

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-02-0025
)
M. Trombetta & Sons, Inc.,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a Complaint on August 16, 2002. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

Complainant alleges: (1) during the period April 1999 through July 1999, M. Trombetta & Sons, Inc. [hereinafter Respondent], through its employee, Joseph Auricchio, made illegal payments to a United States Department of Agriculture inspector in connection with seven false United States Department of Agriculture inspection

certificates associated with seven transactions involving perishable agricultural commodities which Respondent purchased, received, and accepted from six sellers in interstate or foreign commerce; (2) on June 28, 2000, the United States District Court for the Southern District of New York entered a judgment in which Joseph Auricchio pled guilty to bribery of a public official in violation of 18 U.S.C. § 201(b); (3) Respondent made illegal payments to a United States Department of Agriculture inspector on numerous occasions prior to the period April 1999 through July 1999; and (4) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce (Compl. ¶¶ III-VI). On October 4, 2002, Respondent filed an Answer denying the material allegations of the Complaint and raising five affirmative defenses.

On July 14-18, 21-23, 2003, and August 21, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted an oral hearing in New York, New York. David A. Richman, Office of the General Counsel, United States Department of

Agriculture, Washington, DC, represented Complainant.¹ Mark C. H. Mandell, Law Firm of Mark C. H. Mandell, Annandale, New Jersey, represented Respondent.²

On February 6, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order Pertaining Only to the Disciplinary Proceeding. On April 12, 2004, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Order. On April 30, 2004, Complainant filed Complainant's Reply to Respondent's Proposed Findings of Fact, Conclusions of Law, and Order.

On May 12, 2005, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) finding, during the period April 1999 through July 1999, Respondent, through its employee and agent, paid unlawful bribes and gratuities to a United States Department of Agriculture inspector in connection with seven federal inspections of perishable agricultural commodities which Respondent purchased, received, and accepted from six sellers in interstate or foreign commerce; (2) concluding Respondent engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a

¹On January 31, 2005, Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, entered an appearance on behalf of Complainant, replacing David A. Richman as counsel for Complainant (Notice of Appearance, filed January 31, 2005).

²On June 29, 2005, Paul T. Gentile, Gentile & Dickler, New York, New York, entered an appearance on behalf of Respondent, replacing Mark C. H. Mandell as counsel for Respondent (Letter from Paul T. Gentile and Mark C. H. Mandell to the Hearing Clerk, filed June 29, 2005).

specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce; (3) ordering publication of the facts and circumstances of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) revoking Respondent's PACA license (Initial Decision and Order at 20, 23).

On July 21, 2005, Respondent appealed to the Judicial Officer, and on August 3, 2005, Complainant filed Complainant's Response to Appeal Petition. On August 10, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order. Therefore, except for minor modifications, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions, as restated.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Administrative Law Judge exhibits are designated "ALJX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

.....

§ 499b. Unfair conduct

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 499e(c) of this title. 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 chapter.

.....

§ 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.

....

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499b(4), 499h(a), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

....

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

- (a) For the purpose of this section—
- (1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such

official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

.....

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act[.]

.....

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A).

**ADMINISTRATIVE LAW JUDGE’S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Decision Summary

Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period April 1999 through July 1999, at the Hunts Point Terminal Market in the Bronx, New York. Specifically, Respondent, through its employee Joseph Auricchio, made seven illegal cash payments to United States

Department of Agriculture produce inspector William J. Cashin in connection with seven federal inspections of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce from six produce sellers. In addition, Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) on numerous occasions prior to the period April 1999 through July 1999, at the Hunts Point Terminal Market in the Bronx, New York.

Specifically, Respondent, through its employee Joseph Auricchio, made illegal cash payments to United States Department of Agriculture produce inspectors in connection with federal inspections of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce from produce sellers. Respondent is responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee Joseph Auricchio, who, in the scope of his employment, paid the unlawful bribes and gratuities to United States Department of Agriculture produce inspectors. Under the PACA, the acts of the employee are deemed to be the acts of the employer. Making illegal payments to United States Department of Agriculture produce inspectors was an egregious failure by Respondent to perform its duty under the PACA to maintain fair trade practices. The revocation of Respondent's PACA license is commensurate with the seriousness of Respondent's violations of the PACA.

Findings Of Fact

1. Respondent is a New York corporation, holding PACA license number 021070, with an address of Units 102-105, Hunts Point Terminal Market, Bronx, New York 10474 (CX 1).
2. Respondent was started in the 1890s, and the fifth generation of the family is now in the business. The current managers are Philip James Margiotta, also known as Philip J. Margiotta (at the Hunts Point Terminal Market), and Stephen Trombetta (at the Bronx Terminal Market). (Tr. 500, 504, 1677.)
3. At all times material to this proceeding, Philip Joseph Margiotta, also known as P.J. Margiotta, owned 60 percent of Respondent and Stephen Trombetta owned 40 percent of Respondent (CX 1; Tr. 1676-77).
4. At all times material to this proceeding, Respondent's president and treasurer were Philip Joseph Margiotta; Respondent's vice president was Stephen Trombetta; and Respondent's secretary was Philip James Margiotta (CX 1; Tr. 1662, 1679).
5. Respondent began doing business in the Hunts Point Terminal Market in the Bronx, New York, when Hunts Point Terminal Market opened, in about 1967 or 1968 (Tr. 502).
6. Respondent hired Joseph Auricchio in about 1994 to perform various jobs. At all times material to this proceeding, Mr. Auricchio worked for Respondent. In 1999, Mr. Auricchio worked as a salesperson for Respondent. (Tr. 504-05, 508, 1158.)

