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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 11-0333
AMS-DA-11-0067; DA-11-04In re:
Milk in the Mideast Marketing AreaORDER DENYING MOTION BY SUPERIOR DAIRY, INC. TO
DISQUALIFY USDA DAIRY PROGRAM PERSONNEL FROM
PARTICIPATING IN DECISION MAKING PROCESSIntroduction

On October 4, 2011 and October 5, 2011, a hearing was held in Cincinnati, Ohio, regarding proposed amendments to a tentative marketing agreement and Order (“proposed amendments”), pursuant to notice issued September 8, 2011. On September 30, 2011, Superior Dairy, Inc. (“Superior”) filed a motion for an Order disqualifying personnel of the United States Department of Agriculture’s (“USDA”) Agricultural Marketing Services (“AMS”) Dairy Programs from participating in any decision-making process arising from the proposed amendments. On September 30, 2011, AMS, through its attorney, filed an opposition to the motion. On October 3, 2011, counsel for nine dairy farmer cooperatives¹ (“the Cooperatives”) filed an opposition to the motion. Due to the length of the motion² and the temporal proximity of its filing to the hearing, I deferred ruling until after the hearing. I concluded that no prejudice attached to deferring ruling on the motion, as the record remained open pending submission of proposed corrections to the transcript and briefs by interested parties.

¹ Continental Dairy Products, Inc., Dairy Lea Cooperative Inc., Dairy Farmers of America, Inc., Erie Cooperative Association, Foremost Farms USA Cooperative, Inc., Michigan Milk Producers Association, Inc., NFO Inc., Prairie Farms Dairy, Inc., and White Eagle Cooperative Association.

² Superior’s motion, brief and accompanying documentation comprised 129 pages.

Contentions of Superior

Staff and employees of the AMS Dairy Programs should be disqualified from participating in the decision making process regarding the proposed amendments because they are inherently biased by their interest in retaining their employment. Superior argues that the continued employment of such employees depends on the continuation of marketing orders. In addition, Superior contends that the method by which such employees are paid creates an inherent structural bias that foments improper pecuniary interest, which should disqualify employees from participating in decision making. Furthermore, Superior asserts that because the decision making involved in the instant proceeding is adjudicative in nature, ethical policy demands the exclusion of any employee of the United States from participating in decisions if there exists the potential of a compromise of employee integrity due to personal financial interest.

Superior suggests that the inherent defects of the decision making process in the instant proceeding may be cured only by the appointment of a neutral hearing officer with limited input from AMS Dairy Programs staff.

Contentions of the Opposition

AMS rejects Superior's arguments regarding the alleged pecuniary interest of AMS Dairy Programs employees in the decision making process, and observes that Superior objects to a process that is systemic, rather than identifying a particular employee's bias. AMS concedes that Market Administrator employees' salaries are paid from funds supported by handler's payments to producers; however, other Dairy Program employees at USDA headquarters are paid through federally appropriated funds. AMS denies that employees are inherently biased to please dairy producers in order to assure employment security, and notes an instance when a milk marketing Order was terminated following producers' failure to approve a proposed amendment during a

formal rulemaking proceeding. USDA argues that any pecuniary interest that may be inferred from an employees' interest in job security is not significant and is too remote to constitute a denial of due process to the parties involved. AMS also contends that no bias due to employees' interests in their economic well-being can be shown where the employees involved in the process provide guidance to the AMS Administrator and the Secretary but are not the final decision makers.

The Cooperatives contend that this issue was addressed by a decision by the United States District Court for the Northern District of Indiana in *White Eagle Cooperative Assoc. v. Johanns*, 508 F. Supp. 2d 664 (N.D. In. 2007), *aff'd White Eagle Cooperative Assoc. v. Connor*, 553 F. 2d 467 (7th Cir. 2009). The Cooperatives assert that the arguments raised by Superior are identical to those rejected by the district court, and further distinguish the instant matter from the situations underlying other cases cited by Superior in support of their contentions. The Cooperatives identify cases where courts concluded that a pecuniary interest must be direct and significant to constitute a violation of due process.

