

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) OFPA Docket No. 08-0134
)
Promiseland Livestock, LLC, and)
Anthony J. Zeman,)
)
Respondents) **Decision and Order**

PROCEDURAL HISTORY

On June 4, 2008, Lloyd C. Day, Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], initiated this administrative disciplinary proceeding against Promiseland Livestock, LLC, and Anthony J. Zeman¹ by filing a Complaint alleging willful violations of the Organic Foods Production Act of 1990, as amended (7 U.S.C. §§ 6501-6523) [hereinafter the Organic Foods Production Act], and the National Organic Program regulations (7 C.F.R. pt. 205) [hereinafter the Regulations]. On June 30, 2008, William J. Friedman entered an appearance on behalf of Promiseland, and Promiseland filed an answer denying the material allegations of the Complaint.

¹Promiseland Livestock, LLC, and Anthony J. Zeman, collectively, are referred to as “Promiseland” unless clarity demands reference to a specific respondent individually.

On January 26, 2009, the Administrator filed a First Amended Complaint. On February 17, 2009, Promiseland filed a motion to strike the First Amended Complaint, a request for leave to file an answer to the First Amended Complaint under seal, and an answer under seal.

On March 10, 2009, Mr. Friedman withdrew as Promiseland's counsel and requested a stay of pending deadlines in order to provide Promiseland time to obtain replacement counsel. On May 20, 2009, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted a teleconference. Promiseland was unrepresented at that time and Anthony J. Zeman participated individually and on behalf of Promiseland Livestock, LLC. The Chief ALJ denied Promiseland's motion to strike the First Amended Complaint, ordered Promiseland's answer unsealed and served on the Administrator, and set the matter for hearing on June 23, 2009, in Bassett, Nebraska. On June 17, 2009, the Chief ALJ entered an Order cancelling the June 23, 2009, hearing and rescheduling the hearing for July 14, 2009, in Washington, DC.

On the day prior to the scheduled hearing, Promiseland's new counsel filed an Emergency Motion for Continuance. The oral hearing commenced as scheduled on July 14, 2009. Babak Rastgoufard, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Mark Mansour and Patrice M. Hayden, both of Bryan Cave, LLP, Washington, DC, represented

Promiseland.² Following entry of appearances of counsel, the Emergency Motion for Continuance was heard by the Chief ALJ, who denied the motion. However, the Chief ALJ granted leave to delay presentation of Promiseland's case until a later date. On July 14, 2009, the Administrator introduced the testimony of four witnesses and 58 exhibits.³ The following day, July 15, 2009, Anthony J. Zeman testified and the Chief ALJ admitted three of the Administrator's exhibits and one of Promiseland's exhibits. At the conclusion of the hearing on July 15, 2009, the hearing was recessed to be reset on a date to be agreed upon by the parties (Tr. II at 567-68).

The hearing resumed on September 18, 2009. Promiseland recalled Anthony J. Zeman and called two other witnesses. Promiseland introduced two additional exhibits which the Chief ALJ admitted into evidence. The Administrator recalled Dr. Barbara Robinson who had testified previously on July 14, 2009. Both parties presented closing arguments (Tr. III at 64-75).

On November 30, 2009, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order in which he found that Promiseland Livestock, LLC, and

²On October 1, 2010, Patrice M. Hayden withdrew her appearance as co-counsel for Promiseland (Notice of Withdrawal and Notice if [sic] Change of Address for of [sic] Co-counsel for Promiseland Livestock, LLC and Anthony J. Zeman).

³Transcript references are designated as "Tr. I" for the July 14, 2009, segment of the hearing; "Tr. II" for the July 15, 2009, segment of the hearing; and "Tr. III" for the September 18, 2009, segment of the hearing. The Administrator's exhibits are designated as "CX." Promiseland's exhibits are designated as "RX." The Chief ALJ also admitted Joint Exhibit 1, a Stipulation as to Authenticity of Exhibits (Tr. I at 12-13).

Anthony J. Zeman violated the Organic Foods Production Act and the Regulations (7 U.S.C. § 6506(b); 7 C.F.R. §§ 205.103, .400(d)). The Chief ALJ suspended the organic certifications of Promiseland Livestock, LLC, and Anthony J. Zeman for a period of 4 years. In addition, the Chief ALJ disqualified Promiseland Livestock, LLC; Anthony J. Zeman; and any person responsibly connected with Promiseland's certified organic operation from receiving certification under the Organic Foods Production Act for a period of 4 years.

On December 29, 2009, Promiseland appealed the Chief ALJ's Decision and Order. On January 19, 2010, the Administrator filed an opposition to Promiseland's appeal which included the Administrator's cross-appeal. On April 15, 2010, the Hearing Clerk transmitted the record to me for consideration and decision.