7. In 1999, Joseph Auricchio earned between \$800 and \$900 per week as a salesperson for Respondent. While Mr. Auricchio did not earn any commissions as part of his salary, he received bonuses equivalent to 1 or 2 weeks pay at Christmas. (Tr. 1131.)

8. On March 14, 2000, Joseph Auricchio pled guilty to one count of the four-count indictment in *United States v. Auricchio*, Case No. 99 CR 01088-001 (HB) (S.D.N.Y. June 28, 2000). The elements of the offense, bribery of a public official, to which Joseph Auricchio pled guilty, are that he gave a thing of value to a person who is a public official with the corrupt intent to influence an official act by that public official. (CX 4; RX N.)

9. In connection with his guilty plea, Joseph Auricchio told Judge Harold Baer, Jr., under oath, that on July 7, 1999, he offered a government official \$100 to inspect a load of vegetables at the Hunts Point Terminal Market in the Bronx, New York; that he knew what he was doing was wrong; that he did it willfully and knowingly; that the government official was a United States government inspector; and that he wanted the inspector to lower the grade of the vegetables, so that “we could sell it cheaper.” (RX N at 12-14).

10. On June 21, 2000, Joseph Auricchio was found to have paid approximately \$29,100 in cash bribes³ to United States Department of Agriculture produce inspectors at

³The \$29,100 in cash bribes paid by Joseph Auricchio was determined by
(continued...)

the Hunts Point Terminal Market between 1996 and September 1999 (the only time period for which data was available), in connection with inspections of fresh fruits and vegetables for Respondent and was sentenced on count four of the indictment in *United States v. Auricchio*, Case No. 99 CR 01088-001 (HB) (S.D.N.Y. June 28, 2000), to the custody of the Bureau of Prisons for 1 year 1 day; followed by supervised release of 2 years; plus a \$5,000 fine; plus a \$100 special assessment. The other three counts of the four-count indictment in *United States v. Auricchio*, Case No. 99 CR 01088-001 (HB) (S.D.N.Y. June 28, 2000), were dismissed. (ALJX 1; CX 4.)

11. The one count of bribery of a public official on July 7, 1999, of which Joseph Auricchio was convicted (CX 4), was based on the undercover work of William J. Cashin, a United States Department of Agriculture produce inspector at the Hunts Point Terminal Market who had for many years accepted unlawful bribes and gratuities from many produce workers.

12. From July 1979 until August 1999, William J. Cashin was employed as a produce inspector for the United States Department of Agriculture at the Hunts Point, New York, office of the United States Department of Agriculture's Fresh Products Branch (Tr. 128-29).

13. William J. Cashin first inspected produce for Respondent when Mr. Cashin started working for the United States Department of Agriculture, in 1979 (Tr. 134).

³(...continued)
agreement of the parties for sentencing purposes (ALJX 1 at 2 n.1).

14. William J. Cashin was not paid a bribe in connection with the inspection of produce for Respondent until Joseph Auricchio began paying him bribes in 1997 (Tr. 137, 142).

15. William J. Cashin had already begun a bribe-taking relationship with Joseph Auricchio at another location at the Hunts Point Terminal Market where Mr. Auricchio worked before he started working for Respondent (Tr. 139).

16. William J. Cashin agreed, immediately after having been arrested on March 23, 1999, to cooperate with the Federal Bureau of Investigation in its investigation of bribery of United States Department of Agriculture inspectors at the Hunts Point Terminal Market by continuing to operate as he had in the past and reporting daily the payments he collected (Tr. 143; CX 6-CX 9).

17. In response to William J. Cashin's daily reports, the Federal Bureau of Investigation prepared FD-302 forms which reflect what William J. Cashin told them each day (CX 5, CX 6 at 1-2, CX 7 at 1-2, CX 8 at 1-3, CX 9 at 1-2). The portions of the FD-302 forms which correlate to the unlawful bribes and gratuities Mr. Cashin received from Joseph Auricchio are organized for each count of the indictment in *United States v. Auricchio*, Case No. 99 CR 01088-001 (HB) (S.D.N.Y. June 28, 2000), together with applicable United States Department of Agriculture inspection certificates, which show Respondent as having applied for the inspections. (CX 6-CX 9.)

18. Joseph Auricchio was acting in the scope of his employment as a produce salesperson for Respondent when he paid the unlawful bribes and gratuities. When

Joseph Auricchio paid the unlawful bribes and gratuities, he was acting on behalf of Respondent; the unlawful payments could have benefitted Respondent; the unlawful payments were incorporated into Joseph Auricchio's regular work routine for Respondent; Joseph Auricchio made the unlawful payments on a regular basis; Joseph Auricchio was at his regular work place at Respondent when he made the unlawful payments; and Joseph Auricchio made the unlawful payments during his regular work hours for Respondent (Tr. 363-65).

