

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) OFPA Docket No. 12-0216
)
Paul A. Rosberg, d/b/a)
Rosberg Farm,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

The Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], instituted this proceeding by filing a Complaint on January 31, 2012. The Administrator instituted the proceeding under the Organic Foods Production Act of 1990, as amended (7 U.S.C. §§ 6501-6522) [Organic Foods Production Act]; the National Organic Program regulations (7 C.F.R. pt. 205) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges: (1) on November 15, 2006, Paul A. Rosberg applied to OneCert for organic certification under the Regulations while still certified by the Organic Crop Improvement Association and failed to declare on his application to OneCert that he was previously certified by the Organic Crop Improvement Association and failed to provide OneCert with copies of previous noncompliance letters from the Organic Crop Improvement Association or a description of how his noncompliance was resolved, in willful violation of 7 C.F.R.

§ 205.401; (2) on August 28, 2007, Mr. Rosberg applied to International Certification Services, Inc., for organic certification under the Regulations and failed to declare on his application to International Certification Services, Inc., that he was previously certified by the Organic Crop Improvement Association, failed to declare his application for organic certification with OneCert, failed to declare his denial of organic certification by OneCert, and failed to provide International Certification Services, Inc., with copies of previous noncompliance letters or a description of how his noncompliance was resolved, in willful violation of 7 C.F.R. § 205.401; and (3) on September 10, 2007, Mr. Rosberg applied to the Ohio Ecological Food and Farm Association for organic certification under the Regulations and failed to declare on his application to the Ohio Ecological Food and Farm Association that he was previously certified by the Organic Crop Improvement Association, failed to declare his application for organic certification with OneCert and International Certification Services, Inc., failed to declare his denial of organic certification by OneCert and International Certification Services, Inc., and failed to provide the Ohio Ecological Food and Farm Association with copies of previous noncompliance letters or a description of how his noncompliance was resolved, in willful violation of 7 C.F.R. § 205.401.¹ On May 9, 2012, Mr. Rosberg filed an answer generally denying the allegations of the Complaint.²

¹Compl. ¶ II(1)-(3) at 3-4.

²Partial Answer.

On January 30, 2014, the Administrator filed Complainant's Motion for Summary Judgment [Motion for Summary Judgment]. The Hearing Clerk attempted to serve Mr. Rosberg with the Administrator's Motion for Summary Judgment by certified mail at Wausa, Nebraska. The United States Postal Service returned the mailing to the Hearing Clerk marked "unclaimed."³ On March 5, 2014, the Hearing Clerk remailed the Administrator's Motion for Summary Judgment by regular mail to Mr. Rosberg at the same address in Wausa, Nebraska, in an attempt to serve Mr. Rosberg in accordance with 7 C.F.R. § 1.147(c)(1).⁴

On May 28, 2014, Administrative Law Judge Janice K. Bullard [ALJ] filed a Decision and Order on Summary Judgment. On May 30, 2014, the ALJ vacated the Decision and Order on Summary Judgment⁵ and issued an Amended Decision and Order on Summary Judgment in which the ALJ found Mr. Rosberg failed to respond to the Administrator's Motion for Summary Judgment and granted the Administrator's Motion for Summary Judgment.⁶

³United States Postal Service Product and Tracking Information for 7012 1010 0002 0093 7197.

⁴Memorandum to the File issued by Jamaal Clayburn, Legal Assistant, Office of the Hearing Clerk, on March 5, 2014.

⁵Order Vacating Decision and Order Issued on May 28, 2014.

⁶Am. Decision and Order on Summ. J. at 2, 11.

On August 14, 2014, Mr. Rosberg appealed the ALJ's Amended Decision and Order on Summary Judgment to the Judicial Officer.⁷ On August 28, 2014, the Administrator filed Complainant's Response to Appellant's Appeal of Amended Decision and Order on Summary Judgment, and on September 2, 2014, Mr. Rosberg filed a supplement to his August 14, 2014, appeal petition.⁸ On appeal, Mr. Rosberg requested that I vacate the ALJ's Amended Decision and Order on Summary Judgment because the Hearing Clerk failed to serve him with the Administrator's Motion for Summary Judgment at his last known residence in Yankton, South Dakota, as required by 7 C.F.R. § 1.147(c)(1). Mr. Rosberg asserted he informed the Hearing Clerk of his Yankton, South Dakota, residence in a letter dated February 26, 2014, a copy of which letter Mr. Rosberg attached to his Supplement to Appeal Petition.

