

AGRICULTURE DECISIONS

Volume 55

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Part One (General)

Pages 1 – 428



THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

**SECRETARY OF AGRICULTURE v. WILEMAN BROTHERS &
ELLIOTT.**

No. 95-1184.

Decided June 3, 1996.

(Cite as: 116 S. Ct. 1375)

SUPREME COURT OF THE UNITED STATES

The motion of American Mushroom Institute, et al. for leave to file a brief as amici curiae is granted. The motion of National Association of State Departments of Agriculture for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is granted.

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: GRADY PRUETTE, d/b/a C&G PACKERS.

AMAA Docket No. 94-3.

Decision and Order filed January 19, 1996.

Failure to pay assessments when due - Handler - Factors considered in determination of appropriate civil penalty - Civil penalty - Cease and desist order.

Judge Bernstein assessed a civil penalty of \$2,000 against Respondent tomato handler who refused to pay assessments when due despite repeated efforts by the Department to collect the assessments in a timely manner. Factors to be considered in determining the amount of civil penalties which should be assessed against a handler who violates a marketing order include: the nature of the violation, the number of violations, the damage or potential damage to the regulatory program by the violation, prior warnings given to a handler and any other circumstances which shed light on the handler's overall culpability.

Denise Y. Hansberry, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a proceeding brought pursuant to section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, ("AMAA") as amended, 7 U.S.C. § 608c(14)(B). It was instituted by a Complaint filed on August 3, 1994, by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture ("the Department") alleging that Respondent violated the Marketing Order regulating Florida tomatoes, ("the Order") 7 C.F.R. Part 966, by refusing to pay his assessments when due.

During the 1993-94 crop year, Respondent failed to pay his assessments when due despite repeated efforts by the Department to collect the assessments in a timely manner. After the filing of the Complaint, Respondent paid his overdue assessments. Respondent refused, however, to pay a civil penalty which the Department assessed.

I presided over a hearing on November 2, 1995, in Fort Myers, Florida. Complainant was represented by Denise Y. Hansberry, Esq., Office of the General Counsel, United States Department of Agriculture. Respondent appeared *pro se*. Complainant's exhibits are referred to as "CX." Respondent offered no exhibits. The hearing transcript is referred to as "Tr." Complainant filed proposed findings of fact, proposed conclusions of law and a brief on December 4, 1995. Respondent filed no post-hearing written submission. All

proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact

1. Respondent, Grady Pruette, d/b/a C&G Packers, is an individual whose principal place of business is 504 East Main Street, Immokalee, Florida 33934 (Tr. 5).

2. At all relevant times, Respondent was a handler of Florida tomatoes as defined in the Act, 7 U.S.C. § 608c(1), and the Order, 7 C.F.R. § 966.6 (Tr. 5).

3. As a handler regulated under the Florida Tomato Order, Respondent was required to pay assessments to the Florida Tomato Committee, the administrative body charged with overseeing the operation of the Order (Tr. 19; 7 C.F.R. § 966.42(a)).

4. During the 1993-94 crop season, Respondent first shipped Florida tomatoes on December 1, 1993 (CX 8; Tr. 25). Subsequent shipments were made between December 1993 and May 1994 (CX 8). Although the Florida Tomato Committee began billing Respondent within two weeks of the date that he first packed and shipped tomatoes, no payment was made until November 11, 1994 (Tr. 25).

5. During March 1994, the Florida Tomato Committee contacted Respondent by telephone and sent demand letters seeking payment of past due assessments under the Order (CX 1, 2 and 3).

6. Respondent refused to pay his assessments upon receipt of the demand letters, in part based on his vehement opposition to the Florida Tomato Order (Tr. 30, 33-34, 51-54, 71). Subsequently, the Florida Tomato Committee referred the case to the Department with a recommendation that an enforcement action be initiated against Respondent (Tr. 63).

7. On August 3, 1994, the Administrator for the Agricultural Marketing Service filed a Complaint against Respondent seeking payment of \$6,603.85 in overdue assessments and an award of civil penalties in accordance with section 8c(14)(B) of the Act, 7 U.S.C. § 608c(14)(B) (Complaint, ¶ 3).

8. On November 11, 1994, Respondent paid his overdue assessments in the amount of \$6,603.85 to the Florida Tomato Committee (Tr. 7).

9. During the 1990-91 crop year, Respondent also failed to pay his assessments on time despite repeated collection efforts by the Florida Tomato Committee and the Department (CX 5, 7; Tr. 35, 45).

10. Respondent has incurred substantial financial expenses [REDACTED]

(b) (6) [REDACTED]

Conclusion and Discussion

Section 8c(14)(B) of the AMAA (7 U.S.C. § 608c(14)(B)) which was in effect on the date that the Complaint was filed, states in relevant part:

(B) Any handler, subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order . . . may be assessed a civil penalty by the Secretary not exceeding \$1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation. . . .

Thus, § 8c(14)(B) provides absolute authority for the Secretary to impose civil penalties against any handler subject to an Order issued under the AMAA. Factors to be considered in determining the amount of civil penalties which should be assessed against a handler who violates a marketing order include: the nature of the violation, the number of violations, the damage or potential damage to the regulatory program by the violation, prior warnings given to a handler and any other circumstances which shed light on the handler's overall culpability. In addition, it is well recognized that when assessing civil penalties, courts must impose sanctions in a manner which will deter respondents and others from engaging in similar violations in the future. *In re Calabrese, Balice, et al.*, 51 Agric. Dec. 131, 154-155 (1992).

In *United States v. Ruzicka*, 329 U.S. 287, 293 (1946), the Supreme Court addressed the importance of compliance by all handlers operating within the scheme of prevailing marketing order programs. As the Court states:

Promptness of compliance by those subject to the scheme is the presupposition of Order No. 41. Thus, definite monthly deadlines are fixed by the Order for every step in the program. In large measure, the success of this scheme revolves around a "producers" fund which is solvent and to which all contribute in accordance with a formula equitably determined and of uniform applicability. Failure by handlers

to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements.

United States v. Ruzicka, 329 U.S. at 293.

Complainant has requested a penalty of \$4,000. Complainant stresses that there was a previous non-payment of assessments in 1991 for the 1990-91 season in the amount of \$2,425.65 (CX 5-7). Complainant is also concerned that Respondent has incited others not to pay their assessments.

Respondent urges that no fine be assessed. He states that he has learned his lesson; that he will pay future assessments so long as he has funds and that he has incurred large medical bills. Complainant's witness, Bernard Hamel, Field Representative and Compliance Officer for the Tomato Committee, also urged compassion and clemency and requested that a fine be assessed but "suspended" unless non-payment is made in the future (Tr. 62).

The assessment of a large enough penalty is required to deter Respondent and others from committing similar violations in the future. However, penalty assessments must not be draconian and must be tempered with compassion.

Respondent, at first, refused to pay his assessments and previously failed to pay assessments for the 1990-91 crop year. However, Respondent seems to have learned the error of his ways. In addition, Respondent has suffered greatly due to ill health and has incurred huge medical bills in recent years. I am especially impressed by the recommendation of the representative of the Florida Tomato Committee that the assessment of a civil penalty against Respondent be suspended.

In consideration of all the foregoing facts, I assess a civil penalty against Respondent of \$2,000. However, should Respondent fail to pay any future assessment, I urge the imposition of a much larger penalty at that time.

Order

1. Respondent, Grady Pruette, doing business as C&G Packers, his agents and employees, directly or through any corporate or other device, shall comply with each and every provision of the Act, the Order and the Rules and Regulations, and shall cease and desist from any violation thereof.

2. Respondent, Grady Pruette, is assessed a civil penalty of \$2,000 to be paid by certified check or money order made payable to the Treasurer of the United States.

This Decision and Order will become final and effective without further proceedings 35 days after service upon Respondent unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final and effective March, 4, 1996.--Editor]

**In re: SAULSBURY ENTERPRISES, AN UNINCORPORATED ASSOCIATION and ROBERT J. SAULSBURY, AN INDIVIDUAL.
AMAA Docket No. 94-2.**

Decision and Order filed May 7, 1996.

Raisins — Civil penalties — Preponderance of the evidence — Reserve requirements — Reporting requirements — Compliance requirements — Failure to pay assessments — Failure to have raisins inspected — Credibility — Sanction policy.

The Judicial Officer affirmed the decision by Judge Hunt (ALJ) holding that the Respondents violated the Raisin Marketing Order's requirements that each handler have its incoming and outgoing raisins inspected; and, file various reports with the Raisin Administrative Committee. However, the Judicial Officer increased the \$3,000 civil penalty assessed by the ALJ jointly and severally against Respondents, to \$219,000, plus assessments. Specifically, the Judicial Officer: increased the civil penalties to \$120,000 for failure to have incoming and outgoing inspections on raisins shipped to Canada; increased the civil penalties to \$40,000 for failing to file reports; added civil penalties of \$59,000 for failing to hold raisins in reserve; and ordered Respondents to pay assessments for tonnage shipped to Canada of \$557.33 for crop year 1988-89; \$594.68 for 1989-90; and \$521.29 for 1990-91. The standard of proof in AMAA cases is a preponderance of the evidence. Respondents' version of the facts in this case is not credible. A "wet grape product" would deteriorate in the weeks Respondents claim product was in storage in late summer California heat. Complainant's witnesses' credible testimony shows Respondents' product was raisins and ALJ properly found product to be raisins in accordance with the definition of "raisins" in the Raisin Order. The Judicial Officer is not bound by credibility determinations of the ALJ, but can make his own determinations, so long as they are based upon substantive evidence. Respondents' witnesses, Mayes and Saulsbury, were found by Judicial Officer to have little credibility. Respondents' proclaimed ignorance of the Marketing Order, and professed inadvertent violation of the Marketing Order, was not credible. Remedial legislation should be liberally construed to achieve the Act's purpose. The administrative construction of a statute by the officials charged with its enforcement

is entitled to great weight. Marketing Order's civil penalties are designed by Congress to complement the criminal penalties which U.S. Attorneys have authority to seek.

Colleen Carroll, for Complainant.

Brian C. Leighton, Fresno, California, for Respondents.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding brought pursuant to section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937 (hereinafter AMAA), 7 U.S.C. § 608c(14)(B), instituted by a Complaint filed on May 23, 1994, by the Administrator of the Agricultural Marketing Service (hereinafter AMS), United States Department of Agriculture (hereinafter USDA), alleging that Respondents violated various provisions of the Marketing Order Regulating the Handling of Raisins Produced From Grapes Grown in California (hereinafter Raisin Order), 7 C.F.R. pt. 989. An administrative hearing was held in Fresno, California, on March 1 and 2, 1995, before Administrative Law Judge James W. Hunt (hereinafter ALJ). Mr. Brian C. Leighton, Esq., represented Respondents, and Ms. Colleen Carroll, Esq., represented Complainant. The parties submitted proposed findings of fact, proposed conclusions of law, briefs in support thereof, and reply briefs.

On June 27, 1995, the ALJ issued an Initial Decision and Order holding that the Respondents violated the Raisin Order's requirements for handlers during crop years 1988-89, 1989-90, and 1990-91, by failing to have raisins inspected, which raisins were subsequently shipped to Canada, and by failing to file numerous required Raisin Administrative Committee (hereinafter RAC) reports.

The civil penalty the ALJ assessed jointly against Respondents is \$3,000.

On August 29, 1995, Complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated, 7 C.F.R. § 2.35,¹ by filing Complainant's Appeal of Decision and Order; and Memorandum of Points and Authorities in Support of Appeal (hereinafter CA). On September 26, 1995, Respondents filed Respondents' Response to Complainant's Appeal of ALJ's

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

Decision and Order (hereinafter RA), and on October 2, 1995, the case was referred to the Judicial Officer for decision.

Pursuant to the applicable Rules of Practice, 7 C.F.R. §§ 1.130-.151, I am adopting the ALJ's Initial Decision as the final Decision and Order in this proceeding, with significant changes, which demonstrate my disagreement with the ALJ that the violations which the ALJ found were merely "technical," and with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional Conclusions by the Judicial Officer follow the ALJ's conclusions. Based upon a careful consideration of the record in this case, I am increasing the civil penalty to the \$219,000 requested by the administrative officials, plus assessments.

**ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION
(AS MODIFIED)**

....

The Complaint alleges that Respondent[s were] raisin handler[s] as defined by the [Raisin Order]. It alleges that during crop years 1988-89, 1989-90, and 1990-91, [Respondents] shipped raisins to Canada without having them inspected, failed to hold raisins in reserve, failed to file reports, and failed to pay assessments as required by the [Raisin] Order. [Respondents deny] that the product [they] shipped to Canada was raisins or that [they were] handler[s] subject to the [Raisin] Order.

....

Raisin Marketing Order

The [Raisin] Order regulates the handling and marketing of raisins produced by grape growers ("producers") in California. It requires that all raisins be inspected to determine whether they meet the [Raisin] Order's standards for quality. "Handlers" market the raisins. Handlers include raisin processors and packers and "any person who places, ships, or continues natural condition raisins in the current of commerce. . . ." (7 C.F.R. § 989.15.) ["Natural condition raisins" are sun-dried or artificially-dehydrated raisins which have not yet been further processed; e.g., by cleaning, sorting, stemming, grading, seeding, and containerizing into "packed raisins" for marketing. (7 C.F.R. §§ 989.8, .9.) The RAC, comprised of industry representatives, determines for each crop year the percentage of "marketable" raisins that

handlers can sell to "normal" markets as "free tonnage." The remaining percentage must be held "in reserve" for up to 2 years until the [RAC] allows the handlers to sell the raisins. Producers receive payment for the reserve raisins after they are sold. For the three crop years involved here (1988-89, 1989-90, 1990-91), RAC allowed approximately 70 percent of the raisins to be sold "free" each year and approximately 30 percent to be kept in reserve. (Tr. 240-242.) Clyde Nef, RAC's manager, testified that the purpose of requiring raisins to be put in reserve is to prevent competing raisins from flooding the market and driving down the price that producers receive for their raisins. (Tr. 385.)

The [Raisin] Order requires handlers to file various RAC reports on the raisins they handle and pay assessments to [RAC] to defray its expenses.

Raisins, as defined by the [Raisin] Order, mean:

[G]rapes of any variety grown in the area, from which a significant part of the natural moisture has been removed by sun-drying or artificial dehydration, either prior to or after such grapes have been removed from the vines. Removal of a significant part of the natural moisture means removal which has progressed to the point where the grape skin develops wrinkles characteristic of wrinkles in fully formed raisins.

7 C.F.R. § 989.5.

Richard Van Diest, an [AMS] marketing specialist, testified that "[i]t doesn't make any difference how the wrinkles are. They're a raisin." (Tr. 274.)

Raisins with up to a 25-percent moisture content are considered raisins under the [Raisin] Order, but to be acceptable for marketing their moisture content cannot exceed 16 to 18 percent. (Tr. 15[6], 204-0[5], 233, 270.) While the definition does not refer to color, taste, or sugar content of raisins, raisin packers require that [raisins] have a 20- to 22-percent sugar content to be acceptable for marketing to normal consumer outlets. (Tr. 165, 179, . . . 206, 569, 580.) Sugar forms in grapes only while they are on the vine and normally reaches the requisite 22-percent level by the first week of September -- around Labor Day -- at which time they are picked. (Tr. 165-67, . . . 547[-48], 557.) The grapes are then placed in trays on the ground to be sun-dried for 20 to 30 days, when, depending on the weather, they become fully formed raisins. However, mature grapes begin to take on the wrinkling characteristics of raisins

after 2 to 4 days and lose most of their moisture during the first 2 weeks. (Tr. 164, 168-70, 310, 344-46, 353-54. . . .) Grapes with a low moisture and high sugar content dry faster [than grapes with a high moisture and low sugar content]. (Tr. 170.) Raisins with a high sugar content also weigh more [than raisins with low sugar and the same moisture]. (Tr. 208[-09], 356, 529, 548.) Approximately 4½ tons of grapes produce 1 ton of raisins. (Tr. 76.)

Prior to 1972, the [Raisin] Order applied only to raisins that were processed from grapes that were removed from the vine and then dried. Raisins that formed from grapes that dried on the vine were not covered. However, the industry discovered that these vine-dried grapes were being sent to Mexico where they were processed into raisins and returned to [the United States] to be sold in competition with California-produced raisins. The [Raisin] Order was then amended to cover raisins that dried on the vine or on the ground. The industry representative testifying at the hearing on the proposed amendment stated that "it is the consensus of the raisin industry and the committee that the Marketing Order should be amended *to include all dried grapes* under the definition of raisins." (Emphasis added.) The amendment as adopted was substantially the one proposed by the [RAC]. (CX 38, p. 18.)

When raisins are inspected, they are classified under the [Raisin] Order as "standard," "off-grade," or "failing." Inspectors also refer to them as Grades A, B, C, and substandard. A standard or Grade A raisin is one that meets the standards established for raisins for marketing in "normal" outlets for human consumption. An off-grade raisin is one that does not meet the standard but which may be "reconditioned" by additional dehydration. A failing off-grade or substandard raisin is one which cannot be reconditioned or which otherwise fails to make the grade. (7 C.F.R. § 989.24.)

The [Raisin] Order requires that only standard . . . raisins be processed for marketing, and kept in reserve, except that handlers may return off-grade raisins to the producer for "reconditioning" or dispose of off-grade raisins through "non-normal" outlets, usually distilleries, or as feed for animals. A producer may also sell off-grade raisins (after inspection) directly to a California distillery. Distilleries located in the state are considered processors subject to the [Raisin] Order. However, if a producer receives and ships off-grade raisins to an out-of-state distillery, the producer must obtain permission from the RAC. He or she also is then considered to be a handler under the [Raisin] Order and required to file RAC reports. (Tr. 205, 216-17.) Assessments, however, are based only on standard raisins. (Tr. 283-85.) Off-grade raisins sold to distilleries do not compete with standard raisins that are sold to consumers. (Tr. 385.)

Robert J. Saulsbury

Respondent Robert J. Saulsbury (hereinafter Saulsbury) owns a 160-acre farm in California on which he has grown Thompson seedless grapes and produced natural seedless raisins since 1974 (Tr. 5[68]). [Saulsbury testified that:] Sometime in the mid-1980's Saulsbury was contacted by a broker, Ed Lee, who is now dead, that a Canadian company wanted dried grapes for its distillery[;] Lee put Saulsbury in touch with a Canadian importing company, Haida Sales, Ltd.[;] Saulsbury was told by the importer that it did not want a dried raisin, but a "medium" dry grape with a 16- to 18-percent sugar content. (Tr. 568-70.)

S. G. Spear, a representative for Haida Sales in British Columbia, [wrote] of the transaction:

I had a customer here in Vancouver who was looking for dried grapes for distillery purposes and we arranged the sale of these products. The product involved was a dried grape still with a lot of moisture and greenness in it with the sticks and leaves and pieces of the vines.

I arranged to have these purchased for a customer here in Vancouver who was using them for distillery purposes and arranged to make the deliveries and received payment.

Spear made this statement in a letter to Respondents' attorney. (RX 3.) He did not testify.

Ronald Mayes, Saulsbury's farm manager, who has grown grapes and processed raisins for Saulsbury since 1974, testified that he was told that the customer did not want a dried raisin, but a grape with a "little color," 16-percent sugar content, and moisture. (Tr. 520-21.)

Mayes [testified] that he cut the grapes for this purpose around the 15th of August when they had only a 16-percent sugar content and laid them on trays. He said that to limit their drying and exposure to the sun he terraced the ground and placed the grapes closer to the canopy of the vine. (Tr. 521-22, 558.)

After a week, the product [purportedly] was taken to the "sheds" where [it was] put on shakers to remove sand and then put in containers for shipment. Mayes [testified] the product at this stage was a "light colored brown grape" containing a lot of moisture with juice running from the grapes when he squeezed them. He [testified] that some still had their stems attached, unlike dried raisins whose stems fall off. Mayes testified that the product did not taste

sweet like a raisin and that [the product] did not have the wrinkles characteristic of raisins, although he said that some grapes had started to develop wrinkles, which he attributed to the grapes being what he called substandard "water berries." (Tr. 549-51.) [Mayes testified that] he considered the product lower in quality than a substandard raisin, as a "grade nothing." (Tr. 557.)

Saulsbury testified that the product neither looked nor tasted like raisins and that it had too much moisture and was "just too trashy" to be processed as raisins. (Tr. 571-72.)

Phyllis Bond, who worked in Saulsbury's office as bookkeeper-secretary [from September 1987 through June 1990, (Tr. 468-69, 477, 508),] testified that she went to the vineyard on a few occasions when the grapes were drying on the ground. She also worked in the sheds when the containers were being weighed before shipping. She testified that she saw the product in the field and in the shed and that it was dark brown, wrinkled, and looked like raisins except for being a little larger and dirtier than standard raisins with stems still attached to some of the product. She did not taste them. (Tr. 475, 493-96.)

Renee Wassenberg, an [AMS] investigator, testified that Willie Harris, a Saulsbury worker at the time involved here, told her in 1991 that the product he took from the vineyard was "exactly the same type raisin I buy in the box from the grocery store." (Tr. 403-05; CX 4.) Harris did not testify.

After the product was placed in customer-provided cardboard containers, the juice [purportedly] stained the boxes and began to ferment and smell like wine. (Tr. 564.) The containers were stenciled with the notice "DRIED GRAPES DISTILLERY USE ONLY." The import papers identified the product as dried grapes. (Tr. 22; RX 1.)

Saulsbury shipped approximately 754,375 pounds of the product to Canada in the 1988-89 crop year, 819,890 pounds in the 1989-90 [crop year], and 673,614 [pounds] in 1990-91 [crop year]. (CX 35.) The product's weight approximated the annual weight of the raisins Saulsbury had produced on his farm in previous years. (Tr. 3[65]-66.) Saulsbury did not have any of the product inspected before it was shipped to Canada and did not file any of the RAC reports required of handlers. (Tr. 368.)

Saulsbury received \$797 a ton for the product in 1988; \$927 in 1989; and \$916 in 1990. (CX 35.) These prices were \$71 to \$119 a ton less than the prices that producers received for . . . standard raisins in 1988 and 1989. [Producers of standard] raisin[s] . . . received \$916 a ton in 1988 and \$987 in 1989. Complainant did not have the 1990 price for raisins available at the hearing. (Tr. 246; CX 10.)

On the other hand, the prices that Saulsbury received were substantially more than the \$150 a ton that the Sun-Maid Raisin Company paid for off-grade raisins to make grape spirits to fortify wine at its distillery. Russell Murray, a Sun-Maid wine maker, stated that a raisin processed from a grape picked in the middle of August, with a 16-percent sugar content, and dried for only 7 days was a "very low quality product." Such a grape, he said, cannot be made into a good raisin because sugar stops forming once a grape is picked, that such a raisin could not be reconditioned, that it would start fermenting, and that it could not be used in any food product, such as a raisin puree. He said that Sun-Maid would not want such a grape product and that it would not compete with Sun-Maid raisins. [Murray] further opined that a Canadian distillery would not need such a product to make spirits because grain was available for that purpose. However, he conceded that a grape product with a [relatively low] 16-to 17-percent sugar base and high moisture could be sought for its alcohol content since high sugar content kills yeast and stops the fermenting process. [Murray] said that the product could be used as a base for champagne because it would have a higher acid content [but that only "whole, sound grapes with no raisining, no decay" could be used.] (Tr. 153-94.) Murray said he did not know what Canadian distilleries were paying for dried grapes and no evidence was otherwise presented on the value of such a product in Canada. (Tr. 172.)

