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Panni, Lisa dba Fred's Garden vs. AGRICULTURE

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**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF AGRICULTURE**

IN THE MATTER OF:)
) Docket No. 01.16-121056J
LISA PANNI,) (Nursery Certificate)
d/b/a Fred's Garden,)
Respondent.)

INITIAL ORDER OF DEFAULT AND DISMISSAL

NOTICE OF DEFAULT

This matter came on to be heard on September 25, 2013 before Joyce Grimes Safley, Administrative Judge, assigned by the Secretary of State, and sitting for the Commissioner of the Tennessee Department of Agriculture, in Nashville, Tennessee. Mr. K. David Waddell, attorney for the Department of Agriculture, represented the Department of Agriculture or the State. Claimant was not present, nor was anyone present on her behalf.

The subject of this hearing was whether or not Respondent is conducting business as a nursery in the State of Tennessee without the required certificate, in violation of RULE 0080-06-01-.03, TENN. COMP. R. & REG. CH. 0080-06-01.

The State noted that it had achieved service of the Notice of Hearing and Notice of Charges upon Respondent. The State offered the sworn Affidavit of Les Southards, Plant Inspector 2, Tennessee Department of Agriculture, which stated that Mr. Southards served the Notice of Charges and Notice of Hearing upon Respondent personally at her place of business.

It is determined that the State obtained proper service of the notice of hearing upon Respondent. Thereafter, the State moved to be allowed to proceed in Default and present its evidence. The State's motion to proceed in default was **GRANTED**.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the Department of Agriculture met its burden of proof, by a preponderance of the evidence, that Respondent's nursery certificate had expired. Respondent did not re-new her certificate; however, Respondent continued to operate her nursery in violation of RULE 0080-06-01-.03, TENN.COMP. R. & REG. CH. 0080-06-01, RULES OF THE TENNESSEE DEPARTMENT OF AGRICULTURE.

Accordingly, it is therefore **ORDERED** that Grievant's Nursery Certificate is **REVOKED**¹, and Respondent is assessed civil penalties and the costs of this action as set forth below.

This decision is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Ms. Ann Self, the State Plant Pathologist, testified on behalf of the State.
2. One of Ms. Self's job duties includes monitoring nursery operator/owner's compliance with State certification requirements.

¹ Despite Respondent's Nursery certificate having expired, the State may still request that Respondent's certificate be "revoked." After a license or certificate has "expired", renewal of the license or certificate is largely administrative. Revocation of an "expired license" serves also to revoke the automatic "right to renewal" (by simply paying a fee and having the "expired license" administratively renewed automatically without review by the agency).

3. Ms. Self testified that she was responsible for monitoring Respondent's nursery certificate.

4. Respondent's nursery certificate has been expired since 2010.

5. Despite repeated communications from the Department of Agriculture, Respondent has failed to renew her nursery certificate or pay her yearly certificate renewal fees.²

6. Despite the expiration of Respondent's nursery certificate, Respondent continued to operate her nursery.

7. Respondent last paid her nursery certificate renewal fees in 2009. Respondent currently owes \$702.93 in unpaid nursery certificate fees.

8. On March 28, 2013, the Department of Agriculture sent notice to Respondent reminding her that her nursery certificate had expired and that his fees and "late fees" remained unpaid. The Notice advised the Respondent that the failure to pay all amounts due and owing, along with completing and returning a corticated application within seven days of receiving the notice would result in the Department initiating proceedings to revoke his nursery certificate. The Respondent did not return a completed certificate application to the Department, nor did Respondent pay the fees or the "late fee" penalties assessed.

CONCLUSIONS OF LAW

1. The Administrative Procedures Act, T.C.A. §4-5-309, sets forth the procedure for default hearings:

(a) If a party fails to attend or participate in a pre-hearing conference, hearing or other stage of a contested case, the administrative judge or

² A "Nursery Certificate" or Nursery stock certification issued by the Tennessee Department of Agriculture has an annual fee of \$200.00. See TENN. COMP. R. & REG. 0080-21-.01-(1).

hearing officer, hearing the case alone,... may hold the party in default and either adjourn the proceedings or conduct them without the participation of that party, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.

