Commodity Futures Trading Commission
CEA CASES

NAME: PATRICK C. DONOVAN

CITATION: 33 Agric. Dec. 1203

DOCKET NUMBER: 204

DATE: SEPTEMBER 13, 1974

DOCUMENT TYPE: DECISION AND ORDER

(No. 16,016)

In re PATRICK C. DONOVAN. CEA Docket No. 204. Decided September 13, 1974.

Futures commission merchant -- conversion and mishandling of customers' funds -- Wilful violations -- Sanction

Where respondent wilfully violated the Act and regulations by improper management of and mishandling and converting customers' funds, respondent is ordered to cease and desist from such violations. Respondent is denied trading privileges on contract markets for a period of 20 years

Richard W. Davis, Jr., for complainant.

James L. Fox, Chicago, Ill., for respondent.

John A. Campbell, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1). An Initial Decision and Order was filed on June 19, 1974, by Administrative Law Judge John A. Campbell. An appeal to the Judicial Officer was filed by respondent on July 23, 1974. The Judicial Officer has final administrative authority to decide cases under the Commodity Exchange Act (37 F.R. 28475; 38 F.R. 10795).

* The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, p. 550). The Department's first Judicial Officer held the office from 1942 to 1972. The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

The Administrative Law Judge found that the respondent, who was a registered futures commission merchant, mishandled customers' money, and when he closed out the segregated bank account of his firm, he transferred funds to Canada, leaving customers unpaid approximately $ 9,400. The Administrative Law Judge agreed with complainant's view that the "respondent's actions arose from a state of mind which constitutes not only willfulness and criminal intent but actual malice" (Initial Decision, p. 10).

The Administrative Law Judge's Order, issued under 7 U.S.C. 9 and 13b, would suspend the respondent's trading privileges on contract markets for twenty years and for such additional time as may elapse until respondent shows that he has

restored to his customers the amounts of money due them. The Judge also ordered the respondent to cease and desist from committing such violations in the future.

Upon a consideration of the entire record in this case, the Initial Decision and Order is adopted as the final Decision and Order herein, except that the effective date is changed in view of the appeal to the Judicial Officer.

The sanction imposed upon the respondent is consistent with the policy now followed in the Department's regulatory programs. Severe sanctions are imposed for serious violations so as to serve as an effective deterrent to the respondent and to other potential

violators. This policy has been set forth at length in numerous cases. See, *e.g., In re George Rex Andrews,* 32 Agric. Dec. 553, 563-583 (1973); *In re American Commodity Brokers,* 32 Agric. Dec. 1765, 1799 (1973); *In re James J. Miller,* 33 Agriculture Decisions 53, 64-80 (1974), affirmed *sub nom. Miller* v. *Butz,* F.2d (C.A. 5), decided August 8, 1974; *In re J. A. Speight,* 33 Agriculture Decisions 280, 318 (1974). The Department's sanction policy, with relatively minor changes in the language set forth in prior decisions, is set forth as Appendix B to this Decision.

ADMINISTRATIVE LAW JUDGE'S DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1), hereafter referred to as the "Act", which was instituted by a complaint issued by the Deputy Assistant Secretary of Agriculture on December 1, 1972.

The complaint alleges that the respondent, Patrick C. Donovan, during the year 1969, did business as United Commodity Traders and was a registered futures commission merchant under the Act. The complaint further alleges that respondent received money from his customers to margin their trades in commodities for future delivery, that he subsequently converted such funds belonging to five of his customers (four accounts) to his own use and that by so doing he willfully violated sections 4b, 4d and 9 of the Act (7 U.S.C. 6b, 6d and 13), and section 1.20 of the regulations thereunder

Respondent filed an answer to the complaint on January 2, 1973 which states that respondent "admits that he received funds of customers while licensed as a futures commission merchant under the Act, but denies that he converted to his own use any part of the funds thus received. Respondent further states and admits he is currently indebted to:

Fred K. Werhane in the sum of $ 6,987.00

Merritt Wassom in the sum of $ 1,008.80

Leonard Mueller in the sum of $ 258.30

Robert M. Lansford in the sum of $ 359.00

and that the funds of said former customers are held in a trust capacity in the form of cash and an investment in shares of a private corporation; that said individuals are aware of such retention of their funds. Respondent further represents and states

that upon liquidation of the shares he expects to pay the monies due to the named individuals."

The answer denied that respondent violated those sections of the Act cited in the complaint.

An oral hearing was held before me in Chicago, Illinois on October 17 and 18, 1973. The respondent was represented by James L. Fox, of the law firm of Moses, Gibbons, Abramson, and Fox, Chicago, Illinois. Richard W. Davis, Office of the General Counsel, United States Department of Agriculture, appeared as counsel for the complainant.'

FINDINGS OF FACT

1. The respondent, Patrick C. Donovan, is an individual who, at all times material herein, did business as United Commodity Traders and was a registered futures commission merchant under the Commodity Exchange Act.

2. During the calendar year 1969, the following named individuals were customers of the respondent: Robert M. Lansford, Merritt Wassom, Leonard Mueller, Fred K. Werhane (hereafter called "customers").

3. At various times during the calendar year 1969 the customers traded in commodities for future delivery regulated by the Act. Except for one trade in silver which was made for the joint account of Mr. Mueller and Mr. Mitchell, all of the trading which respondent did for the accounts of these customers was in regulated commodities.

4. The respondent received from and held for the customers funds to margin their trades in commodities for future delivery. The margin money received was credited by respondent to an account denominated "non-regulated" maintained in the name of the customer. The financial results of the trading in regulated commodities was carried in an account denominated "regulated". The customers' accounts were finally closed out by transferring the debit balance in the "regulated" account to the "non-regulated" account and deducting it from the credit balance in the "non-regulated" account.

5. At the time when he ceased trading in the customer accounts, the respondent held funds for such customers in the following amounts: for Lansford, $ 359.00; for Wassom,

$ 1,789.55; for Mueller and Mitchell, $ 258.30; for Werhane $ 6,987.00. *

* While a precise statement of amounts of respondent's indebtedness to his customers is not essential to a resolution of the ultimate issues presented by this case, we note however certain problems raised by the record evidence with regard to amounts due.

Regarding the Wassom account, Exhibit CX 3 and the stipulations of counsel (Tr. pp. 66-71) support the $ 1,008.80 figure admitted in the answer. However testimony of an additional $ 780.75 due Wassom because of an error in his corn account (Tr. pp. 39-41, 65, 81-84, CX 8) supports the figure cited above.

