

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) HPA Docket No. 01-D022
)
Tim Gray, an individual,)
)
Respondent) **Order Denying Late Appeal**

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on June 28, 2001. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; 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 on or about May 27, 2000, Tim Gray [hereinafter Respondent] entered a horse known as “JFK All Over” in the 30th Annual Spring Fun Show, in Shelbyville, Tennessee, as entry number 252 in class number 34, while the horse was sore, for the purpose of showing the horse, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ 8). On July 27, 2001, Respondent filed

an Answer admitting he entered JFK All Over in the horse show as alleged in the Complaint, but denying that JFK All Over was entered while sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Answer ¶ 8).

On March 7, 2005, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided at a hearing in Shelbyville, Tennessee. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent appeared pro se.¹ At the close of the hearing, the ALJ issued a decision orally pursuant to section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)): (1) concluding Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) as alleged in the Complaint; (2) assessing Respondent a \$2,200 civil penalty; (3) disqualifying Respondent from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction for 2 years; and (4) ordering Respondent to cease and desist from violating the Horse Protection Act and the regulations issued under the Horse Protection Act (Transcript at 190-93).

On March 10, 2005, the ALJ filed a Confirmation of Oral Decision and Order, and on March 21, 2005, the Hearing Clerk served Respondent with the ALJ's Confirmation of

¹On May 27, 2005, Ted W. Daniel, The Daniel Law Firm, Murfreesboro, Tennessee, filed an appearance on behalf of Respondent (Notice of Appearance, filed May 27, 2005).

the Oral Decision and Order.² On May 27, 2005, Respondent appealed the ALJ's March 7, 2005, decision to the Judicial Officer. On June 27, 2005, Complainant filed a response to Respondent's appeal petition. On September 13, 2005, Respondent filed a reply to Complainant's response to Respondent's appeal petition. On September 19, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

The record establishes that, on March 7, 2005, the ALJ issued a decision, on March 10, 2005, the ALJ filed a Confirmation of Oral Decision and Order, and on March 21, 2005, the Hearing Clerk served Respondent with the ALJ's Confirmation of the Oral Decision and Order.³ Section 1.145(a) of the Rules of Practice applicable at the time Complainant instituted this proceeding, provided that an administrative law judge's decision must be appealed to the Judicial Officer within 30 days after service, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

²United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0001 9221 4585.

³See note 2.

7 C.F.R. § 1.145(a) (2002).⁴ Therefore, Respondent was required to file his appeal petition with the Hearing Clerk no later than April 20, 2005.

On April 4, 2005, Respondent, by telephone, requested that I extend the time for filing his appeal petition to May 20, 2005. Complainant opposed Respondent's request for extension of time,⁵ and on April 6, 2005, I granted Respondent's request for extension of time.⁶ On May 19, 2005, Respondent, by telephone, requested that I extend the time for filing his appeal petition to May 26, 2005. On May 19, 2005, I granted Respondent's second request for an extension of time.⁷ Respondent did not file his appeal petition with the Hearing Clerk until May 27, 2005.

⁴In *PMD v. United States Dep't of Agric.*, 234 F.3d 48 (2d Cir. 2000), the Court held a party's time for appeal of an oral decision in accordance with section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) runs from the date the Hearing Clerk serves the party with the administrative law judge's oral decision, not from the date the administrative law judge issues the oral decision. In response to *PMD*, the Secretary of Agriculture amended section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) to provide that a party must file an appeal of an administrative law judge's oral decision with the Hearing Clerk within 30 days after the issuance of the administrative law judge's oral decision (68 Fed. Reg. 6339-41 (Feb. 7, 2003)). This amendment to the Rules of Practice was not effective until well after the institution of this proceeding, and I do not find the February 7, 2003, amendment applies to this proceeding. Moreover, even if the February 7, 2003, amendment to the Rules of Practice were applicable to this proceeding, the amendment would not affect the disposition of this proceeding.

⁵Complainant's Response to Respondent's Request for Extension of Time to File Appeal Petition filed April 5, 2005.

⁶Informal Order Extending Time for Filing Respondent's Appeal Petition filed April 6, 2005.

⁷Informal Order filed May 19, 2005.

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.⁸ The ALJ's March 7, 2005, decision

⁸*In re Jozset Mokos*, 64 Agric. Dec. ____ (Sept. 6, 2005) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); *In re David Gilbert*, 63 Agric. Dec. ____ (Nov. 30, 2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Vega Nunez*, 63 Agric. Dec. ____ (Sept. 8, 2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final); *In re Ross Blackstock*, 63 Agric. Dec. ____ (July 13, 2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); *In re David McCauley*, 63 Agric. Dec. ____ (July 12, 2004) (dismissing the respondent's appeal petition filed 1 month 26 days after the administrative law judge's decision became final); *In re Belinda Atherton*, 62 Agric. Dec. 683 (2003) (dismissing the respondent's appeal petition filed the day the administrative law judge's decision became final); *In re Samuel K. Angel*, 61 Agric. Dec. 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the administrative law judge's decision became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the administrative law judge's decision became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the administrative law judge's decision became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the administrative law judge's decision became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the administrative law judge's decision became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the administrative law judge's decision became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the administrative law judge's decision became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the administrative law judge's decision became final); *In re K. Lester*, 52 Agric.

