IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50385
Summary Calendar

VINCENT R. CHIODO, d/b/a Chiodo Farms,

Plaintiff-Appellee,

VERSUS

MIKE ESPY, SECRETARY OF AGRICULTURE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CA-1095)

(November 30, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

The Secretary of Agriculture appeals the district court's April 5, 1994, order granting plaintiff Vincent Chiodo's motion for summary judgment. Because the Secretary's disposition of Chiodo's appeal was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, we REVERSE.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Chiodo is an established peanut farmer in Frio County, Texas. For marketing year 1988, he had a peanut quota allocation of 1,110,905 pounds for his farming interests, designated as FSN 1101. He had been issued a Smart Marketing Card for FSN 1101. Chiodo leased another farm, the Beeler Farm (FSN 883), that year, and marketed the peanuts produced on it under his Smart Marketing Card for FSN 1101. Chiodo asserts that, in so doing, he relied upon the advice of the County Executive Director of the program, William H. Kelley.

The Agricultural Stabilization and Conservation Service (ASCS) of the Department of Agriculture assessed a reduced penalty of $60,877.20 against Chiodo for false identification of the peanuts, pursuant to 7 C.F.R. §§ 729.394(e), 729.315, and 729.401 (1988). Chiodo exhausted administrative review of the penalty assessment, including an appeal to the Deputy Administrator of ASCS for State and County Operations (DASCO), and initiated this action challenging the Secretary's decision upholding the penalty.

II.

A.

We review a grant of summary judgment de novo. Exxon Corp. v. Burglin, 4 F.3d 1294, 1297 (5th Cir. 1993); Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). We apply the same standard as did the district court, affirming a grant of summary judgment only where "there is no genuine issue as

to any material fact and [] the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Furthermore, the Administrative Procedure Act requires that, when reviewing an administrative agency's final decision, the district court must uphold the agency's findings and conclusions unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

B.

False identification of peanuts includes "[i]dentifying or permitting the identification of peanuts at time of marketing as having been produced on a farm other than the farm of actual production." 7 C.F.R. § 729.395(a) (1988). Chiodo, in his statement of facts, admits that he marketed peanuts grown on FSN 883 on the marketing card for FSN 1101, knowing that they had not been produced on the latter farm. Thus, § 729.395(a) is on point, and the peanuts were falsely marketed.

The ASCS county committee, of which Chiodo is a member, purported to waive the penalty for this false marketing under 7 C.F.R. § 729.401(b), which provides that "[t]he county committee may in accordance with guidelines issued by the Deputy Administrator, waive any penalty assessed by this subpart in cases in which the county committee determines that the violations upon which the penalties were based were unintentional or without knowledge on the part of the parties concerned." Accordingly, Kelley wrote a letter on behalf of the county committee to the state committee, recom-

mending waiver.

In February 1990, the state committee issued a memorandum to the county committee finding insufficient evidence that the error occurred unintentionally and unknowingly, and therefore denying the request for waiver. This memorandum also directed that Chiodo be notified of a penalty of $107,221.59.

Title 7 C.F.R. § 729.401(e) provides for administrative review of a county committee's penalty waiver decision:

> (e) Review Authority. The Deputy Administrator may, either upon the Deputy Administrator's own motion or in response to appeals which are being taken under § 729.402 require that any determination of a county committee with regard to the reduction or waiver of penalties be reviewed by the State committee or the Deputy Administrator for the purpose of maintaining consistency between different counties in the application of this authority. The Deputy Administrator or the State committee may require a county committee to reverse or otherwise modify its previous determination if the Deputy Administrator or State committee determines that the county committee's previous determination was not made in accordance with the instructions and guidelines issued by the Deputy Administrator or is otherwise not proper. Any person who is adversely affected by any action of the Deputy Administrator or State committee taken under this paragraph may appeal such action by filing a request for reconsideration with the State committee or Deputy Administrator, as appropriate. . . .

7 C.F.R. § 729.401(e) (1988). In addition, more general supervisory authority over county committees is provided in § 729.315:

> (a) State Committee. The State committee shall take any action required to be taken by any county committee in the same State which the county committee fails to take. The State committee shall correct or require the county committee to correct any action taken by any such county committee which is not in accordance with this subpart. The State committee shall also require the county committee to withhold taking any action which is not in accordance with this subpart.

7 C.F.R. § 729.315(a) (1988). A parallel section grants DASCO

similar supervisory authority over the state committees. See 7 C.F.R. § 729.315(b) (1988).

In November 1990, the Texas state ASCS committee advised Chiodo that a reduced penalty of $60,877.20 would be assessed. The basis of the reduction of this penalty by the state committee was the severity of the penalty when compared to the profitability of the violation. Chiodo appealed this decision to DASCO in November 1990, but DASCO denied the appeal in May 1992.

Chiodo asserts that he falsely marketed the peanuts "unknowingly or unintentionally," in the language of § 729.401(b). This assertion, however, is patently inconsistent with his version of the facts. Chiodo does not dispute that he intended every action he took with regard to the production of the peanuts and their marketing; his claim is simply that he did not intend for those actions to violate the law and that he relied upon Kelley's assurances that they would not. This defense is properly characterized as good faith rather than unknowing or unintentional action.

The Secretary anticipated, and provided for, a situation like Chiodo's in 7 C.F.R. § 729.403, which states:

> Any person who relied on the advice of a representative of the Secretary in rendering performance under this subpart, which the person believed in good faith met the requirements of the program as set forth in these regulations may file a request for review of an adverse county committee ruling in accordance with instructions and guidelines issued by the Deputy Administrator. This authority, however, does not extend to cases where such person knew or had sufficient reason to know that the action or advice of the representative of the Secretary upon which the person relied was improper or erroneous . . . .