Mr. Werhane, another customer of respondent suggests that his entire deposit, $ 10,000 is due him. However the $ 6,987.00 figure cited above is the one supported by the record evidence.

6. Respondent invested funds of his customers in shares of a private corporation, which funds had been deposited by them to margin trades in regulated commodity futures.

7. Respondent closed out the segregated bank account of his firm and transferred funds to Canada, while the funds of his customers which were owing to them upon the cessation of trading in their accounts were not returned to those customers.

CONCLUSIONS

Based upon the findings of fact herein it is concluded that respondent received funds to margin trading in regulated commodities, but did not record such funds in the customers' regulated accounts nor hold such funds in

segregation as required by Section 4d(2) of the Act and by Section 1.20 of the regulations. Further it is concluded that respondent failed to return to his customers credit balances remaining in their accounts (credit balances which should have appeared in the customers' regulated accounts had respondent properly credited the margin deposits to such accounts) after such trading ended, thereby converting such funds to his own use in violation of Sections 4b and 9 of the Act. *

* The pertinent provisions of the Act and Regulations appear in the appendix to this decision. [Appendix A]

The manner in which respondent handled the funds of his customers in connection with futures trading is a violation of section 4d(2) of the Act which provides that customers funds "shall be separately accounted for and shall not be commingled

with the funds of such commission merchant" and of section 4b(B) of the Act which declares it to be unlawful to "enter or cause to be entered for such person any false record."

As disclosed by the findings of fact respondent received money from his customers to margin their trades in commodity futures regulated by the Act. Respondent however followed a practice of recording the margin deposits of his customers in non-regulated accounts and recording the financial results of their trading in regulated commodities in accounts denominated "regulated". This was done despite the fact that all trades, except one, which respondent executed for the accounts of the customers were in regulated commodities.

The customers' accounts were finally closed out by transferring the debit balances in the regulated accounts to the non-regulated accounts. After the two accounts were netted there remained zero balances in the regulated accounts and credit balances in the unregulated accounts. However, if respondent had complied with the Act, all trading activity in regulated commodity futures would have been recorded solely in the regulated accounts thereby leaving a credit balance in such accounts at respondent's close of business (Tr. pp. 19-20, 130-131, 166-169). *

* In view of this conclusion we need not consider respondent's jurisdictional argument concerning non-regulated accounts.

Additionally respondent's investment of customers' funds in stock of a private corporation violated section 4d(2) of the Act, which when read in conjunction with 17 C.F.R. 1.25, provides that customers' funds may be invested only in "obligations of the United States, in general obligations of any State or of any political subdivision thereof, or in obligations fully guaranteed as to principal and interest by the United States". The failure to repay customers' funds and the transfer of such funds from the respondent firm's segregated bank account violated section 4d(2) of the Act which requires a futures commission merchant to "treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person -- as belonging to such customer". Such action also violated section 4b(A) of the Act which makes it unlawful "to cheat or defraud or attempt to cheat or defraud" and constitutes conversion in violation of section 9(a) of the Act (7 U.S.C. 13).

We hold respondent's conduct to be willful and flagrant violations of the Act which warrant the severe sanctions recommended by the complainant.

Respondent's defense at the hearing consisted primarily in attacking the Commodity Exchange Authority's failure to take earlier action to rectify respondent's practices. The brief filed on behalf of respondent is critical (page 9) of "parrot-like testimony of the heinous nature of respondent's

conduct, viz., carrying the customer balances in non-regulated accounts, a continuing, open, unconcealed practice maintained while the witnesses' own auditor was aware of it, --". The brief states further: "One word, one admonition to respondent -- would have obviated the problems brought to light herein".

These arguments however are not persuasive in the light of the record evidence. For example, on or about December 5, 1969 personnel of the C.E.A. experienced difficulty in obtaining respondent's books and records in an audit to ascertain possible financial difficulties (Tr. pp. 11-12, 32-36). Almost simultaneously with such request for records respondent notified the C.E.A. by letter dated December 8, 1969 of his intention to relinquish his registration as a futures commission merchant (Exhibit CX 13, Tr. pp. 12-13, 36). Investigation by the C.E.A. disclosed that as of January 1970 respondent discontinued handling trades and no customer funds were on hand. Respondent's records disclosed that funds were moved to Canada and the firm's segregated bank account had been closed (Tr. pp. 12-13, 36, 278).

The record discloses too that the respondent's books and records were inadequate (Tr. pp. 38-39, 136-142, 260-261), and respondent refused in late November 1969 to certify the accuracy of the firm's liabilities that were carried on the books as of June 30, 1969 (Tr. pp. 187-188, 193). Further, the stock purchased by respondent, (see finding of fact 6) was not carried on respondent's books. Auditors for the C.E.A. were informed of its existence by respondent during an audit of his books and records in early October 1969, conducted to determine whether the firm was under capitalized (Tr. pp. 196-197, 203-205).

We are not persuaded by the evidence in the record that the problems brought to light in this proceeding would have been obviated by a word of caution from the C.E.A. Instead we are inclined to agree with complainant's argument which is that:

"The entire record in this proceeding clearly shows that respondent deliberately entered upon and pursued a course of business which was intended to and did deny to his customers the protection which Congress intended to provide in those sections of the Act which respondent has violated. . . . .

[R]espondent, at the very moment when he first received his customers' margin money, initiated a course of dealing designed to facilitate and cover up in advance his conversion of their funds. The respondent's actions arose from a state of mind which constitutes not only willfulness and criminal intent but actual malice. These serious, flagrant, and continuing violations of the Act warrant the imposition of severe sanctions."

The sanction recommended by complainant is severe but clearly warranted by the facts in this case. The complainant recommends that respondent be ordered to cease and desist from similar violations in the future and that he be prohibited from trading on contract markets for twenty years and for such additional time as may elapse until he shows that he has restored to his customers the amounts of money due them.

Such a sanction appears consistent with the views of the Judicial Officer regarding the necessity for severe sanctions for serious violations, in order to achieve the Congressional purposes, as expressed in *In re Sy B. Gaiber & Co.*, (Ruling on Petition for Reconsideration) (31 Agric. Dec. 843, 851-852 (31 A.D. 843, 851-852)(1972)):

Congress enacted the remedial regulatory programs administered by the Department because of a need for economic law and order in the marketplace. The administrative sanctions imposed against violators of such regulatory programs should tend to achieve that purpose.

Persons who engage in a regulated business have been granted a privilege. Suspension or revocation of the privilege for failure to comply with the statutory standards is a necessary power granted to the Secretary to assure a

proper adherence to the regulatory program (see the cases cited in the Decision, and Order herein, p. 47). Just as a lawyer may lose his privilege to practice law if he embezzles a client's funds or engages in other serious violations, a futures commission merchant, broker, or trader who manipulates a futures market or engages in other serious violations may lose his privilege to engage in futures trading.

