

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	BPRA Docket No. 02-0002
)	
Herman Camara, d/b/a Camara's)	
New England Commission)	
Auction, Inc., and also d/b/a)	
Camara's Auction Sales,)	
)	
Respondent)	Decision and Order

PROCEDURAL HISTORY

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on February 19, 2002. Complainant instituted the proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order issued under the Beef Promotion Act (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations issued under the Beef Promotion Act (7 C.F.R. §§ 1260.301-.316) [hereinafter the Beef Promotion Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that Herman Camara, d/b/a Camara's New England Commission Auction, Inc., and also d/b/a Camara's Auction Sales [hereinafter Respondent]: (1) willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay the late-payment charges due on 5,573 cattle on which Respondent collected assessments from February 15, 1995, through May 30, 1996, and February 15, 2000, through September 30, 2000; (2) willfully violated section 1260.172 of the Beef Promotion Order and section 1260.310 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310) by failing to collect and remit assessments due from the sale of 8,320 cattle sold from at least May 27, 1996, through December 27, 1999; (3) violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay the late-payment charges due on 8,320 cattle on which Respondent collected assessments from May 27, 1996, through December 27, 1999; and (4) willfully violated section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required information in required reports (Compl. ¶¶ II-IV).

On March 26, 2002, the Hearing Clerk served Respondent by ordinary mail with a copy of the Complaint, a copy of the Rules of Practice, and a service letter dated February 20, 2002.¹ Moreover, Deputy Sheriff Carl A. Munroe of the Bristol County Deputy Sheriffs' Office, New Bedford, Massachusetts, personally served Respondent

¹See Memorandum to the File dated March 26, 2002, from LaWuan Waring, Legal Technician, Office of Administrative Law Judges, United States Department of Agriculture.

with a copy of the Complaint, a copy of the Rules of Practice, and the Hearing Clerk's February 20, 2002, service letter on April 18, 2002.² Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter dated June 20, 2002, informing him that his answer to the Complaint had not been filed within the time required in the Rules of Practice.³ Respondent failed to respond to the Hearing Clerk's June 20, 2002, letter.

On July 22, 2002, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default" [hereinafter Motion for Default Decision] and a "Proposed Decision and Order Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. On September 12, 2002, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.⁴ Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default

²See Return of Service dated April 22, 2002, signed by Carl A. Munroe, Deputy Sheriff, Bristol County Deputy Sheriffs' Office, New Bedford, Massachusetts; Notice of Service filed May 9, 2002.

³See letter dated June 20, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent.

⁴See Memorandum to the File dated September 12, 2002, from LaWuan Waring, Legal Technician, Office of Administrative Law Judges, United States Department of Agriculture.

Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent a letter dated December 20, 2002, to Respondent informing him that no objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision had been filed within the time required in the Rules of Practice.⁵ Respondent failed to respond to the Hearing Clerk's December 20, 2002, letter.

On December 30, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Decision and Order Upon Admission of Facts by Reason of Default" [hereinafter Initial Decision and Order]: (1) concluding Respondent willfully violated sections 1260.172 and 1260.175 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .175, .310, .312); (2) assessing Respondent an \$11,000 civil penalty; (3) ordering Respondent to pay past-due assessments and late-payment charges to the Cattlemen's Beef Board; and (4) ordering Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations (Initial Decision and Order at 2-4).

On March 10, 2003, Respondent appealed to the Judicial Officer. On March 27, 2003, Complainant filed "Reply to Respondent's Appeal of the ALJ's Decision and Order

⁵See letter dated December 20, 2002, from Tribble Greaves, Acting Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent.

by Reason of Default.” On March 28, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the ALJ’s Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ’s conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

CHAPTER 62—BEEF RESEARCH AND INFORMATION

.....

§ 2902. Definitions

For purposes of this chapter—

.....

(3) the term “Board” means the Cattlemen’s Beef Promotion and Research Board established under section 2904(1) of this title;

.....

(10) [t]he term “order” means a beef promotion and research order issued under section 2903 of this title[;]

.....