Saulsbury took out raisin insurance for his crops in 1988 through 1990 as he had in other years. He also took out grape insurance. Grape insurance covers the fruit as long as it is on the vine; raisin insurance takes effect as soon as the grapes are cut and placed on the ground. Brad McDonald, a crop insurance agent, said that it is not uncommon for growers to take out both types of insurance because they may not know whether they will be growing the crop to be sold as grapes or as raisins. He said that insurance does not commit growers to marketing the one or the other. Saulsbury had told McDonald that he wanted insurance for "dried grapes." McDonald said there was no insurance for dried grapes and that he does not know of any difference between raisins and dried grapes. (Tr. 60, 99, 102-04, 108-12, 131.)

Discussion

The issue presented is whether the . . . product [Respondents] shipped to Canada was raisins subject to the [Raisin] Order. Complainant contends that it was. [Respondents] contend that [the product] was not raisins, but rather was grapes from which only a small portion of the moisture was removed and which did not have the external characteristics of raisins.

Complainant argues, *inter alia*, that the circumstances show that [Respondents'] product was raisins, pointing out that the weight of the . . . product shipped to Canada was comparable in weight to [Respondents'] production of raisins in prior years. Complainant contends that because grapes weigh more than raisins, [Respondents'] . . . product should have weighed substantially more than it did if the product was actually grapes from which little water had been removed. This [analysis] shows, according to Complainant, that the product weighed the same as raisins because it had been dehydrated like raisins and that it was therefore raisins.

. . .

Complainant's weight comparison does suggest that the product shipped to Canada had, like raisins, been substantially dehydrated. [Respondents] did not counter this argument by showing that [they] had decreased [their] production of grapes for sale in Canada. . . .

Complainant's second argument is [that the Respondents' export was priced like standard raisins.] Sun-Maid . . . paid far less [(\$150 a ton, which is about one-sixth, based upon \$150 divided by the average \$900 paid to Respondents)] for its off-grade distillery raisins than the Canadian company paid for [Respondents'] . . . product, but the record does not show [what eventually happened to Respondents' raisins or] that the Canadian firm used [Respondents'] product for the same low-cost purpose as Sun-Maid. The evidence shows only that [Respondents'] product was [purportedly] purchased by an [unnamed] Canadian distillery, not how it was used. As Sun-Maid's representative conceded, [Respondents'] product could have been used in champagne, [but such use was unlikely because of decay and raisining. Sun-Maid's representative further testified that Respondents' product] could also have been used for other more expensive distillery purposes and valued accordingly. [However, once Complainant put on its *prima facie* case that the product was raisins, I do not believe, as Respondents argue, that Complainant had the burden of finding the end user to disprove Respondents' position. In order to make their case, Respondents should have introduced evidence of the use to which their product was put.] In these circumstances, . . . [where there is credible testimony by witness Bond that the product was raisins, there is a] basis for inferring just from the price paid by the Canadian firm that it was purchasing raisins [from Respondents].

As for the actual water content of [Respondents'] product, the record is silent. However, while the product retained moisture, some unknown

percentage of water had been removed, a fact which Saulsbury implies, if not concedes, by referring to the product variously as "dried grapes" and as "medium" dry grapes. Moreover, the product, like raisins, was obviously subjected to a deliberate dehydration process when it was placed on trays on the ground [purportedly] for a week.

Under ordinary circumstances, these grapes would have dried enough in 2 to 4 days to take on the wrinkling characteristics of raisins. However, the witnesses providing this information were obviously referring to mature grapes [like those] that were picked in September when they contained over 20-percent sugar. Since such grapes with a low moisture and high sugar content dry faster, they would presumably become raisin-like sooner than [Respondents'] low sugar, high moisture grapes. The record, again, is unfortunately silent on the relative drying time for the two types of grapes or [the time necessary] for [Respondents'] 16-percent sugar grapes to take on the wrinkling characteristics of raisins. [Sun-Maid's Murray also testified that there are early maturity situations in Madera County in which raisin grapes are harvested as early as mid-August. (Tr. 167-68.)]

The direct evidence on whether [Respondents'] grape product had dried to the point of developing raisin-like wrinkles was provided by the testimony of Mayes, Saulsbury, and Bond. [A]s discussed below, Mayes and Saulsbury were [not] credible witnesses. . . .^[2] Bond was a more credible witness [than either Mayes or Saulsbury] concerning the appearance of the product [in question]. . . . Saulsbury and Mayes described the product as too low in quality to be considered raisins. Saulsbury, for instance, called the product too "trashy" to be processed as raisins, while Mayes said the product did not taste sweet like a raisin and had a light brown color, but without the characteristics of raisins. However, Mayes did concede that some [of the product] had begun to develop wrinkles. Saulsbury and Mayes, in short, to demonstrate that [Respondents'] product should not be considered raisins, emphasized the [allegedly] poor quality of [Respondents'] product as compared to the raisins that are processed for human consumption. However, as discussed later, quality is not a determinative factor[--wrinkles make the raisin].

Bond, on the other hand, was specific in describing the product's appearance, which is the determinative factor, saying [the product] had wrinkles

[² The ALJ determined that Mayes and Saulsbury were credible witnesses on some things, but not credible on the primary issue of whether Respondents' product was raisins. This contradiction is removed, wherein the Judicial Officer finds these two witnesses not credible.]

like raisins. [Bond, Mayes, and Saulsbury agree that the product appeared dirty and some of the product had stems still attached. However, in other respects, Bond's description] is . . . unlike Saulsbury's and Mayes' [testimony] concerning the quality [of Respondents' product]. Bond's testimony that the product looked like raisins is based on seeing the product when she visited the vineyard and worked in the weighing sheds. [Bond testified that the product was "dark, dark, dark brown," wrinkled, larger than standard raisins, with some stems still attached, (Tr. 475, 496), and that the product was "raisins" and looked like shriveled up, dark, dried grapes like you would put in oatmeal, "like you would get at the store." (Tr. 470.)]

Mayes said that he never saw Bond at the vineyard. That may be so, but it does not mean she was never there. The farm covers 160 acres and Mayes would not likely have seen everyone who visited a farm of that size.

Wassenberg also testified that Harris, Saulsbury's former employee, told her that the product looked the same as raisins he bought from a store. While Harris did not testify, his description [corroborates] Bond's testimony and there is no information in the record reflecting adversely on Harris' integrity or that he had any reason to make a false statement to Wassenberg. I find that, although hearsay, Harris' statement is sufficiently reliable in the circumstances to add weight to the evidence showing that the product had wrinkles characteristic of raisins. Cf. *Unique Nursery & Garden Center* [(Decision as to Valkering U.S.A., Inc.)], 53 Agric. Dec. 377, 407 (1994)[, aff'd, 48 F.3d 305 (8th Cir. 1995)]. However, in making the finding that the product had raisin-like wrinkles, I rely principally on Bond's credible testimony.

Saulsbury argues that the [Raisin] Order's definition of raisins is too ambiguous to be enforceable. The definition, however, is clear enough: Grapes become raisins when the loss of moisture reaches the point where the grapes develop wrinkles characteristic of raisins. [Respondents] also argue that [their] product was not raisins because, with [the product's] high moisture content and low sugar, [it] would never have been accepted for marketing to normal consumer outlets. The [Raisin] Order, however, particularly after the 1972 amendment, clearly . . . regulate[s] not only raisins to be sold for human consumption, but all forms of dried grapes, regardless of their quality or whether marketable or not. It is significant in this regard that the [Raisin] Order defines raisins only as grapes that have dried enough to develop raisin-like wrinkles, and not by their taste, color, or sugar content. The sponsors of the 1972 amendment also made this clear when they said that the [Raisin] Order would extend to dried grapes with 25-percent moisture which is far in excess of the acceptable level for the dried grapes to be processed into raisins for human

consumption. In short, I find that [Respondents'] product . . . had lost moisture to the extent of developing wrinkles characteristic of raisins and that [it was] therefore raisins as defined by the [Raisin] Order. [Respondents'] raisins therefore had to be inspected even though they [might] have graded out as off-grade, failing, or substandard raisins. When [Respondents] marketed the raisins by shipping them to a non-normal outlet in Canada, [they] became handlers subject to the [Raisin] Order and violated section 989.59 of the [Raisin] Order by not having the raisins inspected. (7 C.F.R. § 989.59.)

Sanction

Complainant contends that [Respondents], as handler[s], also violated the [Raisin] Order by failing to file the required reports, by failing to pay assessments to the RAC, and by failing to hold raisins in reserve. [Complainant] seeks an order requiring [Respondents] to pay the assessments and to pay a penalty of \$219,000.

The raisins [Respondents] sold to the Canadian distillery were, as noted, [sold at a price which would] qualify as standard (Grade A) raisins. Since the [Raisin] Order bases both assessments and reserves on the raisins being standard raisins, [Respondents] would . . . have had to pay assessments [and would have had to] hold . . . raisins in reserve. . . .

In seeking a \$219,000 penalty, Complainant contends the penalty is necessary to protect the [Raisin] Order from threats to its integrity, citing *In re Onofrio Calabrese*, 51 Agric. Dec. 131, 140 (1992)[, *appeal docketed sub nom. Balice v. United States Dep't of Agric.*, No. CV-F-92-5483-GEB (E.D. Cal. July 21, 1992)]:

Congress has found that the issuance of marketing orders, and the handling of commodities in compliance with such, are necessary to provide "an orderly flow of the supply thereof to market throughout [their] normal marketing season to avoid unreasonable fluctuations in supplies and prices." [Citation omitted.] In 1987, Congress amended the AMAA to provide for administrative penalties for violations of the Order and its regulatory provisions to insure that the purpose of the marketing order program would not be eroded.

. . . .

Finally, Complainant suggests that Saulsbury could have obtained permission to sell his raisins in Canada:

In order for a grower to ship off-grade raisins to a "non-normal outlet" that is outside of California without becoming a handler, he must obtain written approval from the Raisin Administrative Committee. . . . There is no evidence that Saulsbury either sought or obtained approval for his shipments to Canada.

Complainant's [Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof], p. 3 (hereinafter CB).

The [Raisin] Order, however, effectively precludes a handler, with or without RAC approval, from [shipping] . . . off-grade or failing raisins anywhere but to eligible non-normal outlets [within] the [continental] United States [(other than Alaska)]. A handler applying to the RAC to [ship raisins to a non-normal outlet must agree not to [ship] them outside the continental United States [or to Alaska] and further agree that if any of the raisins should be shipped outside the [continental] United States [or to Alaska], the handler will pay the RAC liquidated damages . . . for such raisins. (7 C.F.R. § 989.159(g)(2)(ii)(I), .159(g)(2)(iii).) . . . [Footnote omitted.]

Still, [Respondents] violated the [Raisin] Order and the AMAA provides for a \$1,000 penalty for each violation. (7 U.S.C. § 608c(14)(B).) *In re Onofrio Calabrese, supra*, [51 Agric. Dec.] at 154-155, states:

In determining the amount of the civil penalties to be assessed . . . , it is appropriate to consider the nature of the violations, the number of violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given . . . , and any other circumstances shedding light on the degree of culpability involved.

. . . .

Findings of Fact^[3]

[1. Respondent Saulsbury Enterprises is an unincorporated association of which Respondent Robert J. Saulsbury is a principal or owner. The principal place of business of Saulsbury Enterprises is 20783 Avenue 12, Madera, California 93637.

2. Respondent Robert J. Saulsbury is an individual whose mailing address is (b) (6)

3. During the 1988-89, 1989-90, and 1990-91 crop years, Respondents were engaged in business as handlers of raisins grown in California and were subject to the AMAA, Raisin Order, and regulations issued under the AMAA.

4. On 19 occasions during the 1988-89 crop year, Respondents received approximately 754,375 pounds of natural condition raisins without having them inspected.

5. On 24 occasions during the 1989-90 crop year, Respondents received approximately 819,890 pounds of natural condition raisins without having them inspected.

6. On 17 occasions during the 1990-91 crop year, Respondents received approximately 673,614 pounds of natural condition raisins without having them inspected.

7. On 19 occasions during the 1988-89 crop year, Respondents shipped approximately 754,375 pounds of natural condition raisins without having them inspected.

8. On 24 occasions during the 1989-90 crop year, Respondents shipped approximately 819,890 pounds of natural condition raisins without having them inspected.

9. On 17 occasions during the 1990-91 crop year, Respondents shipped approximately 673,614 pounds of natural condition raisins without having them inspected.

10. From October 26, 1988, to April 26, 1990, Respondents failed to hold approximately 113 tons of raisins in reserve for the 1988-89 crop year; from October 25, 1989, to July 12, 1991, Respondents failed to hold approximately 110 tons of raisins in reserve for the 1989-90 crop year; and from October 31,

[³Complainant's Proposed Findings of Fact and Conclusions of Law are based upon the Complaint and are substituted for the ALJ's Findings of Fact and Conclusions of Law, which substitution is because of my complete agreement with Complainant's theory of this case, Findings of Fact, and Conclusions of Law.]

1990, to June 15, 1992, Respondents failed to hold approximately 104 tons of raisins in reserve for the 1990-91 crop year.

11. During the 1988-89, 1989-90, and 1990-91 crop years, Respondents failed to file with the Raisin Administrative Committee:

- (a) eight RAC-1 Forms, reporting standard raisin acquisitions;
- (b) three RAC-5 Forms, giving notice of intention to handle raisins and making application for inspection;
- (c) three RAC-7 Forms, reporting the status of reserve pool raisins;
- (d) three RAC-20 Forms, reporting the disposition of free tonnage raisins;
- (e) three RAC-21 Forms, reporting free tonnage shipments to foreign countries;
- (f) eight RAC-30 Forms, reporting off-grade raisins;
- (g) three RAC-32 Forms, reporting the disposition of off-grade or failing raisins, or residual material;
- (h) three RAC-35 Forms, applying to sell, ship, or dispose of raisins or raisin residual materials;
- (i) three RAC-50 Forms, reporting inventory of free tonnage raisins, by variety; and
- (j) three RAC-51 Forms, reporting inventory of off-grade raisins, by variety.

12. Respondents violated section 989.80 of the [Raisin] Order by failing to pay \$557.33 in assessments for raisins handled in the 1988-89 crop year, \$594.68 in assessments for raisins handled in the 1989-90 crop year, and \$521.29 in assessments for raisins handled in the 1990-91 crop year.]

Conclusions of Law

[1. Respondents violated section 989.58 of the Raisin Order on 19 occasions during the 1988-89 crop year by receiving natural condition raisins, without having them inspected.

2. Respondents violated section 989.58 of the Raisin Order on 24 occasions during the 1989-90 crop year, by receiving natural condition raisins without having them inspected.

4. Respondents violated section 989.59 of the Raisin Order on 19 occasions during the 1988-89 crop year by shipping natural condition raisins without having them inspected.

5. Respondents violated section 989.59 of the Raisin Order on 24 occasions during the 1989-90 crop year by shipping natural condition raisins without having them inspected.

6. Respondents violated section 989.59 of the Raisin Order on 17 occasions during the 1990-91 crop year by shipping natural condition raisins without having them inspected.

7. From October 26, 1988, to April 26, 1990, Respondents failed to hold raisins in reserve for the 1988-89 crop year, in violation of section 989.66 of the Raisin Order and 989.241 of the regulations.

8. From October 25, 1989, to July 12, 1991, Respondents failed to hold raisins in reserve for the 1989-90 crop year, in violation of section 989.66 of the [Raisin] Order and 989.242 of the regulations.

9. From October 31, 1990, to June 15, 1992, Respondents failed to hold raisins in reserve for the 1990-91 crop year, in violation of section 989.66 of the Raisin Order and 989.243 of the regulations.

10. Beginning in 1988, Respondents violated section 989.73 of the Raisin Order by failing to submit a total of 40 reports to the RAC for crop years 1988-89, 1989-90, and 1990-91.

11. Respondents violated section 989.80 of the Raisin Order by failing to pay \$557.33 in assessments for raisins handled in the 1988-89 crop year, \$594.68 in assessments for raisins handled in the 1989-90 crop year, and \$521.29 in assessments for raisins handled in the 1990-91 crop year.]

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant, as the proponent of an Order, has the burden of proof in cases under the Administrative Procedure Act (hereinafter APA), such as this one, and the standard of proof by which the burden is met is the preponderance of the evidence standard. In this proceeding, Complainant has shown by much more than a preponderance of the evidence that Respondents have committed each of the violations alleged in the Complaint.⁴

⁴See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. ___, slip op. at 3 n.3 (Mar. 15, 1996); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), aff'd, 713 F.2d 179 (6th (continued...)

In this case, the issue is whether Respondents' product qualifies as raisins under the Raisin Order, (7 C.F.R. pt. 989). The ALJ properly answered that question "yes" by holding that Respondents' product is raisins under the Raisin Order. (Initial Decision at 13.) A close examination of the record evidence reveals that there are two competing versions of what happened in this case. These versions are mutually exclusive. (In the following synopses, I make no attempt to cover every possible point in each version.)

Respondents' Version of the Facts

First, Respondents' version of the case: Respondents introduced evidence and made arguments that the product in question was not raisins and thus should not be regulated under the Raisin Order. Rather, Respondents called their product "medium" dry grapes, (Initial Decision at 11), which Respondents prepared and exported in direct response to the needs of a Canadian distillery (unnamed), represented by an American broker, Ed Lee (now deceased), and a Canadian broker, Haida Sales Ltd., of Richmond, B.C. Mr. S. G. Spear, President of Haida, averred in a February 8, 1995, letter, that "[t]he product involved was a dried grape still with a lot of moisture and greenness in it with the sticks and leaves and pieces of the vines." (Initial Decision at 5; RX 3, 7.) (Neither Lee nor Spear appeared at the hearing.)

To prepare this product, Respondents purportedly cut premature grapes in mid-August (prior to the customary Labor Day cutting time), when the sugar content was about 16 percent, and placed the moist grapes in trays on terraced ground (next to and under the vine canopy) to sun-dry for 5 to 7 days (turning them at least once). (Initial Decision at 6; Tr. 540.) Respondent Saulsbury and employee/witness Mr. Ronald Mayes testified variously for Respondents that the product had a lot of moisture; that the grapes were a light colored brown but mostly green; that the stems were still attached; that the product did not taste raisin sweet; that the product did not have wrinkles like a raisin; that any grapes appearing wrinkled were really immature, substandard "water berries"; that juice ran from the grapes when squeezed; that the customer-provided cardboard boxes were stained with juice and smelled like wine from fermentation; that the boxes were stencilled with the words "DRIED GRAPES DISTILLERY USE ONLY"; that the

⁴(...continued)

Cir. 1983); *In re Gold Bell-J&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

product was a substandard "grade nothing"; and that the product was too "trashy" to be processed as raisins. (Initial Decision at 6-7; Tr. 511-83; RX 1.) Saulsbury and Ronald Mayes had been making raisins in that same vineyard since 1974. (Initial Decision at 5; Tr. 511, 568.) Saulsbury was proud of his raisin-making ability, stating, "I make a better raisin than [Sun-Maid's raisins]." (Tr. 581.)

According to Respondents' chronology, then, for each pertinent crop year, 1988-89, 1989-90, and 1990-91, the grapes were cut around August 15th, sun-dried on the ground for a week, turned, perhaps rolled, collected around August 22nd, shaken to remove sand, stored in the customer's boxes in the shed for about 2 weeks, and then trucked to Canada--thus, shipping purportedly would commence around September 7th, in each crop year. (Initial Decision at 6; Tr. 524, 559-61.) Respondents shipped approximately 754,375 pounds in the 1988-89 crop year; 819,890 pounds in 1989-90 crop year; and 673,614 pounds in 1990-91 crop year, which approximated the Respondents' total annual raisin production in previous years. (Initial Decision at 7.) Respondents received \$797 a ton in 1988-89; \$927 a ton in 1989-90; and \$916 a ton in 1990-91. (Initial Decision at 8; CX 35.)

For the same years, other Raisin Order raisin growers received a "calculated producers return per ton"--based on 100 percent delivery of standard N.S. (natural seedless) raisins--of approximately \$916 in 1988-89; \$987 in 1989-90; and \$951⁵ in 1990-91. (CX 10.) However, under the Raisin Order, raisin growers were only allowed to sell between 69 percent and 73 percent of their raisin production as "free tonnage" in those years, having to keep between 27 and 31 percent of their raisins in reserve for up to 2 years. (*Id.*) When the prices are compared, it is obvious that in each pertinent crop year, Respondents received very nearly the "calculated producers return" for standard raisins for Respondents' purportedly "trashy," "grade nothing," non-raisin, medium dry grape product.

In contrast, Russell Murray, the expert wine maker for the Sun-Maid Company's distillery, testified that his company would pay only \$150 a ton for off-grade raisins for distillery purposes, depending on the alcohol-producing "sugar points"; and only \$75 a ton for Respondents' product, as described by Saulsbury and Mayes. (Initial Decision at 8; Tr. 189.) However, Murray was

⁵Estimated. I averaged the reserve tonnage price for the 1987-88, 1988-89, and 1989-90 crop years, and then added that figure of \$182 to 69% of the 1990-91 free tonnage price: 69% x \$1,115 = \$769 + \$182 = \$951. (CX 10.)

clear that Sun-Maid would not actually buy or sell a product such as that purportedly produced by Respondents. (Tr. 171, 193.)

Complainant's Version of the Facts

Second, Complainant's version of the case: Complainant's version is that Respondents merely ignored the Raisin Order in crop years 1988-89, 1989-90, and 1990-91, and exported all of Respondents' customary, annual, standard raisin production to Haida Sales Ltd., in Richmond, B.C., Canada. (CA, p. 5.)

Complainant's witnesses testified, and Complainant's corroborating exhibits showed, that the product which Respondents had characterized as a "medium" dry grape, actually had all the characteristics of Respondents' customary and usual standard raisin. Phyllis Bond, Respondents' bookkeeper-secretary-office manager during the great majority of the pertinent years (from September 1987 through June 1990), (Tr. 468-69, 476-77, 508), described the product as "dark, dark, dark brown," wrinkled, and that it looked like raisins except for being a little larger and dirtier than standard raisins, with stems still attached to some of the product. (Initial Decision at 7; Tr. 468-69, 475, 477, 493-96, 508.) Phyllis Bond testified: "They were dried grapes, shrivelled up, dark, and like I would put in my oatmeal. They're just like you would get at the store." (Tr. 470.) Phyllis Bond had continuous access to the vineyard in these years, and observed Respondents' product drying on the ground, the product on a shaker machine, the containers being weighed in the shed, the product being stored there, and the shipment of the product at the beginning of October, and ending by mid-October. (Tr. 474, 480.) Once in the pertinent 3-year period, shipments actually began September 26, 1990. (CX 37.)

Phyllis Bond testified from personal knowledge that Respondents in at least one year sold their raisins "through the raisin board." (Tr. 484.) Phyllis Bond testified that the raisins sent to Haida Sales were particularly praised as raisins by Mr. Spear, President of Haida. Ms. Bond testified that Spear was "just always very pleased with the product," that Spear said "they were the perfect size," and that Spear said that "he couldn't have gotten better raisins anywhere, that they were the best." (Tr. 478-79.) Also, Ms. Bond testified that Spear "said the raisins look beautiful." (Tr. 503.)

Phyllis Bond helped to: weigh the raisins, mark the cartons with the weight, tape the lids shut on the bins, and prepare the truckers' bills of lading for shipment to Canada. (Tr. 469-70, 475-76.) The ALJ found Ms. Bond's testimony more credible than that of Saulsbury and Ronald Mayes on the appearance of the product. (Initial Decision at 12.) Moreover, in finding that

the product had raisin-like wrinkles, which is determinative of the crucial issue that the product was raisins, the ALJ relied on Bond's testimony. (*Id.* at 3.)