Statement of the Facts

In support of its motion, Superior submitted the Declaration of John H. Vetne, an attorney whose practice concentrates on representing dairy industry clients and who was a former employee of USDA's Office of General Counsel ("OGC"). ("Declaration"). Mr. Vetne described the regulatory scheme for fixing minimum milk prices or rates that milk handlers are required to pay milk producers, including regulations mandating milk revenue pooling. He also summarized how the price for milk is regulated throughout the country and how milk marketing orders operate. Declaration at ¶¶ 6 through 12. Pursuant to controlling law, any decision of the Secretary of USDA regarding a milk marketing order must be approved by producers. 7 U.S.C. §608c(5)(8)-(9); 7 C.F.R. §§900.14, 900.300-311. Declaration at ¶14. A marketing order shall

not be amended or otherwise put into effect if more than one-third of affected producers disapprove. Id. If a simple majority disapproves of an existing marketing order, it must be terminated by the Secretary. 7 U.S.C. §608c(16)(B). 7 C.F.R. §§900.14, 900.300-311.

Declaration at ¶15.

Whenever one third or more of affected producers make a written request for a hearing in a proposed amendment, the Secretary must hold the hearing if certain criteria are met. §608c(17). 7 C.F.R. §§900.14, 900.300-311. Declaration at ¶16. Such hearings fall within the purview of the Administrative Procedure Act, 5 U.S.C. §§556 and 557 (“APA”), and relevant provisions of the APA are incorporated into USDA’s Rules of Practice. 7 C.F.R. §§900.1900.18; Declaration at ¶¶17 and 18. The Administrator of AMS is designated to issue recommended decisions in milk marketing order rulemaking pursuant to 5 U.S.C. §557(b) and 7 C.F.R. §900.12 and §900.1(e), and the Secretary is designated to review those recommendations and make a final decision. 7 C.F.R. §900.13; Declaration at ¶¶19; 24. However, AMS Dairy Programs employees³ prepare recommended decisions for the Administrator. Declaration at ¶20 ¶ 22. The final decision is made on review of or appeal from the recommendation of agency employees. 5 U.S. C. §557(c); Declaration ¶23; 25; and Exhibit A of Declaration.

Federal milk marketing orders are administered regionally by a Market Administrator whose expenses are paid from fees charged to handlers and producers subject to the marketing order. 7 C.F.R. §§1000.85 and 1000.86; Declaration ¶ 26; Exhibits C & D of Declaration. Market Administrator employees are not entitled to privileges accorded to federal civil servants

³ I decline to give full weight to Mr. Vetne’s contentions regarding which employees of AMS are involved in the decision making process. Although I fully credit the information contained in the attachments, which represent pages from USDA’s website, the information does not specifically identify the duties of the named individuals. Similarly, I fully credit Mr. Vetne’s experience which may have given him familiarity with how AMS Dairy Programs employees are involved with the decision making process. However, the evidence of record does not directly describe those duties..

generally and are paid under a separate salary and wage plan. 5 U.S.C. §5102(c)(14);

Declaration ¶29.

Discussion

I initially find that contrary to the assertions of USDA, AMS Dairy Programs employees are involved in the decision making process in a manner that exceeds mere advice to the ultimate decision maker. Accordingly, I find it appropriate to address the issue of whether the pecuniary interests of AMS Dairy Programs employees are such to require their disqualification from participation in the rulemaking process associated with the instant proposed amendments in order to assure compliance with due process concerns and the APA.

Upon consideration of the evidence and arguments presented by the parties on the issue of whether AMS Dairy Programs employees are inherently biased because of financial self interest, I am persuaded that the holding of the federal district court in the case of *White Eagle Cooperative Association* (“*White Eagle*”), supra., on the question of whether employees in a marketing area should be disqualified from participating in the decision making process because of a pecuniary interest is applicable to the instant circumstances. The court’s review of an allegation that the pecuniary interests of USDA Dairy Program employees violated the Administrative Procedures Act and the Due Process Clause of the Fifth Amendment to the U.S. Constitution was one of four issues⁴ that the court reviewed, and the issue that is central to Superior’s motion. The court relied upon the standard set by the United States Supreme Court for determining whether the pecuniary interest of a decision maker shall constitute a denial of due process. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Supreme Court concluded that the adjudicator must have a “direct, personal, and substantial pecuniary interest in the outcome of a