(14) the term “qualified State beef council” means a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State;

....
(16) the term “Secretary” means the Secretary of
Agriculture[.]

§ 2903. Issuance of orders

(a) During the period beginning on January 1, 1986, and ending thirty days after the receipt of a proposal for a beef promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment on such proposed order. Such proposal may be submitted by any organization meeting the requirements for certification under section 2905 of this title or any interested person, including the Secretary.

(b) After notice and opportunity for public comment are given, as provided for in subsection (a) of this section, the Secretary shall issue a beef promotion and research order. The order shall become effective not later than one hundred and twenty days following publication of the proposed order.

§ 2904. Required terms in orders

An order issued under section 2903(b) of this title shall contain the following terms and conditions:

....
(8)(A) The order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed by the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments.

(B) If an appropriate qualified State beef council does not exist to collect an assessment in accordance with paragraph (1), such assessment shall be collected by the Board.

....
(11) The order shall require that each person making payment to a producer, any person marketing beef from cattle of the person’s own production directly to consumers, and any importer of cattle, beef, or beef products maintain and make available for inspection such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order. Such information shall be made available to the

Secretary as is appropriate to the administration or enforcement of this chapter, the order, or any regulation issued under this chapter. In addition, the Secretary shall authorize the use of information regarding persons paying producers that is accumulated under a law or regulation other than this chapter or regulations under this chapter.

....

(12) The order shall contain terms and conditions, not inconsistent with the provisions of this chapter, as necessary to effectuate the provisions of the order.

§ 2908. Enforcement

(a) Restraining order; civil penalty

If the Secretary believes that the administration and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may—

- (1) issue an order to restrain or prevent a person from violating an order; and
- (2) assess a civil penalty of not more than \$5,000 for violation of such order.

7 U.S.C. §§ 2902(3), (10), (14), (16), 2903, 2904(8)(A)-(B), (11), (12), 2908(a) (footnotes omitted).

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

....

PART VI—PARTICULAR PROCEEDINGS

....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990”

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

- (1) allow for regular adjustment for inflation of civil monetary penalties;
- (2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and
- (3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

- (1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;
- (2) “civil monetary penalty” means any penalty, fine, or other sanction that—
 - (A)(i) is for a specific monetary amount as provided by Federal law; or
 - (ii) has a maximum amount provided for by Federal law; and
 - (B) is assessed or enforced by an agency pursuant to Federal law; and
 - (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and
- (3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

- (1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security

Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

- (2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

- (1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds
- (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—(1) Agricultural Marketing Service. . .*

....

(xvi) Civil penalty for failing to remit any assessment or fee or for violating a program under the Beef Research and Information Act, codified at 7 U.S.C. 2908(a)(2), has a maximum of \$5,500.

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

....

**CHAPTER XI—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MISCELLANEOUS COMMODITIES),
DEPARTMENT OF AGRICULTURE**

....

PART 1260—BEEF PROMOTION AND RESEARCH

Subpart A—Beef Promotion and Research Order

DEFINITIONS

....

§ 1260.102 Secretary.

Secretary means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated, the authority to act in the Secretary's stead.

§ 1260.103 Board.

Board means the Cattlemen's Beef Promotion and Research Board established pursuant to the Act and this subpart.

....

§ 1260.106 Collecting person.

Collecting person means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

....

§ 1260.115 Qualified State beef council.

Qualified State beef council means a beef promotion entity that is authorized by State statute or a beef promotion entity organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research, and consumer and industry information programs; and that is certified by the Board pursuant to this subpart as the beef promotion entity in such State.

....

§ 1260.128 Act.

Act means the Beef Promotion and Research Act of 1985, Title XVI, Subtitle A of the Food Security Act of 1985, Pub. L. 99-198 and any amendments thereto.

....

ASSESSMENTS

§ 1260.172 Assessments.

(a) *Domestic assessments.* (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar (\$1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

....

