

FACTUAL BACKGROUND

The factual background of this civil action was described in detail by United States District Judge Edward N. Cahn in a related decision, Kreider Dairy Farms, Inc. v. Glickman, No. 95-CV-6648, 1996 U.S. Dist. LEXIS 12094, at *5-7 (E.D. Pa. August 14, 1996). The following facts are taken from Chief Judge Cahn's August 14, 1996 decision.

Plaintiff Kreider Dairy Farms, Inc. ("Kreider") is a dairy farm corporation with its principal office in Manheim, Pennsylvania. Manheim is located within what the United States Department of Agriculture ("USDA") considers to be the Middle Atlantic area, a region in which sales of milk are regulated by Federal Milk Marketing Order 4 ("Order 4"). See 7 C.F.R. § 1004 (1995). Although Kreider is physically located within the boundaries of Order 4, it sells fluid milk in the marketing area covered by the New York-New Jersey Milk Marketing Order 2 ("Order 2").¹

Since 1990, Kreider has been selling packaged kosher fluid milk to two subdealers or handlers: the Foundation for the Preservation and Perpetuation of the Torah Laws and Customs, Inc. ("FPPTLC") and Ahava Dairy Products, Inc. ("Ahava"). The FPPTLC is a distributor of fluid milk and milk products and is located in Baltimore, Maryland. It sells fluid milk to customers in

¹ Kreider, 1996 U.S. Dist. LEXIS 12094, at *5-7.

Lakewood, New Jersey. Ahava, which is also a distributor of fluid milk and milk products, is located in Brooklyn, New York. Ahava distributes its dairy products in Brooklyn, Manhattan, and Queens, New York.²

PROCEDURAL HISTORY

This civil action is closely related to earlier litigation between plaintiff and defendant in Kreider Dairy Farms, Inc. v. Glickman, Nos. 95-CV-06648 and 98-CV-00518 ("Kreider I"). Kreider I and the instant action ("Kreider II") share the same factual background, and the procedural history of Kreider I is essential to an understanding of the issues before us on appeal in Kreider II. The procedural history of both actions follows, and is taken from, the August 14, 1996 opinion of Chief Judge Cahn in Kreider, 1996 U.S. Dist. LEXIS 12094, at *5-7, and from the opinion of the United States Court of Appeals for the Third Circuit in Kreider Dairy Farms, Inc. v. Glickman, 190 F.3d 113, 116-117 (3d Cir. 1999), where indicated.

Kreider I

In December 1990 the Market Administrator ("MA") responsible for administering Order 2 learned that Kreider was selling fluid milk to Ahava for distribution into the milk

² Id.

marketing area covered by the New York-New Jersey Milk Marketing Order. Subsequently, the MA determined that Kreider also sold milk to the FPPTLC, which distributed it into the Order 2 marketing area.³

By letter dated December 19, 1990, the MA informed Kreider that it might be subject to regulation under Order 2 and instructed it to file reports with the MA's office. In January 1991 Kreider filed an application for a producer-handler designation with the MA for Order 2.⁴ The MA denied the

³ Id.

⁴ A "producer-handler" designation would exempt Kreider from paying into the producer-settlement fund used to regulate the price paid to milk producers under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c (1994) ("AMAA"). Specifically:

Milk marketing orders issued under the [AMAA] provide for the classification of milk in accordance with the form in which or the purpose for which it is used, and for the payment to all producers delivering milk to all handlers under a particular order of uniform minimum prices for all milk so delivered. The procedure is generally as follows:

The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions. . . . The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less

(Footnote 4 continues.)

application based on its determination that Kreider did not meet the requirements of a producer-handler as defined in § 1002.12 of Order 2. See 7 C.F.R. § 1002.12 (1995).

Instead, in July 1992, following audits of Kreider, the MA concluded that Kreider should be billed as a regulated handler operating a partial pool plant under Order 2. On August 7, 1992 the MA sent a billing statement to Kreider, billing it as a regulated handler under Order 2 for the period November 1991 to June 1992. Subsequently, the MA continued to bill Kreider on a monthly basis as a handler operating a partial pool plant.⁵

On December 28, 1993 Kreider filed a petition challenging the MA's determination that Kreider was a handler regulated by Order 2 and liable for payments to the producer-settlement fund, rather than a producer-handler exempt from such payments.⁶ The Judicial Officer ("JO") dismissed Kreider's petition, affirming the MA's determination that Kreider was not

(Footnote 4 continued:)

than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.