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Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the administrative law judge's decision became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the administrative law judge's decision became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the administrative law judge's decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the administrative law judge's decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the administrative law judge's decision had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision becomes final); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the administrative law judge's decision became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the

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became final on May 26, 2005. Respondent filed an appeal petition with the Hearing Clerk on May 27, 2005, 1 day after the ALJ's March 7, 2005, decision became final. Therefore, I have no jurisdiction to hear Respondent's appeal.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

⁸(...continued)

respondent's appeal dated before the administrative law judge's decision became final, but not filed until 4 days after the administrative law judge's decision became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the administrative law judge's decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the administrative law judge's decision).

We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. See, e.g., *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.^{9]}

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon

⁹*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating the filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding pro se does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.¹⁰ The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the ALJ's decision became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.^[11]

¹⁰Fed. R. App. P. 4(a)(5).

¹¹*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day

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Accordingly, Respondent's appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4), "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal."

In Complainant's June 27, 2005, response to Respondent's appeal petition, Complainant argues I have no jurisdiction to hear Respondent's late-filed appeal petition.¹² On July 12, 2005, Respondent requested an opportunity to reply to the jurisdictional argument raised by Complainant.¹³ On July 14, 2005, I issued a Ruling Granting Respondent's Motion to Reply to Complainant's Response.

On September 13, 2005, Respondent filed Respondent's Reply Brief in which Respondent asserts the ALJ's March 7, 2005, decision is not yet final and the time for filing his appeal petition has not begun to run. Respondent argues the ALJ had no authority to sever the proceeding against Respondent and Sand Creek Farms, Inc., and, as

¹¹(...continued)
limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

¹²Complainant's Response to Respondent's Appeal Petition and Request for Oral Argument at 5-7.

¹³Respondent's Motion for Permission to File Reply Brief in Response to Complainant's Jurisdictional Argument in Part II of Complainant's Brief.

the proceeding as to Sand Creek Farms, Inc., is not yet final, the proceeding as to Respondent is not yet final and will not be final until it is final for all issues and all respondents.¹⁴

I disagree with Respondent's contention that an administrative law judge to whom a proceeding is assigned has no authority to sever the proceeding. Respondent correctly asserts the Rules of Practice do not explicitly authorize severance of proceedings. However, the Rules of Practice provide that an administrative law judge may direct parties or their counsel to attend a conference when the administrative law judge finds the proceeding would be expedited by a conference.¹⁵ At the conference, matters that may expedite or aid in the disposition of the proceeding may be considered.¹⁶ Administrative law judges have explicit authority to take all actions authorized under the Rules of Practice.¹⁷ I find the authority of an administrative law judge to take action authorized under the Rules of Practice includes action to implement matters considered during a conference. The ALJ conducted teleconferences on March 3 and 4, 2005. During the

¹⁴On March 3 and 4, 2005, the ALJ conducted teleconferences with Respondent, Sand Creek Farms, Inc., and Complainant. Following these teleconferences, the ALJ severed, *In re Sand Creek Farms, Inc.*, HPA Docket No. 01-A022. This severance resulted in two proceedings, *In re Sand Creek Farms, Inc.*, HPA Docket No. 01-C022, and the instant proceeding, *In re Tim Gray*, HPA Docket No. 01-D022. (Order Severing Cases, filed March 10, 2005.)

¹⁵7 C.F.R. § 1.140(a).

¹⁶7 C.F.R. § 1.140(a)(3)(ix).

¹⁷7 C.F.R. § 1.144(c)(14).

March 4, 2005, conference, the ALJ notified the parties that, in order to proceed in an orderly and efficient fashion, she would sever *In re Sand Creek Farms, Inc.*, HPA Docket No. 01-A022, and not require Sand Creek Farms, Inc., to participate in the March 7, 2005, hearing with Respondent.¹⁸

Moreover, I disagree with Respondent's contention that the ALJ cannot sever a proceeding because only the Hearing Clerk may assign a proceeding a docket number. Section 1.134 of the Rules of Practice provides for the Hearing Clerk's assignment of a docket number to each proceeding, as follows:

§ 1.134 Docket number.

Each proceeding, immediately following its institution, shall be assigned a docket number by the Hearing Clerk, and thereafter the proceeding shall be referred to by such number.

7 C.F.R. § 1.134. Immediately after Complainant filed the Complaint, the Hearing Clerk assigned a docket number to the proceeding, as required by the Rules of Practice. The record indicates that the parties and the ALJ referred to the proceeding by that docket number until the ALJ first severed the proceeding. Once the ALJ severed the original proceeding, the proceeding no longer existed in its original form and section 1.134 of the Rules of Practice (7 C.F.R. § 1.134) does not require that the resulting severed proceedings retain the docket number assigned to the original proceeding.

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

¹⁸See Complainant's Response to Respondent's Appeal Petition and Request for Oral Argument at 3-4; Respondent's Reply Brief at 2.

ORDER

Respondent's appeal petition, filed May 27, 2005, is denied. Administrative Law Judge Jill S. Clifton's decision issued March 7, 2005, is the final decision in this proceeding.

Done at Washington, DC

October 17, 2005

William G. Jenson
Judicial Officer