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UNITED STATES DEPARTMENT OF AGRICULTURE USDA
BEFORE THE SECRETARY OF AGRICULTURE

2003 NOV -4 P 1:37

In re:)
)
Massachusetts Independent)
Certification, Inc.,)

OFFPA Docket No. 03-0001

RECEIVED

Petitioner

Order Dismissing "Complaint"

On February 26, 2003, Petitioner Massachusetts Independent Certification, Inc. (MICI) filed a multi-page, multi-count Complaint, seeking to appeal an action by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (USDA) (Administrator), who, on or about October 25, 2002, sustained The Country Hen's appeal of MICI's denial of organic certification. Respondents, the Administrator and the Secretary of Agriculture (Secretary), moved to dismiss MICI's Complaint on March 14, 2003, for lack of subject matter jurisdiction.

Petitioner MICI is a "certifying agent" for the National Organic Program under 7 U.S.C. § 6514 and 7 C.F.R. § 205.500 *et seq.* The Country Hen had, on or about July 15, 2002, applied for certification as a producer of organic eggs under the USDA organic seal. For various reasons, on or about October 4, 2002, MICI issued a notice of noncompliance to The Country Hen and in an additional procedure, MICI's certification committee denied organic certification to The Country Hen and on October 22, 2002, issued a formal ruling of its decision to The Country Hen.

A certifying agent such as MICI acts on behalf of the Secretary of Agriculture (and not adverse to the Secretary), and, as is pertinent here, is defined:

7 U.S.C. § 6502 (3) **Certifying agent**

The term "certifying agent" means . . . any person (including private entities) who is accredited by the Secretary as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation in accordance with this chapter.

Respondents raise a preliminary issue, that the Office of Administrative Law Judges lacks subject matter jurisdiction to decide this case, citing in particular 7 C.F.R. § 205.681(a)(1):

7 C.F.R. §205.681 **Appeals.**

(a) *Certification Appeals.* . . .

(1) If the Administrator . . . sustains a certification applicant's or certified operation's appeal of a certifying agent's decision, the applicant will be issued organic certification, or a certified operation will continue its certification, as applicable to the operation. **The act of sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent.**

(emphasis added)

The issues have been well-briefed. I accept as filed the following documents submitted by Petitioner MICI: Complaint, filed February 26, 2003; Opposition to Motion to Dismiss, filed April 3, 2003; Opposition to Respondents' Motion to Dismiss filed May 27, 2003; and Motion to Strike and Motion to File Surreply, filed May 27, 2003. I accept as filed the following documents submitted by Respondents Secretary and the Administrator: Motion to Dismiss Complaint, filed March 14, 2003; Response to Petitioner's Opposition, filed May 8, 2003; and Supplemental Memorandum to Clarify Issues, filed October 28, 2003.

In cases where a denial of certification is appealed, the prefatory comments in the final rule (65 Fed. Reg. 80636, col. 1) state:

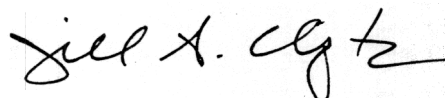
"The Administrator . . . will review the case and render an opinion on the appeal. When the appeal is sustained, the certified operation and certifying agent are notified and **the case ends.**"

(emphasis added)

I conclude that the Office of Administrative Law Judges lacks subject matter jurisdiction and that **the Complaint must be and is hereby ordered DISMISSED.**

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 4 day of November, 2003



Jill S. Clifton
Administrative Law Judge