(5) Each person responsible for the remittance of the assessment pursuant to § 1260.172(a)(1) and (2) shall remit the assessment to the qualified State beef council in the State from which the cattle originated prior to sale, or if there is no qualified State beef council within such State, the assessment shall be remitted directly to the Board. . . . Assessments shall be remitted not later than the 15th day of the month following the month in which the cattle were purchased or marketed.

....

§ 1260.175 Late-payment charge.

Any unpaid assessments due to the Board pursuant to § 1260.172 shall be increased 2.0 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purposes of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the qualified State beef council or Board, whichever is earlier.

....

Subpart B—Rules and Regulations

....

§ 1260.310 Domestic assessments.

(a) A \$1.00 per head assessment on cattle sold shall be paid by the producer of the cattle in the manner described in § 1260.311.

(b) If more than one producer shares the proceeds received for the cattle sold, each such producer is obligated to pay that portion of the assessments which are equivalent to the producer's proportionate share of the proceeds.

(c) Failure of the collecting person to collect the assessment on each head of cattle sold as designated in § 1260.311 shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or the Cattlemen's Board as required in § 1260.312.

....

§ 1260.312 Remittance to the Cattlemen’s Board or Qualified State Beef Council.

Each person responsible for the collection and remittance of assessments shall transmit assessments and a report of assessments to the qualified State beef council of the State in which such person resides or if there is no qualified State beef council in such State, then to the Cattlemen’s Board as follows:

(a) *Reports*. Each collecting person shall make reports on forms made available or approved by the Cattlemen’s Board. Each collecting person shall prepare a separate report for each reporting period. Each report shall be mailed to the qualified State beef council of the State in which the collecting person resides, or its designee, or if there exists no qualified State beef council in such State, to the Cattlemen’s Board. Each report shall contain the following information:

(1) The number of cattle purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, and the dates of such transactions;

(2) The amount of assessment remitted;

(3) The basis, if necessary, to show why the remittance is less than the number of head of cattle multiplied by one dollar; and

(4) The date any assessment was paid.

(b) *Reporting periods*. Each calendar month shall be a reporting period and the period shall end at the close of business on the last business day of the month.

(c) *Remittances*. The remitting person shall remit all assessments to the qualified State beef council or its designee, or, if there is no qualified State beef council, to the Cattlemen’s Board at P.O. Box 27-275; Kansas City, Missouri 64180-0001, with the report required in paragraph (a) of this section not later than the 15th day of the following month. All remittances sent to a qualified State beef council or the Cattlemen’s Board by the remitting persons shall be by check or money order payable to the order of the qualified State beef council or the Cattlemen’s Board. All remittances shall be received subject to collection and payment at par.

7 C.F.R. §§ 3.91(a), (b)(1)(xvi); 1260.102-.103, .106, .115, .128, .172(a)(1), (a)(5), .175, .310, .312.

**ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Herman Camara, is in the business of buying and selling livestock. Prior to October 1998, Camara's New England Commission Auction, Inc., operated as a corporation. In October 1998, Camara's New England Commission Auction, Inc., dissolved and ceased to operate as a corporation. Since October 1998, Respondent has operated his business as a sole proprietorship doing business under the name of Camara's New England Commission Auction, Inc., and also under the name of Camara's Auction Sales. Respondent's mailing address is 275 Hortonville Road, Swansea, Massachusetts 02777.

2. Respondent, at all times material to this Decision and Order, was the *collecting person* as defined in section 1260.106 of the Beef Promotion Order (7 C.F.R. § 1260.106); therefore, Respondent was required by the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations to collect and remit assessments for cattle he bought or sold in the manner provided in the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations.

3. Respondent willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) in that Respondent, as the collecting person, failed to pay the late-payment charges due on 5,573 cattle on which Respondent collected assessments from February 15, 1995, through May 30, 1996, and February 15, 2000, through September 30, 2000. Respondent started to remit the assessments collected on the 5,573 cattle in March 2000 and continued to pay until October 2000. However, Respondent failed to pay the late-payment charges due for failing to pay the assessments in a timely manner as required by the Beef Promotion Order and thereby violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175). The amount of late-payment charges due on the 5,573 cattle totaled \$14,488.60 as of January 3, 2002. Each transaction constitutes a separate violation.