19. Joseph Auricchio was acting within the scope of his employment as a produce salesperson for Respondent each time he paid an unlawful bribe or gratuity to William J. Cashin, as reported in CX 6 through CX 9 and as reflected in count four of the indictment in *United States v. Auricchio*, Case No. 99 CR 01088-001 (HB) (S.D.N.Y. June 28, 2000), regardless of whether anyone at Respondent directed Joseph Auricchio to make the unlawful payments, provided Joseph Auricchio the money to make the unlawful payments, or was even aware that Joseph Auricchio was making the unlawful payments (Tr. 363-64).

20. After careful consideration of all the evidence before me, I accept as credible the testimony of Joan Marie Colson; William J. Cashin; John Aloysius Koller; Philip James Margiotta; Peter Silverstein; Max Montalvo; Frank J. Falletta; Matthew John Andras; Harlow E. Woodward, III; Stephen Trombetta; Martin A. Shankman; Patricia Baptiste; Philip Harry Lucks; and Philip Joseph Margiotta.

Discussion

Respondent's employee, Joseph Auricchio, paid unlawful bribes and gratuities to United States Department of Agriculture produce inspector William J. Cashin during the period April 20, 1999, through July 7, 1999, in connection with produce inspections requested by Respondent. In addition, Respondent's employee, Joseph Auricchio, on numerous occasions prior to the period April 1999 through July 1999, paid unlawful bribes and gratuities to United States Department of Agriculture produce inspectors in connection with produce inspections requested by Respondent. The only question is whether Joseph Auricchio's unlawful bribes and gratuities causes his employer, Respondent, to suffer the consequences under the PACA.

Respondent argues that the seven United States Department of Agriculture inspection certificates issued by William J. Cashin during the period April 20, 1999, through July 7, 1999, may not have contained any false information. Respondent suggests that what William J. Cashin recorded was true; that in actuality, he gave no "help." I do not discuss the evidence that Respondent cites in support of its argument (*see* Respondent's Proposed Findings of Fact, Conclusions of Law, and Order), because the outcome here remains the same even if the United States Department of Agriculture inspection certificates were accurate. A payment to a United States Department of Agriculture inspector to obtain an accurate United States Department of Agriculture inspection certificate negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture inspector and undermines the confidence

produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture inspector. Commission merchants, dealers, and brokers have a duty to refrain from paying United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture inspectors. A PACA licensee's payment to a United States Department of Agriculture inspector, whether it is to obtain an accurate United States Department of Agriculture inspection certificate or an inaccurate United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector.

Respondent argues Complainant's entire case is founded upon the allegation that the United States Department of Agriculture inspection certificates in issue contained false information (Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 21). I disagree. Making unlawful payments to a United States Department of Agriculture produce inspector is an unfair trade practice, regardless of the produce inspector's response (Complainant's Reply to Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 15-16).

Respondent argues that the recorded conversations between Joseph Auricchio and United States Department of Agriculture produce inspector William J. Cashin, while Mr. Cashin was working undercover, impeach Mr. Cashin's credibility when Mr. Cashin testified that he "gave help" by reporting the produce he inspected to be in worse condition than it actually was (RX P, RX V). I disagree. The recorded conversations upon which Respondent relies, reveal caution on the part of both Mr. Auricchio and Mr. Cashin regarding the extent to which the produce should be misrepresented, if at all, but I find Mr. Cashin's testimony to be credible. The daily reporting to the Federal Bureau of Investigation, while Mr. Cashin was working undercover, provides reliable verification of Joseph Auricchio's unlawful payments on behalf of Respondent to a United States Department of Agriculture produce inspector (CX 6-CX 9).

United States Department of Agriculture produce inspector William J. Cashin testified, as follows:

[BY MR. RICHMAN:]

Q. Was there any basic understanding between you and Mr. Auricchio about what you would be doing with regard to your inspections for Respondent?

[BY MR. CASHIN:]

A. Yes.

Q. What was that understanding?

A. He was looking for help on the various loads of produce.

Q. And how did that understanding come about between you and Mr. Auricchio?

A. At M. Trombetta I don't remember the exact how it came about there, but I knew Joe Joe from another location in the market before he started working at Trombetta.

Q. And you had that understanding from that time as well?

A. Yes.

Q. How did Mr. Auricchio let you know that he wanted help on a particular load?

A. Usually I would in fact every time he was there, when I was sent to Trombetta, I would always talk to him. And he and I would discuss the load and he would tell me he needed help on the load.

Q. And what was your understanding of the meaning of the phrase help, when it was requested in connection with the produce inspection?

A. Help came in any one of three ways, and they weren't always done at the same time. The first one was he was asking me to write the condition defects on the certificate in such a way that they were over the delivery marks.

Q. Can you explain that actually what is good delivery?

A. Okay, in the USDA Standards there are tolerances for certain defects. The delivery standards are a parallel set of standards set forth either by the PACA or within the industry itself and these standards were set a little bit higher than the USDA Standards. And for example if the USDA allowed three percent decay in a certain defect, the good delivery standard would be five percent. So one of the ways of help was that Joe Joe would want me to write the product up in such a way that it was over the good delivery standard, because he didn't want the product to fail USDA, but still make good delivery.

Q. Okay and you mentioned there are three ways in which you would give help?

A. Yes, the second way was the number of containers. He sometimes would need or want the number of containers reported on the certificate to closely match to the manifest of what was originally sent when loaded.

