

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KEVIN GUBBELS

:

CIVIL ACTION NO.:

&

:

COMPLAINT

INSURE MY HONEY, INC.

:

:

:

:

Plaintiffs,

:

:

v.

SONNY PERDUE,
IN HIS OFFICIAL CAPACITY AS
SECRETARY
UNITED STATES DEPARTMENT OF
AGRICULTURE,

:

:

:

:

:

&

:

:

UNITED STATES DEPARTMENT OF
AGRICULTURE,

:

:

:

&

:

:

MARTIN R. BARBRE,
IN HIS OFFICIAL CAPACITY AS
ADMINISTRATOR
UNITED STATES RISK MANAGEMENT
AGENCY,

:

:

:

:

:

&

:

:

UNITED STATES RISK MANAGEMENT
AGENCY,

:

:

:

Defendants.

:

COMPLAINT

Government contractors face profound consequences whenever a federal agency seeks to prohibit them from participating in any federal transactions. Federal agencies must therefore

strictly adhere to procedural rules that protect core due process rights. After all, “[g]overnment contracting has become an economic mainstay for a number of commercial enterprises. It goes without saying, therefore, that disqualification from government contracting is a very serious matter for these businesses.” *Sloan v. Dep’t of Hous. & Urban Dev.*, 231 F.3d 10, 17 (D.C. Cir. 2000). Indeed, “the very economic life of the contractor may be in jeopardy.” *Old Dominion Dairy Prod., Inc. v. Sec’y of Def.*, 631 F.2d 953, 968 (D.C. Cir. 1980). Suspension and debarment expose a contractor to “economic losses, professional indignities, and injuries to their reputations, and these sufferings no doubt will continue to linger so long as [the contractors] are tarnished by an official record suggesting that they engaged in ‘serious irregularities’ in their business dealings with the Government.” *Sloan*, 231 F.3d at 17.

The U.S. Department of Agriculture, acting through the U.S. Risk Management Agency has ignored these truisms and wielded its awesome power of suspension without observing the applicable regulatory requirements or following key constitutional protections. USDA has indefinitely suspended Kevin Gubbels and his insurance agency, Insure My Honey, Inc., from participating in the latter’s business of selling and servicing federal crop insurance policies. USDA has imposed such suspension without clearly identifying a lawful basis for that decision, without providing him with a hearing where he could contest disputed facts underlying the suspension, and without issuing a final decision in a reasonable period of time. The agencies have even forbidden Mr. Gubbels’s independent agents from issuing or renewing any crop insurance policies even though they were never named in the suspension order and they are not under Mr. Gubbels’s control. Moreover, Mr. Gubbels has no hope of having a hearing in front of an impartial adjudicator, as the existing regulations consolidate the roles of both prosecutor and judge in the same person—the agency head.

Neither the applicable regulations nor the Fifth Amendment's Due Process Clause sanction the agencies' conduct. The Defendants must be enjoined from continuing this unlawful conduct.

PARTIES

1. Plaintiff Kevin Gubbels is a natural person and a resident of the State of Nebraska.
2. Plaintiff Insure My Honey, Inc. is a Nebraska Corporation with its principal place of business in Nebraska.
3. Defendant Sonny Perdue is the agency head of the United States Department of Agriculture and is sued in his official capacity as Secretary of the USDA.
4. Defendant USDA is an agency of the United States.
5. Defendant Administrator Martin R. Barbre is the agency head of the United States Risk Management Agency and is sued in his official capacity as Administrator of the RMA.
6. Defendant RMA is an agency of the United States.

JURISDICTION AND VENUE

7. This Court has federal question jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331.
8. This Court has the authority to grant declaratory and injunctive relief in this matter pursuant to 28 U.S.C. §§ 2201 and 2202.
9. Venue for this action properly lies in this district pursuant to 28 U.S.C. §§ 1391(b)(2), and (e)(1)(C) because Mr. Gubbels resides in this judicial district and because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

STATEMENT OF FACTS

10. Plaintiff Kevin Gubbels is a native of Nebraska who has been involved with agriculture his entire life. He began his own farming operation at the age of 12 and has worked either as a farmer within the agriculture industry ever since.