I found Mr. Rosberg informed the Hearing Clerk of his Yankton, South Dakota, residence and found the Hearing Clerk failed to serve Mr. Rosberg with the Administrator's Motion for Summary Judgment in accordance with 7 C.F.R. § 1.147(c)(1). Accordingly, I vacated the ALJ's Amended Decision and Order on Summary Judgment and remanded the proceeding to the ALJ to provide Mr. Rosberg an opportunity to respond to the Administrator's Motion for Summary Judgment.⁹

On October 30, 2014, the ALJ issued an Order on Remand directing the Hearing Clerk to serve Mr. Rosberg with the Administrator's Motion for Summary Judgment and directing

⁷Motion for Reconsideration: Objection for Decision Without Hearing or Notice of Hearing.

⁸Supplemental Motion for Reconsideration: Objection for Decision Without Hearing or Notice of Hearing [Supplement to Appeal Petition].

⁹Rosberg (Remand Order), No. 12-0216, 2014 WL 7405838 (U.S.D.A. Sept. 29, 2014).

Mr. Rosberg to respond to the Administrator's Motion for Summary Judgment within 30 days after receipt of the Administrator's Motion for Summary Judgment.

On December 2, 2014, Jason Ravensborg entered an appearance on behalf of Mr. Rosberg and requested an extension of time within which to file a response to the Administrator's Motion for Summary Judgment. The ALJ granted the December 2, 2014, motion for extension of time and a subsequent motion for extension of time, and, on February 13, 2015, Mr. Ravensborg filed a timely response to the Administrator's Motion for Summary Judgment.¹⁰

¹⁰Respondent's Answer to Complainant's Motion for Summary Judgment.

On February 18, 2015, Mr. Rosberg himself moved for an extension of time to respond to the Administrator's Motion for Summary Judgment and requested that the ALJ recuse herself. On February 20, 2015, the ALJ denied the motion for recusal and the motion for extension of time, but allowed additional time for Mr. Rosberg to file documents, notwithstanding that Mr. Rosberg had filed his February 18, 2015, motion directly, despite the entry of an appearance by Mr. Ravensborg as counsel for Mr. Rosberg.¹¹

On March 13, 2015, Mr. Rosberg filed documents. On March 19, 2015, Mr. Rosberg requested that the ALJ reconsider the ALJ's February 20, 2015, Order. On March 26, 2015, the Administrator filed a reply to Mr. Rosberg's February 13, 2015, response to the Administrator's Motion for Summary Judgment.¹² On March 30, 2015, Mr. Ravensborg filed a motion to withdraw as counsel for Mr. Rosberg. On April 7, 2015, Mr. Rosberg moved to dismiss the case or, in the alternative, to indefinitely continue the case,¹³ and on April 13, 2015, Mr. Rosberg filed a request for summary judgment.

¹¹ALJ's Order Denying Motion for Recusal; Denying Motion for Extension to File an Answer; and Granting Motion for Extension of Time to File Submissions.

¹²Complainant's Response to Respondent's Answer to Complainant's Motion for Summary Judgment.

¹³Motion for Case Dismissal or Indefinite [sic] Continuance.

On April 28, 2015, the ALJ issued an order granting Mr. Ravensborg's motion to withdraw as counsel for Mr. Rosberg, denying Mr. Rosberg's request for reconsideration of the ALJ's February 20, 2015, Order, and denying Mr. Rosberg's motion to dismiss or, in the alternative, to indefinitely continue the proceeding.¹⁴ On April 28, 2015, the ALJ also issued a Decision on Remand in which the ALJ: (1) concluded there are no genuine issues of material fact presented in this proceeding and entry of summary judgment in favor of the Administrator is appropriate; (2) concluded Mr. Rosberg willfully violated 7 C.F.R. § 205.401 as alleged in the Complaint; (3) ordered Mr. Rosberg to cease and desist from violating the Regulations; (4) revoked Mr. Rosberg's organic certification under the Regulations for a period of five years; and (5) disqualified Mr. Rosberg from being eligible to be certified as an organic operation under the Organic Foods Production Act for a period of five years.¹⁵