Kreider, 1996 U.S. Dist. LEXIS 12094, at *3 n.2 (internal citations omitted).

⁵ Id.

⁶ Decision and Order of Judicial Officer William G. Jensen, dated August 5, 2003 ("August 5, 2003 Decision"), Exhibit 59 to Administrative Record ("Record"), at pages 1-2.

eligible for producer-handler status because it sold milk to two subdealers, Ahava and FPPTLC.⁷ The JO found that Kreider's reliance on Ahava and FPPTLC to distribute some of its fluid milk products evidenced its lack of complete and exclusive control over all facilities and resources used for the production, processing and distribution of milk, as required to qualify as a producer-handler under Order 2.⁸

On October 18, 1995 Kreider filed a complaint pursuant to the AMAA in the District Court challenging the JO's decision. See AMAA, 7 U.S.C. § 608c(15)(B) (1994). By opinion and Order dated August 14, 1996, the District Court denied the parties' cross motions for summary judgment and remanded for further administrative findings on whether Kreider was "riding the pool," that is, whether Kreider was the type of dairy for which producer-handler status should be denied pursuant to the promulgation history of the producer-handler exemption.⁹

On remand, Administrative Law Judge ("ALJ") Edwin S. Bernstein held a hearing on April 23, 1997 and issued a Decision and Order dated August 12, 1997 holding that Kreider was "riding the pool" and therefore was not entitled to producer-handler

⁷ Id. at 2.

⁸ Id.

⁹ Kreider Dairy Farms, Inc. v. Glickman, 190 F.3d 113, 116-117 (3d Cir. 1999).

status.¹⁰ Kreider did not timely appeal this decision, and the decision of ALJ Bernstein became final.¹¹

Kreider II

On February 17, 1998 Kreider commenced Kreider II by filing a new petition for review while ALJ Bernstein's decision was on appeal.¹² The new petition sought a refund of Kreider's payments to the producer-settlement fund from December 1995 through December 1997.¹³ Kreider subsequently filed an amended petition which expanded the time period under review to December 1999.¹⁴

Kreider II first came before Judicial Officer William G. Jensen on a certified question from ALJ Dorothea A. Baker as to whether or not it should be dismissed based on the doctrine of res judicata.¹⁵ JO Jensen found that Kreider II was barred by claim preclusion to the extent that it pertains to the period December 1995 to April 1997 (the period during which

¹⁰ Id.

¹¹ Id.

¹² Petition Pursuant to 7 U.S.C. § 608C(15)(A) and 7 C.F.R. §§ 900.50-900.71, filed February 17, 1998, Exhibit 1 to Record.

¹³ Id. at paragraphs 13-15.

¹⁴ Amended Petition Pursuant to 7 U.S.C. § 608C(15)(A) and 7 C.F.R. §§ 900.50-900.71, filed September 7, 2000, Exhibit 22 to Record.

¹⁵ Certified Question, filed December 21, 2000, Exhibit 30 to Record at page 1.

Kreider sold milk products to Ahava).¹⁶ Because Kreider I did not decide the issue of Kreider's status during the period when Kreider did not sell fluid milk products to Ahava, JO Jensen did not preclude Kreider from litigating its status under Order 2 for the period from May 1997 through December 1999.¹⁷

Further proceedings before ALJ Jill S. Clifton led her to dismiss the portion of Kreider II which survived JO Jensen's issue-preclusion decision, on the grounds that Kreider's failure to re-apply for producer-handler status rendered the petition defective.¹⁸ In the alternative, ALJ Clifton found that it would have been reasonable for the MA to deny any such application on the basis of Kreider's ongoing sales to subdealers.¹⁹

On August 5, 2003 JO Jensen affirmed ALJ Clifton's decision.²⁰ Specifically, JO Jensen held that Kreider's January 1991 application for designation as a producer-handler did not constitute an application for designation as a producer-handler for the period from December 1995 through December 1999.²¹ Finding that an application was a necessary prerequisite for

¹⁶ Id. at 10-11.

¹⁷ Id. at 11.

¹⁸ Decision, filed May 31, 2002, Exhibit 49 to Record, at page 1.

¹⁹ Id.

²⁰ August 5, 2003 Decision.

