UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMA Docket No. M-08-0071
	)	
Hein Hettinga and Ellen Hettinga,	)	
d/b/a Sarah Farms,	)	
	)	
Petitioners	)	**Decision and Order**

PROCEDURAL HISTORY

On March 7, 2008, Hein Hettinga and Ellen Hettinga, d/b/a Sarah Farms [hereinafter the Hettingas], instituted this administrative proceeding by filing a Petition[1] pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. The Hettingas seek a determination that the Market Administrator misinterpreted and misapplied the federal order regulating the handling of "Milk in the Arizona-Las Vegas Marketing Area" (7 C.F.R. pt. 1131 (Apr. 1, 2006)) [hereinafter the Arizona-Las Vegas Milk Marketing Order] by imposing minimum price

[1]The Hettingas entitle their Petition "Petition for Declaratory Relief and for Restitution of April 2006 Assessment" [hereinafter Petition].

regulations upon the Hettingas for the month of April 2006; a determination that the imposition of the minimum price regulations on the Hettingas was not in accordance with the Arizona-Las Vegas Milk Marketing Order; a refund of the $324,211.60 assessment which the Hettingas paid under protest; interest, attorney fees, and costs; and all other relief to which the Hettingas might be entitled.

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], responded to the Petition by filing "Answer of Respondent" on April 7, 2008. On May 6, 2008, United Dairymen of Arizona, Shamrock Foods, Shamrock Farms, Parker Farms, and the Dairy Institute of California [hereinafter the Intervenors] filed a motion for leave to intervene in the proceeding pursuant to 7 C.F.R. § 900.57. On August 27, 2008, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] granted the motion to intervene.

On September 10, 2008, the ALJ conducted a hearing in Washington, DC. Alfred W. Ricciardi, of Aiken, Schenk, Hawkins & Ricciardi, P.C., Phoenix, Arizona, represented the Hettingas. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Two witnesses testified at the hearing: James R. Daugherty, the market administrator for the federal order regulating the handling of "Milk in the Pacific Northwest Marketing Area" (7 C.F.R. pt. 1124) and the federal order regulating the handling of "Milk in the Arizona

Marketing Area" (7 C.F.R. pt. 1131),[2] and William Alan Wise, the assistant market administrator for the federal order regulating the handling of "Milk in the Pacific Northwest Marketing Area" (7 C.F.R. pt. 1124) and the federal order regulating the handling of "Milk in the Arizona Marketing Area" (7 C.F.R. pt. 1131).[3] Ten exhibits were introduced and received into evidence. The Hettingas, the Administrator, and the Intervenors each filed a post-hearing brief. Following the filing of the post-hearing briefs, the Hettingas sought leave to file a reply brief to address issues raised in the Intervenors' post-hearing brief. The ALJ granted the Hettingas' motion, and on November 13, 2008, the Hettingas filed Petitioners' Reply Brief.

On November 17, 2008, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ concluded that the market administrator's imposition of minimum price regulations upon the Hettingas for the month of April 2006 was in accordance with law, denied the relief sought by the Hettingas, and dismissed the Hettingas' March 7, 2008, Petition with prejudice (Initial Decision at 7-8). On December 12, 2008, the Hettingas appealed to, and requested oral argument before, the

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[2]The Administrator removed Clark County, Nevada, from the Arizona-Las Vegas milk marketing area (71 Fed. Reg. 25,495, 25,502 (May 1, 2006)). Subsequently, the Administrator published a final rule changing the name of the federal milk marketing order from "Milk in the Arizona-Las Vegas Marketing Area" to "Milk in the Arizona Marketing Area" and changing the name of the milk marketing area from the "Arizona-Las Vegas marketing area" to the "Arizona marketing area" (71 Fed. Reg. 28,248, 28,249 (May 16, 2006)).

[3]See note 2.

Judicial Officer. On December 30, 2008, the Intervenors filed a response in opposition to the Hettingas' appeal petition, and on January 5, 2009, the Administrator filed a response in opposition to the Hettingas' appeal petition.