I affirm the Chief ALJ's decision that Promiseland Livestock, LLC, and Anthony J. Zeman violated the Organic Foods Production Act and the Regulations (7 U.S.C. § 6506(b)(1)(B); 7 C.F.R. §§ 205.103(c), .400(d)) but increase the period of disqualification from receiving certification under the Organic Foods Production Act from 4 years to 5 years. Therefore, I suspended the organic certifications of Promiseland Livestock, LLC, and Anthony J. Zeman for a period of 5 years and disqualify Promiseland Livestock, LLC; Anthony J. Zeman; and any person responsibly connected with Promiseland's certified organic operation from receiving certification under the Organic Foods Production Act for a period of 5 years.

DECISION

Discussion

The Administrator alleged that Promiseland willfully violated the Organic Foods Production Act and the Regulations by refusing to provide Agricultural Marketing Service employees access to Promiseland's records during the period January 22, 2007, through June 5, 2007, on June 6, 2007, and on June 10, 2008 (First Amended Compl. ¶¶ 38, 45-86, 96-110, 114-117).

The Organic Foods Production Act requires that operators of farms and handling operations that are certified as organic “maintain records of all organic operations separate from records relating to other operations and make such records available at all times for inspection by the Secretary, the certifying agent, and the governing State official[.]” (7 U.S.C. § 6506(b)(1)(B).)

The Regulations identify entities that must maintain records, the nature of the records that must be maintained, and the persons to whom the records must be made available, as follows:

§ 205.103 Recordkeeping by certified operations.

(a) A certified operation must maintain records concerning the production, harvesting, and handling of agricultural products that are or that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)).”

(b) Such records must:

(1) Be adapted to the particular business that the certified operation is conducting;

(2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited;

(3) Be maintained for not less than 5 years beyond their creation; and

(4) Be sufficient to demonstrate compliance with the Act and the regulations in this part.

(c) The certified operation must make such records available for inspection and copying during normal business hours by authorized representatives of the Secretary, the applicable State program's governing State official, and the certifying agent.

7 C.F.R. § 205.103. The Regulations also provide that, in order to receive and maintain organic certification, a person must maintain records and allow access to those records, as follows:

§ 205.400 General requirements for certification.

A person seeking to receive or maintain organic certification under the regulations in this part must:

....

(d) Maintain all records applicable to the organic operation for not less than 5 years beyond their creation and allow authorized representatives of the Secretary, the applicable State organic program's governing State official, and the certifying agent access to such records during normal business hours for review and copying to determine compliance with the Act and the regulations in this part, as provided for in § 205.104[.]

7 C.F.R. § 205.400(d).

The Administrator contends Promiseland willfully failed to make the records available when requested by authorized representatives of the Secretary of Agriculture. Promiseland argues that access to Promiseland's records was provided (Promiseland's Post Trial Brief at 2-4).

David Trykowski, director of compliance, Security and Safety Division, Agricultural Marketing Service [hereinafter the Compliance Office], testified that the National Organic Program differs from other programs administered by the Agricultural Marketing Service in that inspection and certification is performed by private or state certifying agents rather than United States Department of Agriculture inspectors (Tr. I at 25-29). Mr. Trykowski testified that there are approximately 95 accredited certifying agents, most of which are private entities. At the time of the hearing, accredited certifying agents had certified more than 27,000 operations (Tr. I at 29).

Accredited certifying agents accept applications for organic certification. Each application is accompanied by an organic systems plan which specifies how the applicant intends to comply with the requirements of the Organic Foods Production Act and the Regulations. Once the organic systems plan has been reviewed and accepted, the accredited certifying agent conducts an on-site inspection of the facility to verify that the organic systems plan is being followed. After the inspection, if the accredited certifying agent determines the requirements have been met, the entity is certified as meeting the criteria to operate as a certified operation under the Organic Foods Production Act and the Regulations. (Tr. I at 26-28.) After certification, the accredited certifying agent generally conducts annual inspections to ensure the certified operation continues to comply with the Organic Foods Production Act and the Regulations (Tr. I at 28). In addition to the inspections and routine audits of certified operations conducted by the

accredited certifying agent, the Agricultural Marketing Service has two individuals assigned to review complaints received concerning participants in the National Organic Program (Tr. I at 30-32).