4. Respondent willfully violated section 1260.172 of the Beef Promotion Order and section 1260.310 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310) in that Respondent, as the collecting person, failed to collect and remit assessments

due from the sale of 8,320 cattle sold from at least May 27, 1996, through December 27, 1999. Respondent violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) in that Respondent, as the collecting person, failed to pay the late-payment charges due on 8,320 cattle on which Respondent collected assessments from May 27, 1996, through December 27, 1999. The amount of assessments and late-payment charges due on the 8,320 cattle totaled \$22,880.25 as of January 3, 2002. Each transaction constitutes a separate violation.

5. Respondent willfully violated section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required information in required reports.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact in this Decision and Order, Respondent has violated sections 1260.172 and 1260.175 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .175, .310, .312).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent requests that I set aside the Initial Decision and Order and provide him with opportunity for hearing. Respondent bases his requests on the purported “failure to obtain good service” and on “other valid reasons.” (Respondent’s Appeal Pet.)

As an initial matter, Respondent fails to identify, describe, or otherwise clarify the “other valid reasons” as a basis for his requests that I set aside the Initial Decision and Order and that I provide him with opportunity for hearing. Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that each issue in an appeal petition “shall be plainly and concisely stated.” While Respondent’s unadorned “other valid reasons” may be a concise statement of an issue, I do not find the issue to be plainly stated. Moreover, I find Respondent’s “other valid reasons” too vague to address further, except to dismiss the issue as a basis for setting aside the Initial Decision and Order and providing Respondent with opportunity for hearing, on the ground that Respondent has failed to plainly state the issue, as required in section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)).

I also reject Respondent’s contention that he was not properly served in this proceeding. Section 1.147(c) of the Rules of Practice provides a document is deemed to be received by a party if it is sent by ordinary mail or personally served on a party, as follows:

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

....

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, 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, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

....

(3) Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of:

(i) Delivery to any responsible individual at, or leaving in a conspicuous place at, 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, or

(ii) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

7 C.F.R. § 1.147(c)(1), (c)(3).

The Hearing Clerk sent a copy of the Complaint, a copy of the Rules of Practice, and a service letter, dated February 20, 2002, by certified mail to Respondent. The United States Postal Service marked the certified mailing “unclaimed” and returned it to the Hearing Clerk.⁶ On March 26, 2002, the Hearing Clerk properly served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk’s February 20, 2002, service letter by ordinary mail in accordance with section 1.147(c)(1) of the Rules of

⁶See envelope with certified mail number 7099 3400 0013 8805 8287.

Practice (7 C.F.R. § 1.147(c)(1)).⁷ Moreover, on April 18, 2002, Deputy Sheriff Carl A. Munroe of the Bristol County Deputy Sheriffs' Office, New Bedford, Massachusetts, properly served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's February 20, 2002, service letter by personal service in accordance with section 1.147(c)(3)(ii) of the Rules of Practice (7 C.F.R. § 1.147(c)(3)(ii)).⁸ Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

Sections 1.136(c) and 1.139 of the Rules of Practice clearly state the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

.....

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the

⁷See note 1.

⁸See note 2.

respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Complaint served on Respondent informs Respondent of the consequences of failing to file a timely answer, as follows:

The Respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151. Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 3.

Similarly, the Hearing Clerk informed Respondent in the February 20, 2002, service letter, which accompanied the Complaint and the Rules of Practice, that a timely answer must be filed, as follows:

CERTIFIED RECEIPT REQUESTED

February 20, 2002

Camara's New England
Commission Auction, Inc.
also doing business as
Camara's Auction Sales
275 Hortonville Road
Swansea, Massachusetts 02777

Gentlemen:

Subject: In re: Herman Camara, doing business as Camara's New England Commission Auction, Inc., and also doing business as Camara's Auction Sales, Respondent - BPRD Docket No. 02-0002

Enclosed is a copy of the Complaint, which has been filed with this office under the Beef Promotion and Research Act of 1985.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint.

It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law

Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

Letter dated February 20, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent (emphasis in original).