Q. Why would you do that?

A. It was my understanding it would make the certificate more legitimate, and also they would get more money back from the shippers.

Q. And what is the third way that you would give help?

A. The third help was temperature. You would need the temperature reported on the certificate to closely match the accepted levels of shipment. So again it would lend legitimacy to the inspection certificate.

Q. Were the figures that you put down on the inspection certificate when you gave help, an accurate reflection of the produce you were inspecting?

A. No.

Q. When you gave help with respect to the condition of the produce, how would the figure that you put down on the certificate for the condition of the produce help the Respondent?

A. Again, it was my understanding that they would be able to get more money back from the shippers or renegotiate their deals.

Q. And when you gave help with respect to the quantity of the produce, I think you just answered this, but just to clarify. When you gave help with respect to the quantity of the produce inspected, how would the figures you put down for the quantity of the produce inspected help the Respondent?

A. Again, it was my understanding that it would lend legitimacy to the certificate and they were able to get more money back.

Q. And when you gave help with respect to the temperature of the produce, how would the figures that you put down for the temperature of the produce help the Respondent?

A. It again was my understanding it would lend legitimacy to the whole inspection package.

Q. On what percentage of the loads that you inspected of Respondent would you give help?

A. When Joe Joe was there, about 100 percent.

Q. And when did you first start receiving these payments at Trombetta?

A. In 1997.

Tr. 139-42.

Respondent argues Joseph Auricchio's payments to William J. Cashin may not have been "in connection with a produce transaction" (Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 22). Respondent's argument is strained in light of all the evidence that the money Joseph Auricchio gave William J. Cashin was in connection with a produce transaction. But this is how Respondent summarizes it:

Without an active Auricchio connection to the purchasing of the produce shipments and/or negotiations with suppliers, or Respondent's actual knowledge (with active or tacit approval) of Auricchio's alleged illegal activities down in the sales booth, the vital link between the actions alleged by Complainant and the produce transactions it seeks to protect is broken, and Complainant cannot establish the violations of Section 2(4) that it has alleged. Since Complainant has failed to make that connection, the Complaint must be dismissed.

Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 23.

I disagree. Joseph Auricchio worked for Respondent. Even though Philip James Margiotta, the buyer/broker for much of the produce, may have had no idea that Mr. Auricchio was arranging for incoming produce to be reported by the United States

Department of Agriculture produce inspector to be in worse condition than it actually was, the unlawful payments were nonetheless made in connection with produce transactions. Further, even though Respondent's negotiations of the prices to be paid for the incoming produce may have been honest and trustworthy, the unlawful payments were nonetheless made in connection with produce transactions.

Respondent argues that it provided proper supervision for Joseph Auricchio (Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 22-23). Actually, Respondent did very little, in 1999 and before, to surveil its own employees (Tr. 1140-55). During the time since Joseph Auricchio's criminal activity was exposed, Respondent has taken commendable precautions (Tr. 1161-63).

Respondent argues United States Department of Agriculture inspectors may have committed extortion and Joseph Auricchio may have been the victim of extortion (RX O; Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 27). There is no evidence that Joseph Auricchio was the victim of extortion (ALJX 1; Tr. 1129-30).

Section 16 of the PACA (7 U.S.C. § 499p) incorporates principal-agent common law, making no exception for criminal activity of the agent. Both the United States Court of Appeals for the District of Columbia Circuit⁴ and the United States Court of Appeals

⁴*Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

for the Sixth Circuit⁵ have affirmed the use of the PACA principal-agency provision under circumstances like those in this proceeding.

Respondent argues that section 16 of the PACA (7 U.S.C. § 499p) is inapplicable to this case. Respondent argues that Joseph Auricchio's illegal payments to United States Department of Agriculture produce inspector William J. Cashin were beyond the scope of his employment; that Joseph Auricchio's criminal activity cannot have been within the scope of his employment and cannot become Respondent's violation of the PACA. I find to the contrary, that Joseph Auricchio was working within the scope of his employment when he paid the unlawful bribes and gratuities.

Joseph Auricchio did pay the unlawful bribes and gratuities within the scope of his employment as Respondent's produce salesperson. During Joseph Auricchio's working hours, at Respondent's location, as part of his job as a salesperson for Respondent, Joseph Auricchio met with United States Department of Agriculture produce inspectors to give them the information needed regarding the produce inspections. (Tr. 363-65.) Making illegal payments to the United States Department of Agriculture produce inspectors in connection with the produce inspections, even if he did that on his own, unknown to others, did not remove Joseph Auricchio from the scope of his employment.

Even if Joseph Auricchio was not authorized or directed by Respondent to pay unlawful bribes and gratuities to United States Department of Agriculture inspectors, and

⁵*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584 (6th Cir. 2003).

even if Respondent was unaware of his payments to United States Department of Agriculture inspectors, Respondent is indeed responsible under the PACA for Joseph Auricchio's unlawful bribes and gratuities in connection with the produce inspections ordered by Respondent.⁶

Regarding payment of the unlawful bribes and gratuities, there may not have been unity between employee and employer factually, but the principal-agent legal principle imposes unity between employee and employer. Consequently, whether Joseph Auricchio was authorized or directed by his employer to pay the unlawful bribes and gratuities does not affect the disposition of this proceeding.

