

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	FMIA Docket No. 14-0094
)	FMIA Docket No. 14-0095
Paul Rosberg and)	
Nebraska's Finest Meats, L.L.C.,)	
)	
)	Order Denying Respondents'
Respondents)	Petition for Reconsideration

PROCEDURAL HISTORY

On September 24, 2014, Paul Rosberg and Nebraska's Finest Meats, L.L.C. [Respondents], filed "Appeal or Motion for Reconsideration of September 10th, 2014 Order" [Petition for Reconsideration] requesting that I reconsider *In re Paul Rosberg* (Order Denying Late Appeal), __ Agric. Dec. ____ (Sept. 10, 2014). On October 15, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Respondents' Petition for Reconsideration.

DISCUSSION

The rules of practice applicable to this proceeding¹ provide that a party to a proceeding may file a petition to reconsider the decision of the Judicial Officer, as follows:

¹The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite. . . .*

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3). The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised in Respondents' Petition for Reconsideration, I find no error of law or fact necessitating modification of *In re Paul Rosberg* (Order Denying Late Appeal), __ Agric. Dec. __ (Sept. 10, 2014). Moreover, Respondents do not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of *In re Paul Rosberg* (Order Denying Late Appeal), __ Agric. Dec. __ (Sept. 10, 2014). Therefore, I deny Respondents' Petition for Reconsideration.

Respondents raise five issues in their Petition for Reconsideration. First, Respondents contend I erroneously stated Administrative Law Judge Janice K. Bullard [ALJ] ordered the indefinite withdrawal of inspection services from Respondents (Pet. for Recons. at 1).

The ALJ explicitly ordered the indefinite withdrawal of inspection services from

Respondents, as follows:

ORDER

Inspection services are hereby indefinitely withdrawn from Respondents Nebraska's Finest Meats, L.L.C[.,] and Paul Rosberg. This sanction extends by association to Kelly Rosberg, manager of Nebraska's Finest Meats, and inspection services are hereby indefinitely withdrawn from Kelly Rosberg.

ALJ's Decision and Order on the Record [ALJ's Decision] at 7. Therefore, I reject

Respondents' contention that my statement that the ALJ issued an order indefinitely withdrawing inspection services from Respondents, is error.

Second, Respondents contend I erroneously stated the Hearing Clerk served Mr. Rosberg with the ALJ's Decision on June 23, 2014. Respondents assert the ALJ's Decision was "made" on June 19, 2014, not June 23, 2014. (Pet. for Recons. at 2).

The Rules of Practice provide that the date of service of an administrative law judge's decision is the date of delivery by certified or registered mail, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

....

(c) *Service on party other than the Secretary.* (1) Any . . . initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual[.]

7 C.F.R. § 1.147(c)(1). United States Postal Service records establish the Hearing Clerk served Mr. Rosberg with the ALJ's Decision by certified mail on June 23, 2014.² Therefore, I reject

²United States Postal Service Product & Tracking Information for 7003 1010 0001

Respondents' contention that my statement that the Hearing Clerk served Mr. Rosberg with the ALJ's Decision on June 23, 2014, is error.

Third, Respondents contend I erroneously stated Respondents appealed the ALJ's Decision on July 29, 2014. Respondents assert they appealed the ALJ's Decision on July 19, 2014. (Pet. for Recons. at 2).

The Rules of Practice provide that a document is deemed to be filed at the time it is received by the Hearing Clerk, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

....

(g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk[.]

7 C.F.R. § 1.147(g). The Hearing Clerk's date stamp establishes the date a document reaches the Hearing Clerk.³ The Hearing Clerk's date stamp establishes that Respondents' appeal petition reached the Hearing Clerk on July 29, 2014. Therefore, I reject Respondents' contention that my statement that Respondents appealed the ALJ's Decision on July 29, 2014, is error.

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³*In re Susan Biery Sergojan* (Order Denying Pet. to Reconsider), 69 Agric. Dec. 1438, 1442 (2010) (stating the Hearing Clerk's date and time stamp establishes the date and time a document reaches the Hearing Clerk); *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244, 287 (2009) (holding the most reliable evidence of the date a document reaches the Hearing Clerk is the date and time stamped by the Office of the Hearing Clerk on that document), *appeal dismissed*, No. 1:10-cv-00217-AWA-DLB (E.D. Cal. June 23, 2010); *In re Bruce Lion* (Ruling), 65 Agric. Dec. 1214, 1221 (2006) (same).

Fourth, Respondents, relying on *Houston v. Lack*, 487 U.S. 266 (1988), contend their appeal of the ALJ's Decision was timely, as the mailbox rule applies in this proceeding (Pet. for Recons. at 1).

Houston v. Lack holds, under Federal Rule of Appellate Procedure 4(a)(1), a pro se prisoner's notice of appeal is filed at the moment of delivery to prison authorities for forwarding to the appropriate United States district court. The Federal Rules of Appellate Procedure govern procedure in the United States courts of appeals⁴ and are not applicable to administrative proceedings conducted under the Rules of Practice. Therefore, I find *Houston v. Lack*, which construes the Federal Rules of Appellate Procedure, inapposite.⁵

⁴Fed. R. App. P. 1(a)(1).

⁵*In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492, 536-38 (2002) (holding *Houston v. Lack*, 487 U.S. 266 (1988), inapplicable to proceedings conducted under the Rules of Practice).