The House Report on the 1968 amendments to the Commodity Exchange Act states that it is the view of the committee that serious violations "should be subject to severe penalties" (H. Rep. No. 743, 90th Cong., 1st Sess., p. 5). The administrative sanctions should be severe enough to serve as a deterrent to future similar violations by the respondents and by other persons.

ORDER

1. The respondent, Patrick C. Donovan, shall cease and desist from:

(a) cheating and defrauding or attempting to cheat and defraud any person and from entering or causing to be entered for any person any false record in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery.

(b) failing to treat and deal with money, securities, and property of his customers as belonging to such customers.

(c) failing to separately account for money, securities, and property of his customers and commingling it with his own funds.

(d) converting to his own use money, securities, and property of his customers.

2. The respondent, Patrick C. Donovan, is prohibited from trading on or subject to the rules of any contract market for a period of twenty years and thereafter until such time as he demonstrates that he has made restitution to the individuals named in Finding of Fact 2 of all money due to them. When, after the expiration of the twenty year period, respondent demonstrates that such restitution has been made, a supplemental order will be issued in this proceeding terminating this prohibition. All contract markets shall refuse all trading privileges to the respondent until such supplemental order is issued. Such prohibition and refusal shall apply to all trading done and positions held directly by the respondent, either for his own account or as the agent or representative of any other person or firm, and also to all trading done and positions held indirectly through persons or firms owned or controlled by the respondent, or otherwise.

3. The cease and desist provisions of this Order set forth in paragraph 1, above, shall become effective on the date this Decision and Order are served on respondent. The period of the prohibition of trading and denial of trading privileges to the respondent set forth in paragraph 2, above, shall become effective on the thirtieth day after the date this Decision and Order are served on respondent.

4. A copy of this Decision and Order shall be served upon each of the parties and on each contract market.

APPENDIX A

Pertinent provisions of the Act and regulations read in part as follows:

***Section 4d (7 U.S.C. 6d*)**

It shall be unlawful for any person to engage as futures commission merchant in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery . . . . unless

(1)

(2) such person shall, ... , treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. Such money, securities, and property shall be separately accounted for and shall not be commingled with the funds of such commission merchant or be used to margin or guarantee the trades or contracts, or to secure or extend the credit, of any customer or person other than the one for whom the same are held: Provided, however, That such money, securities, and property of the customers of such futures commission merchant may, for convenience, be commingled and deposited in the same account or accounts with any bank or trust company or with the clearing house organization of such contract market, and that such share thereof as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle the contracts or trades of such customers, or resulting market positions, with the clearing house organization of such contract market or with any member of such contract market, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connectton with such contracts and trades; Provided further, That such money may be invested in obligations of the United States, in general obligations fully guaranteed as to principal and interest by the United States, such investments to be made in accordance with such rules and regulations and subject to such conditions as the Secretary of Agriculture may prescribe.

It shall be unlawful for any person, including but not limited to any clearing agency of a contract market and any depository, that has received any money, securities, or property for deposit in a separate account as provided in paragraph (2) of this section, to hold, dispose of, or use any such money, securities, or property as belonging to the depositing futures commission merchant or any person other than the customers of such futures commission merchant. *

* Act as amended February 19, 1968, Public Law 90-258. The Senate Report on the 1968 amendments states in connection with the last paragraph of Section 4d: Section 6(b) adds a new provision to section 4d of the act which makes it unlawful for banks, clearing agencies of contract markets, or any other persons with whom futures commission merchants deposit customers' funds to treat such funds as belonging to any person other than such customers. *This is to prohibit expressly customers' funds from being used to offset liabilities of the futures commission merchants or otherwise being misappropriated,* (emphasis added) See 1968 U.S. Code Cong. and Admin. News, pp. 1673, 1679.

***Section 1.20 of the regulations* (*17 C.F.R. 1.20*)**

(a) All money, securities, and property received by a futures commission merchant to margin, guarantee, or secure the trades or contracts of commodity customers and all money accruing to such customers as the result of such trades or contracts shall be separately accounted for and be segregated as belonging to such customers. Such money, securities, and property, when deposited with any bank, trust company, clearing organization of a contract market, or another futures commission merchant, shall be deposited under an account name which will clearly show that they are customers' money, securities, and property, segregated as required by the Commodity Exchange Act. Each registrant shall obtain and retain in his files for the period provided in § 1.31, an acknowledgement from such bank, trust company, clearing organization of a contract market, or futures commission merchant, that it was informed that the money, securities and property deposited therein are those of commodity customers and are being held in accord with the provisions of the Commodity Exchange Act. Under no circumstances shall any portion of commodity customers' money, securities, or property be obligated to the clearing organization of a

contract market, or to any member of a contract market, a futures commission merchant, or any depository except to margin, guarantee, secure, transfer, adjust, or settle trades and contracts made on behalf of such commodity customers. Nor shall any such money, securities, or property be held, disposed of, or used as belonging to the depositing futures commission merchant or any person other than the customers of such futures commission merchant.

***Section 4b* (*7 U.S.C. 6b*)**

It shall be unlawful . . . . for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person . . . .

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or . .

***Section 9* (*7 U.S.C. 13*)**

(a) It shall be a felony punishable by a fine of not more than $ 10,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any futures commission merchant, or any employee or agent thereof, to embezzle, steal, purloin, or with criminal intent convert to his own use or the use of another, any money, securities, or property having a value in excess of $ 100, which was received by such commission merchant to margin, guarantee, or secure the trades or contracts of any customer of such commission merchant or accruing to such customer as the result of such trades or contracts. . . . .

APPENDIX B

U.S.D.A. SANCTION POLICY

It is the policy of the Department to impose severe sanctions upon respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department.

The imposition of a severe, administrative sanction is never a pleasant task. A license suspension or revocation order prevents a person from engaging in his chosen business for a specified period, or permanently. This can cause great hardship, not only to the individual violator, but to his family, employees, and customers.

It is much easier and more pleasant to be "charitable" to the violator, putting more emphasis on his needs than the needs of society. The noted German philosopher Nietzsche observed almost a century ago:

There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining "punishment" and "being supposed to punish" hurts it, arouses fear in it. "Is it not enough to render him *undangerous?* Why still punish? Punishing itself is terrible." n1

n1. Nietzsche, *Beyond Good and Evil* (1886; Kaufmann trans., 1966), § 201, p. 114.