After careful review of the evidence as a whole, I am unable to determine whether anyone at Respondent, besides Joseph Auricchio, was involved in making the unlawful payments. It is difficult to believe that Joseph Auricchio paid the unlawful bribes and gratuities out of his own pocket. The evidence fails to prove whether the money Joseph Auricchio gave United States Department of Agriculture inspectors was his own money, or Respondent's money, or money from some other source.

Joseph Auricchio was not a witness. From the evidence, including particularly the plea agreement letter (ALJX 1) and the transcript of Mr. Auricchio's guilty plea (RX N), there is no evidence suggesting that anyone at Respondent, besides Joseph Auricchio,

⁶7 U.S.C. § 499p; *Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406 (D.C. Cir. 2005); *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584 (6th Cir. 2003).

may have been involved in paying the unlawful bribes and gratuities. Joseph Auricchio did not implicate his employer. The evidence does not prove that anyone else at Respondent knew Joseph Auricchio was illegally giving money to United States Department of Agriculture inspectors.

John A. Koller, a senior marketing specialist employed by the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, testified that bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the United States Department of Agriculture recommends PACA license revocation as the only adequate option. I agree. I find Joseph Auricchio's actions within the scope of his employment are deemed to be the actions of Respondent and those actions were so egregious that nothing less than PACA license revocation is an adequate remedy. Mr. Koller explained the United States Department of Agriculture's recommendation for PACA license revocation as follows:

[BY MR. RICHMAN:]

Q. Are you aware of the sanction Complainant recommends in this case?

[BY MR. KOLLER:]

A. Yes, I am.

Q. How are you aware of the sanction?

A. I participated in the development of the sanction recommendation.

Q. And what is the sanction recommendation in this case?

A. A license revocation.

Q. And what is the basis for Complainant's sanction recommendation?

A. Well, the basis of Complainant's recommendation for a license revocation is based on several factors. The evidence clearly shows that Respondent paid bribes to a produce inspector. The FBI has documented that over a two-and-a-half month period of time, bribery payments were made that affected seven inspections. Further aggravating the situation, Mr. Cashin has testified that he had been accepting bribes from Respondent since 1997. And bribery payments to a produce inspector has an effect on the trade as a whole. And these -- what will happen is thousands of dollars in adjustments could arise or will arise from these false inspections. Another factor is the industry relies on the produce -- on the inspection certificate to quickly resolve disputes. And approximately 150,000 inspections are performed each year by the Fresh Products Branch, and it is important that these inspections are accurate. If there is any suspicion that these inspections have been tainted due to bribery payments being made to the Produce Inspector to change the outcome of the results, change the outcome of the inspection, this is something that affects the industry as a whole. Because as the sellers become aware of this bribery situation coming along, then it affects the credibility of the inspection certificate itself and the inspection process. It provides a problem for the industry. The trades rely on the results of that inspection to be impartial and accurate. Another concern is the concern of when you have got a wholesaler that is paying bribes to a produce inspector, other wholesalers on the market may very well feel -- may very well pay bribes as well to the produce inspector. For example, when you have got a wholesaler in the Hunts Point Market who is paying bribes to a produce inspector to affect the outcome of the inspection and be in a position to get price adjustments on a particular commodity, then they will be able to sell the produce for less. And when other wholesalers become aware of this, they will feel that they are in a position to have to pay the bribes as well in order to compete with the wholesalers that are paying these bribes. And again, with this is consideration, the effects that this causes on the inspection process and the effect on the Hunts Point Market itself is that whether there is a wholesaler paying bribes or not, it casts a concern to the industry as to who they can rely on in the market there at the market -- the wholesalers on the market.

Excuse me. And finally, the Department strongly believes that a strong sanction not only on the Respondent will also -- will not only be a deterrent to Respondent, but will also be a deterrent to other members of the trade who are contemplating making bribery payments to a produce inspector.

.....

Q. Does the fact that it was Mr. Cashin, a USDA employee, who received the bribes, have any effect on Complainant's sanction recommendation?

A. No.

Q. Why not?

A. Bribery payments being made to a produce inspector is a serious violation of the PACA. Whether it is to a produce inspector or to any member of the trade, and in the situation where a produce inspector has taken bribes on an inspection, does not excuse the PACA licensee from those actions of committing the bribery itself.

Q. Does Complainant recommend a civil penalty in this case as an alternative to license revocation?

A. No.

Q. Why not?

A. The Department feels that -- or it believes that this type of violation is a most serious violation under the Act. And as, you know, the effects of bribery payments, you know, first off, it is bribery payments of the produce inspector. You have got that. The bribery payments have been taking place over a period of time, they are repeated. The bribery payments affect the credibility of the inspection certificate, and then that consequently affects the reliability and credibility of that inspection to the industry to quickly resolve disputes. The other concern, again, is the competitive nature, the competitive aspect of the industry on the Hunts Point Market or any other market. If you have got firms paying bribes that are giving -- that are getting an advantage with price adjustments, there again, causes a problem with competition. Those firms that are not in the same situation, they are not able to compete in that situation. Also, the aspect of

Department -- in order to deter this type of action, this violation, from occurring, a strong sanction of a license revocation to deal with one of these most serious violations of the Act would be the appropriate thing. And the Department has also consistently recommended that a revocation of a license be the recommendation for sanction where a serious violation of the PACA by committing a bribe has taken place.

