UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	OFPA Docket No. 15-0050
	)	OFPA Docket No. 15-0051
Kriegel, Inc., and	)	
Laurance Kriegel,	)	
	)	
Respondents	)	**Decision and Order**

PROCEDURAL HISTORY

The Associate Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], instituted this proceeding by filing an Order to Show Cause on January 8, 2015. 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: (1) alleged Kriegel, Inc., and Laurance Kriegel [Respondents] were not eligible to be certified under the Organic Foods Production Act and the Regulations because Respondents failed to update their organic system plan, pursuant to 7 C.F.R. § 205.201(a), and failed to provide information necessary to determine their compliance with previously identified areas of noncompliance with the Regulations, pursuant to 7 C.F.R. § 205.401(d);[1] and

[1]Order to Show Cause ¶ II at 3. The Administrator also alleged that, on March 31, 2014,

(2) directed Respondents to show cause why their application for organic certification under the Regulations should not be denied. On February 19, 2015, Respondents filed a Response to Order to Show Cause.

On April 24, 2015, Acting Chief Administrative Law Judge Janice K. Bullard [Chief ALJ] filed an Order Directing the Parties to Submit Evidence in which the Chief ALJ directed that, no later than June 26, 2015, each party file with the Hearing Clerk: (1) documentary evidence the Chief ALJ should consider; (2) a written argument stating the party's position in this proceeding; and (3) a proposed decision which addresses the party's contentions. On June 25, 2015, the Administrator filed documentary evidence[2] and proposed findings of fact, proposed conclusions of law, a proposed order, and a brief in support of the Administrator's proposed findings of fact, proposed conclusions of law, and proposed order.[3] Respondents failed to respond to the Chief ALJ's April 24, 2015, Order Directing the Parties to Submit Evidence.

---

the Texas Department of Agriculture found Respondents are not eligible to be certified because Respondents failed to resolve outstanding areas of noncompliance or come into full compliance with the Regulations, pursuant to 7 C.F.R. § 205.402(a)(3) (Order to Show Cause ¶ III at 3). Subsequent to filing the Order to Show Cause, the Administrator stated he inadvertently included this allegation in the Order to Show Cause, would not present evidence to prove this allegation, and would not present arguments in support of this allegation (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 1 n.1).

[2]The Administrator identified the filed documents as "CX 1-CX 19."

[3]Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof.

On August 26, 2015, the Chief ALJ issued a Decision and Order in which the Chief ALJ: (1) concluded the Texas Department of Agriculture properly found Respondents were not eligible to be certified under the Organic Foods Production Act and the Regulations because Respondents failed to provide the information necessary to determine their eligibility for organic certification, pursuant to 7 C.F.R. § 205.201(a); (2) concluded the Texas Department of Agriculture properly found Respondents were not eligible to be certified under the Organic Foods Production Act and the Regulations because Respondents failed to provide documentation with their application for organic certification that verified their compliance with 7 C.F.R. §§ 205.103, .200, .203, .205-.206, and .406, pursuant to 7 C.F.R. § 205.401(d); (3) concluded the Administrator properly upheld the determinations of the Texas Department of Agriculture that Respondents were not eligible for organic certification under the Organic Foods Production Act and the Regulations; and (4) denied Respondents' applications and request for organic certification under the Organic Foods Production Act and the Regulations.[4]

On September 11, 2015, Respondents filed a Notice of Appeal [Appeal Petition]. The Hearing Clerk served the Administrator with the Respondents' Appeal Petition on September 11, 2015, and, pursuant to the Rules of Practice, the Administrator was required to file with the Hearing Clerk a response to the Respondents' Appeal Petition no later than October 1, 2015.[5] On October 22, 2015, the Administrator filed Complainant's Response to Appellants' Notice of Appeal. The Hearing Clerk included the Administrator's late-filed response to the Respondents' Appeal Petition in the record. I have not considered the Administrator's response to the

[4]Chief ALJ's Decision and Order at 7.