7 C.F.R. § 729.403 (1988). Paragraph 997 of part 52 of the ASCS Handbook for the Peanut Quota Program for State and County Offices 1-PN SCOAP ("Handbook") amplifies this regulation, allowing, but not requiring, DASCO to

> . . . consider a producer to have fully complied with the provisions of the peanut program if: (1) The producer acted in good faith, relying on incorrect information provided by, or incorrect action taken by the Secretary's authorized representative [and] (2) The producer had no reason to suspect action was improper or the information was erroneous.

Handbook, Part 52, ¶ 997.

Section 729.403 and the ASCS regulations in paragraph 997 do not save Chiodo, though, even if we assume that the state committee's imposition of a penalty and rejection of the county committee's waiver constitute an "adverse county committee ruling" under the supervisory power of § 729.315(a). The plain language of § 729.403 grants the producer who relied upon a misrepresentation of the Secretary's representative with an alternative appeal route "in accordance with instructions and guidelines issued by the Deputy Administrator."

Paragraph 997 of the handbook, quoted above, permits DASCO to excuse the producer who relied upon agency disinformation but is not worded in mandatory language. Accordingly, neither the regulation nor the guideline creates an affirmative defense for Chiodo; § 729.403 merely grants him an additional appeal route.

Here, that appeal route is redundant. Chiodo exhausted his administrative remedies, including an appeal to DASCO, and his claim about relying upon the erroneous assurances of Kelley

remained constant throughout the appeals process. The most that can be said is that DASCO failed to exercise its option, under paragraph 997, to consider Chiodo to be in compliance with the program because of Kelley's alleged misinformation.

Nor was this failure an abuse of discretion. DASCO would have been amply supported in a finding that, in light of his status as a member of the county committee, with over two decades of experience farming peanuts, Chiodo had sufficient reason to know or suspect, in the language of § 729.403 and paragraph 997, that Kelley's advice was erroneous. Section 729.403 does not give Chiodo a defense; its existence, though, demonstrates that the Secretary did have cases like Chiodo's in mind when the regulations were drafted, and that § 729.401(b), dealing with violations that are "unintentional and without knowledge," does not embrace them.

Because Chiodo's own version of the facts demonstrates that his actions in falsely marketing the peanuts were intentional, the state committee's conclusion that there was insufficient evidence to support the county committee's finding that the violation was unknowing and unintentional is amply justified. Likewise, DASCO's denial of Chiodo's appeal, affirming the state committee's decision, is well supported.

DASCO's action was certainly not arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law. Accordingly, we agree with the Secretary that the district court erred in holding the assessment of penalty against Chiodo for false identification to have been arbitrary and capricious.

III.

The Secretary also argues that the district court erred in finding that Chiodo had been deprived of an impartial final hearing in violation of due process of law. In so holding, the court relied upon the Food, Agriculture, Conservation and Trade Act of 1990 (the "Act"), P.L. 101-624, which mandated that ASCS establish a new "producer appeals process" called the National Appeals Division, to replace DASCO's appeal review. The Act was passed on November 28, 1990. Chiodo did not enjoy a right to review by a National Appeals Division.

The very language of the Act supports the Secretary's claim. It states that

> [the] amendment made by subsection (a) creating the National Appeals Division] shall not apply to any appeal or proceeding with respect to any adverse determination made by any state or county committee . . . by employees or agents of the committees, [or] by other personnel of the [ASCS] . . . prior to [November 28, 1990].

Food, Agriculture, Conservation, and Trade Act of 1990 (the "Act"), Pub. L. 101-624, § 1132(b) (1990). The initial determination adverse to Chiodo was made by the state committee on November 7, 1990. Since this is the adverse determination that Chiodo is appealing, the plain language of the statute says that Chiodo is not entitled to an appeal before the National Appeals Division.

Nonetheless, Chiodo argues that the Act should be applied retroactively, citing Vandervelde v. Yeutter, 789 F. Supp. 24 (D.D.C. 1992). In Vandervelde, the district court reviewed an adverse determination against a producer under the Dairy Termination Program, which, like the peanut program, was amended by the

Act, now codified at 7 U.S.C. § 1433(c), to create a National Appeals Division. In Vandervelde, as here, the adverse determination being appealed occurred before the passage of the Act. The district court, in a logical maneuver reminiscent of pulling oneself up by one's own bootstraps, held that the Act should apply because, by vacating DASCO's adverse determination and remanding, the district court had "as a practical matter" ensured a determination by DASCO that, if adverse, would occur within the period of time covered by the Act. 789 F. Supp. at 26.

The Vandervelde court seemed strongly motivated by equitable factors not relevant in the case at bar. The court expressed concern that in Vandervelde the "administrative hearings were not conducted in the manner deemed most likely to obtain the facts [and] [t]he record is replete with hearsay." Id. at 25. These evidentiary problems are not present here, as Chiodo has admitted all of the facts underlying the determination that his false marketing was not unintentional or unknowing. Because Vandervelde is distinguishable on the facts, and because its approach is inconsistent with the plain language of the Act, we decline to follow it.

IV.

In support of the judgment, Chiodo makes a number of other arguments on appeal, all of which are without merit. For the reasons stated above, the summary judgment is REVERSED, and the cause is REMANDED for proceedings consistent with this opinion.