Q. Is that the policy of the Department?

A. That is the policy of the Department.

Tr. 367-71.

Conclusions

Joseph Auricchio, Respondent's employee, paid unlawful bribes and gratuities to a United States Department of Agriculture inspector, during the period April 1999 through July 1999, in connection with seven federal inspections involving perishable agricultural commodities which Respondent purchased, received, and accepted from six sellers in interstate or foreign commerce. In addition, Joseph Auricchio, on numerous occasions, paid unlawful bribes and gratuities to United States Department of Agriculture inspectors prior to the period April 1999 through July 1999, in connection with federal inspections involving perishable agricultural commodities which Respondent purchased, received, and accepted from produce sellers in interstate or foreign commerce.

Joseph Auricchio was acting in the scope of his employment as a produce salesperson for Respondent, when he paid unlawful bribes and gratuities to United States Department of Agriculture inspectors in connection with federal inspections involving perishable agricultural commodities which Respondent purchased, received, and accepted

from produce sellers in interstate or foreign commerce, even if what he did was unauthorized. When Joseph Auricchio paid the unlawful bribes and gratuities, he was acting on behalf of Respondent; the unlawful payments could have benefitted Respondent; the unlawful payments were incorporated into Joseph Auricchio's regular work routine for Respondent; Joseph Auricchio made the unlawful payments on a regular basis; Joseph Auricchio was at his regular work place at Respondent when he made the unlawful payments; and Joseph Auricchio made the unlawful payments during his regular work hours for Respondent.

Joseph Auricchio was acting as Respondent's agent when he paid unlawful bribes and gratuities to United States Department of Agriculture inspectors in connection with federal inspections involving perishable agricultural commodities which Respondent purchased, received, and accepted from produce sellers in interstate or foreign commerce.

Joseph Auricchio's willful violations of the PACA are deemed to be Respondent's willful violations of the PACA. *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

Respondent, through its employee and agent, paid unlawful bribes and gratuities to United States Department of Agriculture inspectors in connection with federal inspections involving perishable agricultural commodities which Respondent purchased, received, and accepted from produce sellers in interstate or foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent is responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee who paid the unlawful bribes and gratuities to the United States Department of Agriculture produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform an implied duty, arising out of any undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.

The duty that Respondent failed to perform is the duty to maintain fair trade practices required by the PACA. Paying unlawful bribes and gratuities to United States Department of Agriculture produce inspectors is an unfair trade practice and failure to maintain fair trade practices. Regardless of a produce inspector's response -- even if the produce inspector had not falsified the United States Department of Agriculture inspection certificates -- and even if the wholesaler gained no unfair economic advantage and made no attempt to gain any unfair economic advantage -- making unlawful payments to a United States Department of Agriculture produce inspector is an unfair trade practice. The unlawful payments to the United States Department of Agriculture produce inspectors were egregious even if Respondent got nothing in return. *JSG Trading Corp. v. United States Dep't of Agric.*, 235 F.3d 608, 614-15 (D.C. Cir. 2001).

Respondent's violations of the PACA were egregious, requiring a remedy of suspension or revocation. *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 780-81 (2003). Although suspension was the chosen remedy in *Geo. A. Heimos*, which concerned Geo. A. Heimos' employees altering inspection certificates, suspension would not be adequate to respond to the seriousness of Respondent's failures.

Respondent's failures threatened the integrity of the United States Department of Agriculture inspection process, casting suspicion on inspection results and tending to taint the marketplace.

Considering all of the evidence, Respondent, but for the actions of Joseph Auricchio, appears to have been trustworthy, honest, and fair-dealing. For the purpose of this Decision and Order, I find no culpability on the part of anyone within Respondent other than Joseph Auricchio. Of particular significance is that United States Department of Agriculture produce inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years and had been inspecting at Respondent's place of business for about 20 years, collected no bribes from Respondent until Joseph Auricchio started to work as a salesperson for Respondent in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working for Respondent. Nevertheless, I hold Respondent responsible for the actions of Joseph Auricchio, just as if Respondent itself had performed each of Mr. Auricchio's acts.

The United States Department of Agriculture is charged with overseeing the integrity of the United States Department of Agriculture inspection process and must take appropriate action against a PACA licensee committing an unfair trade practice, even if only one employee of the PACA licensee commits the unfair trade practice, and whether or not such employee is a manager, supervisor, officer, director, or shareholder of the PACA licensee.

Revocation of Respondent's PACA license is commensurate with the seriousness of Respondent's violations of the PACA (Tr. 367-71). Any lesser remedy than license revocation would not be commensurate with the seriousness of Respondent's PACA violations, even though many of Respondent's competitors were committing like violations, and even though United States Department of Agriculture inspectors who took the unlawful bribes and gratuities were arguably more culpable than those that paid them (Tr. 367-71).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's Appeal Petition

Respondent raises five issues in Respondent's Appeal Petition. First Respondent asserts the ALJ's findings of fact are not supported by the evidence (Respondent's Appeal Pet. at 2-3).

I disagree with Respondent. I have carefully reviewed the record. I find the ALJ's findings of fact are supported by reliable, probative, and substantial evidence.