Mr. Trykowski testified that Promiseland first came to his attention in March of 2006, when the Agricultural Marketing Service received a complaint concerning the Promiseland operation (Tr. I at 33). The complaint contained a number of allegations, including feeding nonorganic feed to livestock, purchasing conventional grain, mislabeling the grain, and reselling the grain as an organic product (CX 33). Upon receipt of the complaint, the Agricultural Marketing Service determined that Promiseland had been certified and identified Promiseland's accredited certifying agent as Quality Assurance International. Consistent with the Agricultural Marketing Service's usual practice, the Agricultural Marketing Service sent a letter to Quality Assurance International requesting that it investigate the allegations (CX 34; Tr. I at 34-35, 66). The Agricultural Marketing Service sent a follow-up letter when it had not received the requested inspection results from Quality Assurance International by September of 2006 (CX 35; Tr. I at 70-71).⁴

⁴Quality Assurance International had provided the Agricultural Marketing Service with a "Noncompliant" letter that Quality Assurance International had sent to Promiseland on March 16, 2006, as well as a notification of "Client Status-Suspension Pending" dated April 18, 2006, but had not provided the requested investigation results (CX 21, CX 23, CX 35).

Quality Assurance International responded to the follow-up letter, indicating its investigation was still under way and it had been unable to conduct an audit, which had been scheduled to be conducted on August 11, 2006, as Promiseland Livestock, LLC, indicated no one would be available that day. Quality Assurance International rescheduled the audit for October 10-12, 2006. (CX 25, CX 36; Tr. I at 72-73, 75.)

When the Quality Assurance International inspector attempted to perform an audit on October 10, 2006, Promiseland informed the inspector that Promiseland changed accredited certifying agents. Promiseland refused to provide the Quality Assurance International inspector access to any records. On October 10, 2006, Promiseland faxed a letter to Quality Assurance International informing it that Promiseland Livestock, LLC, surrendered its Quality Assurance International certification, effective August 10, 2006. (CX 26-CX 27; Tr. I at 77-79.)

In order to change accredited certifying agents, Promiseland was required to complete the entire certification process with the new accredited certifying agent, Indiana Certified Organic. This process included submitting a new application with supporting documentation and undergoing an on-site inspection by the new accredited certifying agent. Documentation submitted by Promiseland included a handwritten "ICO Organic Farm Plan Questionnaire," dated June 7, 2006 (CX 28). Promiseland also submitted additional typed questionnaires, dated July 13, 2006, which were signed on August 1, 2006 (CX 29; Tr. I at 80-82). Indiana Certified Organic conducted the on-site inspection

of Promiseland's Falcon, Missouri, location on August 2, 2006, Promiseland's Grant City, Missouri, location on August 3, 2006, and Promiseland's Bassett, Nebraska, location on August 10, 2006. Ib Hagsten, an independent inspector, conducted the inspection on behalf of Indiana Certified Organic. (CX 31-CX 32.)

While certified operations are free to change accredited certifying agents at will, the timing of Promiseland's change of accredited certifying agents and the difference between Quality Assurance International's evaluation of Promiseland's audit trail and record keeping and Indiana Certified Organic's evaluation of Promiseland's audit trail and record keeping raised concerns with the Compliance Office as to whether there had been unacceptable application of the standards (Tr. I at 85-87).

I note that, when Quality Assurance International attempted to schedule an inspection of Promiseland on August 11, 2006, Promiseland indicated only that no one would be available on the day of the scheduled inspection. Promiseland made no mention to Quality Assurance International that it had been terminated as Promiseland's accredited certifying agent. Promiseland met with the inspector from its new accredited certifying agent, Indiana Certified Organic, on August 10, 2006, the day before Promiseland denied Quality Assurance International access. Quality Assurance International was not notified at that time that it had been replaced as Promiseland's accredited certifying agent. In fact, Quality Assurance International did not receive the notice of termination until October of 2006. Although Indiana Certified Organic's certification (CX 6-CX 7) was dated as

being effective August 10, 2006 (the same date as the final portion of the on-site inspection), I conclude the certification was issued sometime later, as Mr. Hagsten's report was not created until August 13, 2006, at 8:17 p.m. (CX 31). Furthermore, while Quality Assurance International reported significant audit trail deficiencies for both 2005 and 2006 (CX 15, CX 20-CX 21, CX 23), Indiana Certified Organic found Promiseland's audit trail and record keeping acceptable (CX 31). Anthony J. Zeman testified that the differences were attributable to Promiseland's investment in a new record keeping system.

A few months after Promiseland changed accredited certifying agents, the Compliance Office was asked by the National Organic Program to obtain records from Promiseland in connection with Promiseland's transactions with another company, Aurora Organic Dairy, an entity that was the subject of an investigation for violations of the Organic Foods Production Act and the Regulations. Questions had been raised in the Aurora Organic Dairy investigation concerning livestock that Aurora Organic Dairy had stated it had obtained from Promiseland (Tr. I at 88-89).