On May 21, 2015, Mr. Rosberg filed a request that the ALJ reconsider the ALJ's Decision and Order on Remand and the ALJ's April 28, 2015, Order.¹⁶ On June 8, 2015, Mr. Rosberg filed a Notice of Appeal. On June 9, 2015, the ALJ issued an Order Denying Reconsideration. On July 13, 2015, Mr. Rosberg appealed the ALJ's Decision and Order on Remand to the Judicial Officer [Appeal Petition]. On July 30, 2015, the Administrator filed Complainant's Response to Appellant's Appeal of Decision and Order on Remand, and on July 31, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

¹⁴Order Granting Counsel's Motion to Withdraw as Counsel; Denying Respondent's Request for Reconsideration of My Order of February 20, 2015; and Denying Respondent's Motion to Dismiss or Indefinite Continuance [ALJ's April 28, 2015, Order].

¹⁵ALJ's Decision and Order on Remand at 13-14.

¹⁶Mr. Rosberg's Motion for Reconsideration of Two Orders.

DECISION

Mr. Rosberg's June 8, 2015, Notice of Appeal

The Rules of Practice set forth requirements for an appeal petition, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

7 C.F.R. § 1.145(a).

Mr. Rosberg's June 8, 2015, Notice of Appeal reads in its entirety, as follows:

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE
Docket No 12-0216

In re:

Paul A Rosberg doing business as
Rosberg Farm

Respondent.

Notice of Appeal

I Paul A Rosberg appeals [sic] any and all orders of Janice K Bullard. I wish to hold my appeal until my motion to reconsideration [sic] has been ruled on. So under duress I made out this Notice of Appeal in fear that the clerk has not filled [sic] my motion for reconsider [sic] that was to be decided by this byest [sic] Administrative [sic] Law Judge.

Respectively [sic] submitted

Paul A Rosberg

Notice of Appeal (emphasis in original). Mr. Rosberg's Notice of Appeal does not remotely conform to the requirements of an appeal petition set forth in 7 C.F.R. § 1.145(a). Therefore, I find Mr. Rosberg's Notice of Appeal is not an appeal petition. Instead, I find Mr. Rosberg's Notice of Appeal is a request that I extend the time for filing an appeal petition until a reasonable time after the ALJ rules on Mr. Rosberg's May 21, 2015, Motion for Reconsideration of Two Orders.

On June 9, 2015, the ALJ ruled on Mr. Rosberg's May 21, 2015, Motion for Reconsideration of Two Orders,¹⁷ and, on June 15, 2015, the Hearing Clerk served Mr. Rosberg with the ALJ's Order Denying Reconsideration.¹⁸ As Mr. Rosberg requested that I extend the time for filing an appeal petition until a reasonable time after the ALJ ruled on Mr. Rosberg's Motion for Reconsideration of Two Orders, and filed his Appeal Petition within 30 days after the Hearing Clerk served him with the ALJ's ruling, I find Mr. Rosberg's Appeal Petition timely filed.

Mr. Rosberg's July 13, 2015, Appeal Petition

The ALJ found the Administrator properly supported the Administrator's Motion for Summary Judgment and Mr. Rosberg failed to show there is a genuine issue for trial (ALJ's Decision and Order on Remand at 1, 5, 12). On appeal, Mr. Rosberg contends sworn statements of two witnesses, which he submitted in this proceeding, set forth specific facts showing a

¹⁷ALJ's Order Denying Reconsideration.

¹⁸United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9853 1819.

genuine issue for trial; therefore, the ALJ's Decision and Order on Remand granting the Administrator's Motion for Summary Judgment, is error (Appeal Pet. at 1).

