

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) A.Q. Docket No. 03-0002
)
Vega Nunez,)
)
Respondent) **Order Denying Late Appeal**

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a “Complaint” on November 7, 2002. Complainant instituted the proceeding under the Animal Health Protection Act (7 U.S.C.A. §§ 8301-8320 (West Supp. 2004)); regulations issued under the Animal Health Protection Act (9 C.F.R. pt. 94) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151 (2002)) [hereinafter the Rules of Practice].

Complainant alleges that on or about January 17, 2001, Vega Nunez [hereinafter Respondent] imported approximately 4 pounds of meat sausage from Germany into the United States at Chicago, Illinois, in violation of 9 C.F.R. § 94.11(a), (b), and (c) because

the meat product did not comply with the requirements necessary for such meat to be imported into the United States (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 14, 2002.¹ Respondent filed an answer to the Complaint on December 9, 2002.

On March 23, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139 (2002)), Complainant filed a “Motion for Adoption of Proposed Default Decision and Order” and a “Proposed Default Decision and Order.” The Hearing Clerk served Respondent with Complainant’s Motion for Adoption of Proposed Default Decision and Order and Complainant’s Proposed Default Decision and Order and a service letter on April 3, 2004.² On April 13, 2004, Respondent filed objections to Complainant’s Motion for Adoption of Proposed Default Decision and Order and Complainant’s Proposed Default Decision and Order.

On May 10, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139 (2002)), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a “Decision and Order by Reason of Admission of Facts”: (1) concluding that Respondent violated the Animal Health Protection Act and the Regulations, as alleged in the

¹United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 2905.

²United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 7849.

Complaint; and (2) assessing Respondent a \$50 civil penalty (Decision and Order by Reason of Admission of Facts at 4).

On May 24, 2004, the Hearing Clerk served Respondent with the ALJ's Decision and Order by Reason of Admission of Facts.³ On June 28, 2004, Respondent appealed to the Judicial Officer. Complainant failed to file a response to Respondent's appeal petition, and on September 2, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

The record establishes that the Hearing Clerk served Respondent with the ALJ's Decision and Order by Reason of Admission of Facts on May 24, 2004.⁴ Section 1.145(a) of the Rules of Practice provides 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.

7 C.F.R. § 1.145(a) (2002).

³United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0003 5453 1952.

⁴See note 3.

Therefore, Respondent was required to file her appeal petition with the Hearing Clerk no later than June 23, 2004. Respondent did not file her appeal petition with the Hearing Clerk until June 28, 2004.

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.⁵ The ALJ's Decision and Order by

⁵*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. ____ (Oct. 20, 2003) (dismissing the respondent's appeal petition filed the day the administrative law judge's decision and order 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 and order 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 and order 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 and order 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 and order 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 and order 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 and order 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 and order 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 and order 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 and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed
(continued...)

⁵(...continued)

2 days after the administrative law judge's decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the administrative law judge's decision and order 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 and order 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 and order 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 and order 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 and order 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 and order 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 and order 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 and order 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 and order 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 and order 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 and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal
(continued...))

Reason of Admission of Facts became final on June 28, 2004,⁶ the day Respondent filed an appeal petition. 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:

⁵(...continued)
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 respondent's appeal dated before the administrative law judge's decision and order became final, but not filed until 4 days after the administrative law judge's decision and order 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).

⁶7 C.F.R. § 1.139 (2002); Decision and Order by Reason of Admission of Facts at 5.

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):

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 1398.⁷

⁷*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

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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 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.⁸ 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 and Order by Reason of Admission of Facts 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

⁷(...continued)

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).

⁸Fed. R. App. P. 4(a)(5).

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.^{9]}

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 1.139 of the Rules of Practice (7 C.F.R. § 1.139 (2002)), “no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.”

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

⁹*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 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).

ORDER

Respondent's appeal petition, filed June 28, 2004, is denied. Administrative Law Judge Jill S. Clifton's Decision and Order by Reason of Admission of Facts, filed May 10, 2004, is the final decision in this proceeding.

Done at Washington, DC

September 8, 2004

William G. Jenson
Judicial Officer