²¹ Id. at 19-22, 45.

designation as a producer-handler, JO Jensen determined that the Kreider II petition was premature.²²

In the alternative, JO Jensen found that Kreider was barred by issue preclusion from litigating its status under Order 2 for the period from December 1995 through April 1997, when Kreider was still selling fluid milk products to Ahava.²³ As for the remaining period of time from May 1997 through December 1999, when Kreider was no longer selling to Ahava, JO Jensen held that Kreider would not have been entitled to producer-handler status based on its sales to FPPTLC.²⁴ JO Jensen based this finding on a combination of factors that were indicative of Kreider's lack of control over distribution of its products, including Kreider's lack of familiarity with FPPTLC's operations²⁵ and FPPTLC's ability to turn to other suppliers during periods of short supply.²⁶

On August 22, 2003 plaintiff filed a one-count Complaint against defendant seeking judicial review of the August 5, 2003 decision pursuant to the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c(15)(B), and the Administrative

²² Id. at 22-23.

²³ Id. at 22-23.

²⁴ Id. at 23-25.

²⁵ Id. at 30.

²⁶ Id. at 31.

Procedure Act, 5 U.S.C. § 706. Defendant filed an Answer to the Complaint on November 10, 2003, and the administrative record of the USDA decision was filed on December 15, 2003.

On February 20, 2004 plaintiff filed a Motion for Summary Judgment. Defendant's Motion for Summary Judgment was filed on April 1, 2004. Plaintiff filed its Memorandum of Plaintiff, Kreider Dairy Farms, Inc. in Opposition to Defendant's Motion for Summary Judgment on April 23, 2004.

The parties agree that there are no issues of material fact. Each party believes that it is entitled to judgment as a matter of law on the Complaint based on the undisputed facts.

For the reasons which follow, we find that defendant is entitled to judgment as a matter of law on plaintiff's Complaint. Thus, we now grant defendant's motion for summary judgment, deny plaintiff's motion, and dismiss plaintiff's Complaint.

STANDARD OF REVIEW

Our review of the Decision and Order "is limited to a determination whether the rulings of the Secretary [of the USDA] are in accordance with law and his findings are supported by substantial evidence." Lewes Dairy, Inc. v. Freeman, 401 F.2d 308, 315-316 (3d Cir. 1968); see 7 U.S.C. § 608c(15)(B). We may not find facts de novo. Id. at 315. Specifically, "[t]he scope of review is a narrow one and the court should not

substitute its judgment for that of the agency. Kreider I, 1996 U.S. Dist. LEXIS 12094, at *7-8 (citing Motor Vehicle Manufacturers Association v. State Farm Mutual, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866-2867, 77 L. Ed. 2d 443, 457-458 (1983)). Because we find that the August 5, 2003 Decision was supported by substantial evidence and was in accordance with the law, we affirm that Decision and Order. Therefore, we grant defendant's motion, deny plaintiff's motion, and dismiss plaintiff's Complaint.

DISCUSSION

The basis for the instant appeal of JO Jensen's August 5, 2003 Decision is the denial of producer-handler status to Kreider for the period of December 1995 to December 1999. Specifically, JO Jensen affirmed the decision of ALJ Clifton that Kreider's failure to re-apply for producer-handler status for the period at issue rendered the petition defective. For the reasons explained below, we find that the August 5, 2003 Decision was supported by substantial evidence and was rendered in accordance with the law. Accordingly, we grant defendant's motion and deny plaintiff's motion.

For the time period relevant to this action, 7 C.F.R. § 1002.12 controlled the designation of handlers as producer-

handlers in Order 2.²⁷ Specifically, 7 C.F.R. § 1002.12 provided for such a designation "following the filing of an application pursuant to" the requirements set forth in detail in § 1002.12. Thus, at a minimum, a handler was required to properly apply for producer-handler status.

Kreider argues that its January 1991 application for producer-handler status satisfies this application requirement. However, the January 1991 application was denied by the MA on August 7, 1992.²⁸ On appeal to the JO, the MA's decision was affirmed. After the issue of the MA's denial of Kreider's application was remanded to the USDA by Chief Judge Cahn's Opinion and Order dated August 14, 1996, ALJ Bernstein again affirmed the denial of producer-handler status on August 12, 1997.²⁹ That decision was not timely appealed and became final.³⁰ Thus, Kreider's January 1991 application for producer-handler status was finally resolved and the denial of such application affirmed.