In order to assist with the Aurora Organic Dairy investigation, Terry Kaiser, an Agricultural Marketing Service compliance officer, contacted Promiseland seeking records needed for the investigation (Tr. I at 88-89). Mr. Kaiser made repeated requests for Promiseland's records during the period January 22, 2007, through June of 2007; however, Promiseland produced no records for inspection (CX 37; Tr. I at 90-91).

Confronted now with a lack of cooperation involving two separate outstanding investigations concerning Promiseland, the Compliance Office dispatched two teams to conduct unannounced inspections at Promiseland facilities. One team went to the Promiseland facility in Falcon, Missouri, and the other team went to the Promiseland facility in Grant City, Missouri (Tr. I at 89-92, 94-102). The Agricultural Marketing Service compliance officers sent to Falcon, Missouri, presented Promiseland with a letter, dated June 5, 2007, signed by Mr. Trykowski as head of the Compliance Office, citing Agricultural Marketing Service efforts to obtain Promiseland's records in connection with the Aurora Organic Dairy investigation, citing the regulatory authority which requires certified operations to make records available to authorized representatives of the Secretary of Agriculture (7 C.F.R. § 205.103(c)), and including the following notice:

If you, or any representative of your organization, fail to make your records available for inspection and copying, I will request that the National Organic Program Manager within 48 hours propose your suspension from the National Organic Program in accordance with 7 CFR § 205.660(b)(1).

CX 39 at 2.

The Compliance Office team sent to Promiseland's Falcon, Missouri, facility had two objectives: first, to obtain the records necessary for the Aurora Organic Dairy investigation and second, to obtain the records necessary to conduct an audit of Promiseland's organic systems plan (Tr. I at 199, 202-05). Eleanor "Shelly" Scott, one of the Agricultural Marketing Service compliance officers sent to Falcon, Missouri, testified that, while Promiseland provided the records requested in connection with the Aurora

Organic Dairy investigation, Promiseland failed to provide the records necessary to audit Promiseland's organic systems plan (Tr. I at 199-204). Ms. Scott stated she and Richard Matthews, an Agricultural Marketing Service compliance officer, arrived at Promiseland's location in Falcon, Missouri, on June 5, 2007. After some difficulty contacting a Promiseland Livestock, LLC, representative, Ms. Scott and Mr. Matthews eventually reached Leslie Ehnis. After Ms. Scott and Mr. Matthews identified themselves to Ms. Ehnis, explained the reasons for their visit, and gave Ms. Ehnis a copy of Mr. Trykowski's June 5, 2007, letter (CX 39), Ms. Ehnis asked Ms. Scott and Mr. Matthews to return that afternoon. When the Agricultural Marketing Service compliance officers returned to the Promiseland facility, the Aurora Organic Dairy records were provided. When Ms. Scott and Mr. Matthews asked for the Promiseland records necessary to audit Promiseland's organic systems plan, Ms. Ehnis stated she had farm work to do and she needed to talk with Anthony J. Zeman about the audit. Ms. Scott and Mr. Matthews stated they would return the following day, June 6, 2007. Upon returning on June 6, 2007, Ms. Scott and Mr. Matthews were denied access to the records necessary to conduct the Promiseland audit. (Tr. I at 197-207; CX 38.)

The three Agricultural Marketing Service compliance officers sent to Promiseland's Grant City, Missouri, facility received a more cooperative reception. These Agricultural Marketing Service compliance officers interviewed Adam Zeman, Anthony J. Zeman's son, concerning the operation at Grant City, Missouri, and

allegations contained in the complaint which had been received by the Agricultural Marketing Service (Tr. I at 266-71). Although Adam Zeman cooperated with the inspection, Anthony J. Zeman's testimony is inconsistent with other evidence regarding the Grant City, Missouri, facility. Anthony J. Zeman testified that the Grant City, Missouri, facility never operated as an organic facility; rather, the Grant City, Missouri, facility was a conventional operation operated by his son, Adam (Tr. II at 486-87). Indiana Certified Organic's inspection of all three Promiseland sites, including Grant City, Missouri, for compliance with the National Organic Program, leads me to believe the Grant City, Missouri, facility was an organic facility. Furthermore, although Anthony J. Zeman testified that the last time Promiseland kept animals at the Grant City, Missouri, facility was in 2005 (Tr. II at 431-32), Mr. Hagsten's report indicates that animals raised on Promiseland grass are finished out for 70-75 days at the Grant City, Missouri, feedlot (CX 31 at 1).

