

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL H. REVELL,)
)
 Petitioner,)
)
 vs.) Case No. 07-4904
)
 WILSON AND SON SALES, INC., and)
 THE OHIO CASUALTY INSURANCE)
 COMPANY, AS SURETY,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

The final hearing in this case was held by video-teleconference on January 21, 2008, at video sites in Tampa and Tallahassee, Florida, before Administrative Law Judge Bram D.E. Canter of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Michael H. Revell, pro se
Post Office Box 812
Zolfo Springs, Florida 33890

For Respondent Wilson & Sons, Inc.:

Johnnie B. Byrd, Esquire
Byrd & Stitzel, P.A.
206 North Collins Street
Plant City, Florida 33563

For Respondent Ohio Casualty Insurance Company:

No appearance

STATEMENT OF THE ISSUES

The issue to be determined in this proceeding is whether Respondents Wilson and Son Sales, Inc. (Wilson), and Ohio Casualty Insurance Company, as surety, are indebted to Petitioner for certain Florida-grown agricultural products.

PRELIMINARY STATEMENT

On or about August 30, 2007, Petitioner filed a claim with the Department of Agriculture and Consumer Services (Department) alleging that Wilson was indebted to Petitioner for squash that Petitioner produced and delivered to Wilson to sell for Petitioner on commission as a broker in agricultural products. Ohio Casualty Insurance Company was identified in the complaint as the surety for Wilson.

The Department subsequently asked Petitioner to amend its claim to include the mailing address of the surety, and notified Petitioner that he could also include palettizing charges in his amended complaint. Petitioner filed an amended claim on or about September 21, 2007, claiming Wilson was indebted to Petitioner for \$27,250.63.

The Department notified Wilson and its surety of the filing of Petitioner's amended claim and of their opportunity to file a written answer to the claim and to request a hearing on the matter. Wilson answered the amended complaint, denying Petitioner's allegations, and requested an administrative

hearing. The Department then referred the matter to the Division of Administrative Hearings to conduct the requested hearing.

For the videoconference final hearing, the Administrative Law Judge was at the Tallahassee site and all other participants were at the Tampa site. Petitioner testified on his own behalf. Petitioner's Exhibits 1 through 11 and 14 through 16 were admitted into evidence. Wilson presented the testimony of Robert Wilson, Kenny Moore, and Jeff Jensen. Respondent's Exhibits 1 through 6 were admitted into evidence. Official recognition was given to certain regulations promulgated by the United States Department of Agriculture under the Perishable Agricultural Commodities Act, as well as an excerpt from a court case interpreting the Act.

A court reporter recorded the final hearing, but a transcript was not ordered. Petitioner and Wilson filed post-hearing submittals which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Petitioner is a producer of several vegetable crops in Hardee County.

2. Wilson is a dealer in agricultural products. More specifically, Wilson operates an agricultural broker business in Plant City.

3. Wilson's surety is Ohio Casualty Insurance Company.

4. Although Wilson has written contracts with some producers, Wilson does not have written contracts with all producers. In the absence of a contract, the terms of Wilson's broker services are almost always the same; that is, Wilson gets a commission of 10 percent on the sale of the produce and \$.35 per box for palletizing and pre-cooling the produce, in return for which Wilson makes a reasonable and good faith effort to sell Petitioner's produce for the best price.

5. Petitioner contacted Wilson in January 2007, about bringing flat beans to Wilson to sell. Wilson expressed interest and informed Petitioner about Wilson's standard terms as described above. These terms were agreeable to Petitioner and he brought the beans to Wilson later that month. Although Petitioner and Wilson had no written contract, the parties' mutual understanding of the terms of their agreement created an enforceable oral contract.

6. Wilson sold Petitioner's beans and no dispute arose from this first transaction. The parties' subsequent transactions for other produce were undertaken pursuant to the same oral contract terms.

7. Because Wilson works on a commission basis, it is generally in Wilson's self-interest to sell growers' produce for the best price.

8. Petitioner contacted Robert Wilson, Wilson's owner, by telephone in February 2007, and informed Wilson of his plans to grow wax beans and "hard squash." It was not stated in the record whether all three varieties of hard squash later grown by Petitioner, butternut squash, acorn squash, and spaghetti squash, were discussed by Petitioner and Robert Wilson during their February 2007 telephone conversation. A major dispute in the case was whether the parties' February discussion about hard squash created some obligation on the part of Wilson beyond the oral contract terms described above. Petitioner claims that Wilson encouraged him to plant the squash and that Petitioner would not have planted the squash otherwise.