[5]See 7 C.F.R. § 1.145(b).

Respondents' Appeal Petition because the response was late-filed, and the Administrator's late-filed response forms no part of the basis for this Decision and Order. On October 23, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Kriegel, Inc., and Mr. Kriegel's Appeal Petition

Respondents raise eight issues in their Appeal Petition. First, Respondents assert they have "not used any chemicals for many years" (Appeal Pet. ¶ I at 2).

The Administrator did not allege that Respondents used chemicals (Order to Show Cause), and Respondents' use of chemicals is not at issue in this proceeding. Moreover, even if I were to find that Respondents have "not used any chemicals for many years," as Respondents assert, that finding would not alter my disposition of this proceeding. Therefore, I conclude Respondents' assertion that they have "not used any chemicals for many years" is not relevant to this proceeding.

Second, Respondents assert they accurately completed all forms necessary for organic certification; therefore, Respondents qualify for organic certification (Appeal Pet. ¶ II at 2).

The Chief ALJ found the unrefuted evidence establishes Respondents have not complied with the Regulations requiring Respondents to submit complete applications and an organic system plan to their certifying agent, the Texas Department of Agriculture.[6]

The Judicial Officer is not bound by the Chief ALJ's factual determinations. The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial

[6]Chief ALJ's Decision and Order at 4-5.

decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> . . . .
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

> *Appeals and review*. . . .
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

The consistent practice of the Judicial Officer is to give great weight to the findings by administrative law judges.[7] The Judicial Officer has reversed an administrative law judge's

[7]JSG Trading Corp. (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 687-90 (U.S.D.A. 1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *final decision on remand* 58 Agric. Dec. 1041 (U.S.D.A. 1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); Goetz, 56 Agric. Dec. 1470, 1510 (1997); Hodgins, 56 Agric. Dec. 1242, 1364-65 (U.S.D.A. 1997), *remanded*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000) (citation limited under

findings of fact where: (1) documentary evidence or inferences to be drawn from the facts are involved;[8] (2) the record is sufficiently strong to compel a reversal as to the facts;[9] or (3) an administrative law judge's findings of fact are hopelessly incredible.[10] The Chief ALJ's findings of fact are fully supported by the documentary evidence, and I find nothing in the record compelling reversal of the Chief ALJ's findings of fact. Respondents' request that I reverse the Chief ALJ's findings of fact is based upon Respondents' unsupported assertion that they accurately completed all forms necessary for organic certification. I decline to reverse the Chief ALJ's findings of fact based upon Respondents' unsupported assertion of fact.

Third, Respondents assert the Chief ALJ's references to CX 1-CX 8, CX 13-CX 15, and CX 17-CX 19 in the Chief ALJ's August 26, 2015, Decision and Order are references to

---

6th Circuit Rule 28(g)), *printed in* 59 Agric. Dec. 534 (U.S.D.A. 2000), *final decision on remand*, 60 Agric. Dec. 73 (U.S.D.A. 2001), *aff'd* 33 F. App'x 784 (6th Cir. 2002); Saulsbury Enterprises (Order Denying Pet. for Recons.), 56 Agric. Dec. 82, 89 (U.S.D.A. 1997); Andershock's Fruitland, Inc., 55 Agric. Dec. 1204, 1229 (U.S.D.A. 1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998), *reprinted in* 57 Agric. Dec. 1458 (U.S.D.A. 1998).

[8]Upton, 44 Agric. Dec. 1936, 1942 (U.S.D.A. 1985); Petty, 43 Agric. Dec. 1406, 1421 (U.S.D.A. 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); Aldovin Dairy, Inc., 42 Agric. Dec. 1791, 1797-98 (U.S.D.A. 1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); Farrow, 42 Agric. Dec. 1397, 1405 (U.S.D.A. 1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); King Meat Co., 40 Agric. Dec. 1468, 1500-01 (U.S.D.A. 1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (U.S.D.A. 1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

[9]Stamper, 42 Agric. Dec. 20, 30 (U.S.D.A. 1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (U.S.D.A. 1992).