On May 16, 2008, Anthony J. Zeman and Mr. Friedman, Promiseland's attorney at the time, met in Washington, DC, with representatives from the Compliance Office. One of the purposes of the meeting was for the Compliance Office to obtain Promiseland's withheld records. Apparently, Anthony J. Zeman and Mr. Friedman had the records with them at the meeting, but failed to provide the records to the representatives of the Compliance Office for review and copying. Anthony J. Zeman testified that, although he brought Promiseland's records with him to the meeting, including binders and several

CDs or DVDs containing the computerized programs, Mr. Friedman put the records in his briefcase and never proffered access to the records. In any event, records sufficient to conduct an audit of Promiseland again were not produced. (Tr. I at 113-16, 238-39; Tr. II at 534-36; CX 61-CX 64.)

On June 10, 2008, Ms. Scott and Ross Laidig, an Agricultural Marketing Service compliance officer, requested records necessary to conduct an audit of Promiseland's Falcon, Missouri, organic systems plan, and Anthony J. Zeman denied the Agricultural Marketing Service compliance officers access to the records (Tr. I at 207-09).

Despite a duty to produce records on request from authorized representatives of the Secretary of Agriculture, the applicable State organic program's governing State official, and the accredited certifying agent (7 U.S.C. § 6506(b)(1)(B); 7 C.F.R. §§ 205.103(c), .400(d)), Anthony J. Zeman seeks to excuse Promiseland's record production delicts arguing:

he was too busy coping with the impact of natural events -- an ice storm causing Promiseland to lose electric service for 13 days in January of 2006 (Tr. II at 501);

he was dissatisfied with, and subsequently fired, Quality Assurance International as Promiseland's accredited certifying agent (Tr. II at 441-43, 464-70, 474-76, 526);

the demands on his time at multiple locations during the planting season did not allow him to be present when records were requested (Tr. II at 503-07, 529-30);

the record requests came from individuals who did not understand farming and were too vague (Tr. II at 441-43); and

the advice of counsel (Tr. II at 512-13, 530-31, 538).

Given the size of Promiseland's operation,⁵ such excuses over the prolonged period of time involved in this action cannot be countenanced. While the Compliance Office may exercise substantial latitude or leniency in exacting cooperation in the production of requested records in individual cases where warranted, the Secretary of Agriculture and the Secretary of Agriculture's authorized representatives have an unfettered and absolute right under the Organic Foods Production Act and the Regulations to have records produced upon request without the type of delay, obstruction, and willful withholding that has been manifested by Promiseland in this action.

Promiseland cannot seek refuge from the obligation to make records available by invoking advice of counsel. I have long held that reliance on erroneous advice is misplaced. *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978). Even if advice of counsel were a defense, Promiseland had not retained Mr. Friedman until sometime after June 5, 2007, after Promiseland denied the Agricultural Marketing Service access to Promiseland's records (Tr. I at 222-23;

⁵The Indiana Certified Organic certificates indicate Promiseland's operation involved 13,000 acres on which Promiseland raised multiple crops and 22,000 head of cattle (CX 6-CX 7). The dollar volume of Promiseland's operation is in excess of seven figures (Tr. I at 218-20). As such, the Promiseland operation exceeds the threshold definition of a small agricultural producer set forth in 13 C.F.R. § 121.201.

CX 42). After Mr. Friedman had been retained, his efforts to limit the scope of review of the records and to superimpose the need for his presence during any contact with the United States Department of Agriculture served only to continue to frustrate the efforts by Agricultural Marketing Service employees to obtain records to which they were entitled under the Organic Foods Production Act and the Regulations (CX 51, CX 53, CX 58, CX 63, CX 73). Furthermore, Mr. Friedman's reference in his letter of June 29, 2007, to the Administrator to "badge-toting AMS agents demanding to rummage around a farmer's home" (CX 55 at 3) is contradicted by the testimony of his own client Anthony J. Zeman. When referring to Ms. Scott, Anthony J. Zeman stated "[t]o her credit, she was very congenial." (Tr. II at 507.) This approach by Mr. Friedman contributed to an atmosphere that hindered cooperation.

Anthony J. Zeman's testimony and the exhibits clearly indicate that Ms. Ehnis handled most of Promiseland's correspondence and record keeping. Her testimony indicates that the duties of her job continued to evolve, starting with paying bills on the day-to-day level and progressed to the point where Promiseland's administrative matters consumed approximately 30-40% of her time (Tr. III at 10-15). Ms. Ehnis testified that, with the help of others, Promiseland developed its own computer program for crop and livestock records (Tr. III at 16-19). Ms. Ehnis knew how Promiseland's records were organized. Ms. Ehnis would have been the logical individual, rather than Anthony J.

Zeman, to make Promiseland's records available to individuals entitled to access. (Tr. II at 480, 552-53, 556-57; CX 17-CX 18, CX 21-CX 22, CX 24, CX 27-CX 28, CX 40.)