Phyllis Bond's testimony, that the product in question in years 1988-90 was actually the usual and customary standard raisins produced by Respondents--not a high moisture, low sugar (16 percent), "medium" dry grape, as characterized by Respondents--was corroborated by Willie Harris, a vineyard tractor driver for Respondents during the pertinent time frame. While admitting that, being from Mississippi, he did not know how to make grapes into raisins, Harris told AMS investigator Renee Wassenberg (and signed an affidavit to this effect) that the product he took from the Respondents' vineyard to the shed was "exactly the same type raisin I buy in the box from the grocery store." (Initial Decision at 7; Tr. 403-05; CX 4.)

Respondents' counsel objected to the affidavit, (CX 4), of Willie Harris, because, Respondents allege, Complainant did not properly serve the subpoena to compel Harris' appearance at the hearing. (RA, pp. 6-7; Tr. 401, 403, 408, 411, 594-95.) I agree with the ALJ, however, that USDA attempted to serve Mr. Harris. The AMS inspector who took Mr. Harris' affidavit, Renee Wassenberg, testified at the hearing about the circumstances of her taking Mr. Harris' statement and was available for and was subjected to Respondents' counsels' cross-examination. (Tr. 420-31.) The only relevant point from Harris' affidavit is that it corroborates Phyllis Bond's testimony that the product was raisins. Even if Harris' affidavit was not allowed, Bond's testimony about the product being raisins, which testimony the ALJ specifically found more credible than Respondents' witnesses' testimony, would have been sufficient to allow the ALJ's Finding of Fact that the product was raisins. But, I find that CX 4 was properly admitted, and that the Harris statement was properly corroborated by Wassenberg's hearsay testimony. Reliable hearsay is routinely admissible in administrative proceedings such as this one, *sub judice*.

Complainant's Version of the Case Is Correct

Respondents' version of the case does not withstand scrutiny, for the reasons below. If, as Respondents aver, it is true that Respondents cut the grapes around August 15th, placed them on the ground for a week, turned them, perhaps rolled them, stored them in the shed for 2 weeks, and then shipped them to Canada around September 7th, the routine paperwork would show that. But, Phyllis Bond's testimony, Respondents' invoices and bills of lading, and United States and Canadian customs forms irrefutably establish that the annual

shipments did not begin until early October, except once when shipments began on September 26, 1990. (CX 34, 35, 37; Tr. 470-71, 479-80.)

This chronological discrepancy is devastating to Respondents' version of the case, because, by Respondents' own painstaking testimony, the moist, "medium" dry grape product under scrutiny is perishable. Thus, I do not find it credible that a grape put on the ground in the sun for a week in mid-August, purportedly retaining a good deal of moisture, turned, perhaps rolled, collected, shaken on a shaker, and put in bins in an unrefrigerated shed, could be stored in the late August and September California heat--a period of 6 weeks or more--and not decay, ferment, mold, and/or become infested with insects. (Tr. 163-64.)

Actually, there is some evidence in the record that Respondents fumigated the shed to prevent infestation as follows:

[BY MR. LEIGHTON:]

Q. Okay, did you have to fumigate during that period of time?

[BY MR. MAYES:]

A. Yes, for gnats and some of them would get blown by the flies and would have maggots in it and we'd fumigate to keep them from rotting in the best we could.

Tr. 562; CX 4.

However, I must infer that Mr. Mayes was colloquially referring to damage by flies and maggots as "rot," because I do not find it credible that one could fumigate for "rot"--that is, the biological breakdown of the moist grape over time, irrespective of maggot infestation. Now, had Mayes been referring to completely-processed storable raisins, his testimony about fumigation would make sense. In fact, Willie Harris' statement corroborates the fact that fumigation was done, but, Harris fumigated raisins. (CX 4, p. 1.) But, I do not find it credible that pesticides would prevent rot in a wet grape product stored in California from approximately August 22nd to approximately October 1st. Moreover, the shaker shed, I infer, was not refrigerated or even air conditioned, because of witness Mayes' testimony of the shaker machine's dirt production and the fans blowing the dust. (Tr. 530-31, 553, 559.)

There is more testimony in the record from the expert, experienced (24 years) wine maker (Russell Murray of Sun-Maid) that is convincing to me that

the moist grapes described by Respondents could not store for several weeks; and the record further shows that Respondents' product was held in storage, for many weeks. (Tr. 163-64, 167, 174.) Murray testified that wet grapes, as described by Respondents, are subject to leakage, attract insects, occasion fermentation, cannot be shipped for long distances, and must be placed in grape tanks for transportation over short distances, as follows:

[BY MS. CARROLL]

Q. And what would be the moisture content of those raisins that you just talked about?

[BY MR. MURRAY]

A. Well, when Sun Maid received raisins, they have to be below 18 percent moisture to be considered storable.

In a situation where we have a rain disaster where raisins are getting ready to break down or decay on the field, we allow them to bring them in at higher moistures, but then we put them through our dryers. We have some artificial means of drying raisins.

Q. As opposed to sun drying?

A. Exactly. And so at that point, we could -- let's say if they all get rained on, we can't save them all, but we can save a portion.

Q. And when you said 18 percent moisture to be storable. What do you mean by storable?

A. Well, if they are higher in moisture by 16 to 18 percent, raisins are subjected to leakage. The juices actually run out of the -- there's still enough juice in the raisin that it runs out of the box and the storage bin. And insect attraction, fermentation takes place. Several bad things happen if they're not dry enough. Drying is actually the way that we make grapes into a storable product, it would be raisins.

Q. Okay. Would a grape that is at a higher moisture than the 16 to 18 percent you talked about be suitable for shipping?

A. Certainly not for very long distances.

Q. Why?

A. Again. The insect problem, the leakage. I move them from Kingsburg to Orange Cove in grape tanks, which hold all the liquids that would be expressed when they're above those moistures.

Q. Where's Kingsburg?

A. Kingsburg is about 35 miles from Orange Cove. It's about a 45-minute drive.

Tr. 156-57.

Saulsbury and Mayes testified that moisture would run out if Respondents' grapes were squeezed, that juice stained the cartons, and that fermentation had begun as of the September 7th date Respondents claimed for shipping. I just do not find it credible that non-raisin grapes could have stored until the actual October shipping dates shown on the invoices, bills of lading, and United States and Canadian customs forms.

However, even if one were to suspend disbelief about Respondents' shipping dates, and purposely entertain the possibility that there is a Canadian distillery somewhere willing to pay (just under) the going rate of standard raisins for a 16-percent sugar, wet grape, or "medium" dry grape product, for what could this product be used? The suggestion was made that this product could be used as a base for champagne, but (wine expert) Mr. Murray's testimony refutes this possibility. (Respondents' counsel recognized that Murray was an expert on distilleries. (Tr. 161.) Murray testified that a high-acid, low-sugar grape (16 percent) like that claimed by Respondents, is used in champagne, because lower sugar aids higher alcohol production and lower sugar also allows the higher acid level needed in champagne. But, champagne makers need a very clean product, with no raisining or decay, as follows:

[BY MR. MURRAY:]

A. If they were going to make a champagne base, in other words a base wine that would be used either for blending or to make

inexpensive champagnes, then they would want them at the lower sugar range at 16 and 17.

[BY MR. LEIGHTON:]

Q. And higher moisture?

A. There would be more moisture, I would assume. Yes.

Q. So champagnes are less sugar, around 16?

A. Correct. Around 16, 17. What happens is as sugar goes up in grapes, acid content goes down. And champagnes, you want a higher acid base wine, so they pick them greener, so to speak, so you wind up with a product that is lower in alcohol but higher in acid.

Q. And now with the champagne -- when they make champagne, do they -- the[y] want the less sugar, 16 or so, they want more moisture. But, do they lose moisture in the process?

A. No. When you say more moisture, really the key is the acid content. It really isn't -- the moisture isn't significant. In fact, if you pick grapes too green, 12 or 13, you actually get less liquid out of them than you would if they were at 20.

Q. Okay. And for champagne, what would you prefer? Less liquid?

A. No. Liquid has no bearing on it. You would certainly want all the liquid you get.

Q. Okay.

A. That's the end product.

Q. Well, do the[y] have less acid with a lower sugar content?

A. No, lower sugar -- if the sugar's low, the acid's high.

Q. Okay. Do they want higher acid?

A. That's correct.

Q. So, when somebody wants to buy Thompson grapes to make a cheap champagne, what kind of specifications would they give a grower?

A. Well, they would send the field reps out to check the sugars and the acids and they would want the grower to pick the grape when it had the highest acid possible, with a minimum sugar of 16 or 17.

Q. Okay. And would they care whether or not the grapes dried out a little before shipment?

A. Yeah, you bet they would. They would have to be whole, sound grapes with no raisining, no decay.

Q. When does the raisining and decay start?

A. Well, traditionally, it wouldn't start in 16 or 17 percent sugar grapes. That normally happens when grapes are riper. But, if you got into a situation where there was early rains or something, then mold o[r] rot set in, then you could have it in the greener grapes.

Q. Okay. But only if there was mold or rot that set in or they got damaged?

A. Right. Or for some reason, the grapes were exposed to sun, there are several insects that will basically defoliate a vine. And so if all the leaves were going off the vine and the grapes were exposed to the sun, they would sunburn and there would be some raisining. That would be detrimental.

Tr. 186-88.

I find that the product described by Respondents, *supra*, certainly could not be used for such a champagne base. Moreover, Murray testified that a wine

product, based upon the price paid for Respondents' exported product together with shipping costs would have to be \$75 a bottle. (Tr. 192.)

If not champagne, into what else could this purportedly non-raisin product be manufactured? Respondents testified that their product, at 16-percent sugar, could not be processed into a raisin--there would be no "meat," just skins. (Tr. 556.)

Moreover, since distilleries are only interested in the sugar content of grapes or raisins, because sugar is what is converted into alcohol, the product described by Respondents would not be very valuable to a distillery. Wine expert Murray testified that distilleries pay per sugar "point" and Sun-Maid would usually pay only \$150 a ton. (Tr. 158.) Speculating on Respondents' product, Murray testified that, if it started at 16-percent sugar and was dried down to 25-percent sugar, Respondents would receive \$3 per sugar point, times 25 percent (25 points), or \$75 per ton. (Tr. 189.) Murray was asked why raisins command prices of \$1,000 a ton, while distillery raisins go for \$150 a ton or less, and the answer is that raisins consumed by humans are more valuable than the distillery raisin, which is the end of the food chain, as follows:

[BY MS. CARROLL:]

Q. Okay. And what was the price that you were paying in that same period of time for raisins for use in distillery?

[BY MR. MURRAY:]

A. That would have been \$150.00.

Q. Okay. So, for raisins for use in the box, it's around \$1,000.00?

A. I would say yeah, that's --

Q. An average?

A. Yeah.

Q. And then for use in distillery, it's \$150.00?

A. That's correct.

Q. Why is there such a discrepancy?

A. Well, certainly, raisins would be consumed by humans. It would be much more valuable than those that would be put through a distillery.

Distillery is kind of the end of the line. In other words, if you have raisins that you can't do anything else with, that's -- they either go to cattle feed, animal feed or distillery. That's sort of the end of the food chain, so to speak.

Tr. 159.

I find it incredible that Respondents would ship 16-percent sugar raisins to Canada to be made into alcohol. It is not economically supportable; especially, since Canada has a plethora of much cheaper grain spirits for fortifying cordials, liqueurs, or other fortified alcoholic concoctions, as expert Murray testified. (Tr. 160-63.)

Other products mentioned by expert Murray in his testimony, which Sun-Maid manufactures for the bakery industry--raisin paste, raisin puree, and raisin juice concentrate--are all made from food-grade raisins. Murray testified that a "substandard . . . 16 percent sugar, partially dried sticks and stems" raisin would not be food grade, and thus not usable for food preparation. (Tr. 177-78.)

The record does not reveal a plausible explanation for Respondents' shipment of such a purportedly low-grade product to Canada, or identify what an end-user distilling company could possibly make from such a product to render such an endeavor economically worthwhile. The letters from President Spear of Haida Sales, I find, are purposefully vague about Haida Sales' mysterious client and the use for Respondents' product. Moreover, I have already determined that Spear's evidence is contradictory, because of the sterling appraisal of Respondents' raisins he gave to Phyllis Bond, *supra*, on the one hand, and, on the other, the substandard, "medium dry grape" Spear describes in his letters, (RX 3, 7). I infer, therefore, that there is no such end user, and that there is no mystery distillery product. I conclude that the product Respondents exported to Canada through their export agent, Haida Sales, was the same standard raisin made by Respondents in previous years, as detailed in RAC documents concerning Respondents' raisin production from 1974 to 1986. (CX 3.) Particularly important is page 5 of Complainant's Exhibit 3, which is

Respondents' Assignment of Pool Equity (RAC) form for the 1986-87 crop year, in which Saulsbury personally assigned 100-percent interest (789,534 lbs.) in Respondents' Thompson Natural Seedless Raisins to West Coast Growers & Packers, Inc. Complainant's Exhibit 3, page 5, is evidence of Saulsbury's desire to sell 100 percent of his raisin production and bypass reserve requirements, which desire was noted by Phyllis Bond, who stated, "[Saulsbury] liked the idea of having 100 percent return on his money, on his crop." (Tr. 586.) I find that the following crop year, 1987-88, was the first year Respondents shipped their production to Canada, based upon Mayes' testimony that Respondents shipped to Canada a crop year earlier than 1988-89. (Tr. 520.)

I specifically reject Respondents' assertion that Complainant bore the burden of disproving Respondents' "end user" defense, and that Complainant should have investigated more thoroughly in Canada for the end user. On the contrary, this mystery of the end user was always in the power of the Respondents to reveal. Respondents, and their export agent, President Spear of Haida Sales, could have made Respondents' case plausible at any time by revealing the end user, and the end use. Instead, Mr. Spear was virtually non-responsive both to AMS Compliance Director David N. Lewis' August 7, 1991, letter, and to investigator Wassenberg's August 19, 1991, telephone call, requesting Haida Sales, Ltd.'s, records to verify receipt of Respondents' raisins, as follows:

We request that you provide us with copies of the receiving manifests, bills of lading, and any other documentation you received from either Mr. Saulsbury or ABC Customs Brokers for the years 1985, 1987, 1988, 1989, and 1990, concerning Mr. Saulsbury's raisin shipments. We also request copies of the documents in your records (contracts with Mr. Saulsbury and/or ABC Customs Brokers, letters and other correspondence) which relate to the shipment of those raisins.

CX 42; RX 8.

President Stuart G. Spear's letter, in its entirety reads as follows:

In answer to your letter, date stamped August 7, 1991, I should like to answer as follows.

I, nor my company, Haida Sales Ltd., has ever imported California raisins.

We have brought in, each fall, totes (1500 lbs) of semi-dried grapes for distillery purposes. This product contains leaves, branches, stems, grapes in various states of decay or dryness.

RX 7.

In contrast, Mr. Spear told Respondents' office manager Phyllis Bond, how much he loved the "raisins." Thus, Spear's letters, (RX 3, 7), supporting Respondents' description of the product are completely undercut by the credible hearsay testimony of Bond who testified that Spear told her how pleased he was with Respondents' "beautiful," "best," and "perfect" raisins. (Tr. 478-79, 503.)

Complainant's theory of the case is that Respondents ignored the Raisin Order, and exported Respondents' uninspected, albeit routine, annual, standard raisin crop to Canada. After Complainant introduced substantive evidence that the product was indeed raisins, I find that the burden of coming forward with opposing evidence--beyond that of mere testimonial assertions to the contrary by Respondent Saulsbury and employee Mayes--shifted to Respondents. That is, if Respondents' defense to the Complaint of shipping uninspected raisins is that their product was not raisins, the evidence should be more than just evidence that their buyer asked for non-raisins. The evidence should document that the buyer got non-raisins; and, at least, counter the evidence from witness Bond that what she saw shipped was raisins. Respondents, concerning three full crop years, did not put on any evidence that what arrived in Canada was that which the Respondents testified that they shipped. They could have, they did not, and I infer, therefore, that Complainant is correct on this issue.

On the other hand, I find troubling instances in which Respondents' theory of the case is vulnerable. For example, there are at least a couple of instances in which a question is raised regarding the identity of the individual who, in effect, "turned Saulsbury in" for violating the Raisin Order. One occurs in Renee Wassenberg's testimony and her report on serving the subpoena on Saulsbury, when Wassenberg quotes Mrs. Saulsbury as commenting to her husband, Respondent Saulsbury, "I wonder who turned you in." (CX 30; Tr. 394.) Another is Respondents' lengthy examination of Phyllis Bond's motivations, after being terminated by Saulsbury from her employment with Respondents for apparent disloyalty. (Tr. 497-507; 575-79.) Respondents pursued this subject in an attempt to damage Phyllis Bond's credibility because she purportedly had reason to "turn Respondents in," but Respondents never accused Ms. Bond of lying. (Tr. 484-85.) My understanding of the testimony is that Respondents imply that Skip Pettit, Respondent Saulsbury's self-described

long-time nemesis, (Tr. 575), put Phyllis Bond up to confessing Respondents' violations, or perhaps Skip Pettit turned Saulsbury in. (Tr. 504-05.)

However, such revelations alone are not probative. Even if it were true that Skip Pettit persuaded Phyllis Bond to "turn Saulsbury in" to AMS investigator Renee Wassenberg, that alone does not help Respondents' case. Rather, Phyllis Bond's testimony would also have to be shown to be false, which it has not been, based upon this record. Similarly, evidence that Skip Pettit turned "Saulsbury in," which is not in this record, would not be probative. However, Respondents' palpable attitude that Respondents were "turned in," carries the concomitant specter of a guilty conscience, or guilty attitude.

Another vulnerability in Respondents' theory of the case arises from Bond's testimony that the payroll records for the pertinent period would show 1 week for cutting the grapes, and another week or so for turning and rolling the grapes. Bond's testimony shows that Respondents' grapes were on the ground for well over 2 weeks beginning at the end of August, and not the 5 to 7 days Respondents averred that the grapes were on the ground from mid-August, as follows:

[BY MS. CARROLL:]

Q. Do you recall during the time you were employed by Mr. Saulsbury when he -- and specifically 1988 and '89 -- when the grapes were laid down, I think is the term?

[BY MS. BOND:]

A. When the season started?

Q. I guess when the grapes -- when he would cut grapes from the vines?

A. Okay, believe it was right at the end of August.

Q. And can you tell either from your memory or from your documentation when shipments to Canada would begin?

A. Oh, before mid-October, I believe. In -- yes, beginning of October. Think it'd be over with, you know, early, you know, between early -- before mid-October it'd be over with, generally.

.....

Q. And do you have -- did you prepare any records about the length of time the raisin -- or, the grapes were on the trays?

A. The records that would show that would be the payroll records.

Q. Now why would that be?

A. Well, we would pay according to the job.

Q. Okay, and you would pay the people in the field?

A. Mhm (affirmative).

.....

Q. And after the grapes were cut and laid on trays, what -- do you know, I don't know if you know this, but what would happen to them?

A. Well, if my memory serves right, it would take approximately -- they would cut the grapes, start at one end and go all the way down, and generally by the time they'd get down to the other end it'd be time to go back to the start and turn them, and so they'd go back and turn them. So we'd have a cutting payroll, a turning payroll, and then by the time they were turned and they got down to the end it'd be about time to come back, I believe, to roll them.

Q. What does that mean?

A. They roll them in the paper trays and then once they were rolled, after they were rolled, they would pick them up then and take them to the shed.

Q. And was that procedure in effect in 1988 and 1989?

A. Yes.

....

[BY MR. LEIGHTON:]

Q. Do you know how long the product was on the ground?

[BY MS. BOND:]

A. Take about a week, I'd say approximately a week when they cut, and then they would go back and turn them, that'd take about another week, and then they would roll them. I -- an approximate --

Q. Do you recall providing a statement to Renee Wassenberg where you stated I don't recall how long they were down but at least a week?

A. At least a week.

....

Q. You don't know how many days past a week?

A. No, I don't. I just remembered how the payroll went, and it was usually a weekly payroll and each step usually took a week because of payroll.

....

Q. Where in the payroll records would it describe that it was for rolling or for picking or for turning?

A. We had a terrace system on our -- on the computer that was like a farm management, and it would be each thing was enterprise, so that we could get the cost of each subsequently, you know, what -- how it -- in order or how much it would cost to do each process. So it's in the computer records in the payroll as to --

Q. And the payroll records would state what date the raisins were put on the ground and what date they were picked up?

A. It'd be a weekly payroll. And --

Q. Okay, so the -- so if a week had gone by and now it's time to do the payroll, the payroll records, this terrace system, would show picking, okay, or rolling, okay.

MS. CARROLL: NEED TO ANSWER AUDIBLY.

A. Yes.

Tr. 479-82, 492-95.

This testimony is dispositive of two issues: (1) when the grapes were laid down: It was the end of August, not mid-August; and (2) how long the grapes were on the ground: For well over 2 weeks, not 5 to 7 days. Respondents had two chances to produce the payroll records, which ostensibly could have proved their case theory. The first chance was on the occasion of the subpoena. The USDA investigators appeared at the vineyard with the subpoena duces tecum but they were rebuffed by Saulsbury. Later, they were again rebuffed by Respondents' counsel, both by telephone to AMS investigator Wassenberg and by letter, to the effect that there were no Raisin Order documents to produce, because Respondents do not "handle 'raisins'." (CX 32; Tr. 394-95.) A second chance to produce the payroll records, of course, was at the hearing, when Ms. Bond actually testified to the existence of the payroll records.

It was solely in Respondents' power to exculpate Respondents and prove Respondents' theory of the case by producing the records, which Respondents failed to do.

Credibility of Witnesses

The ALJ made the correct determination on the crucial witness, Phyllis Bond, when he found her testimony determinative that the product was raisins. However, the ALJ's further credibility determinations, that Mayes' and Saulsbury's testimony on the quality of the raisins was credible, are erroneous, as explained below.

Normally the Judicial Officer accords great weight to the ALJ's credibility determinations, but the Judicial Officer is not bound by them, as long as the Judicial Officer's contrary decision is supported by substantive evidence, as follows:

[I]rrespective of the ALJ's credibility determinations, the Judicial Officer would still be able to make a separate determination that these witnesses have very little credibility (see *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, [506 U.S. 826] (1992), for a lengthy supportive discussion based upon *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).) The summary statement at the end of this analysis is worth quoting here, as follows (*Id.* at 893):

From the foregoing, it is abundantly clear that the Judicial Officer is not bound by the credibility determinations of the ALJ, and that the standard on court review is whether there is substantial evidence to support the Judicial Officer's contrary decision.

In re Midland Banana & Tomato Co., 54 Agric. Dec. 1239, 1271-72 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995).

The ALJ determined that Phyllis Bond was the more credible witness, among those testifying on the conclusive issue of whether the product was raisins, as follows:

The direct evidence on whether Saulsbury's grape product had dried to the point of developing raisin-like wrinkles was provided by the testimony of Mayes, Saulsbury, and Bond. Except as discussed below, Mayes and Saulsbury were credible witnesses and I credit their testimony. The exception relates to the extent their testimony differs from Bond's concerning the appearance of the product. On this point, I find that Bond was a more credible witness. Saulsbury and Mayes described the product as too low in quality to be considered a raisin. Saulsbury, for instance, called the product too "trashy" to be processed as raisins, while Mayes said the product did not taste sweet like a raisin and had a light brown color, but without the characteristics of raisins. However, Mayes did concede that some had begun to develop wrinkles. Saulsbury and Mayes, in short, to demonstrate that their product should not be considered raisins emphasized the poor quality of their product as compared to the raisins that are processed for human consumption. However, as discussed later, quality is not a determinative factor.