Second, Respondent contends the ALJ erroneously concluded Joseph Auricchio acted within the scope of his employment when he made payments to United States Department of Agriculture produce inspector William J. Cashin. Respondent asserts Mr. Auricchio was employed by Respondent as a “dock” salesperson with limited duties and responsibilities. Specifically, Respondent asserts Mr. Auricchio was not authorized to purchase produce, order inspections of produce, or negotiate prices paid for produce. (Respondent’s Appeal Pet. at 4-6.)

As an initial matter, the evidence establishes that, at all times material to this proceeding, Joseph Auricchio had authority to order United States Department of Agriculture inspection of produce for Respondent (Tr. 532-33, 1117). Moreover, the issue in this proceeding is not Mr. Auricchio’s authority to order produce, order United States Department of Agriculture inspection of produce, or negotiate prices, but rather, Mr. Auricchio’s payments to United States Department of Agriculture inspectors in connection with the inspection of produce for Respondent.

Respondent contends the ALJ relied upon the wrong factors when determining whether Joseph Auricchio acted in the scope of his employment with Respondent when he paid a United States Department of Agriculture inspector in connection with the inspection of produce. The ALJ cited the following factors as the basis for her determination that Mr. Auricchio was acting within the scope of his employment:

Joseph (“Joe Joe”) Auricchio was acting in the scope of his employment as a produce salesman for Trombetta, Inc. when he paid the unlawful bribes and gratuities. When he paid the unlawful bribes and gratuities, he was

acting on behalf of his employer, Trombetta, Inc.; the unlawful payments could have benefited Trombetta, Inc.; the unlawful payments were incorporated into his regular work routine for Trombetta, Inc.; he made the unlawful payments on a regular basis; he was at his regular work place at Trombetta, Inc. when he made the unlawful payments; and he made the unlawful payments during his regular work hours for Trombetta, Inc. Tr. 363-65.

Initial Decision and Order at 7. Generally, the factors considered to determine whether conduct of an employee or agent is within the scope of employment are: (1) whether the conduct is of the kind the employee or agent was hired to perform;⁷ (2) whether the conduct occurs during working hours; (3) whether the conduct occurs on the employment premises; and (4) whether the conduct is actuated, at least in part, by a purpose to serve the employer or principal.⁸ I find the ALJ considered the proper factors to determine whether Joseph Auricchio was acting within the scope of his employment with Respondent, and I agree with the ALJ's finding that Mr. Auricchio was acting within the scope of employment with Respondent when he paid United States Department of Agriculture inspectors in connection with the inspection of produce for Respondent.

Third, Respondent contends the ALJ erroneously concluded William J. Cashin's testimony was credible. Respondent asserts William J. Cashin gave perjured testimony. Specifically, Respondent asserts Mr. Cashin testified that he falsified United States

⁷Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

⁸*See generally* Restatement (Second) of Agency § 228 (1958).

Department of Agriculture inspection certificates in connection with his July 7, 1999, inspection of potatoes and lemons for Respondent, but that audio-visual tapes of conversations between Mr. Auricchio and Mr. Cashin regarding the inspection clearly establish that Mr. Auricchio told Mr. Cashin to issue accurate United States Department of Agriculture inspection certificates. (Respondent's Appeal Pet. at 7.)

I find nothing on the audio-visual tape (RX P) that supports Respondent's assertion that William J. Cashin gave perjured testimony regarding his falsification of the United States Department of Agriculture inspection certificates relating to the July 7, 1999, inspection of potatoes and lemons for Respondent (CX 9 at 3-4). Instead, I agree with the ALJ that the conversations on the audio-visual tape "reveal caution on the part of both Mr. Auricchio and Mr. Cashin[] regarding the extent to which the produce should be misrepresented, if at all" (Initial Decision and Order at 9). Therefore, I reject Respondent's assertion that Mr. Cashin gave perjured testimony.

Respondent also finds remarkable the ALJ's determination that William J. Cashin was credible in light of his taking bribes and committing tax fraud. Mr. Cashin's previous crimes implicate his credibility. However, the Judicial Officer's consistent practice is to give great weight to credibility determinations of administrative law judges,

since they have the opportunity to see and hear witnesses testify.⁹ I find no basis on the record before me for reversing the ALJ's credibility determination.

Fourth, Respondent contends the ALJ erroneously relied on Joseph Auricchio's plea of guilty to bribery of a public official in connection with a United States Department of Agriculture inspection of potatoes on July 7, 1999, as Mr. Auricchio was not telling the truth when he stated during his allocution, he paid Mr. Cashin so that Respondent could sell produce at a cheaper price (Respondent's Appeal Pet. at 8).

⁹*In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____, slip op. at 16 (Sept. 8, 2005); *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. ____, slip op. at 33-37 (May 9, 2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp.2d 1308 (D. Kan. 1998), *aff'd*, 12 Fed. Appx. 718 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262 (Table), 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

On October 21, 1999, the United States Attorney for the Southern District of New York issued an indictment charging Joseph Auricchio with four counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The indictment states Joseph Auricchio:

[U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, JOSEPH AURICCHIO, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at M. Trombetta & Sons, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>AMOUNT OF BRIBE</u>
ONE	4/20/99	\$100
TWO	5/11/99	\$100
THREE	6/16/99	\$50
FOUR	7/7/99	\$100

CX 3. Mr. Auricchio plead guilty to count four of the indictment, and admitted, under oath, that he paid William J. Cashin a bribe of \$100, as alleged in count four of the indictment, in connection with the inspection of potatoes in order to sell the potatoes cheaper, as follows:

THE COURT: All of this is under oath, Mr. Auricchio, so you understand that if you have made a false statement you can be prosecuted anew. I tell you that as a prelude. If you want to plead guilty, I want you to tell me what it is that you did that causes you to offer to plead guilty. Indeed, we are talking only about the fourth count in this 99 Crim. 1088 indictment. So, it is now your turn.