On January 9, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision denying the relief sought by the Hettingas and dismissing the Hettingas' March 7, 2008, Petition with prejudice.

DECISION

Background

The Hettingas, since 1994, have owned and operated Sarah Farms, a large dairy business in Arizona. Sarah Farms is an integrated producer and handler that produces milk on farms owned by the Hettingas and processes that raw milk into bottled milk for sale directly to consumers, milk dealers, and retailers. The Hettingas own and control all aspects of milk production and milk processing of their Sarah Farms operation, processing and selling in excess of 3,000,000 pounds of their farm-produced milk monthly in what formerly was the Arizona-Las Vegas milk marketing area (now known as the Arizona milk marketing area).

On February 24, 2006, the Administrator issued a final rule, which became effective April 1, 2006, that subjected producer-handlers operating in the Arizona-Las Vegas and Pacific Northwest milk marketing areas to the pricing and pooling provisions

of their respective marketing orders if that person had in-area route distributions of class I milk in excess of 3,000,000 pounds per month (71 Fed. Reg. 9430 (Feb. 24, 2006)). As a producer-handler of milk since 1994 and continuing until April 1, 2006, the Hettingas had been exempt from the minimum pricing and pooling provisions of federal milk marketing orders adopted by the Secretary of Agriculture under the AMAA. Acting under the newly adopted final rule, the market administrator assessed a pool payment of $324,211.60 on the Hettingas for milk processed in April 2006, based upon the Hettingas in-area route distributions of class I milk in excess of 3,000,000 pounds.

On April 11, 2006, Congress enacted the Milk Regulatory Equity Act of 2005 [hereinafter the MREA] which amended and supplemented the AMAA. The MREA statutorily affirmed the Secretary of Agriculture's determination to place volume limits on the applicability of the producer-handler exemption. On May 1, 2006, the Administrator issued a final rule amending the 10 federal milk marketing orders to implement the MREA.[4]

In asserting that the market administrator wrongfully assessed a pool payment of $324,211.60 against them for the month of April 2006, the Hettingas argue that May 2006 was the first month in which an assessment could properly be made and the assessment for April 2006 was not in accordance with law as their status as a producer-handler was

[4]71 Fed. Reg. 25,495 (May 1, 2006).

not formally cancelled. The Hettingas cite as support for their argument 7 C.F.R. § 1131.10(c) which provides:

> **§ 1131.10 Producer-handler.**
>
> . . . .
>
> (c) *Cancellation*. The designation as a producer-handler shall be canceled upon determination by the market administrator that any of the requirements of paragraphs (a)(1) through (5) of this section are not continuing to be met, or under any of the conditions described in paragraphs (c)(1), (2) or (3) of this section. Cancellation of a producer handler's status pursuant to this paragraph shall be effective on the first day of the month following the month in which the requirements were not met or the conditions for cancellation occurred.

Further, the Hettingas argue, as they continuously held the status of a producer-handler for 12 years, notice of loss of that status was required, and the market administrator failed to provide that notice.

While it is clear that the Hettingas had indeed qualified as a producer-handler prior to April 1, 2006, the definition of "producer-handler" was changed by the final rule which became effective on April 1, 2006 (71 Fed. Reg. 9430 (Feb. 24, 2006)). Included in the changes in the new definition is a requirement that, in order to become a producer-handler, a two-step process is required: (a) the operator has to apply to be a producer-handler, and (b) the market administrator has to designate a qualified dairy operation as a producer-handler.[5] The cancellation provision relied upon by the Hettingas

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[5]Prior to the April 1, 2006, changes to the Arizona-Las Vegas Milk Marketing Order, a producer-handler self-determined the scope of his or her operation and the market administrator audited the information to verify its accuracy (Tr. 23-24). The

(continued...)

was another change that also became effective on April 1, 2006. The Administrator argues that, as the cancellation provision did not exist prior to April 1, 2006, the now-existent cancellation provision logically applies only to producer-handlers that have been designated as such by the market administrator after April 1, 2006. Moreover, as there is no evidence that the Hettingas ever applied for the producer-handler designation[6] (even if they had been otherwise eligible, which they were not, as their class I route distribution exceeded the 3,000,000 pound threshold), *a priori*, the Hettingas could not have been a producer-handler within the post-April 1, 2006, definition.