2. As noted above, Respondent failed to appear at this hearing after he received proper notice of the hearing. The State was allowed to proceed in Default and present its witness and evidence in Respondent's absence.

3. The Tennessee Department of Agriculture is authorized by T.C.A. §43-1-701(b) and T.C.A. §43-1-703(a) to perform certain functions, charge fees for various services it provides, including, but not limited to, permit processing fees, license fees, registration fees, plan review fees, facility inspection fees, charter fees, and the costs of the department as may be necessary to implement associated provisions of the Administrative Procedures Act.

4. It is noted that no permit or renewal of a permit shall be issued to an applicant until all fees required by T.C.A. §43-1-701(b) and T.C.A. §43-1-703(a) are paid in full.

5. A "Nursery Certificate", as defined by RULE 0080-06-01-.02(1), is:

A document authorized or prepared by a duly authorized federal or state regulatory official that affirms, declares, or verifies that any nursery stock, plan, product, shipment or other officially regulated article meets phytosanitary (quarantine), nursery inspection, pest freedom, plant registration or certification, or other legal requirements. Such documents are known by the purpose for their issuance: Phytosanitary Certificate (for the purpose of verifying compliance with phytosanitary [quarantine] requirements); Nursery Stock Certificate (for the purpose of verifying compliance with nursery inspection and pest freedom standards); registration or certification tags, seals, etc. (for the purpose of verifying compliance with registration or certification requirements.)

6. T.C.A. §43-6-102(9) defines "Nursery Stock" as:

All trees, shrubs, or other perennial plants or parts of trees, shrubs, or other perennial plants grown or kept for, or capable of propagation, distribution, or sale on a commercial basis.

7. “Plant” is defined as RULE 0080-06-01-.02(13) as: “any part of a plant, tree, plant product, shrub, vine, fruit, vegetable, seed, bulb, stolon, tuber, corm, pip, cutting, scion, bud, graft, or fruit pit.”

8. The State or Department has proved, by a preponderance of the evidence that Respondent failed to renew his Certification for Nursery Stock after his Nursery Certificate expired in 2011. Despite repeated correspondence and “warnings” from the Department of Agriculture, Respondent continued to engage in the Nursery Stock business without renewing his Nursery Stock certificate.

9. RULE 0080-6-1-.03(1) provides:

No nursery stock and other rooted plants or propagating materials shall be sold, offered for sale, or transported within or into the state of Tennessee unless it has been inspected and the owner of same holds a valid certificate affirming that same nursery stock is true to its name (scientific and/or approved common name) and apparently free of insect pests, pest plants, and/or plant diseases...”

10. The State or Department has proved, by a preponderance of the evidence, that Respondent continued to operate his nursery business and buy/sell nursery stock without the required certificate after multiple warnings from the Department of Agriculture regarding expiration of his certificate.

11. RULE 0080-25-01-.01 (21) states:

Any person and/or firm who sells, offers for sale, or moves plants without having first secured a nursery and Plant Dealer’s Certificate shall be subject to the following Civil Penalties:

- 1st offense -- warning
- 2nd offense -- \$100 civil penalty
- 3rd offense -- \$250 civil penalty

4th offense -- \$500 civil penalty

5th offense -- \$500 civil penalty

12. The Department asks this Judge to revoke Respondent's certification, to assess the unpaid costs of licensure (\$702.93), to assess a civil penalty of \$500.00 against Respondent, and to assess the costs of this action against Respondent.

13. The Department has met its burden of proof, by a preponderance of the evidence, that Respondent has committed the violations as set forth above.

Accordingly, for the reasons stated above, Respondent's Nursery Certification is **REVOKED**. Respondent is **assessed back fees of \$702.93**, a **civil penalty in the amount of \$250.00**, and Respondent is assessed the **costs of this action**. The Department is instructed to file a sworn statement of costs.

It is so **ORDERED**.

This order entered and effective this ____day of December, 2013.

Joyce Grimes Safley
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this ____day of _____, 2013.

J. Richard Collier

J. Richard Collier, Director
Administrative Procedures Division