Similarly, in administering regulatory programs, there is a danger that the agency may become so "pathologically soft and tender" that it fails to achieve the purpose of the legislators who enacted the remedial statutes.

Since the Department of Agriculture administers approximately 50 regulatory statutes -- more than any other

agency -- it is important that the Department administer the statutes in a manner to achieve the Congressional purposes.

The sanction policy that has been followed in the Department's administrative, disciplinary proceedings decided in the last two years is set forth at length below. Most of this language is taken verbatim from prior decisions. See, *e.g., In re George Rex Andrews,* 32 Agric. Dec. 553, 563-583 (1973); *In re American Commodity Brokers,* 32 Agric. Dec. 1765, 1799 (1973); *In re James J. Miller,* 33 Agriculture Decisions 53, 64-80 (1974), affirmed *sub nom. Miller* v. *Butz,* F.2d (C.A. 5), decided August 8, 1974; *In re J. A. Speight,* 33 Agriculture Decisions 280, 318 (1974).

The administrative proceeding in this case does not partake of the essential qualities of a criminal proceeding. In permitting a person to engage in a Federally regulated business, the Government has, in effect, granted him a privilege. Suspension of the privilege for failure to comply with the statutory standard "is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act:" *Nichols & Co.* v. *Secretary of Agriculture,* 131 F.2d 651, 659 (C.A. 1). Accord: *Helvering* v. *Mitchell,* 303 U.S. 391, 399; *Kent* v. *Hardin,* 425 F.2d 1346, 1349 (C.A. 5); *Blaise D'Antoni & Associates, Inc.* v. *Securities & Exch. Com'n,* 289 F.2d 276, 277 (C.A. 5), certiorari denied, 368 U.S. 899; *Eastern Produce Co.* v. *Benson,* 278 F.2d 606, 610 (C.A. 3); *Cella* v. *United States,* 208 F.2d 783, 789 (C.A. 7), certiorari denied, 347 U.S. 1016; *Irving Weis & Co.* v. *Brannan,* 171 F.2d 232, 235 (C.A. 2); *Nelson* v. *Secretary of Agriculture,* 133 F.2d 453, 456 (C.A. 7); *Board of Trade of City of Chicago* v. *Wallace,* 67 F.2d 402, 407 (C.A. 7), certiorari denied, 291 U.S. 680; and *Farmers' Livestock Commission Co.* v. *United States,* 54 F.2d 375, 378 (E.D. Ill.). See, also, *Ex Parte Wall,* 107 U.S. 265, 287-290; *Hawker* v. *New York,* 170 U.S. 189, 190-200; *Steuart & Bro.* v. *Bowles,* 322 U.S. 398, 406-407; *Brown* v. *Wilemon,* 139 F.2d 730, 731-732 (C.A. 5); Chamberlain, Dowling, and Hays, *The Judicial Function in Federal Administrative Agencies* (1942), pp. 93-95.

The function of an administrative sanction is "deterrence rather than retribution" (Schwenk, "The Administrative Crime, Its Creation and Punishment by Administrative Agencies," 42 *Mich. L. Rev.* (1943) 51, 85).

Under the foregoing authorities, the sanction should, *inter alia,*

be adequate to deter the respondents from future violations.

In *Beck* v. *Securities and Exchange Commission,* 430 F.2d 673, 675 (C.A. 6), the Court questioned, without deciding, whether a suspension order may also be used to deter others in the regulated industry from committing similar violations. As far as I know, this is the only case in which the use of an administrative sanction to deter others has been questioned. Previously, the use of an administrative sanction to deter others had been assumed to be proper. See, *e.g., American Air Transport and Flight School, Inc., Enforcement Proceeding,* 2 Pike & Fischer Ad. L. 2d 213, 215 (C.A.B.). See, also, the dissenting opinion in *Beck* v. *Securities and Exchange Commission,* 413 F.2d 832, 834 (C.A. 6).

In cases arising under the Civil Aeronautics Act, it has been expressly held that the Civil Aeronautics Board has the power to "impose a suspension as a 'sanction' against specific conduct or because of its 'deterrence' value --

either to the subjec ender or to others similarly situated." *Pangburn* v. *C.A.B.*, 311 F.2d 349, 354 (C.A. 1). Accord: *Hard* v. *Civil Aeronautics Board,* 248 F.2d 761, 763-765 (C.A. 7), certiorari denied, 355 U.S. 960; *Wilson* v. *Civil Aeronautics Board,* 244 F.2d 773, 773-774 (C.A. D.C.), certiorari denied, 355 U.S. 870.

The remedial provisions of a regulatory program would be drastically affected if the agency could consider the effect of sanctions only on the respondents and not on others. It is well recognized that persons regulated by a governmental agency keep abreast of administrative proceedings. The actions of potential violators could be significantly affected by the sanctions imposed against other persons. Eight years' experience in the administration of a regulatory program has convinced me that it is necessary to consider, as a major factor, the effect of a sanction in a particular case not only on the violator, but on other potential violators, as well.

Socrates recognized that "the proper office of punishment is two-fold: he who is rightly punished ought either to become better and profit by it, or he ought to be made an example to his fellows, that they may see what he suffers, and fear and become better." n2

n2. Encyclopedia Brittanica, *The Great Ideas: A Syntopicon of Great Books of the Western World* (Vol. II, 1952), pp. 492-493.

Similarly, Plato said that no man is to be punished "because he did wrong, for that which is done can never be undone, but in

order that, in the future times, he, and those who see him corrected, may utterly hate injustice, or at any rate abate much of their evil-doing." n3

n3. *Id.* at 492.

The deterrent effect of punishment of one violator on potential violators is recognized in Deuteronomy 13:10-11 (R.S.V.; see also, Deuteronomy 19:19-20), as follows:

You shall stone him to death with stones * * *. And all Israel shall hear, and fear, and never again do any such wickedness as this among you.

In the field of criminal law, it is settled beyond question that one of the primary purposes of the penalty imposed on a particular violator is to deter other potential violators.