Although the parties differ as to whether the amendments to the Arizona-Las Vegas Milk Marketing Order merely amend the old order, or create a new order, determination of that question is unnecessary, as the inescapable effect of the amendments in this case, regardless of which terminology is used, changed the definition of "producer-handler" in such a way as to make the Hettingas no longer eligible for the regulatory exemption afforded producer-handlers. Similarly, the Hettingas' argument regarding the imprecision in the use of terminology by the market administrator and his staff in describing the "designation" or "status" of a producer-handler fails to provide any

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[5](...continued)
pre-April 1, 2006, definition of the term "producer-handler" did not have any provision for designation of producer-handlers by the market administrator and contained no provision for the cancellation of the producer-handler designation by the market administrator (Tr. 64). *See* 7 C.F.R. § 1131.10 (2006); 64 Fed. Reg. 48,010 (Sept. 1, 1999).

[6]Tr. 71-72.

support for the Hettingas' position as, in absence of a published definition of the terms, recourse falls upon the regulatory language contained in the Arizona-Las Vegas Milk Marketing Order. Last, the boot strap argument that a producer-handler who not only exceeds the volume threshold of 3,000,000 pounds of route distribution, but also has never applied to be designated as, or been designated as, a producer-handler after April 1, 2006, somehow still requires cancellation under the new cancellation provision effective April 1, 2006, is without merit.

Findings of Fact

1. The Hettingas, since 1994, have owned and operated Sarah Farms, a large dairy business in Arizona.

2. Sarah Farms is an integrated producer and handler that produces milk on farms owned by the Hettingas and processes that raw milk into bottled milk for sale directly to consumers, milk dealers, and retailers.

3. The Hettingas own and control all aspects of milk production and milk processing of their Sarah Farms operation, processing and selling in excess of 3,000,000 pounds of their farm-produced milk monthly in what formerly was the Arizona-Las Vegas milk marketing area (now known as the Arizona milk marketing area).

4. On February 24, 2006, the Administrator issued a final rule, which became effective April 1, 2006, that subjected producer-handlers operating in the Arizona-Las

Vegas and Pacific Northwest milk marketing areas to the pricing and pooling provisions of their respective milk marketing orders if they had in-area route distributions of class I milk in excess of 3,000,000 pounds per month (71 Fed. Reg. 9430 (Feb. 24, 2006)).

5. From 1994 and continuing until April 1, 2006, the Hettingas, as a producer-handler of milk, had been exempt from the minimum pricing and pooling provisions of federal milk marketing orders adopted by the Secretary of Agriculture under the AMAA.

6. Following adoption of the final rule, the market administrator assessed a pool payment of $324,211.60 on the Hettingas for milk processed in April 2006.

7. The Hettingas paid the pool assessment of $324,211.60 under protest.

8. On April 11, 2006, Congress enacted the MREA which amended and supplemented the AMAA. The MREA statutorily affirmed the Secretary of Agriculture's determination to place volume limits on the applicability of the producer-handler exemption. On May 1, 2006, the Administrator issued a final rule amending the 10 federal milk marketing orders to implement the MREA.[7]

9. Commencing April 1, 2006, the Hettingas ceased to be eligible for the producer-handler exemption under the Arizona-Las Vegas Milk Marketing Order because the Hettingas' in-area route distributions of class I milk exceeded 3,000,000 pounds per

[7]See note 4.

month, because the Hettingas failed to apply for a producer-handler designation, and because the market administrator did not designate the Hettingas as a producer-handler.