11. In 2009 he began selling crop insurance and slowly developed his own business. In 2016 he began selling Apiculture Pilot Insurance and Pasture, Rangeland, Forage (PRF) programs through the Federal Crop Insurance Program (FCIP), administered by the USDA RMA. He sold these policies through his corporate entity, Insure My Honey, Inc.

12. In 2019, Insure My Honey, Inc. had independent contractor relationships with 60 crop insurance agents operating in 25 different states. Mr. Gubbels never had direct management or supervisory authority over the contracting agents. Together the agents sold more than \$12 million in FCIP insurance premiums. Insure My Honey, Inc. had net revenues of approximately \$1.7 million in 2019.

13. As an FCIP agent Mr. Gubbels agreed to be bound by the Standard Reinsurance Agreement issued by the Federal Crop Insurance Corporation (FCIC). Section IV(h)(2) of the applicable agreement provided a catchall saying, “[T]he Company and its affiliates shall comply with FCIC procedures[.]”

14. PRF policies help protect farmers against loss due to a lack of precipitation. For 2020 policies, the sales closing date *to agents* was November 15, 2019. However, agents were then required to submit the policy applications to an approved insurance provider (AIP) by December 9, 2019. RMA’s processing date *from AIPs* to RMA was December 15, 2019.

15. On December 3, 2019, Mr. Gubbels made a presentation at an Imperial County Farm Bureau meeting in Imperial County, California. At the meeting, Mr. Gubbels represented to farmers that they could still apply for 2020 PRF policies, but insisted that they apply no later than December 5, 2019, so that he could submit and process the applications to RMA before the December 9th deadline.

16. At the meeting Mr. Gubbels noted that prior PRF policies had “paid out” in California for 8 out of 10 years and that it resulted in a “profit over premium cost” of \$3.60 per acre over the last 20 years. Mr. Gubbels made sure to describe the program as a “safety net” and a risk mitigation strategy. Mr. Gubbels also discussed multiple crop insurance programs but did not assert that a producer could participate in both the PRF program and the Forage Production program.

17. On February 21, 2020, Martin R. Barbre, Administrator for the RMA, sent Mr. Gubbels a Notice of Suspension and Proposed Debarment from Participation in United States Government Programs. Pursuant to the notice Administrator Barbre “immediately excluded [Mr. Gubbels] from participating as either a participant or a principal in covered transactions under United States non-procurement and procurement programs through the executive branch of the United States Government.” Administrator Barbre further “propose[d] to debar [Mr. Gubbels] for three years from participating in programs of the United States Federal government, to commence upon the issuance of a final notice of government-wide debarment.” The suspension was ongoing “pending the completion of debarment proceedings.”

18. Administrator Barbre alleged that Mr. Gubbels merited suspension pursuant to 2 C.F.R. § 180.800(b)(3) and 2 C.F.R. §§ 180.700(b),(c), which permitted suspension based on a “[v]iolation of the terms of a public agreement or transaction so serious as to affect the integrity

of an agency program, such as—(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction[.]”

19. Administrator Barbre made three allegations. First, he alleged that Mr. Gubbels violated the catchall provision at Section IV(h)(2) of the Standard Reinsurance Agreement, when he “misrepresented the PRF application deadline as December 6, 2019, which is three weeks later than the actual deadline.” Second, he alleged that Mr. Gubbels “misrepresented FCIP policy and procedure during your presentation by falsely claiming that producers may double-insure their alfalfa crop through yield protection and rainfall index protection,” when “section 17 of the Rainfall and Vegetation Index Plan Common Policy, producers must not double-insure their alfalfa crop through yield protection and rainfall index protection.” Third, Administrator Barbre alleged that Mr. Gubbels “publicly advocated that the FCIP is not a risk management tool, but rather an investment tool.” The administrator did not assert that the advocacy allegations violated any provision of the Standard Reinsurance Agreement or any other law or regulation.

20. Administrator Barbre concluded “that adequate evidence exists to support cause for debarment and that immediate action is necessary to protect the public interest[.]” Specifically, Administrator Barbre said that he had reviewed an email sent by the Imperial County Farm Bureau that had summarized what it expected Mr. Gubbels to present at the December 3, 2019, meeting and “information from individuals who attended” the presentation, which he considered to be “adequate evidence.” Administrator Barbre also concluded that these were “past misrepresentations” and since Mr. Gubbels had “ongoing involvement” with FCIP, “immediate action [wa]s necessary to protect the public interest.” Ultimately the administrator determined that Mr. Gubbels’s actions “indicate[] a serious lack of business honesty and integrity

demonstrating that [Mr. Gubbels is] not presently responsible, which poses a significant risk to the government.”