* * * punishment, in this context [*i.e.*, "general prevention"], is used not to prevent future violations on the part of the criminal, but in order to instill lawful behavior in others. n4

* * * deterrence * * * is aimed at the protection of society. By making a certain action a punishable offense, we expect that people will refrain from committing the offense through fear of punishment. * * *

The purpose of punishment as a deterrent * * * is also to demonstrate to the potential offender the consequences if he violates the law. n5

* * * the deterrent value of a correctional system is not restricted to those who come into direct contact with it but applies to the whole population. n6

* * * it is a primarily preventive consideration -- having an eye to what is necessary to keep the people reasonably law-abiding -- which today's legislators have in mind, too, when they define crimes and stipulate punishments. n7

* * * *police regulations* which are such commonplaces in modern times: traffic ordinances, building codes, * * * regulations governing commerce, etc. Here

there is no doubt that punishment for infraction has primarily a general-preventive function. Here nearly all of us are potential criminals. n8

The purpose of punishment, be it a criminal sentence, a civil penalty, or punitive damages, is not to inflict suffering or to impose a loss on the offender. Its object is to act as a deterrent: first to discourage the offender himself from repeating his transgression; and, second, to deter others from doing likewise. n9

Sentencing is * * * an exacting task in which the Court undertakes to * * * impose a sentence which will best protect society, deter others and punish * * * the offender. n10

More controversial but certainly no less important [than deterrence of the individual violator] is the need for *deterrence,* "general prevention," of potential criminals who may be dissuaded from crime by the threat and the administration of penalties. n11

* * *

Penalties are not provided as punishment for the individual who has gone wrong. Their imposition is alone justified for the effect the punishment may have upon the convict in preventing him from continuance in crime and in teaching him that "the way of the transgressor is hard." But the still greater effect to be attained is the deterrent effect the sentence may have upon those who may be inclined to follow the criminal course upon which the convict has embarked. n12

* * * deterrence looks primarily at the potential criminal outside the dock [of the courtroom] * * * n13

Punishment can protect society by deterring potential offenders * * * n14

* * * the greater the penalty, the "higher the costs associated with criminal activity," and the higher these costs, the fewer crimes committed. n15

One of these goals [of law] is deterrence by means of punishment. We punish in order to deter people from engaging in the undesirable conduct which we call crime.

* * * deterrence, addresses itself * * * both to the individual himself -- we hope he will be deterred in the future -- and to the entire community. n16

n4. Andenaes, "The General Preventive Effects of Punishment," 114 *University of Pennsylvania Law Review* (1966), 949, 982.

n5. Gardiner, "The Purposes of Criminal Punishment," 21 *Modern Law Review* (1958), 117, 121.

n6. Gould and Namenwirth, "Contrary Objectives: Crime Control and the Rehabilitation of Criminals," in *Crime and Justice in American Society* (1971), 237, 246.

n7. Andenaes, "General Prevention -- Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science*(1952), 176, 177.

n8. Andenaes, "General Prevention -- Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 182.

n9. *Collins* v. *Brown,* 268 F. Supp. 198, 201 (D.C.D.C.).

n10. *United States* v. *Mandracchia,* 247 F. Supp. 1, 4 (D.N.H.).

n11. Tappan, *Crime, Justice and Correction* (1960), p. 243.

n12. *Id.* at 243, fn. 5, quoting from People v. *Gowasky,* 219 App. Div. 19, 24, 25, 219 N.Y.S. 373, 380, affirmed, 244 N.Y. 451, 155 N.E. 737.

n13. Fitzgerald, *Salmond on Jurisprudence* (12th ed., 1966), § 15, p. 94.

n14. *Ibid.*

n15. Berns, "Justified Anger: Just Retribution," *Imprimis* (Vol. 3, No. 6, June 1974), p. 3.

n16. Puttkammer, *Administration of Criminal Law* (1953), 8.

Perhaps the most salient authority for the proposition that one of the primary ends of punishment is to serve as a deterrent to other potential violators is Chief Justice William Howard Taft's

statement written in 1928:

* * * the chief purpose of the prosecution of crime is to punish the criminal and to deter others tempted to do the same thing from doing it because of the penal consequences. n17

n17. Menninger, *The Crime of Punishment* (1968), 194. The original statement of Chief Justice Taft's position appeared in his article, "Toward a Reform of the Criminal Law," in *The Drift of Civilization* (1929).

Johannes Andenaes, a leading authority from the University of Oslo, makes the same point, as follows: "From the point of view of sheer logic one must say that general prevention -- *i.e.,* assurance that a minimum number of crimes will be committed --must have priority over special prevention -- *i.e.,* impeding a particular criminal from future offenses." n18

n18. Andenaes, "The General Preventive Effects of Punishment," 114 *University of Pennsylvania Law Review* (1966), 949, 952.

In other words, it is more important to the general welfare of society to consider the effect that a sanction will have on other potential violators than to consider the sanction needed to prevent the particular individual from again violating the law. In fact, it is not uncommon to have certain types of offenses committed where "there will practically never be an individual preventive need for punishment" and yet punishment "is necessary for general prevention." n19

n19. Andenaes, "General Prevention -- Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 196.

Whether punishment achieves the objective of deterring others from violating the law is questioned by some authorities, n20 but affirmed by many others.

n20. See, *e.g.,* Menninger, *The Crime of Punishment* (1968), preface, viii, and pp. 9, 108, 113, 206-208. However, even though Menninger believes that our present system of punishing criminals is a "crime" (id. at 28, 86, 280), he favors "penalties" for violators. He states (*id.* at 202-203):

Certainly the abolition of punishment does not mean the omission or curtailment of penalties; quite the contrary. Penalties should be greater and surer and quicker in coming. I favor stricter penalties for many offenses, and more swift and certain assessment of them.

But these are not *punishments* in the sense of long-continued torture -- pain inflicted over years for the sake of inflicting pain. If I drive through a red light, I will be and should be penalized.

* * *

> If we disregard traffic signals we are penalized, not punished. If our offense was a calculated "necessity" in an emergency, then the fine is the "price" of the exception.
>
> * * *
>
> All legal sanctions involve penalties for infraction. But the element of punishment is an adventitious and indefensible *additional* penalty; it corrupts the legal principle of *quid pro quo* with a "moral" surcharge. Punishment is in part an attitude, a philosophy. It is the deliberate infliction of pain in addition to or in lieu of penalty. It is the prolonged and excessive infliction of penalty, or penalty out of all proportion to the offense.
>
> Persons with a will to believe in the efficacy of an exclusively individualistic and positivistic correctional system often quote the words of Warden Kirchwey. His patent oversimplifications of man's behavioral motivations should be noted, for this sort of loose thinking and naive criminological idealism pervert the ends of correction.
>
> * * *
>
> It is true, certainly, that the Classical doctrine of deterrence appears crudely oversimple in the light of modern conceptions of human behavior. In terms of reasonable goals for today it proposed to accomplish both too much and too little. This doctrine of deterrence was substantially more sound, however, than the position taken by those who deny any preventive effect to criminal sanctions. It is maintained here that the penal law and its application do in fact deter; indeed, with the declining efficacy of other forms of social control, it must be relied upon increasingly to maintain standards of behavior that are essential to the survival and security of the community. A complete failure of legal prevention cannot be inferred from the serious crimes committed by a small per cent of the population any more than can its success by the law obedience of the great preponderance of men. The matter is not so simple. <21>
>
> n21. Tappan, *Crime, Justice and Correction* (1960), pp. 245, 246.