9. Petitioner never made clear, however, what additional obligation was created by Robert Wilson's encouragement beyond the obligation to accept delivery of and make good faith efforts to sell Petitioner's squash at the best price. Petitioner did not use the word "guarantee," but his claim seems to be that Wilson became obligated to guarantee that the squash would be sold for a price close to the price published in the Columbia (South Carolina) Market Report, a periodic publication of produce prices.

10. Such an obligation on the part of a broker is contrary to the general practice in the trade. Petitioner's evidence was insufficient to prove more than that Robert Wilson thought he could sell Petitioner's squash and had a genuine interest in acting as broker for Petitioner's squash. The evidence was insufficient to prove the existence of a contractual guarantee that Wilson would obtain a certain price for Petitioner's hard squash or do more than was promised with regard to the beans that Wilson had sold for Petitioner; that is, to try to sell the produce for the best price.

11. When Petitioner's wax beans were picked in late April, he brought them to Wilson to sell. No dispute arose regarding the sale of the wax beans.

12. Petitioner brought squash to Wilson in five deliveries between May 12 and May 29, 2007. Petitioner said that on one of these deliveries, he had to leave the boxed squash in the parking lot of Wilson's facility because there was so much cantaloupe that had been delivered ahead of him. Petitioner says he was told by a Wilson employee that the squash would not be put in the cooler. Petitioner thinks Wilson was more interested in moving the cantaloupe than the hard squash. Petitioner thinks his squash was not put in the cooler or was put in too late. Wilson denies that Petitioner's squash was not put into the cooler or was put in late.

13. Robert Wilson claims that he made many calls in an effort to sell Petitioner's squash, but he could not find interested buyers for all of the squash because (1) the demand for hard squash dried up, (2) some of Petitioner's squash was of low quality, and (3) the squash began to spoil. Petitioner denied these allegations.

14. Petitioner received invoices and other paperwork from Wilson showing that Wilson sold Petitioner's first delivery of 490 boxes of acorn squash for \$10.18 per box. It sold Petitioner's second delivery of 519 boxes of acorn squash for \$2.08 per box. For Petitioner's third delivery of 110 boxes of acorn squash and 240 boxes of spaghetti squash, Wilson "dumped" the acorn squash by giving it away for free to the Society of St. Andrews food bank, and sold the spaghetti squash for \$5.15 per box. Wilson sold petitioner's fourth delivery of 279 boxes of butternut squash for \$.55 per box.¹

15. Competent substantial evidence in the record established that it is a regular occurrence for agricultural products awaiting sale to decay and become unsellable, and for the broker to dump the products in a landfill or give the products to a charitable organization and then provide the grower a receipt for tax deduction purposes.

16. It was undisputed that Wilson did not notify Petitioner before disposing of his squash. Petitioner claims he

should have been notified by Wilson if the squash was beginning to spoil. However, Petitioner did not prove that prior notification was a term of their oral contract.

17. Petitioner claims further that the federal Perishable Agricultural Commodities Act required Wilson to notify Petitioner before dumping the squash and to have the squash inspected to determine whether, in fact, it was spoiled. As discussed in the Conclusions of Law below, this federal law is not applicable.

18. Competent substantial evidence in the record established that the market for agricultural products fluctuates and, at times, can fluctuate rapidly.

19. For hard squash, which is normally prepared in an oven, the market demand can drop dramatically due to the onset of warm weather simply because people tend not to cook hard squash dishes in warm weather. Petitioner's squash was being marketed in May, which means the beginning of warm weather for most areas of the United States. This fact supports Wilson's claim that the demand for hard squash had been good, but fell rapidly just at the time Wilson was trying to sell Petitioner's squash.

20. The problem with the claims made by Petitioner in this case is simply one of insufficient proof. It is not enough for Petitioner to offer theories about what he thinks happened or to

raise questions which are not fully answered. Petitioner had no proof that his squash was not put in Wilson's cooler, that his squash did not begin to decay, that the demand for hard squash did not fall rapidly, that Wilson did not make reasonable efforts to sell the squash, that Wilson had willing buyers for Petitioner's squash at a better price, or that Wilson sold squash from other growers at a better price.