A document required or authorized to be filed under the Rules of Practice is deemed to be filed at the time the document reaches the Hearing Clerk,⁶ and the Judicial Officer has consistently held that the mailbox rule is not applicable to proceedings under the Rules of Practice.⁷ An incarcerated pro se respondent's delivery of a document to prison authorities for forwarding to the Hearing Clerk does not constitute filing with the Hearing Clerk under the Rules of Practice.⁸ Therefore, I reject Respondents' contention that their appeal petition must be

⁶7 C.F.R. § 1.147(g).

⁷*In re Agri-Sales, Inc.* __ Agric. Dec. __, slip op. at 9 (Aug. 4, 2014) (stating the Judicial Officer has consistently held that the mailbox rule is not applicable to proceedings under the Rules of Practice); *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 86 (2009) (stating the argument that the mailbox rule applies to proceedings under the Rules of Practice has been consistently rejected by the Judicial Officer); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 302 (2005) (stating the mailbox rule does not apply in proceedings under the Rules of Practice); *In re William J. Reinhart*, 59 Agric. Dec. 721, 742 (2000) (rejecting the respondent's contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted under the Rules of Practice), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003).

⁸*See generally In re Jack Stepp* (Ruling Denying Respondents' Pet. for Recons. of the Order Lifting Stay), 59 Agric. Dec. 265, 268 (2000) (stating neither respondents' mailing the reply to motion to lift stay nor the United States Postal Service's delivering the reply to motion to lift stay to the United States Department of Agriculture, Mail & Reproduction Management Division, Mail Services Branch, constitutes filing with the Hearing Clerk); *In re Harold P. Kafka* (Order Denying Late Appeal), 58 Agric. Dec. 357, 365 (1999) (stating the respondent's unsuccessful efforts to file his appeal petition with the Hearing Clerk do not constitute filing the appeal petition with the Hearing Clerk), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table), *printed in* 60 Agric. Dec. 23 (2001); *In re Sweck's, Inc.*, 58 Agric. Dec. 212, 213 n.1 (1999) (stating appeal petitions must be filed with the Hearing Clerk; stating the hearing officer erred when he instructed the litigants that appeal petitions must be filed with the Judicial Officer); *In re Daniel E. Murray* (Order Denying Pet. for Recons.), 58 Agric. Dec. 77, 82 (1999) (stating the effective date of filing a document with the Hearing Clerk is the date the

deemed to have been filed on the day Mr. Rosberg delivered the appeal petition to prison authorities for forwarding to the Hearing Clerk, I reject Respondents' contention that the mailbox rule applies to this proceeding, and I reject Respondents' contention that they timely filed their appeal petition.

Fifth, Respondents contend my conclusion that the Judicial Officer does not have jurisdiction to extend the time for filing an appeal after an administrative law judge's decision has become final, is error (Pet. for Recons. at 2).

document reaches the Hearing Clerk, not the date the respondent mailed the document); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 140 n.2 (1999) (stating the date typed on a pleading by a party filing the pleading does not constitute the date the pleading is filed with the Hearing Clerk; instead, the date a document is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Severin Peterson* (Order Denying Late Appeal), 57 Agric. Dec. 1304, 1310 n.3 (1998) (stating neither the applicants' mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating even if the respondent's answer had been received by the complainant's counsel within the time for filing the answer, the answer would not be timely because the complainant's counsel's receipt of the respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

The Judicial Officer has continuously and consistently held, under the Rules of Practice, that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.⁹ Respondents offer no support for their contention that this holding is incorrect; therefore, I reject Respondents' contention that the conclusion is error.

For the foregoing reasons, the following Order is issued.

ORDER

Respondents' Petition for Reconsideration, filed September 24, 2014, is denied.

⁹*See, e.g., In re Piedmont Livestock, Inc.* (Order Denying Late Appeal), ___ Agric. Dec. ___ (Apr. 29, 2013) (dismissing Piedmont Livestock, Inc.'s appeal petition filed 3 days after the chief administrative law judge's decision became final and dismissing Joseph Ray Jones's appeal petition filed 1 day after the chief administrative law judge's decision became final); *In re Custom Cuts, Inc.* (Order Denying Late Appeal), ___ Agric. Dec. ___ (Feb. 20, 2013) (dismissing the respondents' appeal petition filed 1 month 27 days after the chief administrative law judge's decision became final); *In re Robert M. Self* (Order Denying Late Appeal), ___ Agric. Dec. ___ (Sept. 24, 2012) (dismissing the respondent's appeal petition filed 18 days after the chief administrative law judge's decision became final); *In re Timothy Mays* (Order Denying Late Appeal), 69 Agric. Dec. 631 (2010) (dismissing the respondent's appeal petition filed 1 week after the administrative law judge's decision became final); *In re David L. Noble* (Order Denying Late Appeal), 68 Agric. Dec. 1060 (2009) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Michael Claude Edwards* (Order Denying Late Appeal), 66 Agric. Dec. 1362 (2007) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); *In re Tung Wan Co.* (Order Denying Late Appeal), 66 Agric. Dec. 939 (2007) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); *In re Tim Gray* (Order Denying Late Appeal), 64 Agric. Dec. 1699 (2005) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); *In re Jozset Mokos* (Order Denying Late Appeal), 64 Agric. Dec. 1647 (2005) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); *In re Ross Blackstock* (Order Denying Late Appeal), 63 Agric. Dec. 818 (2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); *In re David Gilbert* (Order Denying Late Appeal), 63 Agric. Dec. 807 (2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Vega Nunez* (Order Denying Late Appeal), 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

Done at Washington, DC

October 31, 2014

William G. Jenson
Judicial Officer