As an argument for the abolition of the deterrent doctrine, it is often maintained that neither the threat nor application of penalties does prevent crime. This position reflects the simplistic notion, too commonly prevailing in matters of social action, that nothing has been achieved merely because not everything is accomplished that we should like. It is sometimes said that high crime rates prove that sanctions do not deter or that penalties actually invite the crimes of men who seek punishment to dissolve their feelings of guilt. With tiresome frequency the illustration is cited of the pickpockets who actively plied their trade in the shadow of the gallows from which their fellow knaves were strung. These assertions have a superficial relevance but they do not dispose of the issue by any means.

* * * [as to studies] indicating that the death penalty is ineffective as a deterrent to murder, their very broad interpretation has rendered a disservice to the more general issue of punishment as a deterrent to all kinds of criminal behavior. Such as expansive conclusion is obviously not justified since murder is, in many ways, a unique kind of offense often involving very strong emotions. n22

* * *

It is naive to suppose that punishment exists in a vacuum and is unrelated to the specific kinds of acts and the meaning which the punishment has for the actor. n23

n22. Chambliss, "The Deterrent Influence of Punishment," 12 *Crime & Delinquency* (1966), 70, 71.

n23. *Id.* at 75.

That sanctions do in fact, serve as a deterrent to "white-collar" violations is evidenced by a number of studies.

As Sutherland's analysis of white-collar crime has shown, violators of the Sherman Antitrust law are relatively free from criminal prosecution, though the imposition of punishment would be *maximally effective* with this type of offense. n24

*An intensive study of parking violators indicates that * * * an increase in the severity and certainty of punishment does act as a deterrent to further violation. These findings suggest the necessity for a reappraisal of current thinking. Studies demonstrating the ineffectuality of punishment as a deterrent to certain types of offenses should not be interpreted to mean that punishment is ineffective in deterring* all *types of offenses.* n25

n24. Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions," 1967 *Wisconsin Law Review* 703, 716 (emphasis supplied).

n25. Chambliss, "The Deterrent Influence of Punishment," 12 *Crime & Delinquency* (1966), 70.

Since one of the main purposes of a criminal law sentence is to deter other potential violators from committing similar violations, it follows, *a fortiori,* that one of the main purposes of an administrative law sanction is to deter other potential violators. In criminal law, "[r]etribution or social retaliation, though persistently criticized by modern advocates of a progressive penology, continues to be a major ingredient of our penal law and of our correctional system." n26 "The principle of retribution was formulated in the *lex talionis,* the Mosaic doctrine expressed in *Deuteronomy,* 19:21: 'Thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.'" n27

But retribution or social retaliation is not one of the objectives of administrative sanctions -- they are to "assure a proper adherence to the provisions of the Act" (*Nichols & Co.* v. *Secretary of Agriculture, supra*). Hence deterrence -- both as to the individual violator, and as to other potential violators -- is the primary, if not the only, objective of an administrative sanction.

n26. Tappan, *Crime, Justice and Correction* (1960), p. 241. See, also, Berns, "Justified Anger: Just Retribution," *Imprimis* (Vol. 3, No. 6, June 1974); Encyclopedia Brittannica, *The Great Ideas: A Syntopicon of Great Books of the Western World* (Vol. II, 1952), pp. 488-492.

n27. Tappan, *Crime, Justice and Correction* (1960), p. 241, fn. 3.

To serve as an effective deterrent to potential violators of a regulatory statute, I believe that administrative sanctions should be severe; sanctions which are too lenient, rather than being a deterrent, will serve as a catalyst for violations by others. Not all criminologists, sociologists, or jurists share this view; but many noted authorities do.

Since the power of a legal threat to function as a simple deterrent comes from the unpleasantness of the consequences threatened, one natural strategy for increasing the deterrent efficacy of threats is to increase the severity of threatened consequences. The theory of increased penalties as a marginal deterrent is simple and straightforward: all other things being equal, an increase in the severity of consequences threatened should reduce the number of people willing to run the risk of committing a particular criminal act * * * n28

* * *

* * * when penalties for criminal activity that many people find attractive are quite low, thereby making crime a reasonable alternative to legitimate means of obtaining gratification for many persons, even a high probability of apprehension may leave a high rate of the threatened behavior, and increases in the severity of threatened consequences can be expected to have a more substantial marginal deterrent effect than if the level of consequences threatened is already quite high in relation to the benefits obtainable through criminal means. n29

* * *

* * * if potential offenders believe that their chances of apprehension cannot be dismissed, the risk of a high penalty provides more incentive to avoid crime than the risk of a low penalty. n30

* * *

* * * it is likely that increases in the severity of threatened consequences are more or less significant, depending on the relationship between size of penalty increase and size of base penalty. n31

If we are hopeful of the curative effects of a threat, we have to make the threat unpleasant, which is another way of saying that we have to be severe. n32

n28. Zimring, *Perspectives on Deterrence,* Crime and Delinquency Issues, A Monograph Series, National Institute of Mental Health -- Center for Studies of Crime and Delinquency (1971), 83-84.

n29. *Id.* at 84.

n30. *Id.* at 85.

n31. *Id.* at 89.

n32. Puttkammer, *Administration of Criminal Law* (1953), 16-17.

Dr. Zimring, a noted authority, capsulizes this concept in answering the question, "how can the legal system make the best use of variations in severity [of sanctions] to achieve social defense?" by stating: n33

One answer is that, since the goal of all legal threats is to keep the population law abiding, the potential effectiveness of variations in severity of threatening consequences should be used to create the widest possible distinction between criminal and noncriminal behavior by threatening all types of serious crime with penalties which are as severe as possible. The aim of this strategy is to create a walled fortress around criminal activity by using the full power of threatened consequences to keep potential criminals from becoming actual criminals.

Another possible strategy would be to threaten all serious crimes with major penalties, but to save a considerable amount of variation in threatened penalties to underscore distinctions between *types of crime,* as well as between serious crime and law-abiding behavior.

n33. Zimring, *Perspectives on Deterrence,* Crime and Delinquency Issues, a Monograph Series, National Institute of Mental Health -- Center for Studies of Crime and Delinquency (1971), 90.