Based on the date the Hearing Clerk properly served Respondent with the Complaint by ordinary mail (March 26, 2002), Respondent's answer was due no later than April 15, 2002. Respondent's first filing in this proceeding is dated March 10, 2003, and was filed March 17, 2003, 11 months 2 days after Respondent's answer was due.

Based on the date Deputy Sheriff Munroe properly served Respondent with the Complaint by personal service (April 18, 2002), Respondent's answer was due no later than May 8, 2002, and Respondent's first filing in the proceeding was filed 10 months

9 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint.

The Hearing Clerk sent a letter dated June 20, 2002, to Respondent informing him that his answer to the Complaint had not been received within the allotted time.⁹ Respondent failed to respond to the Hearing Clerk's June 20, 2002, letter.

On July 22, 2002, Complainant filed a Motion for Default Decision and a Proposed Default Decision. On September 12, 2002, the Hearing Clerk served Respondent with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision by ordinary mail in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)).¹⁰ Respondent's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were due no later than October 2, 2002. Respondent's first filing in this proceeding is dated March 10, 2003, and was filed March 17, 2003, 5 months 15 days after Respondent's objections were due.

⁹See note 3.

¹⁰See note 4.

On December 30, 2002, the ALJ issued the Initial Decision and Order in which the ALJ found Respondent admitted the allegations in the Complaint by reason of default.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,¹¹ generally there is no basis for setting aside a default decision

¹¹See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not

(continued...)

that is based upon a respondent's failure to file a timely answer.¹² The Rules of Practice clearly provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent's first filing in this proceeding was filed 11 months 2 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for the purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive

¹¹(...continued)
object to the respondent's motion to reopen after default).

¹²*See, e.g., In re Heartland Kennels, Inc.*, 61 Agric. Dec. ____ (Oct. 8, 2002) (holding the default decision was properly issued where the respondents' answer was filed 3 months 9 days after the Hearing Clerk served the complaint on the respondents and the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act alleged in the complaint); *In re Wayne W. Coblenz*, 61 Agric. Dec. 330 (2002) (holding the default decision was properly issued where the respondent's first and only filing in the proceeding was filed 7 months 8 days after the Hearing Clerk served the complaint on the respondent and the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Packers and Stockyards Act alleged in the complaint); *In re Stephen Douglas Bolton* (Decision as to Stephen Douglas Bolton), 58 Agric. Dec. 254 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was filed 54 days after the Hearing Clerk served the complaint on the respondent and 34 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824(2)(B), as alleged in the complaint).

Respondent of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹³

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

ORDER

1. Respondent is assessed an \$11,000 civil penalty. The civil penalty shall be paid by certified check, cashier's check, or money order, made payable to the "Treasurer of the United States," and sent by a commercial carrier, such as FedEx or United Parcel Service, to:

Sharlene Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Mail Stop 1417
Washington, DC 20250-1417

¹³*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

Respondent's payment of the civil penalty shall be sent to, and received by, Ms. Deskins within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check, cashier's check, or money order that payment is in reference to BPRA Docket No. 02-0002.

2. Respondent shall pay his past-due assessments and accrued late-payment charges to the Cattlemen's Beef Board. The amount of past-due assessments and late-payment charges totaled \$37,732.46. This total includes amounts Respondent has failed to pay the Cattlemen's Beef Board from January 2000 to April 2002. The payment shall be made by certified check, cashier's check, or money order, payable to the "Cattlemen's Beef Board" and shall be sent to:

Cattlemen's Beef Board
P.O. Box 3316
Englewood, Colorado 80155

Respondent's payment of past-due assessments and late-payment charges shall be sent to, and received by, the Cattlemen's Beef Board within 60 days after service of this Order on Respondent.

3. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations and, in particular, shall cease and desist from:

- (a) failing to remit all assessments when due;
- (b) failing to remit overdue assessments and late-payment charges on those assessments; and
- (c) failing to submit mandatory reports and required information in mandatory reports.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

Done at Washington, DC

April 3, 2003

William G. Jenson
Judicial Officer