Findings of Fact

1. Promiseland Livestock, LLC, is a limited liability company, incorporated under the laws of the State of Missouri (CX 1-CX 3). Since 2002, Promiseland has maintained certified organic facilities at various locations, including: Promiseland Heifer Ranch, Falcon, Missouri; Promiseland Bassett, Bassett, Nebraska; and the Promiseland Feedlot, Grant City, Missouri.

2. Anthony J. Zeman, also known as Anthony Zeman and "Tony" Zeman, resides in Bassett, Nebraska, and is the sole organizer, agent for service of process, and chief operating officer of Promiseland Livestock, LLC (CX 1, CX 3; Tr. II at 413-14).

3. Quality Assurance International and Indiana Certified Organic are accredited certifying agents authorized by the Agricultural Marketing Service to certify operations under the Organic Foods Production Act and the Regulations.

4. Quality Assurance International certified Promiseland's livestock and crop operations as meeting the requirements under the Organic Foods Production Act and the Regulations to operate as a certified organic farm operation from April 29, 2002, until sometime in 2006 (CX 4-CX 5).

5. Indiana Certified Organic certified Promiseland's livestock and crop operations as meeting the requirements under the Organic Foods Production Act and the

Regulations to operate as a certified organic farm operation from and after August 10, 2006 (CX 6-CX 9).

6. In March of 2006, the Compliance Office received a complaint alleging that Promiseland was not complying with the requirements of the National Organic Program. These allegations included feeding nonorganic feed to organic livestock and purchasing conventional grain, mislabeling the grain as organic, and reselling the grain as organic product. (CX 33.)

7. After determining that Promiseland was a certified operation under the National Organic Program, the Compliance Office requested that the accredited certifying agent, Quality Assurance International, investigate the allegations in the complaint (CX 34; Tr. I at 34-35, 66). Quality Assurance International contacted Promiseland to schedule an on-site inspection visit on August 11, 2006, but was informed that no one would be available on that date. Quality Assurance International rescheduled the inspection for October 10-12, 2006 (CX 25, CX 36; Tr. I at 72-73, 75). When the Quality Assurance International inspector arrived on October 10, 2006, Promiseland advised the inspector that, as a result of being dissatisfied with the service provided by Quality Assurance International, Promiseland had replaced Quality Assurance International with another accredited certifying agent and that no records would be produced (CX 26-CX 27; Tr. I at 77-78). Quality Assurance International subsequently advised the Compliance Office that, as a result of its termination as Promiseland's accredited

certifying agent, Quality Assurance International was unable to conduct the requested investigation.

8. A few months after Promiseland changed accredited certifying agents, the Compliance Office received a request from the National Organic Program to obtain records from Promiseland concerning Promiseland's transactions with Aurora Organic Dairy in connection with an ongoing investigation of Aurora Organic Dairy. Agricultural Marketing Service compliance officer Terry Kaiser was assigned the task of obtaining Promiseland's records; however, despite Mr. Kaiser's repeated efforts, during the period January 22, 2007, through June 5, 2007, to obtain Promiseland's records, Promiseland produced no records (CX 37; Tr. I at 88-92).

9. With two separate outstanding investigations concerning Promiseland, the Compliance Office dispatched two teams to conduct inspections at Promiseland's facilities. One team went to the Promiseland facility in Falcon, Missouri, and the other team went to the Promiseland facility in Grant City, Missouri. (Tr. I at 89-92, 94-102.)

10. Agricultural Marketing Service compliance officers Eleanor "Shelly" Scott and Richard Matthews went to Promiseland's Falcon, Missouri, facility. The Agricultural Marketing Service compliance officers brought with them a letter dated June 5, 2007, addressed to Anthony J. Zeman and signed by Mr. Trykowski, director of the Compliance Office. The Agricultural Marketing Service compliance officers gave the letter to Promiseland. The letter cites the Agricultural Marketing Service's efforts to obtain

Promiseland's records in connection with the Aurora Organic Dairy investigation, cites the regulatory authority requiring certified operations to make records available to authorized representatives of the Secretary of Agriculture (7 C.F.R. § 205.103(c)), and includes the following notice:

If you, or any representative of your organization, fail to make your records available for inspection and copying, I will request that the National Organic Program Manager within 48 hours propose your suspension from the National Organic Program in accordance with 7 CFR § 205.660(b)(1).

CX 39 at 2.