Johannes Andenaes, of the University of Oslo, regarded by many as one of the most distinguished of the modern scholars writing about deterrence, states that the "simplest way to make people more law-abiding, therefore, is to increase the punishment." n34 Mr. Andenaes believes that Feuerbach's formula of psychological coercion: "the risk for the lawbreaker must be made so great, the punishment so severe, that he knows he has more to lose than he has to gain from his crime" has a "certain validity" as to violators of "economic regulations." n35 "(E)conomic crimes," to utilize his epithet, are clearly within the purview of the foregoing severity doctrine, such crimes being violations of "governmental regulation of the economy: price violations, rationing violations, unlawful foreign exchange transactions, offenses against workers protection, disregard of quality standards, and so on." n36

n34. Andenaes, "General Prevention -- Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 191.

n35. Andenaes, "General Prevention -- Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 178-179, 185.

n36. *Id.* at 184.

The applicability of severe sanctions to deter violations of "regulations governing commerce" and other "economic" regulations is succinctly treated by Andenaes:

I shall begin with a group of crimes which play a modest role in the literature but which have a good deal of practical importance and are good for illustration, all these *police regulations* which are such commonplaces in modern times: traffic ordinances, building codes, laws governing the sale of alcoholic beverages, regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general-preventive function. Here nearly all of us are potential criminals. A public-spirited citizen has, of course, certain inhibitions against breaking laws and regulations. But experience shows that moral and social inibitions against breaking the law are not enough in themselves to insure obedience, where there is conflict with one's private interests. Thus the extent to which there can be effective enforcement by means of punishment determines to what extent the rules are actually going to be observed. n37

* * *

A large number of the people who are affected by economic regulations * * * feel no strong moral inhibition against infraction. They often find excuses for their behavior in political theorizing: they oppose the current government's regulative policies; * * *. Yet the matter of obedience or disobedience can often have important economic consequences. * * * In this area, at any rate, Feuerbach's law of general prevention has a certain validity: it is necessary that consideration as to the risk involved in breaking the law should outweigh consideration of the advantages to breaking the law. n38

n37. Andenaes, "General Prevention -- Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 182.

n38. *Id.* at 185.

Andenaes is careful to note that severity of punishment has a more salient effect on crimes, like economic violations, "committed after careful consideration * * * than for crimes which grow out of emotions or drives which overpower the individual (e.g. the so-called crimes of passion)." n39

n39. *Id.* at 192.

Isaac Ehrlich, in one of the most sophisticated analyses of criminal activity ever made, using a simultaneous equation model for a regression analysis involving fourteen variables, found that the "rate of specific crime categories, with virtually no exception, varies inversely with estimates of the probability of apprehension and punishment by imprisonment * * * and with the average length of time served in state prisons * * *." n40

n40. Ehrlich, "Participation in Illegitimate Activities: A Theoretical and Empirical Investigation," *Journal of Political Economy,* Vol. 81 (May-June, 1973), p. 545.

My views with respect to the necessity for severe sanctions for serious violations, in order to achieve the Congressional purpose of the Department's regulatory programs, were set forth in *In re Sy B. Gaiber & Co.*, in a Ruling on Petition for Reconsideration, as follows (31 Agriculture Decisions 843, 850-851 (1972)):

Congress enacted the remedial regulatory programs administered by the Department because of a need for economic law and order in the marketplace. The administrative sanctions imposed against violators of such regulatory programs should tend to achieve that purpose.

Persons who engage in a regulated business have been granted a privilege. Suspension or revocation of the privilege for failure to comply with the statutory standards is a necessary power granted to the Secretary to assure a proper adherence to the regulatory program (see the cases cited in the Decision and Order herein, p. 47). Just as a lawyer may lose his privilege to practice law if he embezzles a client's funds or engages in other serious violations, a futures commission merchant, broker, or trader who manipulated a futures market or engages in other serious violations may lose his privilege to engage in futures trading.

It is the general administrative practice under the Department's regulatory programs to institute formal actions only as to violations regarded as serious or repeated. Many minor violations are disposed of with a warning letter or an informal stipulation. Hence it is to be expected that the relatively few formal cases which are instituted will generally warrant relatively severe sanctions.

To summarize, a strong argument can be made in support of any philosophy of punishment or sanctions, ranging from extremely light to very severe. There are many excellent judges, criminologists, and sociologists at either end of the poles of this issue; many others take a position between the poles. For the reasons set forth above, where the violation is serious or repeated, I believe in severe sanctions to deter future violations by the respondent and others.

Another principle in determining the sanction to be imposed in a particular case is that, in general, there should be a reasonable relationship between the sanction and the unlawful practices found to exist. n41 In other words, the more serious the violation,

the more severe should be the sanction. Even though punishment for the sake of punishment is not a relevant consideration in the field of administrative law, the principle of having a reasonable relationship between the violation and the sanction still has validity in a case of this nature. This is because in order to achieve the major Congressional purposes of the regulatory program, it is more important to deter serious violations than minor violations. Hence a severe sanction for a serious violation will have a greater deterrent effect

than a milder sanction for a lesser violation, and thus will tend to effectuate the major objectives of the regulatory program.

n41. *Kent* v. *Hardin,* 425 F.2d 1346, 1349-1350 (C.A.5); *G. H. Miller & Company* v. *United States,* 260 F.2d 286, 295-297 (C.A. 7, *en banc)* , certiorari denied, 359 U.S. 907; *Daniels* v. *United States,* 242 F.2d 39, 42 (C.A. 7), certiorari denied, 354 U.S. 939; *Irving Weis & Co.* v. *Brannan,* 171 F.2d 232, 235 (C.A. 2); *In re American Fruit Purveyors, Inc.,* 30 Agriculture Decisions 1542, 1596 (1971); *In re Louis Romoff,* 31 Agric. Dec. 158, 177 (1972). See, also, *American Power Co.* v. *S. E. C.,* 329 U.S. 90, 112-118; *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 194; *Great Western Food Distributors* v. *Brannan,* 201 F.2d 476, 484 (C.A. 7), certiorari denied, 345 U.S. 997; *In re Electric Power & Light Corporation,* 176 F.2d 687, 692 (C.A. 2); *Wright* v. *Securities and Exchange Commission,* 112 F.2d 89, 95 (C.A. 2).

In addition, in determining sanctions to be imposed under the Act, great weight should be given to the recommendation of the officials charged with the responsibility for administering the regulatory program. See *In re Sy B. Gaiber & Co.,* Ruling on Reconsideration, 31 Agriculture Decisions 843, 845-846 (1972). Such administrative officials, during the day-to-day administration of a regulatory program, develop a "feel" for the severity of sanctions needed to serve as a deterrent to violations that cannot be developed by the Administrative Law Judges or the Judicial Officer, who come in contact with only a small part of the regulatory program.

