. On June 16, 2023, Lucky and NOP entered into a Settlement Agreement requiring Lucky to make full payment of overdue certification fees within 60 days of execution of the agreement.
9. On July 31, 2023, QAI reported to NOP that Lucky had breached the NOP Settlement Agreement.

10. On July 31, 2023, NOP issued a Notice of Noncompliance and Request for Corrective Action to Lucky.

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...”

On July 16, 2021, QAI certified Lucky for handling. On June 29, 2022, QAI invoiced Lucky for certification-related fees in the amount of \$7,175, with a due date of July 29, 2022. After Lucky failed to make the required payment, QAI sent Lucky a Notice of Noncompliance on September 26, 2022 requiring payment of the overdue fees within 30 days. QAI subsequently issued a Notice of Noncompliance to Lucky on December 5, 2022, after Lucky still failed to make the required payment. QAI issued a Notice of Proposed Suspension on January 20, 2023, after Lucky failed to resolve the noncompliance. After QAI accepted Lucky’s mediation request of February 17, 2023, QAI offered a settlement agreement to Lucky on March 3, 2023, whereby Lucky would be required to make full payment of the overdue \$7,175 within seven days of execution of the agreement. However, Lucky rejected the settlement offer, and therefore, QAI reissued the Notice of Proposed Suspension on May 3, 2023. The May 3, 2023 notice cited the

unpaid \$7,175 as well as an additional \$1,375, which had been invoiced on August 15, 2022 and remained unpaid.

Lucky filed an Appeal with NOP on June 1, 2023, stating that it is a small operation and has been experiencing financial difficulties. Lucky stated that with new orders being received and after receiving a grant, its financial situation should be improving. Therefore, NOP offered Lucky a Settlement Agreement, which was entered into by the parties on June 16, 2023. Per the agreement, Lucky agreed to pay the overdue certification fees from Invoices of June 29, 2022 (\$7,175) and August 15, 2022 (\$1,375), totaling \$8,550. Specifically, Lucky agreed to pay QAI the amount of \$4,550 within 30 days of execution of the agreement and pay \$4,000 within 60 days of execution of the agreement. Lucky also agreed to pay its 2023 and 2024 certification fees by the deadline. However, on July 31, 2023, QAI reported to NOP that Lucky had failed to pay the \$4,550 within 30 days of the Settlement Agreement's execution, namely July 15, 2023.

Therefore, on July 31, 2023, NOP issued to Lucky a Notice of Noncompliance and Request for Corrective Action, directing Lucky to pay the first payment of \$4,550 to QAI within 15 days of receipt of the notice, and the remaining \$4,000 by its due date of 16 days from the date of the notice. Lucky states that it attempted to make payment of the \$4,550 but sent it to the wrong address and therefore, recalled the mailing. When NOP asked Lucky about the additional \$4,000 also overdue, Lucky claimed not to be aware that the entire \$8,550 was due. However, the NOP Settlement Agreement as well as the Notice of Noncompliance issued July 31, 2023 were both very clear on the amounts needed to be paid and the payment dates. It was reiterated to Lucky on August 18, 2023, that the total amount of \$8,550 was due immediately; however, Lucky has failed to pay the overdue certification fees. QAI subsequently informed NOP that

Lucky made a payment of \$500 on September 19, 2023; however, Lucky remains in arrears on its certification fees by \$8,050, which is over a year past due.

Despite the issuance of notices of noncompliance and notices of proposed suspension by QAI, and Lucky entering into a Settlement Agreement with NOP, whereby it agreed to make the required payment, Lucky has failed to do so. Lucky had agreed in Terms 4A and 4B of the June 16, 2023 Settlement Agreement to pay the overdue \$8,550. Further, the Settlement Agreement in Term 4G states that, “Lucky agrees that the failure to abide by the terms of paragraphs immediately above shall result in USDA, AMS possibly pursuing administrative action against Lucky.” Clause 3D of the Settlement Agreement states that, “Lucky withdraws its 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 Lucky with alleged violations of the OFPA and the USDA organic regulations for any actions disclosed by the investigation which gave rise to this agreement.” A closure letter sent to Lucky on June 16, 2023 with the executed agreement also stated that, “... failure to abide by the terms of the agreement shall automatically void the Settlement Agreement and USDA, and AMS may pursue an administrative hearing process.” Lucky has breached the June 16, 2023 Settlement Agreement with NOP; and may not remain certified.

CONCLUSION

Evidence substantiates that Lucky has violated the organic regulations at 7 C.F.R. §205.400, and 7 C.F.R. §205.406, by failing to pay its certification-related fees, despite being given opportunities to do. Lucky has breached its June 16, 2023 Settlement Agreement with

NOP. Therefore, the May 3, 2023 Notice of Proposed Suspension is revived. Lucky can't remain certified at this time.

DECISION

Lucky's June 1, 2023 Appeal of the May 3, 2023 Notice of Proposed Suspension is denied, and Lucky's certification is suspended. Pursuant to the organic regulations at 7 CFR §205.662(f), Lucky may apply for reinstatement at any time after it has made full payment of all delinquent certification-related fees to QAI. The request for reinstatement must be accompanied by evidence demonstrating that said full payment has been made, and that Lucky is also in compliance with all other organic regulations. While under suspension, Lucky may not sell, label, or represent any products as organic.

Additionally, attached to this formal Administrator's Decision denying Lucky's Appeal is a Request for Hearing form. Should it wish to further appeal this decision, Lucky has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

Done at Washington, D.C., on this 30th
day of October, 2023.

**BRUCE
SUMMERS**

Digitally signed by BRUCE
SUMMERS
Date: 2023.10.30 15:21:12
-04'00'

Bruce Summers
Administrator
Agricultural Marketing Service