Conclusions of Law

1. The Secretary has jurisdiction over this action.

2. The market administrator's assessment of $324,211.60 against the Hettingas for the month of April 2006 was appropriate and in accordance with law based upon the April 1, 2006, revisions to the Arizona-Las Vegas Milk Marketing Order (71 Fed. Reg. 9430 (Feb. 24, 2006)).

3. Effective April 1, 2006, the definition of "producer-handler" was changed by final rule. Included in the changes to the new definition was a requirement that in order to become a producer-handler a two-step process is required: (a) the operator has to apply to be a producer-handler, and (b) the market administrator has to designate a qualified dairy operation as a producer-handler. (71 Fed. Reg. 9430 (Feb. 24, 2006).)

4. Cancellation of the designation as a producer-handler was not required for an entity which had not applied for designation as, and had not been designated as, a producer-handler after April 1, 2006.

5. The Hettingas' in-area route distributions of class I milk exceeded 3,000,000 pounds in April 2006 and precluded them from being eligible for designation as a producer-handler even had they applied.

The Hettingas' Request for Oral Argument

The Hettingas' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[8] is refused because the parties have thoroughly briefed the issues and the issues are not complex. Thus, oral argument would serve no useful purpose.

The Hettingas' Appeal Petition

The Hettingas raise four issues in their "Appeal to the Judicial Officer and Request for Oral Argument" [hereinafter Appeal Petition]. First, the Hettingas contend "the ALJ erred in concluding that the Market Administrator was not required to cancel the status of the Hettingas as a producer-handler in accordance with the provisions of 7 C.F.R. § 1131.10(c)." (Appeal Pet. at 1.)

The Administrator amended the definition of the term "producer-handler" in the Arizona-Las Vegas Milk Marketing Order effective April 1, 2006, to include provisions for the market administrator's designation of persons as producer-handlers and cancellation of the producer-handler designation. The market administrator never designated the Hettingas as a producer-handler under the April 1, 2006, definition of "producer-handler." The Arizona-Las Vegas Milk Marketing Order provides that the designation of producer-handler shall be cancelled by the market administrator under certain circumstances (7 C.F.R. § 1131.10(c) (2007)). Logically, the market administrator

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[8] 7 C.F.R. § 900.65(b)(1).

cannot cancel a designation that does not exist. Therefore, as the Hettingas were never designated as a producer-handler under the April 1, 2006, definition of "producer-handler," the ALJ correctly concluded that the market administrator could not cancel the producer-handler designation of the Hettingas.

Second, the Hettingas contend the ALJ's failure to decided whether the February 24, 2006, final rule (71 Fed. Reg. 9430 (Feb. 24, 2006)) amended the Arizona-Las Vegas Milk Marketing Order or created a new Arizona-Las Vegas Milk Marketing Order, is error. The Hettingas take the position that the Arizona-Las Vegas Milk Marketing Order was merely amended; hence, the Hettingas continued as a producer-handler until the market administrator cancelled their producer-handler status in accordance with 7 C.F.R. § 1131.10(c). (Appeal Pet. at 2.)

The ALJ found unnecessary the resolution of the issue of the whether the April 1, 2006, final rule amended the Arizona-Las Vegas Milk Marketing Order or created a new Arizona-Las Vegas Milk Marketing Order, as follows:

> Although the parties differ as to whether the amendments to a milk marketing order merely amend the old order, or create a new order, as amended, determination of that question is unnecessary, as the inescapable effect of the amendments in this case, regardless of which terminology is used, changed the definition of producer-handler in such a way as to make the [Hettingas] no longer eligible for the regulatory exemption afforded producer-handlers.

Initial Decision at 5. I agree with the ALJ. The characterization of the final rule (71 Fed. Reg. 9430 (Feb. 24, 2006)) does not affect the disposition of the instant proceeding.

Whether the final rule is characterized as amendment to the Arizona-Las Vegas Milk Marketing Order or a new Arizona-Las Vegas Milk Marketing Order, the effect is the same: namely, prior to the effective date of the final rule, the Hettingas were a producer-handler under the Arizona-Las Vegas Milk Marketing Order; on and after the effective date of the final rule, the Hettingas, as a matter of law, were not a producer-handler. As the Hettingas had never been designated by the market administrator as a producer-handler, the market administrator had no designation to cancel.