11. Ms. Scott and Mr. Matthews' inspection visit to Promiseland's Falcon, Missouri, location on June 5, 2007, was to serve two purposes. The first purpose was to obtain the records pertaining to the Aurora Organic Dairy investigation, and the second purpose was to obtain the records necessary to conduct an audit of Promiseland's organic systems plan to determine if Promiseland was meeting the requirements of the Organic Foods Production Act and the Regulations (Tr. I at 199, 202-05). Although Promiseland's records necessary for the Aurora Organic Dairy investigation were produced on June 5, 2007, access to Promiseland's records required for an audit of Promiseland was denied on June 6, 2007, by Leslie Ehnis, acting on instructions from Anthony J. Zeman (Tr. I at 197-202).

12. On June 10, 2008, Agricultural Marketing Service compliance officers, Ms. Scott and Mr. Laidig, attempted another inspection of Promiseland and access to Promiseland's records was again denied by Anthony J. Zeman (Tr. I at 207-09).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. A certified operation's compliance with its obligations under the Organic Foods Production Act and the Regulations to maintain records and to make those records available to persons designated under the Organic Foods Production Act and the Regulations for the purpose of determining compliance with the Organic Foods Production Act and the Regulations is critical to the integrity of the National Organic Program.
3. Promiseland Livestock, LLC, and Anthony J. Zeman, in willful violation of 7 U.S.C. § 6506(b)(1)(B), failed to make records of all organic operations available for inspection by the Secretary of Agriculture on the following occasions: during the period January 22, 2007, through June 5, 2007; June 6, 2007; and June 10, 2008.
4. Promiseland Livestock, LLC, and Anthony J. Zeman, in willful violation of 7 C.F.R. § 205.103(c), failed to make records, concerning the production, harvesting, and handling of agricultural products that are or that are intended to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))," available for inspection and copying during normal business hours by authorized representatives of the Secretary of Agriculture on the following occasions: during the period January 22, 2007, through June 5, 2007; June 6, 2007; and June 10, 2008.

5. Promiseland Livestock, LLC, and Anthony J. Zeman, in willful violation of 7 C.F.R. § 205.400(d), failed to allow authorized representatives of the Secretary of Agriculture access to records applicable to organic operations during normal business hours for review and copying to determine compliance with the Organic Foods Production Act and the Regulations on the following occasions: during the period January 22, 2007, through June 5, 2007; June 6, 2007; and June 10, 2008.

Promiseland's Request for Oral Argument

Promiseland's request for oral argument, which the Judicial Officer may grant, refuse, or limit,⁶ is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Issues on Appeal

Promiseland raises six issues on appeal while the Administrator appeals the Chief ALJ's imposition of a 4-year period of ineligibility to receive certification under the Organic Foods Production Act rather than 5 years, as provided in 7 U.S.C. § 6519(c)(1).

First, Promiseland appeals the Chief ALJ's conclusion that Promiseland willfully failed to provide Agricultural Marketing Service employees access to records arguing the Chief ALJ's conclusion is not supported by the evidence (Promiseland Pet. for Appeal at ii). Promiseland states there was no "long, continuous effort to deny [Agricultural Marketing Service] officials access to records. Rather these were distinct incidents for

⁶7 C.F.R. § 1.145(d).

which [Promiseland] requested accommodation and requested clarification of documents in an attempt to provide the requested documents.” (Brief in Support of Petition for Appeal [hereinafter Appeal Brief] at 5.)

The multiple distinct incidents that occurred over more than 1 year, during which Promiseland failed to provide records to Agricultural Marketing Service employees when requested, constitute grounds to find Promiseland violated the Organic Foods Production Act and the Regulations. The admission of multiple failures to provide the records, Anthony J. Zeman’s admission that the failure to provide records was “an oversight” (Appeal Brief at 2), and Anthony J. Zeman’s admission that there was a “backlog in responding to requests” from the Agricultural Marketing Service (Appeal Brief at 5) demonstrate that Promiseland had a long continuous careless disregard of the statutory requirement mandating that Promiseland make records of all organic operations available at all times for inspection by the Secretary of Agriculture (7 U.S.C. § 6506(b)(1)(B)). This careless disregard of a statutory requirement is sufficient to find that Promiseland’s violations of the Organic Foods Production Act were willful.⁷

⁷See *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996) (stating willfulness includes not only intent to do a prohibited act but also careless disregard of statutory requirements); *Cox v. U.S. Dep’t of Agric.*, 925 F.2d 1102, 1105 (8th Cir.) (same), *cert. denied*, 502 U.S. 860 (1991).

Second, Promiseland argues the Chief ALJ's 5-year suspension of Promiseland from the National Organic Program is contrary to public policy (Appeal Brief at 6).⁸

Promiseland fails to identify the public policy that is purportedly violated by the Chief ALJ's suspension of Promiseland for willful violations of the Organic Foods Production Act and the Regulations, and I am not aware of any public policy violated by the Chief ALJ's suspension of Promiseland's organic certification.