[10]*Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); Ennes, 45 Agric. Dec. 540, 548 (U.S.D.A. 1986).

"unpublished unlawful rules" (Appeal Pet. ¶ II at 2).

On April 24, 2015, the Chief ALJ filed an Order Directing the Parties to Submit Evidence in which the Chief ALJ directed that each party file with the Hearing Clerk documentary evidence the Chief ALJ should consider. On June 25, 2015, in response to the Chief ALJ's order, the Administrator filed documentary evidence which the Administrator identified as "CX 1-CX 19." A plain reading of the Chief ALJ's August 26, 2015, Decision and Order reveals that the Chief ALJ's references to CX 1-CX 8, CX 13-CX 15, and CX 17-CX 19 are references to the documentary evidence the Administrator filed with the Hearing Clerk on June 25, 2015, and are not references to "unpublished unlawful rules," as Respondents assert. Therefore, I reject Respondents' assertion that the Chief ALJ referenced "unpublished unlawful rules" in the Chief ALJ's Decision and Order.

Fourth, Respondents contend this proceeding constitutes a second prosecution for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States (Appeal Pet. ¶ III at 2).

The Double Jeopardy Clause provides that no person will "be subject for the same offence to be twice put in jeopardy of life or limb[.]" (U.S. Const. amend. V.) The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offense.[11]

[11]Monge v. California, 524 U.S. 721, 727-28 (1998); United States v. Dixon, 509 U.S. 688, 696 (1993); Ohio v. Johnson, 467 U.S. 493, 499-500 (1984); Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 306-07 (1984); Oregon v. Kennedy, 456 U.S. 667, 671 (1982); Illinois v. Vitale, 447 U.S. 410, 415-16 (1980); United States v. Dinitz, 424 U.S. 600, 606 (1976); North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

This proceeding is an administrative proceeding brought under the Organic Foods Production Act and the Regulations to determine whether Respondents' applications for organic certification under the Organic Foods Production Act should be denied; it is not a "prosecution" within the meaning of the Double Jeopardy Clause.[12] The Administrator does not seek to punish Respondents. Instead, the Administrator seeks to determine whether Respondents' applications for organic certification under the Organic Foods Production Act should be denied. Therefore, I reject Respondents' contention that this proceeding constitutes a second prosecution for an offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States and conclude the Double Jeopardy Clause cannot be interposed to bar this proceeding.

Fifth, Respondents contend the Chief ALJ has established that her motive is to be an unconstitutional decision maker (Appeal Pet. ¶ III at 2).

Respondents cite no basis for their contention that the Chief ALJ established that her motive is to be an unconstitutional decision maker, and I cannot locate anything in the record that supports Respondents' contention that the Chief ALJ established that her motive is to be an

---

[12]See United States v. Bizzell, 921 F.2d 263, 266 (10th Cir. 1990) (stating administrative proceedings where defendants were debarred from Housing and Urban Development programs were not "prosecutions" within the meaning of the Double Jeopardy Clause); Greenly, AWA Docket No. 11-0073, 2013 WL 8213613, at *4 (U.S.D.A. July 2, 2013) (stating an administrative proceeding to determine whether a person is fit to be licensed under the Animal Welfare Act is not a "prosecution" within the meaning of the Double Jeopardy Clause), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014); KDLO Enterprises, Inc., 70 Agric. Dec. 1098, 1105 (U.S.D.A. 2011) (holding "jeopardy" within the meaning of the Double Jeopardy Clause does not attach to a disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930); Horton, 50 Agric. Dec. 430, 440 (U.S.D.A. 1991) (stating double jeopardy is not applicable to administrative proceedings for the assessment of a civil monetary penalty); McDaniel, 45 Agric. Dec. 2255, 2264 (U.S.D.A. 1986) (stating an administrative proceeding to assess a civil monetary penalty is civil in nature and not subject to the Double Jeopardy Clause).

unconstitutional decision maker. A review of the record reveals that the Chief ALJ conducted this proceeding in accordance with the Administrative Procedure Act and the Rules of Practice and provided the parties with due process in accordance with the Fifth Amendment to the Constitution of the United States.