Bond, on the other hand, was specific in describing the product's appearance, which is a determinative factor, saying they had wrinkles like raisins. Her description otherwise is not unlike Saulsbury's and Mayes' concerning their quality, reporting that the product also appeared dirty with some still having stems attached. Bond's testimony that the product looked like raisins is based on seeing the product when she visited the vineyard and worked in the weighing sheds.

Mayes said that he never saw Bond at the vineyard. That may be so, but it does not mean she was never there. The farm covers 160 acres and Mayes would not likely have seen everyone who visited a farm of that size.

Wassenberg also testified that Harris, Saulsbury's former employee, told her that the product looked the same as raisins he bought from a store. While Harris did not testify, his description is consistent with Bond's testimony and there is no information in the record reflecting adversely on Harris' integrity or that he had any reason to make a false statement to Wassenberg. I find that, although hearsay, Harris' statement is sufficiently reliable in the circumstances to add weight to the evidence showing that the product had wrinkles characteristic of raisins. Cf. *Unique Nursery and Garden Center* [(Decision as to Valkering U.S.A., Inc.)], 53 Agric. Dec. 377, 407 (1994)[, *aff'd*, 48 F.3d 305 (8th Cir. 1995)]. However, in making the finding that the product had raisin-like wrinkles I rely principally on Bond's credible testimony.

Initial Decision and Order, pp. 11-13.

The ALJ's determinations that Mayes' and Saulsbury's testimony is credible is erroneous for at least two reasons. First, as Complainant has argued on appeal, the ALJ's credibility determinations are internally contradictory. (CA, p. 3.) Phyllis Bond described what she saw as looking like store-bought raisins. Mayes and Saulsbury both described wet, brown and green "trashy" grapes with few or no wrinkles. There is no way for both viewpoints to be accurate. Therefore, it is erroneous for the ALJ to determine that Ms. Bond's viewpoint will be accepted to the extent that she saw wrinkles, but, then accept Mayes' and Saulsbury's viewpoint on every other aspect of the product.

Second, the ALJ's analysis that Bond's description is "not unlike" Saulsbury's and Mayes' description concerning quality--the raisins appearing dirty with some stems--is erroneous. Bond described a standard raisin just like the raisin Saulsbury had been making for a decade. Dirt and a few stems do not transform her description of a standard (Grade A), dark brown, store-bought raisin into the low quality product described by Mayes and Saulsbury.

I find that both Mayes and Saulsbury have very little credibility. Their testimony is self-serving and based upon no real evidence. Respondents refused to provide records and Mayes' and Saulsbury's testimony regarding the product is not corroborated by other witnesses; in fact, Respondents' employees, Bond and Harris, contradict Mayes' and Saulsbury's description of the product. Respondents also had no substantial response to the documentary evidence: Census Bureau export papers, Canadian government documents, truckers' bills of lading, crop insurance documents, and RAC records; or to Ms. Bond's description of Respondents' payroll records.

It is worth noting, as well, that, when Phyllis Bond was asked directly if she believed Saulsbury to be honest, she testified that she believed that there was a "problem" in "areas" with Saulsbury's honesty. (Tr. 506.)

In the final analysis, the only evidence that supports Respondents' theory of this case is testimony by Mayes and Saulsbury. That testimony is rebutted by eyewitnesses, documentary evidence, and other unrefuted proof that Respondents' scenario did not happen. The discrepancy between the Mayes and Saulsbury testimony and the overwhelming contradictory evidence introduced by Complainant is the basis for my determination that Mayes and Saulsbury have very little credibility.

Respondents' Proclaimed Ignorance of Raisin Order Not Credible

Another major discrepancy which is a major part of Respondents' rationale is that Respondent Saulsbury had little knowledge of the Raisin Order requirements in 7 C.F.R. pt. 989. Saulsbury testified: "I don't know much about the marketing order," (Tr. 580), and, "I didn't know no [sic] different, I never seen [sic] any RAC or RBA people." (Tr. 570.) Also, on direct examination, Saulsbury testified that he neither thought that the Canadian product would cause someone to call him a handler, (Tr. 574), nor did he ever believe that, from 1988 through 1990, someone would allege that Respondents were violating the Raisin Order. (Tr. 575.) Throughout the record, I find Respondents' posture is a mixture of professed ignorance of the Raisin Order and of proclaimed inadvertent violation of the Raisin Order, because the product

Respondents shipped to Canada purportedly was not raisins, and, if it was raisins, as the ALJ held, the quality was so low as to escape the regulations. My examination of this record reveals that this posture is just not credible.

Phyllis Bond's testimony (together with my inferences explained below) is convincing by much more than a preponderance of the evidence that Respondents were very much aware of the Raisin Order. For example, Bond testified that Raisin Board records of Saulsbury's sales through the Raisin Board in the time period just before 1988-89 were kept in Saulsbury's business office. (Tr. 482-83.) Bond also testified that she believed Saulsbury to be aware of the reserve requirements and the assessment requirements at the time of the violations. (Tr. 586-88.) I also find quite significant in this area, Bond's recollection that Saulsbury wanted a 100 percent return on his money, as follows:

BY MS. CARROLL:

Q. And ask you if you can identify it?

[BY MS. BOND:]

A. This is the statement that I made to Renee Wassenberg. It's dated December of 1990.

Q. Okay, I direct your attention to paragraph 4 on the first page and ask you whether that paragraph refreshes your recollection about whether Mr. Saulsbury ever told you anything concerning the requirements of the raisin marketing order?

MR. LEIGHTON: Objection, Your Honor. She had the witness on the stand before, she could have asked it then, and I don't think any -- I put on any evidence that would cause this to be rebuttal.

MS. CARROLL: This is -- Mr. Saulsbury testified that he had no idea about the raisin committee.

MR. LEIGHTON: And she --

MS. CARROLL: And the requirements.

MR. LEIGHTON: -- and she testified on direct that he never talked --

JUDGE HUNT: I'm just trying to remember what he had said on his testimony, was something having to with the raisin order, and I forgot what it was he said.

MS. CARROLL: About whether he would become a handler.

MR. LEIGHTON: He said he did not think by shipping this product to Canada that he would -- the raisin administrative committee would consider him a handler.

MS. CARROLL: Under the marketing order.

JUDGE HUNT: I'm not sure, so I'll allow the question.

MS. CARROLL: Okay.

BY MS. CARROLL:

Q. Ms. Bond, is --

A. I believe I testified that he didn't say anything about violating, but he did do a year with the raisin RAC, so -- and I know that he wanted a hundred -- he liked the idea of having 100 percent return on his money, on his crop.

Q. Now why was that?

A. Because otherwise he didn't before.

Q. Was Mr. Saulsbury aware, to your knowledge, of the reserve requirements and assessment requirements under the raisin marketing order?

A. I believe he is, yes.

Q. And do you believe he was at the time?

A. Yes.

Tr. 585-86.

I find it noteworthy that, after many years of participating in the Raisin Order reserve pool, in the 1986-87 crop year, Saulsbury assigned 100 percent (and was paid for 100 percent of his crop) of his pool equity to West Coast Growers & Packers, Inc., the same handler that Respondents had been using for every year (except 1980 and 1985) from 1974 to 1986. (CX 3, pp. 2-5.) This assignment indicates to me that Saulsbury was looking for ways to escape the reserve requirements of the Raisin Order, during the mid-1980's time period. Ronald Mayes testified that there was an earlier crop year than 1988, which (I infer) to be the 1987-88 crop year, in which Respondents "made some product that went to Canada." (Tr. 520.) These facts are all part of the context of the mid-1980's, when Saulsbury produced and marketed both almonds and raisins, as explained below.

Realistically, there is no way to be absolutely certain, or prove beyond a reasonable doubt, that Saulsbury knew of the Raisin Order requirements, when he decided to ship uninspected raisins to Canada. But, ours is a much lesser standard, as explained *supra*, a mere preponderance of the evidence. I am very much persuaded that Saulsbury's mid-1980's litigation regarding Saulsbury's other regulated commodity, almonds, means that Saulsbury had to know about the Raisin Order requirements.⁶ I do not believe Respondents can credibly maintain that a producer of almonds and raisins could mount an all-out 7 U.S.C.

⁶Respondents themselves broach the subject of other Marketing Orders thereby indicating Respondents' knowledge of Marketing Order programs. See RA, pp. 1-2 (emphasis in original) which, in pertinent part, provides:

USDA . . . has filed this appeal solely to snivel about the penalty imposed in USDA's effort to bankrupt a 75 year old man farming a mere 160 acres of grapes . . . while at of [sic] the same time the highest levels of USDA is [sic] attempting to convince the District Court in Fresno to give amnesty to Sunkist and its affiliated packing houses for massive cheating spawning [sic] years under a prorate system that Sunkist controlled. They claim in the Sunkist case that they don't want to put the orange handlers out of business by proceeding with fines and penalties, yet they do not hesitate to seek civil penalties of \$219,000.00 against the Respondent that would not only put the Respondent out of business but bankrupt the Respondent for the last few years of his life.

§ 608c(15)(A) legal attack on the Almond Order, as described below, and at the very same time profess ignorance of the requirements of the Raisin Order.

The record is rife with attributions to Saulsbury Orchards & Almond Processing, Inc., e.g., the address of 2121 Almond Avenue, Madera, California, is the same for Saulsbury Enterprises and for Saulsbury Orchards & Almond Processing, Inc.; Respondents used Saulsbury Orchards & Almond Processing, Inc.'s, almond bins to store the raisins; Saulsbury admitted he was in the almond business with family members and others at Saulsbury Orchards & Almond Processing, Inc., from 1969, until at least the late 1980's; Ronald Mayes testified that when he began working for Saulsbury in 1974, it was with Saulsbury's almond business; and Saulsbury and Phyllis Bond both testified about the Saulsbury almond business where she worked with Skip Pettit and Saulsbury's son after being fired by Saulsbury from Saulsbury Enterprises. (CX 26; Tr. 486, 490, 498, 511-12, 529-30, 575, 579.)

Therefore, I find this record shows that Respondent Saulsbury was also operating Saulsbury Orchards & Almond Processing, Inc., which was a producer and handler of almonds under the Almond Order, 7 C.F.R. pt. 981 (Almonds Grown in California), during the 1980's, while at the same time operating Saulsbury Enterprises.

On March 7, 1987, Saulsbury Orchards & Almond Processing, Inc., filed a 7 U.S.C. § 608c(15)(A) petition attacking the Almond Order, *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23 (1991), *aff'd sub nom. Cal-Almond, Inc. v. United States Dep't of Agric.*, No. CV-F-91-064-REC (E.D. Cal. June 3, 1992), printed in 51 Agric. Dec. 44 (1992), *aff'd in part, rev'd in part & remanded*, 14 F.3d 429 (9th Cir. 1993), *final order and judgment on remand*, No. CV-F-91-064-REC (E.D. Cal. Sept. 19, 1994), *aff'd in part & rev'd in part*, 67 F.3d 874 (9th Cir. 1995). This 15(A) petition was filed shortly after the Secretary had successfully sued in United States district court to compel Saulsbury Orchards & Almond Processing, Inc., to pay its almond assessments. *In re Saulsbury*, *supra*, 50 Agric. Dec. at 38. In due course, Saulsbury Orchards & Almond Processing, Inc.'s, 15(A) petition on almonds was dismissed. *In re Saulsbury*, *supra*, 50 Agric. Dec. at 171. Thereafter, Saulsbury Orchards & Almond Processing, Inc., sought review of the Secretary's decision under 7 U.S.C. § 608c(15)(B), in United States district court. *Cal-Almond, Inc., Saulsbury Orchards and Almond Processing, Inc., and Carlson Farms v. United States Dep't of Agric.*, No. CV-F-91-064-REC, slip op. at 49-51 (E.D. Cal. June 3, 1992), printed in 51 Agric. Dec. 44, 77-79 (1992), *aff'd in part, rev'd in part & remanded*, 14 F.3d 429 (9th Cir. 1993),

final order and judgment on remand, No. CV-F-91-064-REC (E.D. Cal. Sept. 19, 1994), *aff'd in part & rev'd in part*, 67 F.3d 874 (9th Cir. 1995).

In light of the discrepancy between the litigation waged by Saulsbury against the Marketing Order on one of his commodities, almonds, and Respondents professed ignorance of and proclaimed inadvertent violation of the Marketing Order regulating Saulsbury's other commodity, raisins, at almost the same time, I find that Respondents' proclaimed ignorance of the Raisin Order requirements is not credible.

Sanction

As stated in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey & Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

The administrative recommendation as to the appropriate sanction is entitled to great weight, in view of the experience gained by the administrative officials during their day-to-day supervision of the regulated industry.

. . . .

. . . [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The Congressional purpose in AMAA cases is important to set forth, because the AMAA has no explicit standards for setting civil penalties, as was explained in *Calabrese*, as follows:

IV. Factors to Be Considered in Determining the Civil Penalty to Be Assessed for Each Violation.

The AMAA, unlike some other statutes, (e.g., the Packers and Stockyards Act, 7 U.S.C. §§ 193(b), 213(b)), provides no explicit

standards to be followed in determining the amount of the civil penalty to be assessed for each violation, except the statutory maximum of \$1,000 for each day a violation continues. The legislative history of the Act explains the purpose of the civil penalty provisions, as follows (H.R. REP. NO. 391(I), 100th Cong., 1st. Sess. 29-30, *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-29-30):

Marketing order penalties

Under current law, any handler who violates a marketing order regulation is subject to a criminal fine of not less than \$50 or more than \$5,000 for each violation and each day during which the violation occurs. Such violations are referred by the Department of Agriculture to the U.S. Attorneys Office of the Department of Justice for prosecution. Only the U.S. Attorneys Office may enforce this section and take action against violators of marketing orders.

This criminal prosecution procedure, however, is both time-consuming and cumbersome. In addition, the U.S. Attorneys offices handle an enormous number and variety of cases on behalf of all Federal Government agencies. Because the Offices cannot effectively handle the volume of cases that they now receive, many regulatory violations are often not pursued.

In many cases, the U.S. Attorneys Offices have not taken any action against reported marketing order violations. In 1986, for example, out of 52 investigations of alleged violations of fruit, vegetable, and specialty crop marketing orders, only 11 were resolved by the U.S. Attorneys Offices.

To maintain the integrity of the marketing order program, it is necessary that civil penalties (imposed through administrative procedures) be used as an enforcement tool to respond to regulatory violations in addition to the criminal enforcement procedures currently provided.

Furthermore, administrative civil penalties will ensure that regulatory violations of marketing orders will be dealt with in a timely, efficient, and effective manner.

Thus, section 1051 contains a provision that gives the Department of Agriculture the authority to initiate an administrative action to assess a civil penalty of not more than \$1000 for each violation against any handler who violates a marketing order. Each day during which a violation continues would be considered a separate violation.

The Secretary would be required to give notice and an opportunity for an agency hearing before assessing a civil penalty. A penalty order would be reviewable in the U.S. district court in any district in which the handler subject to the order is an inhabitant, or has his principal place of business. The bill does not eliminate the authority to seek a criminal fine for a marketing order violation, where appropriate. It simply will authorize the Secretary of Agriculture to seek an administrative civil penalty when circumstances indicate that it would be an effective regulatory enforcement tool.

The importance of compliance by all handlers with Marketing Order programs was explained by the Supreme Court in *Ruzicka, supra*, as follows (329 U.S. at 293):

The success of the operation of such Congressionally authorized milk control must depend on the efficiency of its administration. Promptness of compliance by those subject to the scheme is the presupposition of Order No. 41. Thus, definite monthly deadlines are fixed by the Order for every step in the program. In large measure, the success of this scheme revolves around a "producers" fund which is solvent and to which all contribute in accordance with a formula equitably determined and of uniform applicability. Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage

wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements.

Although the Supreme Court was speaking with respect to a Milk Marketing Order, the same reasoning is applicable to the present Marketing Order. Accordingly, civil penalties must be assessed at a level to deter Respondents and others from similar violations in the future.

In re Onofrio Calabrese, supra, 51 Agric. Dec. at 152-54.

This language from *Calabrese* describing the Congressional intent regarding the imposition of civil penalties for violations of Marketing Orders is particularly appropriate in the instant case in which Respondents had an ingenious scheme to bypass the Raisin Order. By calling their normal production of raisins a "medium dry grape," Respondents provided an excuse not to have their raisins inspected. Moreover, when records on their raisins, which raisins Respondents had produced annually from 1974 to 1987 (according to RAC records (CX 3)) were subpoenaed, Respondents told AMS inspectors that Respondents did not handle raisins and refused to comply with the subpoena. Further, by shipping raisins out of the country, through a complicit Canadian broker, Respondents were able to stop the trail of the product at their foreign broker, who answered an official USDA inquiry with a one-paragraph stonewalling letter, basically restating Respondents' disingenuous description of the product.

Respondents' ingenious scheme seemingly left AMS with no evidence against Respondents. In fact, had not Skip Pettit taken AMS inspector Wassenberg to Phyllis Bond's house, the violations could have gone undetected. Even after this information was given to AMS, Respondents basically "stonewalled" AMS inspector Wassenberg's investigation. USDA was required to develop records by using the RAC, the United States Census Bureau, Canadian authorities, trucking companies, and witness interviews to develop the case.

The following additional passage from *Calabrese*, on the intent of Congress that the civil penalties imposed be a complement to the criminal penalties available to overworked United States Attorneys, is particularly appropriate here:

It is the intent of Congress that the penalties assessed in this proceeding be a complement to the criminal penalties which the United States Attorneys have the authority to seek, but often do not due to their workload demands. In order to be an effective complement (or alternative) to criminal prosecution, the sanctions imposed in these proceedings should be sufficient to remedy the violations committed by the Respondents, and also sufficient to deter such conduct by Respondents and others in the future. An insufficient penalty might be seen by these Respondents or other potential violators as a tolerable cost of doing business, in light of the potential returns available for operating in violation of the Order requirements.

In re Onofrio Calabrese, supra, 51 Agric. Dec. at 162.

Since I agree completely with Complainant's theory of this case, I am adopting as my own Complainant's Appeal's sanction section, together with the sanctions proposed therein, based upon a careful consideration of the record in this case.

The following is an excerpt from Complainant's Appeal, *supra*, at 15-23, which excerpt crafts the proper language describing Respondents' violations, proper citations, transcript quotations, and other minutiae necessary to inform the reviewing court of the exact nature of the violations. Complainant's footnotes and other editorial features are adopted in the original and set forth without indentation as quoted material. The material begins at "Excerpt from Complainant's Appeal Brief" and ends at "End of Excerpt."

EXCERPT FROM COMPLAINANT'S APPEAL BRIEF

B. [Respondents] Should Be Assessed Substantial Civil Penalties and Required to Pay Past Due Assessments

The [ALJ] correctly found that [Respondents'] product met the Raisin . . . Order's definition of "raisins," and that [Respondents were] "handler[s]," and thus subject to regulation. Nevertheless, the [ALJ] found that [Respondents] only violated two provisions of the [Raisin] Order, the reporting and inspection requirements, but that these violations were merely "technical" and merited only a \$3,000 civil penalty (\$1,000 for each shipment year).⁴⁷ The [ALJ] declined to find any violations of the [Raisin] Order assessment and reserve requirements

on the ground that [Respondents'] raisins were such "low quality" that they did not compete with regular table raisins.⁴⁸

⁴⁷The [ALJ] also found only some of the reporting and inspection violations. . . .

⁴⁸("While Saulsbury may have technically violated the Order, it can hardly be said, considering the disposition of his 'trashy' raisins, that his violation 'eroded' the Order or caused 'unreasonable fluctuations in supplies and prices.' If anything, Saulsbury's violation would have inured to the Order's benefit. His raisins, after all, were inferior to the raisins being sold under the Order, as Sun-Maid's representative pointed out, and, in any event, even if they had been inspected, could not have been sold in competition with the Order's standard (Grade A) raisins. By selling his raisins to a Canadian non-normal outlet, therefore, instead of processing his raisins for sale to consumers (by waiting until Labor Day to pick the grapes), the other growers directly benefitted by having that much less market competition. The effect would appear to be the same as if Saulsbury had placed all of his raisins in a permanent reserve -- the flood of raisins on the market that concerned Nef, RAC's manager, would recede, resulting in the raisins that were for sale commanding a higher price than they would otherwise have received if Saulsbury's raisins had competed with them. The other growers did indeed receive more (approximately 10 percent) from the sale of their raisins than Saulsbury received for the raisins he sold in Canada." (Initial Decision at 15).)

The [ALJ] erred in assessing minimal civil penalties. First, [Respondents'] raisins were not inferior. Second, there is no evidence in the record to support the [ALJ's] economic analysis [in the Initial Decision] of the raisin market and the effect of [Respondents'] raisins on it. Third, there is no support for the statement that growers who complied with the reserve requirements received more money for their raisins than [Respondents] did. [Respondents] sold all of [their] raisins in the fall of the crop year. Other handlers could only sell two-thirds of their crop at that time, and had to wait for up to 2 years to sell the rest.

As discussed above, the Initial Decision states that Phyllis Bond's testimony about the appearance of [Respondents'] raisins was credible and that Saulsbury's and Mayes' [testimony] was not. Bond's testimony is inconsistent with a finding

that the raisins were inferior in any way. The [ALJ] thus based a reduced civil penalty on evidence that [he] had already rejected. That is error. The [ALJ] also erred in finding that [Respondents] did not violate the reserve and assessment requirements based on Saulsbury's and Mayes' testimony. Finally, even the violations that the [ALJ] *did* find require assessment of a more significant civil penalty than \$3,000.

The [Initial] Decision states that its \$3,000 civil penalty is the result of applying certain "criteria literally to the facts of this case."

"In determining the amount of the civil penalties to be assessed . . . , it is appropriate to consider the nature of the violations, the number of violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given . . . , and any such other circumstances shedding light on the degree of culpability involved."⁴⁹

⁴⁹The [Initial] Decision only discusses the "damage or potential damage to the regulatory program." (Initial Decision at 16, *citing In re Calabrese*, 51 Agric. Dec. 131, 154-55 (1992)[, *appeal docketed sub nom. Balice v. USDA*, No. CV-F-92-5483-GEB (E.D. Cal. July 21, 1992)]).

To the contrary, a review of the facts here reveals that the [Initial] Decision's \$3,000 civil penalty is woefully inadequate in light of these criteria.

First, [Respondents] knowingly violated the Raisin . . . Order. [Respondents were] aware of the [Raisin] Order requirements and knew what [they were] doing when [they] shipped [their] raisins to Canada without complying with the [Raisin] Order. . . .⁵⁰ In particular, [Saulsbury] has had his raisins inspected since 1974 and was an equity holder in the raisin reserve pool in 1983, 1984, and 1986.⁵¹

Second, the number of [Respondents'] violations is great.⁵²

⁵⁰Tr. 482:16-24. As in *In re Calabrese*, *supra*, 51 Agric. Dec. at 155, this is not a case where a handler "inadvertently violated" the Order.

⁵¹CX 3, 24, 28; Tr. 367:14-368:2; 586:24-587:4.

⁵²See CB at 18-24.

Third, handlers like [Respondents] who fail to comply with the Raisin . . . Order and the regulations threaten the integrity of the marketing order program.⁵³

⁵³Tr. 384:9-17.