21. On March 11, 2020, through counsel, Mr. Gubbels opposed the suspension and proposed debarment in a letter and affidavit. Mr. Gubbels also requested a hearing to challenge the suspension. Mr. Gubbels did not contest that he accepted applications after the November 15th deadline for PRF, although he argued that any misrepresentations were not materially misleading because all applications were submitted to RMA by the December 9th deadline. Mr. Gubbels challenged the evidence that he had informed producers that they could double-insure their alfalfa crops, and included a sworn affidavit saying that he had not made that representation or, if he had, he had misspoken while discussing multiple programs. Third, Mr. Gubbels noted that the allegation regarding the use of terms “returns” and “profits” was both taken out of context and not a violation of any agreement, regulation or statute. In his sworn affidavit, Mr. Gubbels said that he had merely noted truthfully that PRF programs had “paid out” in 8 of 10 previous years, and yielded a “profit over premium cost” of \$3.60 per acre over the last 20 years. Mr. Gubbels attested, however, that he always represented the program as a “risk mitigation strategy” not an income opportunity.

22. On March 13, 2020, Administrator Barbre issued a letter entitled “Important Clarification Regarding Your February 21, 2020 Notice of Suspension and Proposed Debarment From Participation in United States Programs.” In the letter, Administrator Barbre purported to clarify the scope of the suspension and proposed debarment because Mr. Gubbels was the “principal” of Insure My Honey, Inc. Thus the administrator concluded that Mr. Gubbels’s “ownership and control over Insure my Honey, Inc. [] qualifies [him] as a principal under the suspension and debarment regulations.” Administrator Barbre asserted that neither entity could

“issue or renew any crop insurance policies.” Administrator Barbre cited to 7 C.F.R. §§ 180.205(c), and 180.995 as the basis for his conclusion.

23. On March 25, 2020, Administrator Barbre conducted a telephone hearing with Mr. Gubbels’s counsel concerning the suspension. No testimony was taken at the hearing and the administrator did not engage in a factfinding proceeding.

24. On March 31, 2020, Sandy Sanchez, Director of Western Regional Compliance Office, RMA, sent a letter to all of Mr. Gubbels’s independent contractor insurance agents. The letter asserted that “as an employee or affiliate of Kevin Gubbels, you may not issue or renew any crop insurance policies on behalf of Mr. Gubbels” at his insurance agency.

25. On April 2, 2020, Mr. Gubbels provided Administrator Barbre with a supplemental letter and video expressing contrition for accepting PRF applications after the deadline. Administrator Barbre responded by email saying, “My problem isn’t just the sales after SCD but the way he has presented this program. Mr. Gubbels has made a grave error and I’ve got to figure out how to deal with it. I really don’t want to make any more comments yay or nay until the Compliance office has finished their investigation.”

26. To date, Administrator Barbre has not issued either a notice of modification or continuance of the suspension order, or any action on the proposed debarment order. He has also not held an evidentiary hearing on any matter.

COUNT I: VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(A)—AGENCY ACTION WAS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILED TO ADHERE TO ITS OWN REGULATIONS

27. Plaintiff incorporates by reference all of the preceding material as though fully set forth herein.

28. “It is ‘axiomatic,’ ... ‘that an agency is bound by its own regulations.’” *Nat’l Env’tl. Dev. Assoc.’s Clean Air Project v. E.P.A.*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (citation omitted). “Although it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect.” *Id.* (citation omitted). “Thus, an agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations.” *Id.* (citation omitted).

29. Defendants failed to adhere to binding regulations governing suspension and debarment procedures, including by:

- a. Failing to provide Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc. adequate notice of the basis for suspension and proposed debarment as required by 2 C.F.R. §§ 180.700, 180.715, 180.800, 180.805, 417.800;
- b. Failing to provide Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc. an evidentiary hearing as required by 2 C.F.R. §§ 180.735, 180.830;
- c. Failing to provide Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc. a written decision concerning the temporary suspension and proposed debarment within the time limits required by 2 C.F.R. §§ 180.755, 417.755; and

- d. Failing to abide by the limits set out in 2 C.F.R. §§ 180.150, 180.205, 180.625, 180.900, 180.935, 180.995, 180.1000, by imposing a suspension and proposed debarment order against Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc.