Third, the Hettingas contend the ALJ erroneously "downplayed" the imprecision of the market administrator, his staff, and other United States Department of Agriculture employees in using the terms "status" and "designation" to simultaneously define a producer-handler (Appeal Pet. at 2).

The ALJ referenced the United States Department of Agriculture employees' interchangeable use of the terms "status" and "designation," as follows:

> Similarly, imprecation concerning imprecision in the use of terminology by the Market Administrator and his staff in describing the "designation" or "status" of a producer-handler fails to provide any support for the [Hettingas'] position as in absence of a published definition of the terms, recourse falls upon the language of the regulatory language contained in the milk marketing order.

Initial Decision at 5. The purported imprecision of United States Department of Agriculture employees when using the terms "designation" and "status" is not relevant to the disposition of the instant proceeding. The final rule, which amended the definition of

the term "producer-handler," requires that, in order for a person to be a "producer-handler," the market administrator must designate that person as a producer-handler after determining that all of the requirements of 7 C.F.R. § 1131.10 have been met. The Hettingas were never designated by the market administrator as a producer-handler. The purported imprecise language used by United States Department of Agriculture employees does not change the fact that, as a matter of law, on and after April 1, 2006, the Hettingas were not a producer-handler under the Arizona-Las Vegas Milk Marketing Order.

Fourth, the Hettingas contend the ALJ's conclusion that an application for designation of as a producer-handler is required under the Arizona-Las Vegas Milk Marketing Order, is error (Appeal Pet. at 2).

The Arizona-Las Vegas Milk Marketing Order does not explicitly refer to an "application" for designation as a producer-handler. However, producer-handler status is an exception to the general regulatory scheme of the AMAA and must be established by the person seeking the exception.[9] The Arizona-Las Vegas Milk Marketing Order places

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[9] *In re Stew Leonard's*, 59 Agric. Dec. 53, 71 (2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002); *In re Kreider Dairy Farms, Inc.,* 54 Agric. Dec. 805, 826-27 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *order denying late appeal on remand*, 57 Agric. Dec. 397 (1998), *aff'd*, 190 F.3d 113 (3d Cir. 1999); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 67 (1995); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re John Bertovich*, 36 Agric. Dec. 133, 138 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 983 (1974); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 405 (1974); *In re Andrew W. Leonberg*, 32 Agric. Dec.

(continued...)

the burden of establishing and maintaining producer-handler status on the handler. I find that, although 7 C.F.R. § 1131.10 does not explicitly use the word "application," the process by which a person must obtain producer-handler designation under 7 C.F.R. § 1131.10 constitutes an application to the market administrator for such designation.

For the forgoing reasons, the following Order is issued.

ORDER

1. The relief sought by the Hettingas is denied.

2. The Hettingas' March 7, 2008, Petition is dismissed with prejudice.

This Order is effective upon service on the Hettingas.

RIGHT TO JUDICIAL REVIEW

The Hettingas have the right to obtain review of the Order in this Decision and Order in any district court of the United States in which the Hettingas have their principal place of business. The Hettingas must file a bill in equity for the purpose of review of the Order in this Decision and Order within 20 days from the date of entry of the Order in this Decision and Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of

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[9](...continued)
763, 800 (1973), *appeal dismissed*, No. 73-535 (W.D. Pa. Oct. 3, 1973); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 605-06 (1972), *aff'd, United States v. Fitzgerald*, C 227-66 and C 137-72 (D. Utah 1973), *printed in* 32 Agric. Dec. 1100 (1973).

Agriculture.[10] The date of entry of the Order in this Decision and Order is January 15, 2009.

Done at Washington, DC

January 15, 2009

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William G. Jenson
Judicial Officer

[10] 7 U.S.C. § 608c(15)(B).