One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses.¹⁹ If the moving party supports its motion for summary judgment, the burden shifts to the nonmoving party, who may not rest upon mere allegations, denials, speculation, or conjecture to defeat summary judgment, but must, instead, resist the motion for summary judgment by setting forth specific facts, in affidavits, deposition transcripts, exhibits, or other evidence, that raise a genuine issue for trial.²⁰

Mr. Rosberg failed to identify the sworn statements upon which he bases his appeal; however, the record relied upon by the ALJ²¹ contains copies of four sworn statements submitted by Mr. Rosberg. First, Mr. Rosberg attached to his Partial Answer and included in his March 13, 2015, document submission, copies of an affidavit subscribed and sworn by Mr. Rosberg on June 21, 2005, more than one year prior to the date of Mr. Rosberg's November 15, 2006, August 28, 2007, and September 10, 2007, applications for organic certification, which are the

¹⁹*Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Sheets v. Butera*, 389 F.3d 772, 776 (8th Cir. 2004); *Prudential Ins. Co. v. Hinkel*, 121 F.3d 364, 366 (8th Cir. 1997).

²⁰*Gannon Int'l, Ltd. v. Blocker*, 684 F.3d 785, 794 (8th Cir. 2012) (stating speculation and conjecture are insufficient to defeat a motion for summary judgment); *Doe v. U.S. Dep't of Veterans Affairs*, 519 F.3d 456, 461 (8th Cir. 2008) (stating a nonmoving party's allegations or speculation, unsupported by specific facts or evidence, are insufficient to withstand a motion for summary judgment); *Scherr Construction Co. v. Greater Huron Development Corp.*, 700 F.2d 463, 465 (8th Cir. 1983) (stating a party opposing a motion for summary judgment may not rest on allegations in the pleadings but must set forth specific facts that raise a genuine issue for trial).

²¹The ALJ admitted to the record the attachments to Mr. Rosberg's Partial Answer, filed May 9, 2012, and all of the documents filed by Mr. Rosberg on March 13, 2015 (ALJ's Decision and Order on Remand at 5).

subject of this proceeding. Mr. Rosberg's June 21, 2005, affidavit does not set forth specific facts showing a genuine issue for trial as Mr. Rosberg completed the affidavit prior to his applications for organic certification which are the subject of this proceeding.

Second, Mr. Rosberg attached to his Partial Answer a copy of an affidavit subscribed and sworn by Mr. Rosberg on April 6, 2010. Mr. Rosberg's April 6, 2010, affidavit contains a general denial that he violated the Regulations, conjecture that the Complaint is the work of Sam Welsch and Evert Lundquist, and allegations that persons tasked with determining whether Mr. Rosberg met the requirements for organic certification failed to act timely, failed to properly interpret his responses to their questions, lied, and were generally incompetent. Mr. Rosberg's general denial of the allegations in the Complaint, conjecture regarding the identity of persons whose work resulted in the issuance of the Complaint, and allegations regarding the honesty and ability of those tasked with determining whether he met the requirements for organic certification are not specific facts showing a genuine issue for trial.²²

Third, Mr. Rosberg attached to his Partial Answer a copy of an affidavit subscribed and sworn by Kelly Rosberg on April 6, 2010. Ms. Rosberg's April 6, 2010, affidavit merely states an examination of Mr. Rosberg's affidavit will result in the realization that Mr. Rosberg did not violate the Regulations. On its face, Ms. Rosberg's affidavit does not set forth specific facts, but rather, speculation regarding the effect Mr. Rosberg's affidavit will have on persons examining that affidavit.

Fourth, Mr. Rosberg included in his March 13, 2015, document submission, a copy of an undated letter addressed to the National Organic Program signed and sworn by Mr. Rosberg. The

letter requests that the National Organic Program provide Mr. Rosberg with documents that are described in that undated letter, but the letter does not set forth specific facts showing a genuine issue for trial.

Based upon a careful consideration of the record, I find no change or modification of the ALJ's April 28, 2015, Decision and Order on Remand is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision as the final order in a proceeding, as follows:

§ 1.145 Appeal to Judicial Officer.

....

(i) *Decision of the judicial officer on appeal.* If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's April 28, 2015, Decision and Order on Remand is adopted as the final order in this proceeding.

RIGHT TO JUDICIAL REVIEW

²²See note 20.

Mr. Rosberg has the right to obtain judicial review of this Decision and Order in the United States district court for the district in which Mr. Rosberg is located.²³

Done at Washington, DC

August 20, 2015

William G. Jenson
Judicial Officer

²³7 U.S.C. § 6520(b).