THE DEFENDANT: Well, on July 7 I offered a government official \$100 to inspect a load, your Honor.

THE COURT: To inspect a load of what?

THE DEFENDANT: I think it was potatoes.

THE COURT: It was vegetables.

THE DEFENDANT: Vegetables.

THE COURT: And in fact where did that happen?

THE DEFENDANT: In the Hunts Point Market.

THE COURT: Which is in the Southern District of New York?

THE DEFENDANT: Yes.

THE COURT: In the Bronx, right?

THE DEFENDANT: Yes.

THE COURT: And you knew that what you were doing was wrong, is that true?

THE DEFENDANT: Yeah, I knew it was wrong.

THE COURT: And did you do it willfully and knowingly?

THE DEFENDANT: Yes, your Honor.

THE COURT: And with respect to this inspector, he was a public official?

THE DEFENDANT: Yes.

THE COURT: What kind of inspector was he?

THE DEFENDANT: U.S. government inspector.

THE COURT: And he was looking at these potatoes for what purpose?

THE DEFENDANT: To lower the grade on it.

THE COURT: Is that what you wanted him to do? That wasn't his job, right?

THE DEFENDANT: No, no, he was looking at it to see what type of grade it was. I wanted him to lower it.

THE COURT: And what did that do for you?

THE DEFENDANT: You know, we could sell it cheaper.

THE COURT: I see. They weren't your potatoes. You simply purchased them from somebody else?

THE DEFENDANT: Yes, your Honor.

RX N at 12-14.

Respondent cites the July 7, 1999, audio-visual tape (RX P) as the basis for its assertion that the ALJ's reliance on Mr. Auricchio's plea and allocution is error. However, the audio-visual tape is consistent with Mr. Auricchio's guilty plea and allocution. Moreover, Mr. Cashin's testimony is consistent with Mr. Auricchio's plea and allocution. Therefore, I reject Respondent's contention that the ALJ erroneously relied on Mr. Auricchio's plea and allocution.

Fifth, Respondent contends revocation of Respondent's PACA license is unduly harsh and inappropriate (Respondent's Appeal Pet. at 9-10).

A sanction by an administrative agency must be warranted in law and justified in fact.¹⁰ The Secretary of Agriculture has authority to revoke the PACA license of any commission merchant, dealer, or broker whenever the Secretary of Agriculture determines that the commission merchant, dealer, or broker has violated section 2 of the PACA (7 U.S.C. § 499b) and the violation is flagrant or repeated. As discussed in this

¹⁰*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983) (per curiam); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. ___, slip op. at 26 (June 29, 2005); *In re La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 186 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 291, 297 (1999); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1571 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

Decision and Order, *supra*, Respondent's violations of section 2(4) of the PACA are flagrant, willful, and repeated. Therefore, the ALJ's revocation of Respondent's PACA license is warranted in law.

Moreover, I agree with the ALJ's finding that Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are egregious and revocation of Respondent's PACA license is justified in fact. A payment to a United States Department of Agriculture inspector negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture inspector. Commission merchants, dealers, and brokers have a duty to refrain from paying United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture inspectors. A PACA licensee's payment to a United States Department of Agriculture inspector, whether it is to obtain an accurate United States Department of Agriculture inspection certificate or an inaccurate United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. Here the administrative officials recommend the revocation of Respondent's PACA license, and I find no basis to depart from their recommendation.

The ALJ's Publication of the Facts and Circumstances of Respondent's Violations

The ALJ revoked Respondent's PACA license and ordered the publication of the facts and circumstances of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 22-23). The Secretary of Agriculture may revoke a commission merchant's, dealer's, or broker's PACA license for flagrant or repeated violations of section 2 of the PACA (7 U.S.C. § 499b) and may also order the

publication of the facts and circumstances of the violations.¹¹ Publication of the facts and circumstances of Respondent's violations has the same effect on Respondent and persons responsibly connected with Respondent as revocation of Respondent's PACA license;¹² therefore, I find no reason to order the publication of the facts and circumstances of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in addition to revoking Respondent's PACA license.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent M. Trombetta & Sons, Inc.'s PACA license is revoked. The revocation of Respondent M. Trombetta & Sons, Inc.'s PACA license shall become effective 60 days after service of this Order on Respondent M. Trombetta & Sons, Inc.

¹¹See 7 U.S.C. § 499h(a).

¹²*In re JSG Trading Corp.* (Ruling as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion to Stay; and (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 424-27 (2002).

RIGHT TO JUDICIAL REVIEW

Respondent M. Trombetta & Sons, Inc., has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Respondent M. Trombetta & Sons, Inc., must seek judicial review within 60 days after entry of this Order.¹³ The date of entry of this Order is September 27, 2005.

Done at Washington, DC

September 27, 2005

William G. Jenson
Judicial Officer

¹³See 28 U.S.C. § 2344.