21. Petitioner's evidence for his claims consisted primarily of market price reports that he contends show the approximate price Wilson should have gotten for the hard squash. Market price reports have some relevance to the issues in this case, but competent evidence was presented that the prices quoted in the publications are not always reliable to indicate the price a grower can expect to get on any given day, because there are factors that cause the published market price to be an inflated price (and applicable to the highest grade of produce) and because the market price can change rapidly with a change in demand for the product. The oral contract between Petitioner and Wilson required Wilson to try to get the best price for Petitioner's squash, not some particular price appearing in a particular market price report.

22. Petitioner did not show that Wilson got a better price for hard squash of equal quality, or that other brokers in the

area got a better price for hard squash of equal quality at the times relevant to this case.

23. Petitioner's evidence was insufficient to prove that Wilson did not make a reasonable and good faith effort to sell Petitioner's squash at the best price.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction of the subject matter pursuant to Sections 120.569, 120.57, and 604.21(6), Florida Statutes (2007).²

25. Under Florida law, a dealer in agricultural products must be licensed by the Department to transact business in the State of Florida. The licensee must make and deliver to the Department a surety bond or certificate of deposit.
§ 604.20(1), Fla. Stat.

26. Wilson is a "dealer in agricultural products," as defined in Section 604.15(2), Florida Statutes.

27. Squash is an "agricultural product" as defined in Section 604.15(1), Florida Statutes.

28. Section 604.21(1)(a), Florida Statutes, provides:

Any person, partnership, corporation, or other business entity claiming to be damaged by any breach of the conditions of a bond or certificate of deposit assignment or agreement given by a dealer in agricultural products as hereinbefore provided may enter complaint thereof against the dealer and against the surety company, if any, to the department, which complaint shall be a

written statement of the facts constituting the complaint. Such complaint shall include all agricultural products defined in s. 604.15(1), as well as any additional charges necessary to effectuate the sale unless these additional charges are already included in the total delivered price. Such complaint shall be filed within 6 months from the date of sale in instances involving direct sales or from the date on which the agricultural product was received by the dealer in agricultural products, as agent, to be sold for the producer. No complaint shall be filed pursuant to this section unless the transactions involved total at least \$500 and occurred in a single license year. Before a complaint can be processed, the complainant must provide the department with a \$50 filing fee. In the event the complainant is successful in proving the claim, the dealer in agricultural products shall reimburse the complainant for the \$50 filing fee as part of the settlement of the claim.

29. Petitioner's claim was timely, involved transactions greater than \$500, and the filing fee was paid by Petitioner.

30. Petitioner has the burden of proving the allegations of his amended claim by a preponderance of the evidence.

Florida Department of Transportation v. J.W.C. Company, Inc.,
396 So. 2d 778, 788 (Fla. 1st DCA 1981).

31. There is no provision in Chapter 604, Florida Statutes, or in the rules of the Department that governs the conduct of a dealer in agricultural products with regard to the dumping of agricultural products consigned to the dealer.

32. Petitioner cited several rules promulgated by the United States Department of Agriculture pursuant to the Perishable Agricultural Commodities Act, Title 7 United States Code, Section 499a et seq., that he believes Wilson violated. The federal act contains its own procedures for seeking redress of violations through the U.S. Department of Agriculture. No Florida statute or rule was cited by Petitioner which adopts these federal dumping regulations by reference or otherwise makes them enforceable in a state administrative hearing initiated pursuant to Section 604.21(6), Florida Statutes.

33. Furthermore, the federal regulations requiring prior notice and inspection for dumping agricultural products apply to "commission merchants." 7 U.S.C. § 499b(3). Wilson is not a commission merchant.

34. The preponderance of the evidence adduced at the final hearing was insufficient to demonstrate that Wilson is indebted to Petitioner the transactions in dispute.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Department enter a final order dismissing Petitioner's amended claim.

DONE AND ENTERED this 7th day of March, 2008, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of March, 2008.

ENDNOTES

^{1/} Petitioner introduced Exhibits 6 and 7 which he claims show that 415 "packages" of his acorn and butternut squash were given by Wilson to the food bank, but he did not explain how the 415 figure matches up with any of the invoices from Wilson that account for its sales of Petitioner's squash.

^{2/} All references to the Florida Statutes are to the 2007 codification.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.