Sixth, Respondents contend the Texas Department of Agriculture has established that it is an unconstitutional decision maker (Appeal Pet. ¶ III at 2).

Respondents cite no basis for their contention that the Texas Department of Agriculture established that it is an unconstitutional decision maker, and I cannot locate anything in the record that supports Respondents' contention that the Texas Department of Agriculture established that it is an unconstitutional decision maker. Moreover, I cannot locate any authority indicating an extant constitutional impediment to the Secretary of Agriculture's accreditation of the Texas Department of Agriculture as a certifying agent, pursuant to 7 U.S.C. § 6514(a) and 7 C.F.R. § 205.500(a), or to the Texas Department of Agriculture's performing the functions of a certifying agent pursuant to the Organic Foods Production Act and the Regulations.

Seventh, Respondents contend "Federal Rules" require the Texas Department of Agriculture to respond, and, as the Texas Department of Agriculture failed to respond, the Chief ALJ's denial of Respondents' request for organic certification, is error (Appeal Pet. Conclusion at 3). I infer, based upon the Respondents' Appeal Petition, Respondents contend the Texas Department of Agriculture was required by the Rules of Practice to respond to the Administrator's Order to Show Cause.

A plain reading of the Order to Show Cause reveals the Administrator instituted this proceeding against Kriegel, Inc., and Laurance Kriegel and not against the Texas Department of

Agriculture. The Rules of Practice provide that the party against whom a proceeding is instituted, referred to in the Rules of Practice as a respondent,[13] may file a response to a complaint.[14] See 7 C.F.R. § 1.136(a). As the Texas Department of Agriculture is not a party respondent in this proceeding, the Texas Department of Agriculture has no standing to file a response to the Administrator's Order to Show Cause and no consequence follows from the Texas Department of Agriculture's failure to file a response to the Administrator's Order to Show Cause. Therefore, I reject Respondents' assertions that the Texas Department of Agriculture is required to respond and that the Chief ALJ's denial of Respondents' request for organic certification, is error.

Eighth, Respondents contend the Chief ALJ's denial of their applications for organic certification violates their constitutional right to the pursuit of happiness (Appeal Pet. Conclusion at 3).

The Declaration of Independence states that all men are endowed by their creator with certain unalienable rights and among these unalienable rights is the right to the pursuit of happiness;[15] however, neither the Constitution of the United States nor its amendments guarantee a generalized right to the pursuit of happiness. Therefore, I reject Respondents' contention that the Chief ALJ's denial of their applications for organic certification violates a

---

[13]The Rules of Practice define the term "respondent," as follows: "*Respondent* means the party proceeded against." (7 C.F.R. § 1.132 (*Respondent*)).

[14]The Rules of Practice define the term "complaint" to include an order to show cause, as follows: "*Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted." (7 C.F.R. § 1.132 (*Complaint)).*

[15]The Declaration of Independence para. 2 (U.S. 1776).

constitutional right to the pursuit of happiness.

Based upon a careful consideration of the record, I find no change or modification of the Chief ALJ's August 26, 2015, Decision and Order 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 Chief ALJ's August 26, 2015, Decision and Order is adopted as the final order in this proceeding.

RIGHT TO JUDICIAL REVIEW

Respondents have the right to obtain judicial review of this Decision and Order in the United States district court for the district in which Respondents are located.[16]

Done at Washington, DC

October 29, 2015

_____

[16] 7 U.S.C. § 6520(b).

William G. Jenson
Judicial Officer