"Congress has found that the issuance of marketing orders, and the handling of commodities in compliance with such, are necessary to provide 'an orderly flow of the supply thereof to market throughout [their] normal marketing season to avoid unreasonable fluctuations in supplies and prices.' [Citation omitted.] In 1987, Congress amended the AMAA to provide for administrative penalties for violations of the Order and its regulatory provisions to insure that the purpose of the marketing order program would not be eroded."⁵⁴

⁵⁴*In re Calabrese, supra*, 51 Agric. Dec. at 140, citing H.Rep. No. 391(I), 100th Cong., 1st Sess. 29-30, reprinted in 1987 U.S.C.C.A.N. 2313-1, 2313-29-30. In particular, as discussed above, the evidence does not establish that [Respondents'] raisins were inferior or failed USDA inspection, so there is no reason for the [ALJ] to speculate that [Respondents'] activities "helped" the [Raisin] Order or [Respondents'] competitors. In fact, there is every reason to believe that [Respondents'] failure to comply with the [Raisin] Order . . . was detrimental to the raisin program. ("Respondents shipped their almonds into the channels of international commerce totally without regard to the reserve requirements. If other almond handlers were to do the same, the integrity of the Marketing Order program would be quickly eroded." (*Id.* at 159).)

Fourth, [Respondents] profited by not complying with the [Raisin] Order. It was much more lucrative for [Respondents] to sell all of [their] raisins immediately than to withhold a third of [their] crop in reserve for 2 years.⁵⁵ Phyllis Bond pointed out that by selling [their] raisins to Canada, [Respondents]

could both receive a higher price per ton, *and* sell 100 [percent] of [their] crop.⁵⁶

⁵⁵In 1988, the price that the handlers received for the free tonnage percentage of their crop was \$717.50. CX 10. The following year, 1989, it was \$813.95. *Id.* In contrast, [Respondents] received \$797 a ton in 1988, \$927 a ton in 1989, and \$916 a ton in 1990 on 100 [percent] of [their] crop. Initial Decision at 8.

⁵⁶ Q Okay, I direct your attention to paragraph 4 on the first page and ask you whether that paragraph refreshes your recollection about whether Mr. Saulsbury ever told you anything concerning the requirements of the raisin marketing order?

A I believe I testified that he didn't say anything about violating, but he did do a year with the raisin RAC, so -- and I know that he wanted a hundred -- *he liked the idea of having 100 percent return on his money, on his crop.*

Q Now why was that?

A Because otherwise he didn't before. Tr. 585:14-586:23
(Emphasis added).

1. [Respondents] Should Be Assessed \$120,000 for Shipping Raisins Without Having Them Inspected

Between 1988 and 1990, [Respondents] sent 60 shipments of raisins to Canada without having either incoming or outgoing inspections,⁵⁷ thus committing 120 violations of the [Raisin] Order. [Respondents] should therefore be assessed \$1,000 for each violation, or \$120,000.

⁵⁷See CB at 18-19, citing Tr. 198:22-200:8; CX 29, 34, 35 (19 shipments of raisins in 1988, 24 shipments in 1989, and 17 shipments in 1990); ("Saulsbury shipped approximately 754,375 pounds of the product to Canada in the 1988-1989 crop year, 819,890 pounds in 1989-1990, and 673,614 in 1990-1991. . . . Saulsbury did not have any of the product inspected before it was shipped to Canada" (Initial Decision at 7).)

2. [Respondents] Should Be Assessed \$40,000 for Failing To File Reports.

The [Raisin] Order requires raisin handlers to file reports of the inventory, acquisition, disposition, shipment, and status of raisins.⁵⁸ The government alleged that [Respondents] failed to file a total of 40 reports during the 3 years that [they] handled raisins.⁵⁹ The [ALJ] agreed that Saulsbury had failed to file "any of the RAC reports required of handlers," but found that he was only required to file 20 of them, on the assumption that Saulsbury's raisins were "off-grade" or "failing."⁶⁰ As discussed above, the [ALJ's] finding is erroneous. One cannot assume that [Respondents were] exempt from filing all 40 reports, and [their] failure to do so is serious and warrants the imposition of the full \$1,000 civil penalty for each violation.⁶¹

⁵⁸7 C.F.R. § 989.73.

⁵⁹[Respondents were required to file a RAC-5 form notifying the RAC of their intention to become handlers for each of the three crop years, 7 C.F.R. § 989.73(d). (Tr. 256:15-25, 297:10-12, 366:20-367:1.) Respondents were required to file a RAC-7 report of the status of reserve raisins each year, 7 C.F.R. § 989.73(d). (Tr. 297:17-24.) Respondents were required to file eight RAC-30 reports accounting for off-grade raisins (one for each week), 7 C.F.R. § 989.73(d). (Tr. 298:7-9.) Respondents were required to file eight RAC-1 reports of their acquisition of raisins (one for each week that they acquired raisins), 7 C.F.R. §§ 989.73(a), .173(b). (Tr. 297:13-16.) Respondents were required to file three RAC-20 reports of the disposition of free tonnage raisins and three RAC-21 reports of raisins shipped to foreign countries (one for each month they disposed of raisins), 7 C.F.R. § 989.173(c)(1). (Tr. 297:25-298:6.) Respondents were required to file three RAC-50 inventory reports of standard raisins, 7 C.F.R. § 989.73(a). (Tr. 301:22-24.) If Respondents' raisins were found to be "off-grade," "failing," or residual material on inspection, then they were also required to file three RAC-32 reports of their disposition (one for each week they disposed of them), 7 C.F.R. § 989.173, (Tr. 301:2-7); and three RAC-51 inventory reports, 7 C.F.R. § 989.173(a). (Tr. 302:2-4.) Respondents were also required to file three RAC-35 applications with the RAC and to obtain

RAC's approval before they could sell any raisin residual material to an out-of-state "non-normal outlet," 7 C.F.R. § 989.159(g)(2). (Tr. 332:2-36:8.)]

⁶⁰Initial Decision at 7, *citing* Tr. 368.

⁶¹*In re Calabrese, supra*, 51 Agric. Dec. at 164, 166-67, *citing United States v. Ruzicka*, 329 U.S. 287, 288-289 (1946) ("Failure to file a report[s] . . . are serious violations of the Order. . . . These violations fully warrant the civil penalty of \$1,000 each recommended by Complainant. . . .") The [ALJ] appears to have found that [Respondents were] only required to file reports on off-grade or failing raisins or residual material, a finding based solely on the testimony of Saulsbury and Mayes. [Respondents'] raisins were never inspected and found to be below grade, and neither Saulsbury nor Mayes is qualified to grade raisins according to USDA standards.

3. [Respondents] Should Be Assessed \$59,000 for Failing to Hold Raisins in Reserve.

Section 989.66 of the Raisin . . . Order requires each handler to hold in storage a percentage of his raisins until the [RAC] notifies the handler that he is relieved of that responsibility.⁶² During 1988, 1989, and 1990, [Respondents] sold 100 [percent] of [their standard] raisins to Haida Sales, and held *no* raisins in reserve. Phyllis Bond testified that by doing so, [Respondents] received a 100 [percent] return on [their] crop immediately.⁶³ In contrast, handlers who complied with the reserve requirements did not sell 30 percent of their raisins in reserve in crop year 1988-89, 27 percent in crop year 1989-90, and 31 percent in 1990-91, until the applicable release dates.⁶⁴ The evidence shows that [Respondents] failed to hold raisins for a total of 59 months,⁶⁵ and [Respondents] presented no evidence to the contrary.

⁶²7 C.F.R. § 989.66(a), .66(b)(1)(1994); *See* Tr. 240:14-242:24 (" . . . Just to give you an example, if the percentages were 70 percent free and 30 percent reserve, and a handler took in a hundred tons, he would have to set aside in the reserve pool 30 tons for the account of the Committee and to be held in a reserve pool, kept from deterioration, until they were bought and released. ").

⁶³Tr. 585:14-586:23.

⁶⁴Tr. 242:25-243:10; CX 10, 33. *See also* 7 C.F.R. §§ 989.241, .242, .243. *See also* CB at 19-22, citing Tr. 261:19-263:11. As the [Initial] Decision correctly notes, the RAC "determines for each crop year the percentage of marketable raisins that handlers can sell to 'normal' markets as 'free tonnage.' The remaining percentage must be held 'in reserve' for up to two years until the committee allows the handlers to sell the raisins. Producers receive payment for the reserve raisins after they are sold." [Initial] Decision at 2.

⁶⁵In the 1988-89 crop year, [Respondents] failed to hold reserve raisins for 548 days, in the 1989-90 crop year, [Respondents] failed to hold reserves for 626 days, and in the 1990-91 crop year, [Respondents] failed to hold reserves for 594 days.

4. [Respondents] Should Be Ordered to Pay Assessments.

Section 989.80 of the [Raisin] Order requires handlers to pay certain assessments to the [RAC].⁶⁶ Based on the tonnage that [Respondents] shipped to Canada, assessments on [Respondents'] raisins were \$557.33 for crop year 1988-89, \$594.68 for 1989-90, and \$521.29 for 1990-91.⁶⁷ [Respondents] did not pay these assessments.⁶⁸

⁶⁶7 C.F.R. § 989.80 (1994).

⁶⁷Tr. 255:8-256:14; 259:10-20; CX 33.

⁶⁸Tr. 366:20-367:1.

The [ALJ] found that [Respondents] did not violate the assessments requirement because [their] raisins were not marketable as table raisins.

The raisins Saulsbury sold to the Canadian distillery were, as noted, off-grade raisins which would have failed to qualify as standard (Grade A) raisins. Since the Order bases both assessments and reserves on the raisins being standard raisins, Saulsbury would not have had to pay assessments or hold any of his failing raisins in

reserve even if he had had them inspected. Thus, he does not owe any back assessments for these raisins."⁶⁹

⁶⁹Initial Decision at 14. ("The Order requires that only standard Grade A raisins be processed for marketing and to be kept in reserve, except that handlers may return off-grade raisins to the producer for 'reconditioning' or dispose of such raisins through 'non-normal' outlets, usually distilleries, or as feed for animals. A producer may also sell off-grade raisins (after inspection) directly to a California distillery. Distilleries located in the state are considered processors subject to the Order. However, if a producer receives and ships off-grade raisins to an out-of-state distillery, the producer must obtain permission from RAC. He or she is also then considered to be a handler under the Order and required to file RAC reports. . . . Assessments, however, are based only on standard raisins. . . . Off-grade raisins sold to distilleries do not compete with standard raisins that are sold to consumers." (Initial Decision at 4-5).)

As discussed above, [Respondents'] raisins were never inspected by USDA, so there is no reason for presuming that they would have failed inspection or received any particular grade simply because Saulsbury and Mayes said so.

END OF EXCERPT

For the foregoing reasons, I have concluded that the ALJ's Order assessing a civil penalty against Respondents Saulsbury Enterprises and Robert J. Saulsbury should be affirmed, but that the civil penalty should be increased to \$219,000, i.e., an additional \$216,000. I conclude that Respondents must also pay the assessments for crop years 1988-89, 1989-90, and 1990-91.

Order

Respondents, Robert J. Saulsbury and Saulsbury Enterprises, jointly and severally, are assessed a civil penalty in the amount of \$219,000, and are ordered to pay to the Raisin Administrative Committee \$1,673.30 in assessments for crop years 1988-89, 1989-90, and 1990-91. Respondents shall send a certified check or money order in the amount of \$219,000, made payable to "Treasurer of the United States," to Colleen Carroll, Esq., Office of the General Counsel, Room 2014-South Building, United States Department of Agriculture,

Washington, DC 20250-1417, and to pay the assessments owed to the RAC, within 100 days after service of this Order on Respondents.

ANIMAL QUARANTINE AND RELATED LAWS**DEPARTMENTAL DECISIONS****In re: JIM FOBBER and JAMES EDWARD FOBBER, JR.****A.Q. Docket No. 94-19.****Decision and Order filed February 7, 1996.**

Civil penalties — Sanction policy — Interstate movement of swine without required certificates — Interstate movement of cattle — Reliable hearsay — Right to cross-examine — Settlement agreement.

The Judicial Officer affirmed the decision by Administrative Law Judge Paul Kane (ALJ) assessing civil penalties of \$1,000 against Respondent Jim Fobber for moving swine interstate without the required certificates, and \$500 each against Respondent Jim Fobber and Respondent James Edward Fobber, Jr., based upon a settlement agreement reached on the record with respect to the interstate movement of cattle allegedly in violation of the brucellosis regulations. The right to cross-examine is not denied by a witness' failure to attend the hearing; witness' attendance could not be compelled because the controlling Act does not provide subpoena power. Reliable hearsay is admissible in administrative proceedings. It is not necessary to show that Respondent Jim Fobber's actions resulted in the interstate spread of pseudorabies in order to find that he violated 9 C.F.R. §§ 76.6 and 85.7(c). Settlement agreements reached by parties to litigation should not be upset absent extraordinary circumstances. The sanction imposed is appropriate, based upon similar sanctions in similar cases. The sanction is based upon the sanction policy in *In re S.S. Farms Linn County*.

Glenn R. Nadaner, for Complainant.

Respondents, Pro se.

Initial decision issued by Paul Kane, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

This case is an administrative proceeding for the assessment of civil penalties under the Act of February 2, 1903, as amended, (21 U.S.C. §§ 111, 120, 122), for violations of the Act and the regulations issued under the Act, (9 C.F.R. §§ 76.6, 85.7(c), 78.9(b)(3)), governing the interstate movement of swine and cattle. Administrative Law Judge Paul Kane (ALJ) filed an Initial Decision and Order on September 27, 1995, assessing: (1) a civil penalty of \$1,000 against Respondent Jim Fobber for moving swine interstate without a valid certificate; (2) a civil penalty of \$500 against Respondent Jim Fobber based upon a settlement agreement between Respondent Jim Fobber and Complainant regarding the alleged violation of 9 C.F.R. § 78.9(b)(3) set forth in Count III of the Amended Complaint; and (3) a civil penalty of \$500 against Respondent James Edward Fobber, Jr., based upon a settlement agreement between Respondent James Edward Fobber, Jr., and Complainant regarding the

alleged violation of 9 C.F.R. § 78.9(b)(3) set forth in Count III of the Amended Complaint.

On October 23, 1995, Respondent Jim Fobber appealed to the Judicial Officer, to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)^{*} On November 30, 1995, Complainant filed a Response Brief in Opposition to Respondent's Appeal Petition, and on December 1, 1995, the case was referred to the Judicial Officer for decision.

Respondent Jim Fobber's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit, (7 C.F.R. § 1.145(d)), is refused because the issues are not complex and are controlled by established precedents, and thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

This matter is before me on the motion for a decision, filed post-hearing on July 20, 1995, by Complainant's counsel pursuant to 7 C.F.R. § 1.142(c)(1) (1995). . . . [Footnotes 1 and 2 omitted.]

*The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

Counsel's motion is granted. . . .

Pursuant to statutory authority,³ the Secretary issued the regulations, which are alleged to have been violated by the Messrs. Fobber.⁴ These regulations, at the time of the alleged violations were:

[Statutes and Regulations]

§ 76.6 Interstate movement of certain swine not affected with or exposed to hog cholera.⁵

(a) Swine not known to be affected with or exposed to hog cholera may be moved interstate from any point in any nonquarantined area to a recognized slaughtering establishment for immediate slaughter, or to an approved livestock market for sale for immediate slaughter without further restriction under this part.

(b) Swine not known to be affected with or exposed to hog cholera may be moved interstate from any nonquarantined area for feeding or breeding purposes as provided in this paragraph (b):

(1) From any approved livestock market to any point other than a nonapproved livestock market in accordance with Schedule B of § 76.12.

(2) From a farm of origin to any point other than a nonapproved livestock market in accordance with Schedule C of § 76.12.

(3) From any premises other than a farm of origin or an approved or nonapproved livestock market to any point other than a nonapproved livestock market in accordance with Schedule D of § 76.12.

(c) Swine not known to be affected with or exposed to hog cholera may be moved interstate from any nonquarantined area for exhibition purposes as provided in paragraph (b) of this section.

³21 U.S.C.A. § 111, 120 (West 1972 & Supp. 1995).

⁴Count II by Mr. Jim Fobber on November 13, 1991, 9 C.F.R. § 76.6 (hog cholera) and 9 C.F.R. § 85.7(c) (pseudorabies), and Count III by Mr. James Edward Fobber, Jr., and Mr. Jim Fobber on August 18, 1993, 9 C.F.R. § 78.9(b)(3) (brucellosis).

⁵9 C.F.R. § 76.6 (1991), which was unamended through November 13, 1991.

§ 85.7 Interstate movement of swine not vaccinated for pseudorabies and not known to be infected with or exposed to pseudorabies.⁶

Swine not vaccinated for/pseudorabies and not known to be infected with or exposed to pseudorabies shall only be moved interstate in accordance with the following provisions:

....

(c) *General movements.* Swine not vaccinated for pseudorabies and not known to be infected with or exposed to pseudorabies may be moved interstate only if:

(1) The swine are accompanied by a certificate and such certificate is delivered to the consignee; and

(2) The certificate, in addition to the information described in § 85.1, states: (i) The identification required by § 71.19 of this chapter; and (ii) that each animal to be moved: (A) Was subjected to an official pseudorabies serologic test within 30 days prior to the interstate movement and was found negative, the test date and the name of the laboratory conducting the test; or (B) is part of a currently recognized qualified pseudorabies negative herd and the date of the last qualifying test; or, (C) is part of a pseudorabies controlled vaccinated herd and is one of the off-spring that was subjected to the official pseudorabies serologic test to achieve or maintain the status of the herd as a pseudorabies controlled vaccinated herd, and the date of the last test to maintain said status.

§ 78.9 Cattle from herds not known to be affected.⁷

Male cattle which are not test eligible and are from herds not known to be affected may be moved interstate without further restriction. Female cattle which are not test eligible and are from herds not known to be affected may be moved interstate only in

⁶9 C.F.R. § 85.7 (1991), which was unamended through November 13, 1991.

⁷9 C.F.R. § 78.9 (1993), which was unamended through August 18, 1993.

accordance with § 78.10 of this part and this section. Test-eligible cattle which are not brucellosis exposed and are from herds not known to be affected may be moved interstate only in accordance with § 78.10 and as follows:

....

(b) *Class A States/areas.* Test-eligible cattle which originate in Class A States or areas, are not brucellosis exposed, and are from a herd not known to be affected may be moved interstate from Class A States or areas only as specified below:

....

(3) *Movement other than in accordance with paragraphs (b)(1) and (2) of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (b)(1) and (2) of this section only if:

(i) Such cattle originate in a certified brucellosis-free herd and are accompanied interstate by a certificate which states, in addition to the items specified in § 78.1, that the cattle originated in a certified brucellosis-free herd; or

(ii) Such cattle are negative to an official test within 30 days prior to such interstate movement and are accompanied interstate by a certificate which states, in addition to the items specified in § 78.1, the test dates and results of the official tests; or

(iii) Such cattle are moved interstate from a farm of origin directly to a specifically approved stockyard and are subjected to an official test upon arrival at the specifically approved stockyard prior to losing their identity with the farm of origin; or

(iv) Such cattle are moved interstate from a farm of origin or returned interstate to a farm of origin in the course of normal ranching operations, without change of ownership, directly to or from another premises owned, leased, or rented by the same individual.

Discussion

The record permits the entry of the following facts:

The mailing address of Respondent Mr. Jim Fobber is (b) (6)

(b) (6) The mailing address of Respondent Mr. James Edward Fobber, Jr., is (b) (6). On [or about] November 13, 1991, Mr. Jim Fobber purchased a truckload of hogs from an auction house in Illinois and arranged for their sale and transport to a Mr. Moore in Glade Springs, Virginia. . . . Mr. [Jim] Fobber . . . did not obtain the . . . health [certificates required by 9 C.F.R. § 76.6 and § 85.7(c) for the interstate movement] of these animals. . . . Thereafter, animal health specialists employed by the Commonwealth of Virginia detected the pseudorabies virus in Mr. Moore's herd and his farm was quarantined. . . .

The Complainant asserts that these hogs were delivered to Mr. Moore's farm, an allegation which was perceived by Mr. Fobber to be fatal to the truth and accuracy of the Government's case. . . . However, this allegation is but incidental, not reaching the essence of the violations asserted. . . . Whether the animals were moved to a farm, . . . or whether they were delivered to the flatbed truck of Mr. Moore parked along-side the highway, [as asserted by Respondent Jim Fobber,] the hogs did not go directly to slaughter, a condition which would have obviated the [need for] . . . health certificates. Since Mr. [Jim] Fobber was apprised by the Amended Complaint of the essential allegations, the reference in the [Amended] Complaint to farm delivery could not have prejudiced the presentation of proof in defense of the allegations. Mr. [Jim] Fobber had notice of the charges against him and he had an opportunity to reply and to be heard, for he was adequately apprised of the scope of the controversy and the intent of the complaint issued against him. *Abercrombie, et al. v. Clarke*, 920 F.2d 1351, 1360 (7th Cir. 1990)[, cert. denied, 502 U.S. 809 (1991)]; *L. G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971).

Hog cholera has been long subjected to eradication efforts, revealed, in part, as follows:

On August 11, 1972, the Secretary of Agriculture declared hog cholera to be a national emergency. Since that time, each outbreak of hog cholera has been handled as a disease emergency with the area in which the outbreak occurred placed under a Federal quarantine until the infected herd was destroyed and inspection, epidemiological

investigation and other surveillance measures showed the disease to have been eliminated.

In view of the present stage of the hog cholera eradication program, it is deemed advisable to consider the entire United States as an eradication area. . . .⁸

These efforts include enforcement of 9 C.F.R. § 76.6 (1991) which was violated by Mr. Jim Fobber when he moved hogs for delivery to a site other than a recognized slaughtering establishment or as otherwise provided in the regulations.

Pseudorabies has also been subjected to eradication efforts. While it has been known to exist in the United States for more than 150 years,⁹ efforts to extirpate it by promulgation and enforcement of regulations did not commence until 197[9].¹⁰ The regulation which Mr. [Jim] Fobber violated entered prescriptive law . . . with the following comments:

It is the intent of this regulation that swine entered into the slaughter market system remain in the system until consigned to a recognized slaughtering establishment and that they not be diverted for feeding or breeding purposes.

⁸40 Fed. Reg. 53,546 (1975).

⁹44 Fed. Reg. 10,306 (1979).

¹⁰This disease has been described, (42 Fed. Reg. 27,250 (1977)), by the Department of Agriculture as follows:

Pseudorabies, also known as Aujeszky's disease, mad itch, and infectious bulbar paralysis, is primarily a disease of swine caused by a herpes virus. Occasionally, this disease also infects other livestock, dogs, cats, and wild animals causing a fatal encephalomyelitis manifested by intense itching and self mutilation. Swine are believed to be the chief reservoir of pseudorabies, however. In swine the infection is often inapparent, except in suckling pigs which usually develop a fatal encephalomyelitis, and in sows that abort or produce stillborn or mummified fetuses.

There are currently no regulations specifically designed to prevent the interstate spread of pseudorabies. Because the disease is known to be spreading rapidly and causes serious losses, representatives of the swine industry have urged that Federal regulations be placed in effect to prevent further spread of the disease in interstate commerce.

Two comments questioned the necessity of having a pseudorabies regulation without an eradication program. The pseudorabies regulation is aimed at stopping the interstate spread of pseudorabies and in itself will not eradicate the disease; however, it is a tool to slow down and stop the escalating spread of the disease until the necessary tools for an eradication program are available.