⁴ Although Superior argued elements of some of the other issues considered in *White Eagle*, those issues are not squarely on point to the issue before me on Superior’s motion.

case” for his involvement to be considered a deprivation of due process. In determining whether the pecuniary interest of USDA employees whose salaries are paid by milk producers and handlers violated due process, the court in *White Eagle* observed that the payments to the USDA employees are from a pool, and not directly from any particular producers. The court observed that

this crucial step ensures that Dairy Program employees do not serve at the pleasure of producers. . . but, instead, Dairy Program employees serve at the pleasure of the market Administrator who is a USDA employee. The fact that Dairy Program employees’ salaries are indirectly paid for by producers does not rise to the level of a “direct substantial pecuniary interest.”

White Eagle, at 673.

The court further found it speculative to conclude that the employees’ actions would be influenced by their interest in protecting their employment by preventing producers from abolishing the entire milk marketing system. *Id.* at 674. The court applied the standard established by the Supreme Court in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 540 (1961, *reh’ring denied*) for considering the ethical impact of an employee’s circumstances, and concluded that the pecuniary interests of the employees of USDA’s Dairy Programs involved in a marketing order determination did not present a strong likelihood that employees would “be subject to the temptations which the statute seeks to avoid”. *U.S. v. Mississippi Valley Generating Co.* at 560. The *White Eagle* court held:

[t]hus, because the alleged pecuniary interest depends on the speculative claim that producers would abolish the milk marketing system and an employment relationship that is indirect at best, any interest Dairy program employees may have is not a direct pecuniary interest. Thus, their participation in the promulgation of the Milk Marketing order does not offend due process of the APA. . .

White Eagle, at 674.

The holding of the First Circuit Court of Appeals in *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission*, 198 F.3d 1 (1st Cir. 1999, cert denied), also supports finding that the pecuniary interests of the AMS Dairy Program employees involved in marketing order decisions are not sufficient to violate due process. In that case, the court determined that members of a commission who were involved in making decisions regarding regional milk pricing and pooling, although themselves a dairy farmer and processors, did not have a sufficient pecuniary interest in the outcome of the pricing determinations to constitute a due process violation. *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission* at 14.

Accordingly, I find that the pay scheme and method used by AMS in making recommended decisions in milk marketing orders is not inherently a violation of due process or the APA. I find that the pecuniary interests of AMS Dairy Program employees are not direct and significant so as to constitute a “prima facie” violation of due process or the APA. I further find no evidence to conclude that any particular employee of AMS had a pecuniary interest that was direct and substantial and likely to affect the course of that employee’s recommendations. Further, I find the suggestion that employees would make decisions in a manner to protect their employment by sustaining the existence of a marketing order too speculative to represent grounds to disqualify the employees. Although I credit the evidence that past abolition of a marketing order resulted in staff reductions, there is no evidence of record beyond the temporal proximity of the two events to conclude that future decision making by employees was influenced by those reductions in staffing.

As I find that AMS Dairy Program employees have no direct and substantial pecuniary interests relative to the instant proceeding, I decline to address whether the proceeding is adjudicative in nature. Parenthetically, the court in *White Eagle* did consider this issue and

nevertheless found that USDA Dairy Program employees did not have a substantial pecuniary interest meriting their exemption from participating in marketing order decision making.

Conclusion

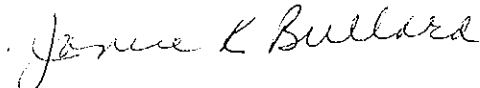
I find insufficient grounds to conclude that AMS Dairy Program employees possess a pecuniary interest so substantial as to require their disqualification from the decision making process related to the instant proposed amendments. Accordingly, I find no grounds to provide the relief requested by Superior.

ORDER

Superior's Motion for an Order Disqualifying AMS Dairy Program personnel from participating in the decision making process related to the instant proposed amendments is DENIED.

Copies of this Order shall be sent to the parties by the Hearing Clerk.

So ORDERED this 28th day of October, 2011 in Washington D.C.



Janice K. Bullard
Administrative Law Judge