WHEREFORE, Plaintiffs, demand judgment against Defendants invalidating Defendants' suspension and proposed debarment order, directing Defendants to reinstate Plaintiffs ability to conduct transactions with the federal government, directing Defendants to adhere to all applicable regulations, and any other relief that may be appropriate.

COUNT II: VIOLATION OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION AND THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(C)—AGENCY ACTION UNCONSTITUTIONALLY FAILED TO COMPLY WITH ITS OWN REGULATIONS

30. Plaintiff incorporates by reference all of the preceding material as though fully set forth herein.

31. “A precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations.” *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 947 (D.C. Cir. 1986); *accord Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422 (1942); *American Hosp. Ass’n v. Burwell*, 812 F.3d 183, 190 (D.C. Cir. 2016). Indeed, “courts have long required agencies to abide by internal, procedural regulations even when those regulations provide more protection than the Constitution or relevant civil service laws.” *Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 246 (D.C. Cir. 2003) (internal citation and quotation marks omitted). If an agency disregards rules governing its behavior, this deprives an affected entity of

the constitutionally guaranteed “due process.” *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (this familiar holding is better known as the *Accardi* doctrine).

32. Defendants failed to adhere to binding regulations governing suspension and debarment procedures, including by:

- a. Failing to provide Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc. adequate notice of the basis for suspension and proposed debarment as required by 2 C.F.R. §§ 180.700, 180.715, 180.800, 180.805, 417.800;
- b. Failing to provide Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc. an evidentiary hearing as required by 2 C.F.R. §§ 180.735, 180.830;
- c. Failing to provide Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc. a written decision concerning the temporary suspension and proposed debarment within the time limits required by 2 C.F.R. §§ 180.755, 417.755; and
- d. Failing to abide by the limits set out in 2 C.F.R. §§ 180.150, 180.205, 180.625, 180.900, 180.935, 180.995, 180.1000, by imposing a suspension and proposed debarment order against Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc.

WHEREFORE, Plaintiffs, demand judgment against Defendants invalidating Defendants' suspension and proposed debarment order, directing Defendants to reinstate Plaintiffs' ability to conduct transactions with the federal government, directing Defendants to adhere to all applicable regulations, and any other relief that may be appropriate.

COUNT III: VIOLATION OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION AND THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(C)—AGENCY ACTION UNCONSTITUTIONALLY FAILED TO AFFORD PLAINTIFF PROCEDURAL DUE PROCESS

33. Plaintiff incorporates by reference all of the preceding material as though fully set forth herein.

34. The Fifth Amendment to the United States Constitution provides that “[n]o person shall” “be deprived of life, liberty, or property, without due process of law.”

35. Plaintiffs have a protected liberty interest in not being suspended or debarred from government contracting based on mere allegations of wrongdoing and dishonesty.

36. Defendants failed to afford Plaintiffs with required due process including by:

- e. Failing to provide Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc. adequate notice of the basis for suspension and proposed debarment;
- f. Failing to provide Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc. an evidentiary hearing;
- g. Failing to provide Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My

Honey, Inc. a final decision concerning the temporary suspension and proposed debarment in a reasonable time; and

- h. Failing to provide Mr. Gubbels, Insure My Honey, Inc., and independent contractor insurance agents affiliated with Mr. Gubbels and Insure My Honey, Inc. a hearing before an impartial decisionmaker.

WHEREFORE, Plaintiffs demand judgment against Defendants invalidating Defendants' suspension and proposed debarment order, directing Defendants to reinstate Plaintiffs' ability to conduct transactions with the federal government, directing Defendants to adhere to all applicable regulations, and any other relief that may be appropriate.

June 1, 2020

Respectfully,

/s/ Harriet M. Hageman
Harriet M. Hageman
(Neb. Bar No. 22846)
Senior Litigation Counsel
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
harriet.hageman@ncla.legal
caleb.kruckenberg@ncla.legal
(202) 869-5210
Counsel for Plaintiffs