

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:) 2002 AMA Docket No. F&V 989-6
)
Boghosian Raisin)
Packing Co., Inc.,)
)
Petitioner) **Remand Order**

PROCEDURAL HISTORY

Boghosian Raisin Packing Co., Inc. [hereinafter Petitioner], instituted this proceeding by filing a Petition¹ on December 2, 2002. Petitioner instituted the proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of “Raisins Produced From Grapes Grown In California” (7 C.F.R. pt. 989); and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

¹Petitioner entitles its Petition “Petition To Modify Raisin Marketing Order Provisions/Regulations And/Or Petition To The Secretary Of Agriculture To Set Aside Reserve Percentages Of All Varieties Of Raisins Established For The 2002-2003 Crop Year, Pursuant To 7 C.F.R. § 989.1 *Et Seq.* And To Exempt Petitioner From Various Provisions Of The Raisin Marketing Order And/Or Any Obligations Imposed In Connection Therewith With Respect To The Reserve Requirements, That Are Not In Accordance With Law” [hereinafter Petition].

On March 3, 2003, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a “Motion to Dismiss Petition.” Respondent contends the Petition does not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) and should be dismissed (Mot. to Dismiss Pet.). On April 2, 2003, Petitioner filed “Petitioner’s Opposition to Respondent’s Motion to Dismiss Petition.”

On April 7, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an “Order Granting in Part and Denying in Part Respondent’s Motion to Dismiss Petition” in which she agreed with Respondent’s contention that the Petition does not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)).

On April 15, 2003, Respondent appealed to the Judicial Officer. On May 9, 2003, Petitioner filed “Response of Boghosian Raisin Packing Co., Inc. to Respondent’s Appeal Petition.” On May 9, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent’s one issue in “Respondent’s Appeal Petition” is that the ALJ, having granted in part Respondent’s Motion to Dismiss Petition, should have: (1) dismissed all or a portion of the Petition; (2) permitted Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ’s dismissal; and (3) permitted Respondent to file an answer to any amended petition in accordance with section

900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)) (Respondent’s Appeal Pet. at 3).

Section 900.52(c)(2) of the Rules of Practice provides if an administrative law judge dismisses a petition or a portion of the petition, the petitioner shall be permitted to file an amended petition and section 900.52a(a) of the Rules of Practice provides the time for the respondent’s filing an answer to the amended petition, as follows:

§ 900.52 Institution of proceeding.

. . . .

(c) *Motion to dismiss petition*—. . . .

(2) *Decision by the Judge*. The Judge, after due consideration, shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65: *Provided*, That within 20 days following the service upon the petitioner of a copy of the order of the Judge dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.

§ 900.52a Answer to petition.

(a) *Time of filing*. Within 30 days after the filing of the petition,^[2] the Administrator shall file an answer thereto: *Provided*, That, if a motion to dismiss the petition, in whole or in part, is made pursuant to § 900.52(c), the answer shall be filed within 15 days after the service of an order of the Judge denying the motion or granting the motion with respect to only a portion of the petition. The answer shall be filed with the hearing clerk who shall cause a copy thereof to be served promptly upon the petitioner.

7 C.F.R. §§ 900.52(c)(2), .52a(a) (footnote added).

The ALJ agreed with Respondent’s contention that the Petition did not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) (Order Granting in Part

²“The term *petition* includes an amended petition.” (7 C.F.R. § 900.51(p).)

and Denying in Part Respondent's Mot. to Dismiss Pet.). However, instead of dismissing the Petition or a portion of the Petition, permitting Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal, and permitting Respondent to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)), the ALJ directed Petitioner and Respondent, as follows:

. . . I direct the parties as follows: (1) By Tuesday, April 22, 2003, Petitioner shall supplement its Petition with the particulars as to why the procedure and percentage calculations and other RAC actions were not in accordance with the Raisin Marketing Order or the Act. (2) Within 20 days after service of those particulars, Respondent shall answer or otherwise respond to the Petition as supplemented. (3) Both parties shall construe the Petition as a request for relief for Petitioner. (4) If, by the date on which Respondent's response is to be prepared, the RAC recommendation of which Petitioner complains is not yet effective and cannot impact handlers, the Respondent may file an affidavit or declaration to that effect, **rather than an Answer.**

Order Granting in Part and Denying in Part Respondent's Mot. to Dismiss Pet. at 1-2 (emphasis in original).

The ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition is a rational disposition of Respondent's Motion to Dismiss Petition; however, the ALJ's order is not in accord with the Rules of Practice. The Rules of Practice are binding on administrative law judges and the Judicial Officer,³ and administrative law

³*In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has no authority to depart from the Rules of Practice). *Cf. In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000) (stating the Judicial Officer and the

(continued...)

judges and the Judicial Officer have very limited authority to modify the Rules of Practice in a proceeding.⁴ A conclusion by the ALJ that the Petition does not conform to section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) requires that the ALJ dismiss the Petition or a portion of the Petition and permit Petitioner to file an amended petition

³(...continued)

administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 123 S. Ct. 1802 (2003); *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes).

⁴See *In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

within 20 days following service on Petitioner of the ALJ's dismissal. Respondent must be permitted to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)). Therefore, I vacate the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition and remand the proceeding to the ALJ to issue an order in accordance with the Rules of Practice.

For the foregoing reasons, the following Order should be issued.

ORDER

1. The ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition, issued April 7, 2003, is vacated.
2. The proceeding is remanded to the ALJ to issue an order in accordance with the Rules of Practice.

Done at Washington, DC

May 13, 2003

William G. Jenson
Judicial Officer