For this reason, we find that the decision of JO Jensen that the January 1991 application for producer-handler status did

²⁷ Effective January 1, 2000, the AMAA was reorganized and the area formerly known as "Order 2" was incorporated into the newly organized "Northeast Marketing Area". The issues formerly addressed by 7 C.F.R. § 1002.12 are now governed by 7 C.F.R. § 1001.

²⁸ Kreider, 1996 U.S. Dist. LEXIS 12094, at *6-7.

²⁹ Kreider, 190 F.3d at 116-117.

³⁰ Id.

not constitute an application for such designation for the period of December 1995 to December 1999 as required by 7 C.F.R.

§ 1002.12 was rendered in accordance with the law and based on substantial evidence of record.³¹

Kreider next argues that its monthly reporting and ongoing litigation with the USDA constituted an application sufficient to allow administrative judicial review. However, we must defer to the administrative agency's findings in this regard. See Motor Vehicle Manufacturers, 463 U.S. at 43., 103 S. Ct. at 2866-2867, 77 L. Ed. 2d at 457-458. JO Jensen's decision affirmed the conclusions of ALJ Clifton that such filings did not constitute an application.³² Kreider's failure to re-apply for producer-handler status wholly by-passed the MA who could have granted Kreider's new application. We find JO Jensen's conclusions to be in accordance with the requirement of 7 C.F.R. § 1002.12 that Kreider file a formal application for the producer-handler designation. Thus, we conclude that JO Jensen's decision not to treat Kreider's monthly reports to the MA as an application for producer-handler status was rendered in accordance with the law.

³¹ We note that the August 5, 2003 Decision of JO Jensen was based on his interpretation of applicable law, and was not contradicted by any evidence of record. JO Jensen relied upon the absence in the evidentiary record of any attempt by Kreider to formally re-apply for producer-handler status. It is exactly this lack of evidence which supports JO Jensen's decision. Because the evidence of record does not include any re-application by Kreider, we find that the August 5, 2003 Decision is supported by substantial evidence.

³² August 5, 2003 Decision, at 18.

Finally, Kreider argues that a formal re-application for producer-handler status for the period from December 1995 to December 1999 would have been futile. Futility is a recognized exception to the general rule that the failure to exhaust administrative remedies bars judicial review of agency action. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 245 (3d Cir. 1980). In its brief, however, Kreider does no more than conclusively state that a re-application would have been futile.

On such a bare assertion we cannot find that such a re-application would have been futile. Moreover, by failing to re-apply for designation as a producer-handler in December 1995 Kreider denied the MA the opportunity to reconsider Kreider's status in light of the changed circumstance that Kreider had stopped selling fluid milk to Ahava. There is no basis for this court to determine that such re-application under changed circumstances would have resulted in a denial of the producer-handler designation and thus have proved futile. Thus, we reject Kreider's argument that the futility exception applies to exempt Kreider from the administrative requirements of 7 C.F.R. § 1002.12.

Therefore, we find that the August 5, 2003 Decision and Order of JO Jensen determining that Kreider failed to first re-apply for such status before seeking administrative judicial

review was rendered in accordance with the law and was supported by substantial evidence. Because we affirm JO Jensen's decision that Kreider's petition was premature, we need not address JO Jensen's alternative reasoning for denying such designation.

CONCLUSION

For all the foregoing reasons, we grant defendant's motion for summary judgment and deny plaintiff's motion for summary judgment. Accordingly, we enter judgment in favor of Defendant on plaintiff's claims and dismiss plaintiff's Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KREIDER DAIRY FARMS, INC.,)
a Pennsylvania Family Farm)
Corporation,)
) Civil Action
Plaintiff,)
)
vs.) No. 03-CV-04840
)
ANN M. VENEMAN,)
Secretary of the United States)
Department of Agriculture,)
)
Defendant.)

O R D E R

NOW, this 15th day of June 2004, upon consideration of the Motion for Summary Judgment, which motion was filed by plaintiff on February 20, 2004; Defendant's Motion for Summary Judgment, which motion was filed on April 1, 2004; and the Memorandum of Plaintiff, Kreider Dairy Farms, Inc. in Opposition

to Defendant's Motion for Summary Judgment, which brief was filed on April 23, 2004; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendant's motion is granted.

IT IS FURTHER ORDERED that plaintiff's motion is denied.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant on plaintiff's claims.

IT IS FURTHER ORDERED that plaintiff's Complaint is dismissed.

BY THE COURT:

James Knoll Gardner
United States District Judge