Two comments expressed the opinion that "lightweight hogs" in slaughter channels should be permitted to go back to farms for further feeding. Producers who place lightweight hogs in slaughter channels usually do so because there is something wrong with the hogs. Usually they are poor "doers" or are "tailenders" from lots of fattening swine. Furthermore, such hogs in slaughter channels may be exposed to diseased hogs outside of feeder and breeder channels where swine are more carefully screened before being admitted for feeding and breeding purposes. Therefore, this suggestion was rejected and no provision was added to the regulations to permit "lightweight swine" in slaughter market channels to return to farms or feedlots.¹¹

Mr. [Jim] Fobber had the obligation to comply with the regulations, for, even failure to prove intent . . . does not [prevent *routine*] . . . imposition of sanctions. *Dean Reed, et al.*, 52 Agric. Dec. 90, 108 (1993), *aff'd [sub nom.] Reed v. USDA*, 39 F.3d 1192, 1994 WL 596616 (10th Cir. 1994) (Table).

. . . [Footnotes 12-14 omitted.]

Findings of Fact and Conclusions

1. Respondent Jim Fobber's mailing address is (b) (6)
(b) (6)
2. Respondent James Edward Fobber, Jr.'s mailing address is (b) (6)
(b) (6)
3. On or about November 13, 1991, Respondent Jim Fobber moved approximately 127 swine interstate from Illinois to Glade Springs, Virginia, without an inspection certificate, as required by 9 C.F.R. § 76.6.

¹¹44 Fed. Reg. 10,306, 10,308 (1979).

4. On or about November 13, 1991, Respondent Jim Fobber moved approximately 127 swine interstate from Illinois to Glade Springs, Virginia, without a certificate, as required by 9 C.F.R. § 85.7(c).

5. With neither inspection nor health certificates, the swine described in Findings of Fact 3 and 4 could only be lawfully delivered to slaughter, which Respondent Jim Fobber failed to do in violation of 9 C.F.R. § 76.6 and § 85.7(c).

6. Count III of the Amended Complaint states that on or about August 18, 1993, Respondents Jim Fobber and James Edward Fobber, Jr., violated the regulations in 9 C.F.R. § 78.9(b)(3) by moving interstate approximately nine test-eligible cattle from Tennessee to Kentucky, without the cattle being accompanied interstate by a valid certificate, as required. At the hearing, Messrs. Fobber and Complainant settled Count III of the Amended Complaint, with Respondents agreeing to pay civil penalties of \$500 each, but neither admitting nor denying guilt.]

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Jim Fobber raises three issues on appeal. First, Respondent Jim Fobber maintains in his Appeal Petition that "I was not allowed to cross-examine Mr. Chris Moore as he was not at the hearing. Had he been there I believe he would have admitted to purchasing hogs for slaughter to be delivered to the packing house and only because of last minute details did his plan change, making him totally responsible for completed delivery to the packing house as the hogs were already inside the state of VA." (Respondent's Appeal Petition, 1 page (Oct. 23, 1995), hereafter "RAP".)

Respondent Jim Fobber was prevented from cross-examining Mr. Moore solely by Mr. Moore's failure to attend the hearing. Respondent's right to cross-examine under the Administrative Procedure Act, (see 5 U.S.C. § 556(d)), and the applicable Rules of Practice, (7 C.F.R. § 1.141(g) (1995)), is dependent upon the appearance of the witness, and, therefore, Respondent's right to cross-examine Mr. Moore was not denied or withheld.

The record shows that Respondent Jim Fobber had an opportunity to conduct cross-examination of all witnesses put forward by the Complainant and that the Respondent took advantage of that opportunity. Further, the record clearly demonstrates that Mr. Moore was asked by Complainant to attend, but chose not to appear. (CX 29; Tr. 29.) Mr. Moore could not be compelled to

attend because the controlling Act does not provide subpoena power, (21 U.S.C. §§ 111, 120, 122), and the applicable Rules of Practice allow the ALJ to issue a subpoena only "as authorized by the statute under which the proceeding is conducted." (7 C.F.R. § 1.144(c)(4).) See *In re Robert Bellinger, D.V.M.*, 49 Agric. Dec. 226, 235 (1990).

Complainant introduced two affidavits signed by J. Chris Moore, (CX 2 and CX 30), in which Mr. Moore stated that he never indicated to Respondent Jim Fobber or Mr. Morrisett (the truck driver employed by Respondent Jim Fobber to deliver the swine to Mr. Moore) that the hogs were to be moved directly to slaughter and that Respondent Jim Fobber delivered 127 hogs to Mr. Moore's farm on or about November 15, 1991. Mr. Moore's affidavits constitute hearsay evidence, but neither the Administrative Procedure Act nor the applicable Rules of Practice, (7 C.F.R. § 1.130 *et seq.*), prohibit the admission of and reliance upon hearsay evidence. Responsible hearsay has long been admitted in the Department's administrative proceedings.¹⁵ Mr. Moore's affidavits are both sworn and are consistent one with the other, even though Mr. Moore provided one on March 5, 1992, (CX 2), and the other on May 17, 1995. (CX 5.)

Further, even if Mr. Moore had attended the hearing and testified in the manner suggested by Respondent Jim Fobber, resulting in a finding that Respondent had not moved the swine in question directly to slaughter because of last minute changes in Mr. Moore's plans, Respondent Jim Fobber nevertheless would still have been responsible for the interstate movement in violation of 9 C.F.R. §§ 76.6 and 85.7(c). As Respondent Jim Fobber stated in his own affidavit, "[s]ince it was one of my trucks that picked up the hogs in IL. and delivered them to VA. I am responsible for the movement." (CX 4.)

Second, Respondent Jim Fobber contends that "[t]here was no evidence presented proving that I introduced pseudorabies into Virginia. The only statement given concerning such was from Mr. Moore where he states 'I have been told by' in exhibit no. 2 page 4 of 4 which is hearsay. There were no exhibits or proof of any swine slaughtered at any packing house

¹⁵*In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

showing to have pseudorabies." (RAP at 1.) Evidence of Respondent Jim Fobber's introduction of pseudorabies into Virginia is not relevant to this case, because the regulations which Respondent Jim Fobber violated¹⁶ do not require proof that Respondent introduced pseudorabies into the Commonwealth of Virginia.

Finally, Respondent Jim Fobber argues: "[i]n the second paragraph of the initial decision and order it states: Proof has been made of or admissions entered to, the allegations of the amended complaint This paragraph mentions swine and livestock movement and according to my records, a consent decision (neither admitting nor denying) was entered into by both me and my son regarding livestock movement which is the only count with my son's name on it. He was only driving the vehicle transporting the cattle and picked up the wrong health certificate by mistake. The correct certificate was faxed immediately to the officer who proceeded [sic] to test the animals, which by the way were negative." (RAP at 1.)

The Respondents and Complainant entered into an agreement on the record in which Respondents each agreed to pay \$500 to settle Count III of the Amended Complaint. (Tr. 7-8.)¹⁷ The transcript is silent with respect to whether the Respondents and Complainant reached any agreement regarding Respondents' admissions or denials of the violations alleged in Count III of the Amended Complaint. However, Respondent Jim Fobber in his Appeal Petition, *supra*, and the Complainant in Complainant's Response Brief in Opposition to Respondent's Appeal Petition (pp. 15-16) both clearly state that it was the intent of the parties' settlement on the record that Respondents neither admitted nor denied guilt.

Therefore, this Decision and Order modifies the ALJ's Initial Decision and Order to eliminate the ALJ's language that implies, or could be inferred to state,

¹⁶9 C.F.R. §§ 76.6, 85.7(c).

¹⁷Respondent Jim Fobber contends in his Appeal Petition, *supra*, that the parties entered into a "consent decision." However, a *Consent Decision* is specifically described in the Rules of Practice applicable to this proceeding, (7 C.F.R. § 1.138), and the agreement forged at the hearing to settle Count III of the Amended Complaint does not satisfy the requirements of 7 C.F.R. § 1.138. Nonetheless, I will honor this settlement as the parties so intended.

that Respondents admitted guilt with respect to the violation in Count III of the Amended Complaint.¹⁸

Complainant requests that an Order be issued stating that:

Respondent Jim Fobber shall make payment of the \$1,500.00 in civil penalties assessed against him within thirty (30) days of the effective date of the Decision and Order; and

Respondent James Edward Fobber, Jr. shall make payments of \$100.00 each month for five (5) consecutive months. Respondent James Edward Fobber Jr.'s initial payment will be due within thirty (30) days from the effective date of the Decision and Order. If Respondent James Edward Fobber, Jr. is late in making or misses any payment, then all remaining payments become immediately due and payable in full. (Complainant's Response Brief in Opposition to Respondent's Appeal Petition at 16.)

The settlement agreement contains no provision that if Respondent James Edward Fobber, Jr., is late in making, or misses, any payment, then all remaining payments become immediately due and payable in full. (Tr. 7-8.) Complainant's request is denied to the extent it is inconsistent with the settlement agreement reached by the parties on the record. In the absence of extraordinary circumstances, it is not in the public interest to upset agreements reached by parties to litigation. *In re Moore Marketing International, Inc.*, 47 Agric. Dec. 1472, 1477 (1988); *In re Nebraska Beef Packers, Inc.*, 43 Agric. Dec. 1783, 1803-04 (1984); *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1826-27 (1976), *aff'd sub nom. Indiana Slaughtering Co. v. Bergland*, No. 76-3949 (E.D. Pa. Aug. 1, 1977). An Order not consistent with Respondents' and Complainant's agreement might upset that agreement. I find that there are no extraordinary circumstances to warrant an Order that is inconsistent with the parties' agreement to settle Count III of the Amended Complaint.

¹⁸Respondent James Edward Fobber, Jr., who did not file an appeal to the Judicial Officer, was a party to the settlement agreement on the record. (Tr. 7.) The modification, which I have made to the Initial Decision and Order to eliminate the ALJ's language that implies or could be inferred to state that the Respondents admitted the allegations in Count III of the Amended Complaint, neither affects the civil penalty assessed against Respondent James Edward Fobber, Jr., nor does it prejudice Respondent James Edward Fobber, Jr., in any way.

Turning to the sanction, the Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The \$500 civil penalty agreed to by each Respondent for the cattle movement is modest, considering the importance of the Cooperative State/Federal Brucellosis Eradication Program. For a detailed explication of the continuing fight against brucellosis, *see In re Terry Horton*, 50 Agric. Dec. 430, 463-64 (1991).

Dr. Thomas A. Dees, Regional Epidemiologist, Southeastern Region, USDA, Veterinary Services, testified as Complainant's sanction witness. Dr. Dees described the Department's pseudorabies eradication program, and the nature of the disease, which causes, *inter alia*, juvenile pig trembling or neurological disturbances, abortions in sows, and suppression of the immune system in all swine. It is very contagious, and the USDA's regulations are crafted to prevent spread of this serious disease. Dr. Dees testified that the \$1,000 civil penalty requested by Complainant was appropriate, as follows (Tr. 53-54):

[BY MR. NADANER]

Q. Are you aware the Department has requested a civil penalty of \$1,000 for this alleged violation of these regulations?

[BY DR. DEES]

A. Yes, sir.

Q. Based on the evidence presented at this hearing, do you believe that requested amount is appropriate?

A. Yes, sir.

Q. Why would that be?

A. Based on the amount of increased hazard that it made to the particular area where pseudorabies being brought in, the amount of work having to be done to eradicate the pseudorabies in the particular area. This would probably be a suitable deterrent.

Moreover, an examination of other cases brought by APHIS for similar violations reveals that civil penalties similar to those sought by Complainant in this case have been assessed in the past. See, e.g., *In re Paul Katoa*, 52 Agric. Dec. 1402 (1993) (\$500); *In re Gene Hill* (Decision as to Les Zedric), 52 Agric. Dec. 1382 (1993) (\$500); *In re Jacky W. Renew* (Decision as to David L. Hall), 52 Agric. Dec. 415 (1993) (\$1,500); *In re Jacky W. Renew* (Decision as to Jacky W. Renew), 52 Agric. Dec. 400 (1992) (\$1,500); *In re Lewis L. Johnson*, 50 Agric. Dec. 1670 (1991) (\$1,000); *In re Gary Hoffman*, 44 Agric. Dec. 2709 (1985) (\$500); *In re Charles Baas*, 44 Agric. Dec. 1163 (1985) (\$600).

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

Order

Respondent Jim Fobber is assessed a civil penalty of \$1,500 to be paid within 30 days after service of this Order on Respondent Jim Fobber.

Respondent James Edward Fobber, Jr., is assessed a civil penalty of \$500 to be paid in five consecutive monthly installments of \$100 each beginning 30 days after service of this Order on Respondent James Edward Fobber, Jr.

Respondents Jim Fobber and James Edward Fobber, Jr., shall make payment in accordance with this Order by sending certified checks or money orders payable to the "Treasurer of the United States" to:

U.S. Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified checks or money orders should include the docket number of this proceeding: A.Q. Docket No. 94-19.

In re: JIM FOBBER and JAMES EDWARD FOBBER, JR.**A.Q. Docket No. 94-19.****Order Denying Respondent Jim Fobber's Petition for Reconsideration filed May 21, 1996.**

Petition for Reconsideration — Interstate movement of swine without required certificates — Settlement agreement.

The Judicial Officer denied Respondent Jim Fobber's late-filed Petition to Reconsider. Respondent Jim Fobber's purported intention, when he purchased swine, to move the swine directly to slaughter does not relieve him of liability for violating 9 C.F.R. §§ 76.6 and 85.7(c) when Respondent did not in fact move the swine directly to slaughter. It is not necessary to show that the swine were infected with a disease in order to find that Respondent Jim Fobber violated 9 C.F.R. §§ 76.6 and 85.7(c). The record contains sufficient evidence to infer that the swine were not vaccinated for pseudorabies. Settlement agreements reached by parties to litigation should not be upset absent extraordinary circumstances.

Susan C. Golabek, for Complainant.

Respondents, Pro se.

Initial decision issued by Paul Kane, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

On February 28, 1996, Jim Fobber (hereinafter Respondent) filed a Petition to Reconsider (hereinafter RPR) the Decision and Order filed in this case on February 7, 1996, and served on Respondent on February 16, 1996. Complainant was served with Respondent's Petition to Reconsider and Complainant filed Complainant's Reply in Opposition to Respondent's Petition to Reconsider the Decision of the Judicial Officer on May 9, 1996. The case was referred to the Judicial Officer for reconsideration on May 13, 1996.

Respondent's Petition to Reconsider was filed 12 days after service of the Judicial Officer's Decision and Order on Respondent. The Rules of Practice applicable to this proceeding, (7 C.F.R. §§ 1.130-.151), provide that a "petition . . . to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition." (7 C.F.R. § 1.146(a)(3).) Accordingly, Respondent's Petition to Reconsider, which was filed 12 days after service of the Decision and Order on Respondent, is denied. Moreover, even if Respondent's Petition to Reconsider had been filed timely, it would have been denied on the merits.

Respondent raises three issues in his Petition to Reconsider. First, Respondent contends that:

The swine were bought to go directly to slaughter, as was proof given in a sworn affidavit from Mr. Lawrence Parks of Parks Livestock, Inc., where the swine were purchased. (CX 8.) Testimony was given at the hearing at Ft. Smith, Arkansas, from Mr. Hash that there [were] 2 slau[gh]terhouses near Glade Springs, Virginia[,] but they are no longer in operation. (Tr. 96-98[.])

RPR, p 1.

Respondent moved approximately 127 swine interstate from Illinois to Glade Springs, Virginia, without an inspection certificate, as required by 9 C.F.R. § 76.6, and without a certificate, as required by 9 C.F.R. § 85.7(c). (Decision and Order, p. 9.) Respondent's contention that he did not violate 9 C.F.R. §§ 76.6 and 85.7(c) because, at the time Respondent purchased the swine, he intended to move the swine interstate directly to slaughter was raised by Respondent in his appeal to the Judicial Officer and rejected. If the swine in question had been moved directly to slaughter, the certificates in question would not have been required. However, as Respondent admits, despite his purported intent when he purchased the swine, he did not in fact move the swine directly to slaughter. As fully discussed in the Decision and Order issued herein, Respondent's purported intention at the time he purchased the swine is not relevant. Respondent's interstate movement of swine without the required certificates was in violation of 9 C.F.R. §§ 76.6 and 85.7(c).

Second, Respondent contends that:

Again, there was no proof that any of the swine from Illinois had pseudorabies or any other disease or for that matter had not been vaccinated for such diseases.

RPR, p. 1.

Respondent violated 9 C.F.R. § 76.6, which applies to swine that are not known to be affected with or exposed to hog cholera, and 9 C.F.R. § 85.7(c)(2), which applies to swine that are not known to be infected with or exposed to pseudorabies. Complainant was not required to prove that the swine Respondent moved interstate "had pseudorabies or any other disease" in order to prove that Respondent violated 9 C.F.R. §§ 76.6 and 85.7(c).

Moreover, the vaccination of the swine in question is not relevant to the violation of 9 C.F.R. § 76.6. However, 9 C.F.R. § 85.7(c) only applies to swine that are not vaccinated for pseudorabies and not known to be infected with or exposed to pseudorabies. Respondent's position throughout this proceeding

has been that he was not required to obtain the certificates required by 9 C.F.R. §§ 76.6 and 85.7(c) because, when he purchased the swine, he purportedly intended to move the swine directly to slaughter, and the swine purportedly were not infected with any disease. Respondent had an opportunity to present evidence that the swine were in fact vaccinated for pseudorabies, and, therefore, not required to be accompanied interstate by the certificates described in 9 C.F.R. §§ 76.6 and 85.7(c), but Respondent chose not to do so. Instead, Respondent in his late-filed Petition to Reconsider raises the specter of the vaccination status of the swine in question for the first time. Respondent's Petition to Reconsider is not accompanied with proof that the swine in question were vaccinated for pseudorabies, nor does Respondent even contend in his Petition to Reconsider that the swine in question were in fact vaccinated for pseudorabies. Instead, Respondent merely states that "there was no proof that any of the swine from Illinois . . . had not been vaccinated for [pseudorabies or any other] diseases." (RPR, p. 1.)

Swine that have been vaccinated for pseudorabies are easily identified. *Official vaccines* [for pseudorabies] are defined as:

Any swine which have been: (1) Vaccinated with an official pseudorabies vaccine by an accredited veterinarian or a State or Federal veterinarian in accordance with recommendations on the vaccine label and the laws and regulations of the State in which the swine are vaccinated; (2) identified by a numbered pink eartag approved by the State in which such swine are vaccinated; [Footnote omitted] and (3) reported as official vaccines at the time of vaccination to the State animal health official.

9 C.F.R. § 85.1.

None of the witnesses that testified described the swine in question as official vaccines or described the swine as being identified with pink eartags; none of the documents introduced into evidence which contain a description of the swine in question indicate that the swine were official vaccines or identified with pink eartags, (CX 1, 7); and none of the affidavits introduced into evidence describe the swine in question as official vaccines or identified with pink eartags, (CX 2, 4, 8, 30). Moreover, the record clearly establishes that the swine in question were not accompanied interstate by the certificates required by 9 C.F.R. §§ 76.6 and 85.7(c) because Respondent purportedly intended to move the swine interstate directly to slaughter, (CX 4, 8); not because of the

vaccination status of the swine in question. I therefore infer that the swine in question were not vaccinated for pseudorabies.

Third, Respondent contents that:

Doctor Duckworth of Greenville, Tennessee[,] in his sworn affidavit states that I have been his client for 10 years, proving that I do obtain health permits for interstate movement of livestock, (CX 19). Because of a simple oversight, [i]t will cost me \$1[,]000.00. The cattle in question there were to go to a feeding facilitie (sic) to be fed for slaughter and were never intended to be unloaded at any place in Kentucky. (Emphasis in original.)

RPR, p. 1.

Count III of the Amended Compliant filed herein alleges that "[o]n or about August 18, 1993, [R]espondent James Edward Fobber, Jr., and [R]espondent Jim Fobber, d/b/a Meade Feeders and/or Meade Cattle Company, violated 9 C.F.R. [§] 78.9(b)(3) . . . by moving interstate approximately 9 test-eligible cattle from Tennessee to Kentucky, without the cattle being accompanied interstate by a valid certificate, as required." Respondents and Complainant entered into an agreement on the record in which Respondents each agreed to pay \$500 to settle Count III of the Amended Complaint. (Tr. 7-8.)

Voluntary settlement agreements reached by parties to litigation should be enforced in the absence of extraordinary circumstances. *In re Moore Marketing International, Inc.*, 47 Agric. Dec. 1472, 1477 (1988); *In re Nebraska Beef Packers, Inc.*, 43 Agric. Dec. 1783, 1803-04 (1984); *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1826-27 (1976), *aff'd sub nom. Indiana Slaughtering Co. v. Bergland*, No. 76-3949 (E.D. Pa. Aug. 1, 1977). Respondent has failed to demonstrate any extraordinary circumstances which would warrant setting aside the settlement agreement that Respondent voluntarily reached with Complainant regarding Count III of the Amended Compliant filed herein.

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

Order

Respondent's Petition to Reconsider is denied.

In re: OW DUK KWON, d/b/a KWANG DONG CHINESE HERBS ENTERPRISE, INC., AND KENNEY TRANSPORT, INC.

A.Q. Docket No. 95-41.

Order Denying Late Appeal as to Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., filed June 6, 1996.

Default — Late appeal — Failure to file answer — Service by certified mail — Civil penalty — Importation of deer antlers in velvet into United States.

The Judicial Officer denied Respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc.'s, late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Chief Administrative Law Judge Victor W. Palmer's Default Decision and Order became final. Even if Respondent's appeal had been timely filed, it would have been denied based upon Respondent's failure to file an Answer which, under the Rules of Practice, (7 C.F.R. § 1.136(c)), constitutes an admission of the allegations in the Complaint. Respondent's assertions regarding the length of time he has been in business, a license obtained from another federal agency, and his belief that he has a good defense are not relevant. Respondent's contention that he was not aware of the proceeding until after the Default Decision and Order became final and effective is not supported by the record. Actual notice is required neither under the Rules of Practice, which provide for service by certified mail, nor under the Due Process Clause, which only requires that notice be sent in a manner reasonably calculated to apprise Respondent of the pendency of the action and afford him an opportunity to present objections. Respondent's contention that he relied upon his custom broker to handle the proceeding is not supported by the record. Neither 21 U.S.C. § 111 nor 9 C.F.R. § 95.12 limit responsibility for compliance with 9 C.F.R. § 95.12 to custom brokers, and Respondent's reliance on a custom broker to assist with importation and to handle and treat products in accordance with 9 C.F.R. § 95.12 does not relieve Respondent of responsibility for compliance with 9 C.F.R. § 95.12.

Darlene M. Bolinger, for Complainant.

Herbert J. Silver, New York, New York, for Respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc.

Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

This case is an administrative proceeding for the assessment of civil penalties under section 3 of the Act of February 2, 1903, as amended, (21 U.S.C. § 122) (hereinafter the Act), for violations of a regulation governing the importation of bones, horns, and hooves, (9 C.F.R. § 95.12), issued under section 2 of the Act, (21 U.S.C. § 111). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service on July 28, 1995. The Complaint and a copy of the Rules of Practice were served by certified mail on Ow Duk Kwon,

d/b/a Kwang Dong Chinese Herbs Enterprise, Inc. (hereinafter Respondent), on August 7, 1995, in accordance with 7 C.F.R. § 1.147(c). Respondent was informed in the Complaint and an accompanying letter from the Office of the Hearing Clerk that, under the Rules of Practice, he had 20 days from the date of service of the Complaint within which to file an Answer and that failure to file an Answer within 20 days constitutes an admission of the allegations in the Complaint and a waiver of the right to a hearing.