The recommendation of the administrative officials as to the sanction is not, of course, controlling. For example, if some of the allegations are not proven or if there are mitigating circumstances not taken into consideration by the administrative officials, the sanction may be considerably less than that recommended by them. See, *e.g., In re American Fruit Purveyors, Inc.,* 30 Agriculture Decisions 1542 (1971). But if the alleged violations are proven, and it appears that the administrative officials have fully considered the respondent's contentions, the recommendation of the administrative officials as to the sanction needed to serve as an effective deterrent to the respondent and to other potential violators should be given great weight. Recognizing the greater opportunity for such administrative officials to develop

expertise in this area, it will be the policy of the Judicial Officer never to increase the sanction recommended by the administrative officials.

Insofar as practicable, the sanctions imposed under a regulatory Act against comparable violators for comparable violations should be reasonably uniform. n42 From the beginning, the Judicial Officer has recongized that "[d]isciplinary action taken under * * * [a regulatory] act should follow some general pattern, * * * so that one order will not be entirely out of line with another involving similar violations." *In re Watkins Commission Company, Inc.,* 4 Agriculture Decisions 395, 400 (1945). See, also, *In re Arnold Fairbank,* 27 Agriculture Decisions 1371, 1384 (1968); *In re Nolan E. Poovey, Jr.,* 27 Agriculture Decisions 1512, 1520-1522 (1968); *In re Boone Livestock Company, Inc.,* 27 Agriculture Decisions 475, 503 (1968); *In re Milton Silver, d/b/a Chambersburg Livestock Sales,* 21 Agriculture Decisions 1438, 1452 (1962); *In re American Fruit Purveyors, Inc.,* 30 Agriculture Decisions 1542, 1595-1596 (1971); *In re Louis Romoff,* 31 Agric. Dec. 158, 177 (1972). n43

n42. Inequality in judicial sentencing occurs "every day, often in different courtrooms in the same courthouse. Two boys fail to report for military induction -- one is sentenced to five years in prison, the other gets probation and never enters a prison. One judge sentences a robber convicted for the third time to one year in prison, while another judge on the same bench gives a first offender ten years. One man far more capable

of serious crime than another and convicted of the same offense may get a fine, while the less fortunate and less dangerous person is sentenced to five years in the state penitentiary." Clark, *Crime in America* (1970), p. 224. There is no excuse for such erratic sanctions in administrative disciplinary proceedings before a single agency.

n43. Accordingly, counsel should, in all cases, in their briefs and arguments, refer to *relevant* prior cases under the Act which should be considered in determining the appropriate sanction to be imposed in the particular case, in the event a violation is found to have occurred.

In determining whether one case is comparable to another, all of the relevant facts and circumstances must be considered, such as the nature of the violations, the nature of the respondents' businesses, the respondents' prior record as to violations, the deliberateness of the violations, prior warnings given to the respondents, etc.

Also, the goal of uniform sanctions for comparable violations necessarily applies only to contested cases. Consent orders issued without a hearing should be given no weight whatsoever in determining the sanction to be imposed in a litigated case. In a

case where a consent order is agreed to by the parties, there is no record or argument to establish the basis for the sanction. It may seem less than appears warranted because of problems of proving the allegations of the complaint or because of mitigating circumstances not revealed to the Administrative Law Judge or the Judicial Officer. Other circumstances, such as personnel and budget considerations and the delay inherent in litigation, may also cause a consent order to seem less severe than appropriate. Conversely, a consent order may seem more severe than appears warranted because of aggravated circumstances not revealed by the complaint.

In some cases, following the "deterrent policy" set forth above may lead to the imposition of a sanction more severe than the sanctions previously imposed under the Act for similar violations. If so, uniformity must yield to effectiveness. An effective sanction will be issued in such cases even if it is more severe than sanctions previously imposed for similar violations. In such circumstances, uniformity will be achieved only as to cases subsequent thereto.

In other words, uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others. See *Hiller v. Securities and Exchange Commission,* 429 F.2d 856, 858-859 (C.A. 2); *G. H. Miller & Company* v. *United States,* 260 F.2d 286, 296 (C.A. 7), certiorari denied, 359 U.S. 907. As the Court held in *Butz* v. *Glover Livestock Comm'n Co.,* 411 U.S. 182, 186: "We read the Court of Appeals' opinion to suggest that the sanction was 'unwarranted in law' because 'uniformity of sanctions for similar violations' is somehow mandated by the Act. We search in vain for that requirement in the statute."

An agency is free to reconsider sanctions previously imposed without prior notice. *Communications Comm'n* v. *WOKO,* 329 U.S. 223, 228; *Continental Broadcasting* v. *Federal Comm. Comm'n.,* 439 F.2d 580, 582-584 (C.A.D.C.); *N.L.R.B.* v. *Majestic Weaving Co.,* 355 F.2d 854, 860 (C.A. 2); quoted with approval in Davis, *Administrative Law Treatise* (1970 Supp.), § 17.08, p. 604.

In *Communications Comm'n* v. *WOKO,* 329 U.S. 223, 228, the Court held: "Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. * * * The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission

in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable."

Similarly, in *Butz* v. *Glover Livestock Comm'n Co.,* 411 U.S. 182, 187, the Court held that the "employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."

As I stated in *In re Sy B. Gaiber & Co.,* Ruling on Reconsideration, 31 Agriculture Decisions 843, 850 (1972):

In any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction will be imposed in that case, rather than merely announcing that in future cases the sanction will be increased. An administrative agency is free to reconsider sanctions previously imposed without prior notice (see *In re Louis Romoff,* 31 Agric. Dec. 158, 186, and cases cited therein), and such practice will be routinely followed. Persons who intentionally violate a regulatory program are not playing a game under which they are entitled to consider the sanctions previously imposed for similar violations and determine whether they want to run the risk of detection and the imposition of such a sanction. They run the distinct risk that a more severe sanction will be imposed against them.

To conclude this extended discussion as to the Department's sanction policy, Congress has determined that there is a need for Federal regulation of the agricultural marketing system. To achieve the Congressional purposes with respect to the various remedial statutes administered by the Department, severe sanctions must be imposed for serious violations. We have no reasonable alternative. "For whatever our opinion may be on the question of free versus controlled economy, there is no denying that ineffective regulation is the worst arrangement of them all." n44

n44. Andenaes, "General Prevention -- Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 184.

LOAD-DATE: June 9, 2008