Third, Promiseland states there was no allegation that "the organic integrity of Promiseland's operation was questioned." (Appeal Brief at 7.) Promiseland's statement is incorrect. Promiseland's refusal to allow review and copying of Promiseland's records, as required by the Organic Foods Production Act and the Regulations, raises the question of the "organic integrity" of Promiseland's operation. The Agricultural Marketing Service has an obligation to assure the public that agricultural products sold, labeled, or represented as organic meet the standards of the National Organic Program. Without the ability to inspect records, the Agricultural Marketing Service's assurances are hollow.

Fourth, Promiseland argues the Chief ALJ's 5-year suspension of Promiseland from the National Organic Program is arbitrary, capricious, and an abuse of discretion (Appeal Brief at 7).⁹ The Chief ALJ's suspension of Promiseland for willful violations of the Organic Foods Production Act and the Regulations is not arbitrary, capricious, or an

⁸The Chief ALJ suspended Promiseland's organic certification for a period of 4 years, not 5 years, as Promiseland asserts (Chief ALJ's Decision and Order at 17).

⁹See note 8.

abuse of discretion because the Organic Foods Production Act is clear and restrictive regarding the eligibility of a person to participate in the National Organic Program after that person violates the purposes of the National Organic Program.

§ 6519. Violations of chapter

....

(c) Ineligibility

(1) In general

Except as provided in paragraph (2), any person who—

....

(C) otherwise violates the purposes of the applicable organic certification program as determined by the Secretary;

after notice and an opportunity to be heard, shall not be eligible, for a period of 5 years from the date of such occurrence, to receive certification under this chapter with respect to any farm or handling operation in which such person has an interest.

(2) Waiver

Notwithstanding paragraph (1), the Secretary may reduce or eliminate the period of ineligibility referred to in such paragraph if the Secretary determines that such modification or waiver is in the best interests of the applicable organic certification program established under this chapter.

7 U.S.C. § 6519(c)(1)(C), (c)(2).

Five years is the statutorily mandated period of ineligibility to receive certification under the Organic Foods Production Act. While the period of ineligibility may be reduced or eliminated if the Secretary of Agriculture determines reduction or elimination of the period of ineligibility is in the “best interests of the applicable organic program” (7 U.S.C. § 6519(c)(2)), Promiseland made no showing that reduction or elimination of

Promiseland's period of ineligibility to receive certification under the Organic Foods Production Act is in the best interests of the National Organic Program. Without such a showing, the appropriate period of ineligibility is 5 years. Furthermore, my review of the record leads me to conclude that any waiver of the 5-year ineligibility period is inappropriate.

Fifth, Promiseland, citing *In re Craig Lesser*, 52 Agric. Dec 155 (1993), argues the Chief ALJ erroneously failed to consider the gravity of Promiseland's violations, Promiseland's good faith, and Promiseland's history of previous violations (Appeal Brief at 7-8). Promiseland's reliance on the *Lesser* decision is misplaced. The factors considered in the *Lesser* decision to determine the amount of a civil penalty to be assessed for violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159), are required by 7 U.S.C. § 2149(b) to be considered when determining the amount of a civil penalty to be assessed for violations of the Animal Welfare Act. The Organic Foods Production Act has no similar provision and 7 U.S.C. § 2149(b) is not applicable to the determination of the appropriate remedy for violations of the Organic Foods Production Act and the Regulations.

Sixth, Promiseland argues a 5-year period of ineligibility would force Promiseland to close (Appeal Brief at 9).¹⁰ Promiseland's argument is without merit. Ineligibility to receive organic certification under the Organic Foods Production Act does not require

¹⁰See note 8.

that Promiseland close; ineligibility merely requires that Promiseland cease selling, labeling, or representing Promiseland product as 100 percent organic, organic, or made with organic ingredients or food groups. Promiseland still has the option to use the facilities for nonorganic production. (Tr. III at 42-44.)

Based upon all of the evidence, including the testimony of the witnesses and exhibits admitted during the hearing, the following Order is entered.

ORDER

1. The organic certifications of Promiseland Livestock, LLC, and Anthony J. Zeman are suspended for a period of 5 years.
2. Promiseland Livestock, LLC; Anthony J. Zeman; and any person responsibly connected with Promiseland's certified organic operation are disqualified from receiving certification under the Organic Foods Production Act for a period of 5 years.
3. This Order shall become effective 60 days after service of this Order on Promiseland Livestock, LLC, and Anthony J. Zeman.

Done at Washington, DC

October 19, 2010

William G. Jenson
Judicial Officer