Respondent failed to file an Answer within 20 days as provided in 7 C.F.R. § 1.136(a). On November 21, 1995, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Adoption of a Proposed Default Decision and Order as to Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc. (hereinafter Motion for Proposed Default Decision), and a Proposed Default Decision as to Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc. (hereinafter Proposed Default Decision), based upon Respondent's failure to file an Answer within the time prescribed in 7 C.F.R. § 1.136(a). The Motion for Proposed Default Decision and the Proposed Default Decision were served on Respondent by certified mail on December 5, 1995. An accompanying letter from the Office of the Hearing Clerk informed Respondent that, under the Rules of Practice, he had 20 days from the date of service of Complainant's Motion for Proposed Default Decision and Proposed Default Decision in which to file objections. Respondent failed to file objections to the Complainant's Motion for Proposed Default Decision or the Proposed Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and, on December 27, 1995, Chief Administrative Law Judge Victor W. Palmer (hereinafter Chief ALJ) filed a Default Decision and Order as to Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc. (hereinafter Default Decision), in which the Chief ALJ found that, on or about February 6, 1992, and May 22, 1992, Respondent imported deer antlers in velvet in violation of 9 C.F.R. § 95.12 and assessed a civil penalty of \$2,000 against Respondent.

The Default Decision served on Respondent on February 6, 1996, provides, in pertinent part, that:

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

Default Decision, p. 4.

A letter from the Office of the Hearing Clerk accompanying the Default Decision informed Respondent that:

Enclosed is a copy of the Default Decision and Order as to Ow Duk Kwon d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., issued in this proceeding by Chief Administrative Law Judge, Victor W. Palmer on December 27, 1995.

Each party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.

If no appeal is filed the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its service. However, no decision or order is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and three copies are required. You are also instructed to consult Section 1.145 of the Uniform Rules of Practice (7 C.F.R. Section 1.145) for the procedure for filing an appeal.

Letter from Fe Angeles, Acting Hearing Clerk, to Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs, dated December 28, 1995.

The Rules of Practice provide that:

§ 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).

The Default Decision was served on Complainant on January 3, 1996, and served by certified mail on Respondent on February 6, 1996. Neither Complainant nor Respondent filed an appeal with the Hearing Clerk within the

required time, and on March 15, 1996, the Office of the Hearing Clerk issued a Notice of Effective Date of Default Decision and Order as to Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc. (hereinafter Notice of Effective Date of Default Decision), which was served on Respondent on March 26, 1996.

Mr. Herbert J. Silver, Esq., sent the Hearing Clerk a letter dated March 29, 1996, stating that the law firm of Abraham & Silver had been retained by Respondent as counsel in this proceeding and requesting a copy of the Default Decision. Respondent then filed a Request to Reopen on April 16, 1996, in which Respondent stated:

Please be advised that we [Abraham and Silver,] have been retained by Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs, Enterprise, Inc.

Our client has brought to our attention a default decision and order which was entered on December 27, 1995. My client did not become aware of this default having been entered against him until he received a copy of a notice of such default dated March 15, 1996.

My client had relied upon [his] custom broker, Kenny [sic] Transport Inc., to take care of this matter. In addition, [Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs, Enterprise, Inc.,] completely relied upon [his] custom broker in connection with the importation of herbs and other products from countries outside the United States.

The violation which [he is] charged with was the result of [his] reliance upon [his] custom broker.

Our client has been in business for more than 14 years without any violation or blemish attached to [him] whatsoever.

We therefore request that this matter be reopened and resultantly that the penalty assessed against our client be reduced from \$2,000.00 to \$1,000.00.

Respondent's Request to Reopen.

Complainant filed Complainant's Opposition to Respondent's Request to Reopen on April 25, 1996. On April 29, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)¹

Respondent's Appeal of Default Decision and Order as to Respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc. (hereinafter Respondent's Appeal Petition), in pertinent part, states:

That respondent has been in the business of importing and exporting herbal medicines and other medicinal remedies primarily to be used in Asian communities, including the importation of deer antlers since 1980.

That respondent during this period of time has been duly licensed and authorized by the United States Fish and Wildlife Commission [sic] to import "deer antlers in velvet".

That the order and decision of this Court was obtained upon default inasmuch as respondent was unaware that this proceeding was pending and relied upon its custom broker, Kenney Transport, Inc., to handle such matters.

That respondent believes it has a good and meritorious defense and as such respectfully requests that the decision and order be vacated so as to enable respondent to submit to the Administrative Judge facts which would support its position that the violation issued by the Department of Agriculture was improper.

Respondent's Appeal Petition, pp. 1-2.

On May 17, 1996, Complainant filed Complainant's Response to Respondent's Appeal Petition, and on May 22, 1996, the case was referred to the Judicial Officer for decision.

¹The position of the Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

For the reasons set forth below, Respondent's Request to Reopen² and Respondent's Appeal Petition must be rejected as untimely. However, even if I had jurisdiction to consider Respondent's filings, which I do not, Respondent states no facts or information upon which relief could be granted.

Neither Respondent's Request to Reopen, filed April 16, 1996, nor Respondent's Appeal Petition, filed April 29, 1996, was filed within 35 days after service of the Default Decision on Respondent which occurred on February 6, 1996. In accordance with 7 C.F.R. § 1.139, the Default Decision became final 35 days after service on Respondent, viz., on March 12, 1996, and the Judicial Officer therefore no longer has jurisdiction to consider Respondent's appeal. It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final. *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (Respondents' appeal, filed 2 days after the Initial Decision and Order became final, dismissed); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (Respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective, dismissed); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (Respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective, dismissed); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (Respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective, dismissed); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final and effective, dismissed); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final, dismissed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (Respondent's appeal, filed with the Hearing Clerk on the day the Initial Decision and Order had become final and effective, dismissed); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (Respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective, dismissed); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173

²In the last paragraph of his April 16, 1996, filing, Respondent requests that the matter be reopened. While the Rules of Practice provide for petitions for reopening the hearing to take further evidence, (7 C.F.R. § 1.146(a)), there was no hearing in the instant proceeding. Therefore, I am treating Respondent's April 16, 1996, filing as an Appeal to the Judicial Officer.

(1983) (Respondent's appeal, filed 1 day after Default Decision and Order became final, denied); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (Judicial Officer has no jurisdiction to consider Respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial 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) (since 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 ALJ nor the Judicial Officer has jurisdiction to consider Respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

The Department'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) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

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. . . .

Accord Bundinich v. Becton Dickinson & Co., 486 U.S. 196, 203 (1988) (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, *rehearing denied*, 434 U.S. 1089 (1978) (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); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (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) (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) (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), *cert. denied*, 493 U.S. 1060 (1990) (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).

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 the Initial Decision and Order 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 for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal. (Rule 4(a)(5).) 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 the Initial Decision has become final.

Moreover, the jurisdictional bar under the Rules of Practice which precludes the Judicial Officer from hearing an appeal that is filed after the Initial

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.

Accord Jem Broadcasting Co. v. FCC, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (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), cert. denied sub nom. *Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

Accordingly, Respondent's appeal 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 the Rules of Practice, "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal." (7 C.F.R. § 1.142(c)(4).)

Even if Respondent's appeal had been timely filed, it would have been denied based upon Respondent's failure to file an Answer. Under the Rules of Practice, Respondent's failure to file an Answer with the Hearing Clerk within 20 days after service of the Complaint constitutes an admission of the allegations in the Complaint and a waiver of hearing. Specifically, the Rules of Practice provide:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an

answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall:

(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(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.

7 C.F.R. § 1.136(a)-(c).

§ 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 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. § 1.139.

§ 1.141 Procedure for Hearing.

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing. . . .

7 C.F.R. § 1.141(a).

The Complaint served on Respondent on August 7, 1995, states: The respondents shall have twenty (20) days after service of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, Washington, D.C. 20250-9200, in accordance with the applicable Rules of Practice (9 C.F.R. § 70.1 and 7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegations in this complaint shall constitute an admission of such allegations. Failure to file an answer within the prescribed time shall constitute an admission of the allegations in this complaint and a waiver of hearing.

Complaint, p. 2.

The Complaint clearly informs Respondent of the consequences of failure to file an Answer. Moreover, a letter from the Office of the Hearing Clerk serving a copy of the Complaint on Respondent expressly advised Respondent of the effect of failure to file an answer or deny any allegation in the complaint. The letter, in pertinent part, states:

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. (Emphasis in the original.)

Letter from Fe Angeles, Acting Hearing Clerk, to Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs, and Kenney Transport, Inc., dated July 31, 1995, p. 1.

Respondent's Answer was due August 27, 1995, and Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint. (7 C.F.R. § 1.136(a), (c).) Accordingly, the Default Decision was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,³ Respondent has shown no basis for setting aside the Default Decision here.⁴

³In re Veg-Pro Distributors, 42 Agric. Dec. 273 (1983) (remand order), final decision, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); In re J. Fleishman & Co., 38 Agric. Dec. 789 (1978) (remand order), final decision, 37 Agric. Dec. 1175 (1978); In re Henry Christ, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), final decision, 35 Agric. Dec. 195 (1976); and see In re Vaughn Gallop, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), final decision, 40 Agric. Dec. 1254 (1981).

⁴See In re Jeremy Byrd, 55 Agric. Dec. ____ (Feb. 21, 1996) (default order proper where timely Answer not filed); In re Moreno Bros., 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); In re Ronald DeBruin, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); In re James Joseph Hickey, Jr., 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); In re Bruce Thomas, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); In re Ron Morrow, 53 Agric. Dec. 144 (1994), aff'd per curiam, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); In re Donald D. Richards, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); In re Mike Robertson, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); In re Morgantown Produce, Inc., 47 Agric. Dec. 453 (1988) (continued...)

⁴(...continued)

(default order proper where Answer not filed); *In re Johnson-Halifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J. W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttome*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttome properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttome), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay \$54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39

(continued...)

The requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely Answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJ's frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"⁵ If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

Moreover, even if Respondent had filed a timely Answer denying the material allegations in the Complaint and had filed a timely appeal, none of the six issues raised in Respondent's Request to Reopen and Respondent's Appeal Petition serve as a basis for reversal of the Chief ALJ's finding that Respondent imported deer antlers in velvet in violation of 9 C.F.R. § 95.12 on or about

*(...continued)

Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

⁵*Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). See *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

February 6, 1992, and May 22, 1992, or the Chief ALJ's assessment of a civil penalty of \$2,000 against Respondent.

First, Respondent contends that "he has been in the business of importing and exporting herbal medicines and other medicinal remedies primarily to be used in the Asian communities, including the importation of deer antlers since 1980," and, that he has operated this "business for more than 14 years without any violation or blemish attached to [him] whatsoever." Second, Respondent contends that "during this period of time [he] has been duly licensed and authorized by the United States Fish and Wildlife Commission [sic] to import 'deer antlers in velvet.'" Third, Respondent asserts that he believes he "has a good and meritorious defense" (Respondent's Request to Reopen; Respondent's Appeal Petition, p. 1.)

None of these contentions is relevant to whether on or about February 6, 1992, and May 22, 1992, Respondent imported deer antlers in velvet in violation of 9 C.F.R. § 95.12. Even if I were to find: (1) that Respondent has been in the business of importing deer antlers since 1980, and that he has operated this "business for more than 14 years without any violation or blemish attached to [him] whatsoever"; (2) that Respondent has been licensed and authorized by the United States Fish and Wildlife Commission [sic] to import deer antlers in velvet since 1980; and (3) that Respondent believes he has a good and meritorious defense, these findings would not constitute a basis for the reversal of the Chief ALJ's Default Decision.

Fourth, Respondent contends that the Default Decision was issued only because Respondent was unaware that the proceeding was pending until he received the Notice of Effective Date of Default Decision. (Respondent's Request to Reopen; Respondent's Appeal Petition, p. 1.)

The record clearly establishes that: (1) the Complaint was sent to Respondent at his last known address by certified mail and that someone at that address signed for the Complaint on August 7, 1995; (2) the Complainant's Motion for Proposed Default Decision and Proposed Default Decision were sent to Respondent at his last known address and that someone at that address signed for the Motion for Proposed Default Decision and the Proposed Default Decision on December 5, 1995; (3) the Default Decision was sent to Respondent at his last known address and that someone at that address signed for the Default Decision on February 6, 1996; and (4) the Notice of Effective Date of Default Decision was sent to Respondent at his last known address and someone at that

address appears⁶ to have signed for the Notice of Effective Date of Default Decision on March 26, 1996. Respondent states in Respondent's Request to Reopen that he received, and provided to his counsel, the Notice of Effective Date of Default Decision and asserts that he was not aware that this proceeding was pending prior to receipt of the Notice of Effective Date of Default Decision in March 1996. Respondent does not explain the apparent conflict between his assertion that he did not have actual notice of this proceeding until he received the Notice of Effective Date of Default Decision and the fact that the Complaint, the Motion for Proposed Default Decision, the Proposed Default Decision, and the Default Decision were mailed to the same person and the same address as the Notice of Effective Date of Default Decision. Nonetheless, Respondent's actual notice of this proceeding and the documents filed by the Complainant is not required under the Rules of Practice or under the Due Process Clause.

The circumstances as to service by certified mail are controlled by prior decisions holding that proper service is made when a Respondent is served with a certified mailing at his or her last known address and someone signs for the document. *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 619 (1988) (the excuse, occasionally given in an attempt to justify the failure to file a timely Answer, that the person who signed the certified receipt card failed to give the Complaint to Respondent in time to file a timely Answer has been and will be routinely rejected); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925, 929 (1987) (a default order is proper where Respondent's sister signed the certified receipt card as to a Complaint and forgot to give it to Respondent when she saw him 2 weeks later); *In re Roy Carter*, 46 Agric. Dec. 207, 211 (1987) (default order proper where a timely Answer is not filed; Respondent properly served where his mother signed the certified receipt card but failed to deliver the Complaint to Respondent); *In re Carl D. Cuttome*, 44 Agric. Dec. 1573, 1576 (1985) (Respondent Carl D. Cuttome properly served where Complaint was sent to Respondent's last known business address and was signed for by Joseph A. Cuttome, who failed to deliver Complaint to Respondent), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Joseph Buzun*, 43 Agric. Dec. 751, 754-56 (1984) (Respondent Joseph Buzun properly served where Complaint sent by certified mail to Respondent's residence was signed for by someone named Buzun, who failed to deliver the Complaint to Respondent).

⁶There is a signature on the return receipt card, however, it is not in block 6 which is the place for the signature of the addressee or agent of the addressee. Rather, the signature is in block 7 which is the place for the date of delivery.

The Rules of Practice provide:

§ 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 the last know[n] residence of such party if an individual

....
(e) *Proof of service.* Any of the following, in the possession of the Department, showing such service, shall be deemed to be accurate:

(1) A certified or registered mail receipt returned by the postal service with a signature

7 C.F.R. § 1.147(c), (e)(1).

The record in this proceeding contains a certified mail receipt returned by the postal service with a signature for each of the following documents: (1) the Complaint; (2) the Motion for Proposed Default Decision; (3) the Proposed Default Decision; (4) the Default Decision; and (5) the Notice of Effective Date of Default Decision. Accordingly, under the Rules of Practice, Respondent was properly served with the Complaint, the Motion for Proposed Default Decision, the Proposed Default Decision, the Default Decision, and the Notice of Effective Date of Default Decision. Respondent failed to file a timely Answer to the Complaint, and, therefore, the Default Decision was properly issued.

Moreover, service in accordance with the Rules of Practice afforded Respondent due process. To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). See *Weigner v. City of New York*, 852 F.2d 646, 649-51 (2d Cir. 1988), cert. denied, 488 U.S. 1005 (1989) (the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated); *NLRB v. Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972) (due process does not require receipt of actual notice in every case).

The Rules of Practice provide for service by certified mail to Respondent's last known principal place of business, followed here, meet the requirements of due process of law. As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S.Ct. at 343 (emphasis added); see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Speigel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E. 2d 1344, 1346 (1982), the court held:

It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably

calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865. [Footnote omitted.]

Accordingly, Respondent was properly served with the Complaint, the Motion for Proposed Default Decision, the Proposed Default Decision, the Default Decision, and the Notice of Effective Date of Default Decision, and the Default Decision was properly issued in this proceeding.

Fifth, Respondent contends that he relied upon his custom broker, Kenney Transport, Inc., to handle the proceeding on his behalf. (Respondent's Request to Reopen; Respondent's Appeal Petition, p. 1.) Kenney Transport, Inc., is a party in this proceeding, but there is nothing in the record to indicate that Kenney Transport, Inc., entered an appearance on behalf of Respondent or in any other way purported to represent Respondent. Moreover, Kenney Transport, Inc., did not represent itself, but, instead, retained the law firm of Skolnick & Hochberg, P.C., to represent it in the proceeding. Skolnick & Hochberg, P.C., entered an appearance that was clearly limited to an appearance on behalf of Kenney Transport, Inc. Further, the proceeding was terminated as to Kenney Transport, Inc., by the entry of a Consent Decision signed by Mr. Ralph Hochberg, Attorney for Kenney Transport, Inc.; the Treasurer for Kenney Transport, Inc., on behalf of Kenney Transport, Inc.; and Ms. Darlene Bolinger, Attorney for Complainant. The Consent Decision was issued by the Chief ALJ on November 16, 1995 (Consent Decision as to Kenney Transport, Inc.), and the record shows no further involvement in the proceeding by Kenney Transport, Inc., either on its own behalf or on the behalf of Respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc. Further still, the record establishes that the law firm of Abraham & Silver entered an appearance on behalf of Respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., on April 1, 1996, but does not indicate that Abraham & Silver was replacing Kenney Transport, Inc., as counsel for Respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., or that Kenney Transport, Inc., was withdrawing as attorney of record for Respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc. I infer from the record that Kenney Transport, Inc., never represented or purported to represent Respondent, Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., in this proceeding.

Sixth, Respondent contends that he relied upon his "custom broker, [Kenney Transport, Inc.,] in connection with the importation of herbs and other products . . ." and that the violations with which Respondent is charged were

"the result of [Respondent's] reliance upon [his] custom broker." (Respondent's Request to Reopen.)

Respondent is deemed by his failure to file an Answer to the Complaint to have admitted, for the purposes of this proceeding, the allegations in the Complaint. (7 C.F.R. § 1.136(c).) The Complaint alleges, and, therefore, Respondent is deemed to have admitted that on or about February 6, 1992, and May 22, 1992, he imported from Russia into the United States "deer antlers in velvet" in violation of 9 C.F.R. § 95.12 because the imported antlers were not consigned to an approved establishment, as required.

Neither 9 C.F.R. § 95.12 nor section 2 of the Act, (21 U.S.C. § 111), under which 9 C.F.R. § 95.12 was issued, limit responsibility for compliance with 9 C.F.R. § 95.12 to custom brokers. Rather, any person who fails to handle or treat the products covered by 9 C.F.R. § 95.12 in the manner specified in 9 C.F.R. § 95.12(a)-(c) is responsible for such failure and subject to the assessment of a civil penalty in accordance with section 3 of the Act, (21 U.S.C. § 122). There is no basis for reading into section 2 of the Act, (21 U.S.C. § 111), or 9 C.F.R. § 95.12 any exemption for persons that use a custom broker to assist with the importation or rely on a custom broker to handle and treat products in accordance with 9 C.F.R. § 95.12. *See generally In re Unique Nursery and Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 411-12, 418-19 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995) (there is no basis for reading into the Federal Plant Pest Act, as amended, (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended, (7 U.S.C. §§ 151-154, 156-165, 167), or 7 C.F.R. §§ 301.45-.45-14 (1991) any exemption for wholesalers, and Respondent's reliance on assurances from brokers that all necessary federal and state requirements had been met, does not relieve Respondent of responsibility for compliance with the regulations.)

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

Order

Respondent's Request to Reopen, filed April 16, 1996, and Respondent's Appeal Petition, filed April 29, 1996, are denied. The Default Decision and Order as to Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., issued and filed by the Chief ALJ on December 27, 1995, is the final Decision and Order in this case.

ANIMAL WELFARE ACT

COURT DECISION

PATRICK D. HOCTOR v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 95-2571.

Filed April 25, 1996.

(Cite as: 82 F.3d 165)

Perimeter fence minimum height requirement not valid - Administrative Procedure Act - Substantive rule subject to notice and comment procedures of the APA.

The United States Court of Appeals for the Seventh Circuit vacated the Secretary's determination that perimeter fence around petitioner's compound violated the Department's regulations for containment of dangerous animals. The court held that Department rule governing minimum height of enclosures for dangerous animals was a substantive rule subject to the notice and comment procedures set forth in the Administrative Procedure Act. The court stated that the minimum height requirement was an arbitrary choice not derivable from the structural strength regulations; thus, the rule is legislative--or substantive--in nature, rather than interpretive. A substantive rule promulgated by an agency is invalid unless the agency first issues a public notice of proposed rulemaking describing the substance of the proposed rule and gives the public an opportunity to submit written comments. If the substantive rule is promulgated, then the agency must set forth the basis and purpose of the rule in a public statement.

Before POSNER, Chief Judge, and DIANE P. WOOD and EVANS, Circuit Judges.

**UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT**

POSNER, Chief Judge:

A rule promulgated by an agency that is subject to the Administrative Procedure Act is invalid unless the agency first issues a public notice of proposed rulemaking, describing the substance of the proposed rule, and gives the public an opportunity to submit written comments; and if after receiving the comments it decides to promulgate the rule it must set forth the basis and purpose of the rule in a public statement. 5 U.S.C. §§ 553(b), (c). These procedural requirements do not apply, however, to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). Distinguishing between a "legislative" rule, to which the

notice and comment provisions of the Act apply, and an interpretive rule, to which these provisions do not apply, is often very difficult--and often very important to regulated firms, the public, and the agency. Notice and comment rulemaking is time-consuming, facilitates the marshaling of opposition to a proposed rule, and may result in the creation of a very long record that may in turn provide a basis for a judicial challenge to the rule if the agency decides to promulgate it. There are no formalities attendant upon the promulgation of an interpretive rule, but this is tolerable because such a rule is "only" an interpretation. Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement, whether the announcement takes the form of a rule or of a policy statement, which the Administrative Procedure Act assimilates to an interpretive rule. It would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities.

The question presented by this appeal from an order of the Department of Agriculture is whether a rule for the secure containment of animals, a rule promulgated by the Department under the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.*, without compliance with the notice and comment requirements of the Administrative Procedure Act, is nevertheless valid because it is merely an interpretive rule. Enacted in 1966, the Animal Welfare Act, as its title implies, is primarily designed to assure the humane treatment of animals. The Act requires the licensing of dealers (with obvious exceptions, for example retail pet stores) and exhibitors, and authorizes the Department to impose sanctions on licensees who violate either the statute itself or the rules promulgated by the Department under the authority of 7 U.S.C. § 2151, which authorizes the Secretary of Agriculture "to promulgate such rules, regulations, and orders as he may deem necessary in order in order to effectuate the purposes of [the Act]." The Act provides guidance to the exercise of this rulemaking authority by requiring the Department to formulate standards "to govern the humane handling, care, treatment, and transportation of animals by dealers," and these standards must include minimum requirements "for handling, housing, feeding, watering, sanitation," etc. 7 U.S.C. § 2143(a).

The Department has employed the notice and comment procedure to promulgate a regulation, the validity of which is not questioned, that is entitled "structural strength" and that provides that "the facility [housing the animals] must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally

sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." 9 C.F.R. § 3.125(a).

Enter the petitioner, Patrick Hoctor, who in 1982 began dealing in exotic animals on his farm outside of Terre Haute. In a 25-acre compound he raised a variety of animals including "Big Cats"--a typical inventory included three lions, two tigers, seven ligers (a liger is a cross between a male lion and a female tiger, and is thus to be distinguished from a tigon), six cougars, and two snow leopards. The animals were in pens ("primary enclosure" in the jargon of the administration of the Animal Welfare Act). The area in which the pens were located was surrounded by a fence ("containment fence"). At the suggestion of a veterinarian employed by the Agriculture Department who was assigned to inspect the facility when Hoctor started his animal dealership in 1982, Hoctor made the perimeter fence six feet high.

The following year the Department issued an internal memorandum addressed to its force of inspectors in which it said that all "dangerous animals," defined as including, among members of the cat family, lions, tigers, and leopards, must be inside a perimeter fence at least eight feet high. This provision is the so-called interpretive rule, interpreting the housing regulation quoted above. An agency has, of course, the power, indeed the inescapable duty, to interpret its own legislative rules, such as the housing standard, just as it has the power and duty to interpret a statute that it enforces. *Stinson v. United States*, 508 U.S. 36, 42-46 (1993).

On several occasions beginning in 1990, Hoctor was cited by a Department of Agriculture inspector for violating 9 C.F.R. § 3.125(a), the housing standard, by failing to have an eight-foot perimeter fence. Eventually the Department sanctioned Hoctor for this and other alleged violations, and he has sought judicial review limited, however, to the perimeter fence. He is a small dealer and it would cost him many thousands of dollars to replace his six-foot-high fence with an eight-foot-high fence. Indeed, we were told at argument that pending the resolution of his dispute over the fence he has discontinued dealing in Big Cats. The parties agree that unless the rule requiring a perimeter fence at least eight feet high is a valid interpretive rule, the sanction for violating it was improper.

We may assume, though we need not decide, that the Department of Agriculture has the statutory authority to require dealers in dangerous animals to enclose their compounds with eight-foot-high fences. The fence is a backup fail-safe device, since the animals are kept in pens, cages, or other enclosures within the compound, in an area that is itself fenced, rather than being free to roam throughout the compound. Since animals sometimes break out or are

carelessly let out of their pens, a fail-safe device seems highly appropriate, to say the least. Two lions once got out of their pen on Hoctor's property, and he had to shoot them. Yet, when he did so, they were still within the containment fence. The Department's regulations do not require a containment fence, and it is unclear to us why, if that fence was adequate--and we are given no reason to suppose it was not--Hoctor would have had to put up an additional fence, let alone one eight-feet high. But we lay any doubts on this score to one side. And we may also assume that the containment of dangerous animals is a proper concern of the Department in the enforcement of the Animal Welfare Act, even though the purpose of the Act is to protect animals from people rather than people from animals. Even Big Cats are not safe outside their compounds, and with a lawyer's ingenuity the Department's able counsel reminded us at argument that if one of those Cats mauled or threatened a human being, the Cat might get into serious trouble and thus it is necessary to protect human beings from Big Cats in order to protect the Cats from human beings, which is the important thing under the Act. In fact Hoctor had shot the two lions because they were dangerously close to one of his employees. Since tort liability for injury caused by a wild animal is strict, *Burns v. Gleason*, 819 F.2d 555 (5th Cir. 1987); *Behrens v. Bertram Mills Circus Ltd.*, [1957] 2 Q.B. 1; W. Page Keeton et al., Prosser and Keaton on the Law of Torts § 76, p. 542 (5th ed. 1984), the common law, at least, is solicitous for the protection of the citizens of Terre Haute against escapees from Hoctor's menagerie even if the Animal Welfare Act is not. The internal memorandum also justifies the eight-foot requirement as a means of protecting the animal predators, though one might have supposed the Big Cats able to protect themselves against the native Indiana fauna.

Another issue that we need not resolve besides the issue of the statutory authority for the challenged rule is whether the Department might have cited Hoctor for having a perimeter fence that was in fact, considering the number and type of his animals, the topography of the compound, the design and structure of the protective enclosures and the containment fence, the proximity of highways or inhabited areas, and the design of the perimeter fence itself, too low to be safe, as distinct from merely being lower than eight feet. No regulation is targeted on the problem of containment other than 9 C.F.R. § 3.125, which seems to be concerned with the strength of enclosures rather than their height. But maybe there is some implicit statutory duty of containment that Hoctor might have been thought to have violated even if there were no rule requiring an eight-foot-high perimeter fence.

The only ground on which the Department defends sanctioning Hoctor for not having a high enough fence is that requiring an eight-foot-high perimeter fence for dangerous animals is an interpretation of the Department's own structural-strength regulation, and "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' *Stinson v. United States, supra*, 508 U.S. at 44-46. The "provided" clause does not announce a demanding standard of judicial review, although the absence of any reference in the housing regulation to fences or height must give us pause. The regulation appears only to require that pens and other animal housing be sturdy enough in design and construction, and sufficiently well maintained, to prevent the animals from breaking through the enclosure--not that any enclosure, whether a pen or a perimeter fence, be high enough to prevent the animals from escaping by jumping over the enclosure. The Department's counsel made the wonderful lawyer's argument that the eight-foot rule is consistent with the regulation because a fence lower than eight feet has zero structural strength between its height (here six feet) and the eight-foot required minimum. The two feet by which Hoctor's fence fell short could not have contained a groundhog, let alone a liger, since it was empty space.

Our doubts about the scope of the regulation that the eight-foot rule is said to be "interpreting" might seem irrelevant, since even if a rule requiring an eight-foot perimeter fence could not be based on the regulation, it could be based on the statute itself, which in requiring the Department to establish minimum standards for the housing of animals presumably authorizes it to promulgate standards for secure containment. But if the eight-foot rule were deemed one of those minimum standards that the Department is required by statute to create, it could not possibly be thought an interpretive rule. For what would it be interpreting? When Congress authorizes an agency to create standards, it is delegating legislative authority, rather than itself setting forth a standard which the agency might then particularize through interpretation. Put differently, when a statute does not impose a duty on the persons subject to it but instead authorizes (or requires--it makes no difference) an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency. Provided that a rule promulgated pursuant to such a delegation is intended to bind, and not merely to be a tentative statement of the agency's view, which would make it just a policy statement, and not a rule at all, the rule would be the clearest possible example of a legislative rule, as to which the notice and comment procedure not followed here is mandatory, as distinct from an interpretive rule; for there would be nothing to interpret. *American Mining*

Congress v. Mine Safety & Health Administration, 995 F.2d 1106, 1109 (D.C. Cir. 1993); Robert A. Anthony, "'Interpretive' Rules, 'Legislative' Rules and 'Spurious' Rules: Lifting the Smog," "8 Admin. L.J. of Am. Univ. 1 (1994). That is why the Department must argue that its eight-foot rule is an interpretation of the structural-strength regulation-itself a standard, and therefore interpretable--in order to avoid reversal.

Even if, despite the doubts that we expressed earlier, the eight-foot rule is consistent with, even in some sense authorized by, the structural-strength regulation, it would not necessarily follow that it is an interpretive rule. It is that only if it can be derived from the regulation by a process reasonably described as interpretation. *Metropolitan School District v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992). Supposing that the regulation imposes a general duty of secure containment, the question is, then, Can a requirement that the duty be implemented by erecting an eight-foot high perimeter fence be thought an interpretation of that general duty?

"Interpretation" in the narrow sense is the ascertainment of meaning. It is obvious that eight feet is not part of the meaning of secure containment. But "interpretation" is often used in a much broader sense. A process of "interpretation" has transformed the Constitution into a body of law undreamt of by the framers. To skeptics the *Miranda* rule is as remote from the text of the Fifth Amendment as the eight-foot rule is from the text of 9 C.F.R. § 3.125(a). But our task in this case is not to plumb the masteries of legal theory; it is merely to give effect to a distinction that the Administrative Procedure Act makes, and we can do this by referring to the purpose of the distinction. The purpose is to separate the cases in which notice and comment rulemaking is required from the cases in which it is not required. As we noted at the outset, unless a statute or regulation is of crystalline transparency, the agency enforcing it cannot avoid interpreting it, and the agency would be stymied in its enforcement duties if every time it brought a case on a new theory it had to pause for a bout, possibly lasting several years, of notice and comment rulemaking. Besides being unavoidably continuous, statutory interpretation normally proceeds without the aid of elaborate factual inquiries. When it is an executive or administrative agency that is doing the interpreting it brings to the task a greater knowledge of the regulated activity than the judicial or legislative branches have, and this knowledge is to some extent a substitute for formal fact-gathering.

At the other extreme from what might be called normal or routine interpretation is the making of responsible but arbitrary (not in the "arbitrary or capricious" sense) rules that are consistent with the statute or regulation under

which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation. A rule that turns on a number is likely to be arbitrary in this sense. There is no way to reason to an eight-foot perimeter-fence rule as opposed to a seven-and-a-half foot fence or a nine-foot fence or a ten-foot fence. None of these candidates for a rule is uniquely appropriate to, and in that sense derivable from, the duty of secure containment. This point becomes even clearer if we note that the eight-foot rule actually has another component--the fence must be at least three feet from any animal's pen. Why three? Why not four? Or two?

The reason courts refuse to create statutes of limitations is precisely the difficulty of reasoning to a number by the method of reasoning used by courts. *Hemmings v. Barian*, 822 F.2d 688, 689 (7th Cir. 1987). One cannot extract from the concept of a tort that a tort suit should be barred unless brought within one, or two, or three, or five years. The choice is arbitrary and courts are uncomfortable with making arbitrary choices. They see this as a legislative function. Legislators have the democratic legitimacy to make choices among value judgments, choices based on hunch or guesswork or even the toss of a coin, and other arbitrary choices. When agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive and require notice and comment rulemaking, a procedure that is analogous to the procedure employed by legislatures in making statutes. The notice of proposed rulemaking corresponds to the bill and the reception of written comments to the hearing on the bill.

The common sense of requiring notice and comment rulemaking for legislative rules is well illustrated by the facts of this case. There is no process of cloistered, appellate-court type reasoning by which the Department of Agriculture could have excogitated the eight-foot rule from the structural-strength regulation. The rule is arbitrary in the sense that it could well be different without significant impairment of any regulatory purpose. But this does not make the rule a matter of indifference to the people subject to it. There are thousands of animal dealers, and some unknown fraction of these face the prospect of having to tear down their existing fences and build new, higher ones at great cost. The concerns of these dealers are legitimate and since, as we are stressing, the rule could well be otherwise, the agency was obliged to listen to them before settling on a final rule and to provide some justification for that rule, though not so tight or logical a justification as a court would be expected to offer for a new judge-made rule. Notice and comment is the procedure by which the persons affected by legislative rules are enabled to communicate their concerns in a comprehensive and systematic fashion to the legislating agency.

The Department's lawyer speculated that if the notice and comment route had been followed in this case the Department would have received thousands of comments. The greater the public interest in a rule, the greater reason to allow the public to participate in its formation.

We are not saying that an interpretive rule can never have a numerical component. See, e.g., *American Mining Congress v. Mine Safety & Health Administration, supra*, 995 F.2d at 1108, 1113; *St. Mary's Hospital v. Blue Cross & Blue Shield Ass'n.*, 788 F.2d 888, 889-91 (2d Cir. 1986). There is merely an empirical relation between interpretation and generality on the one hand, and legislation and specificity on the other. Especially in scientific and other technical areas, where quantitative criteria are common, a rule that translates a general norm into a number may be justifiable as interpretation. The mine safety agency in the *American Mining* case could refer to established medical criteria, expressed in terms of numerical evaluations of x-rays, for diagnosing black-lung disease. 995 F.2d at 1112-13. Even in a nontechnical area the use of a number as a rule of thumb to guide the application of a general norm will often be legitimately interpretive. Had the Department of Agriculture said in the internal memorandum that it could not imagine a case in which a perimeter fence for dangerous animals that was lower than eight feet would provide secure containment, and would therefore presume, subject to rebuttal, that a lower fence was insecure, it would have been on stronger ground. For it would have been tying the rule to the animating standard, that of secure containment, rather than making it stand free of the standard, self-contained, unbending, arbitrary. To switch metaphors, the "flatter" a rule is, the harder it is to conceive of it as merely spelling out what is in some sense latent in a statute or regulation, and the eight-foot rule in its present form is as flat as they come. At argument the Department's lawyer tried to loosen up the rule, implying that the Department might have bent it if Hoctor proposed to dig a moat or to electrify his six-foot fence. But an agency's lawyer is not authorized to amend its rules in order to make them more palatable to the reviewing court.

The Department's position might seem further undermined by the fact that it has used the notice and comment procedure to promulgate rules prescribing perimeter fences for dogs and monkeys. 9 C.F.R. §§ 3.6(c)(2)(ii), 3.77(f). Why it proceeded differently for dangerous animals is unexplained. But we attach no weight to the Department's inconsistency, not only because it would be unwise to penalize the Department for having at least partially complied with the requirements of the Administrative Procedure Act, but also because there is nothing in the Act to forbid an agency to use the notice and comment procedure in cases in which it is not required to do so. We are mindful that the court in

United States v. Picciotto, 875 F.2d 345, 348 (D.C. Cir. 1989), thought that the fact that an agency had used notice and comment rulemaking in a setting similar to the case before the court was evidence that the agency "intended" to promulgate a legislative rule in that case, only without bothering with notice and comment. The inference is strained, and in any event we think the agency's "intent," though a frequently cited factor, is rather a makeweight. What the agency intends is to promulgate a rule. It is for the court to say whether it is the kind of rule that is valid only if promulgated after notice and comment. It is that kind of rule if, as in the present case, it cannot be derived by interpretation. The order under review, based as it was on a rule that is invalid because not promulgated in accordance with the required procedure, it therefore VACATED.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: BIG BEAR FARM, INC., ANDREW BURR, and CAROL BURR.
AWA Docket No. 93-32.
Decision and Order filed March 15, 1996.

Cease and desist order — Civil penalty — License suspension — Recordkeeping violations — Failing to provide appropriate veterinary care and facilities — Perimeter fence requirements — Failing to maintain programs for nonhuman primates — Preponderance of the evidence — Estoppel — Hearsay — Past recollection recorded — Willful — Sanction — Ability to continue operation not relevant to sanction — Renewal of license not basis for dismissal.

The Judicial Officer affirmed Judge Hunt's (ALJ) Decision and Order suspending Respondent Big Bear Farm, Inc.'s, license, assessing a civil penalty jointly and severally against Respondents Andrew Burr and Carol Burr, and directing Respondents to cease and desist from violating the Animal Welfare Act (Act) and the regulations and standards issued under the Act. However, the Judicial Officer increased the ALJ's 30-day suspension order to 45 days and increased the civil penalty assessed from \$1,500 to \$6,750. Complainant, as proponent of the Order, bears the burden of proof and the standard of proof by which burden of persuasion is met is preponderance of the evidence. There is no factual basis for estoppel in this case. The Department's perimeter fence requirements are valid and enforceable. The Complaint filed in the case fully apprised the Respondents of the issues in controversy, satisfies due process, and complies with the applicable Rules of Practice, 7 C.F.R. § 1.135, and there is nothing in the record to indicate that Respondents were misled by the Complaint. Hearsay evidence is admissible in administrative proceedings and hearsay can constitute substantial evidence if reliable and trustworthy. Past recollection recorded is considered reliable, probative, and substantial evidence if made while the events recorded were fresh in the witnesses' minds. The annual renewal of Respondent Big Bear Farm, Inc.'s, license is not a basis for dismissal of the Complaint. Respondents' violations were willful under the Administrative Procedure Act, 5 U.S.C. § 558(c). The sanction imposed is appropriate, and the effect of the assessment of a civil penalty on Respondents' ability to continue to operate as exhibitors under the Animal Welfare Act is not taken into account in determining the amount of the civil penalty to assess.

Sharlene Deskins, for Complainant.

Alan B. Cooper, Hawley, Pennsylvania, for Respondents.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding under the Animal Welfare Act, as amended, (7 U.S.C. § 2131 *et seq.*), (hereafter Act), and the regulations and standards issued under the Act, (9 C.F.R. § 1.1 *et seq.*). The proceeding was instituted by a Complaint filed on July 9, 1993, by the Acting Administrator of

the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA").

The Complaint alleges that Respondents, Big Bear Farm, Inc., Andrew Burr, and Carol Burr, willfully violated the Act and regulations and standards issued under the Act. Respondents filed an Answer to the Complaint, and a hearing was held in Scranton, Pennsylvania, on January 25-26, 1995. Sharlene A. Deskins, Esq., represented Complainant. Alan B. Cooper, Esq., represented Respondents.

On June 2, 1995, Administrative Law Judge James W. Hunt, (hereafter ALJ), issued an Initial Decision and Order assessing a civil penalty of \$1,500 jointly and severally against Respondents Andrew Burr and Carol Burr, suspending Respondent Big Bear Farm, Inc.'s, license under the Act for 30 days and thereafter until Respondents' facility is found by APHIS to be in compliance with the Act and the regulations and standards issued under the Act, and directing Respondents to cease and desist from various practices.

On June 30, 1995, Respondents appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)¹ On August 11, 1995, Complainant filed an Appeal and Opposition to the Respondents' Appeal. On September 7, 1995, Respondents filed a Response to Complainant's Appeal and Opposition to Respondents' Appeal. On September 7, 1995, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, I agree with the ALJ that Respondents willfully violated the Act and the regulations and standards issued under the Act. Specifically, I agree with the ALJ's finding that Respondents committed the violations alleged in paragraphs IV(A); IV(B)(1), with respect to violations of 9 C.F.R. §§ 2.100(a) and 3.125(a); IV(B)(3); IV(B)(4); IV(B)(5), with respect to violations of 9 C.F.R. §§ 2.100(a) and 3.131(c); V(B)(1); V(B)(3); VI(B); VI(C)(1); VI(C)(5); VII(A); VII(B)(3);

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

VII(B)(4); VII(B)(5); VIII(A); VIII(B); VIII(C)(1); and VIII(C)(2) of the Complaint.²

However, I agree with Complainant that the ALJ dismissed many violations alleged in the Complaint that Complainant has proven by at least a preponderance of the evidence.³ Specifically, I agree with Complainant that it has carried its burden of proof by a preponderance of the evidence with respect to the violations alleged in paragraphs II(1); III(A); III(B)(1), with respect to violations of 9 C.F.R. §§ 2.100(a) and 3.125(a); III(B)(3); III(B)(4); III(B)(5); III(B)(7); III(B)(8); III(B)(9), with respect to violations of 9 C.F.R. §§ 2.100(a) and 3.131(c); IV(B)(2); V(A); V(B)(2); VI(A); VI(C)(2); VI(C)(3); VI(C)(4); VI(C)(6), with respect to violations of 9 C.F.R. §§ 2.100(a) and 3.56(a); and VII(B)(2) of the Complaint.

While the Complainant has a *prima facie* case with respect to the violations alleged in paragraphs III(B)(1), with respect to violations of 9 C.F.R. §§ 3.53(a) and 3.80(a); III(B)(2); III(B)(9), with respect to a violation of 9 C.F.R. § 3.84(c); III(B)(10); IV(B)(1), with respect to violations of 9 C.F.R. §§ 3.53(a)

²The ALJ found that Respondents violated 9 C.F.R. §§ 2.100(a), 3.84(a), and 3.131(c) on February 9, 1993. (Initial Decision and Order, p. 14.) Complainant did not allege that Respondents violated 9 C.F.R. § 3.131(c) on February 9, 1993, but instead alleged that Respondents violated 9 C.F.R. §§ 2.100(a), 3.84(a), and 3.131(a). (Paragraph VIII(C)(2) of the Complaint.) I infer that the ALJ's reference to 9 C.F.R. § 3.131(c) was in error and that the ALJ meant to reference 9 C.F.R. § 3.131(a).

³The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re Julian J. Toney*, 54 Agric. Dec. ___, slip op. at 54 (Dec. 5, 1995); *In re Otto Berosini*, 54 Agric. Dec. ___, slip op. at 32 (Sept. 11, 1995); *In re Michael McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re Joetta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

and 3.80(a); IV(B)(5), with respect to a violation of 9 C.F.R. § 3.84(c); VI(C)(6), with respect to a violation of 9 C.F.R. § 3.56(b); VI(C)(7); and VII(B)(1) of the Complaint, I find that the evidence is not as strong as that customarily necessary in these types of cases to support reversal of the ALJ. Further, Complainant has not appealed the ALJ's dismissal of the violation alleged in paragraph III(B)(6) of the Complaint.

Since I found numerous violations not found by the ALJ, I have not adopted the ALJ's Initial Decision and Order as the final Decision and Order. However, since I agree with all of the violations that the ALJ did find, much of the ALJ's discussion of the facts is incorporated into the final Decision and Order. Further, I adopted the ALJ's Findings of Fact and Conclusions of Law, with deletions shown by dots, additions shown by brackets, and minor editorial changes not specified, to which I, of course, added my additional Findings of Fact and Conclusions of Law.

Applicable Statutory Provision, Regulations, and Standards

7 U.S.C.:

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary. (7 U.S.C. § 2140.)

9 C.F.R.:

PART 2 — REGULATIONS

Subpart D—Attending Veterinarian and Adequate Veterinary Care

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however,* That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further,* That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures. (9 C.F.R. § 2.40.)

. . . .

Subpart G—Records

§ 2.75 Records: Dealers and exhibitors.

....

(b)(1) Every . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

- (i) The name and address of the person from whom the animals were purchased or otherwise acquired;
 - (ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;
 - (iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;
 - (iv) The name and address of the person to whom an animal was sold or given;
 - (v) The date of purchase, acquisition, sale, or disposal of the animal(s);
 - (vi) The species of the animal(s); and
 - (vii) The number of animals in the shipment. (9 C.F.R. § 2.75(b)(1).)
-

Subpart H—Compliance With Standards and Holding Period**§ 2.100 Compliance with standards.**

- (a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals. (9 C.F.R. § 2.100(a).)
-

PART 3—STANDARDS

Subpart C—Specifications for the Humane Handling, Care, Treatment and Transportation of Rabbits

§ 3.52 Facilities, outdoor.

(a) *Shelter from sunlight.* When sunlight is likely to cause overheating or discomfort, sufficient shade shall be provided to allow all rabbits kept outdoors to protect themselves from the direct rays of the sun. . . .)

(b) *Shelter from rain or snow.* Rabbits kept outdoors shall be provided with access to shelter to allow them to remain dry during rain or snow. (9 C.F.R. § 3.52(a), (b).)

. . . .

§ 3.55 Watering.

Sufficient potable water shall be provided daily except as might otherwise be required to provide adequate veterinary care. All watering receptacles shall be sanitized when dirty: *Provided, however,* That such receptacles shall be sanitized at least once every 2 weeks. (9 C.F.R. § 3.55.)

§ 3.56 Sanitation.

(a) *Cleaning of primary enclosures.* (1) Primary enclosures shall be kept reasonably free of excreta, hair, cobwebs and other debris by periodic cleaning. Measures shall be taken to prevent the wetting of rabbits in such enclosures if a washing process is used.

(2) In primary enclosures equipped with solid floors, soiled litter shall be removed and replaced with clean litter at least once each week.

(3) If primary enclosures are equipped with wire or mesh floors, the troughs or pans under such enclosures shall be cleaned at least once each week. If worm bins are used under such enclosures[,] they shall be maintained in a sanitary condition.

(b) *Sanitization of primary enclosures.* (1) Primary enclosures for rabbits shall be sanitized at least once every 30 days in the manner provided in paragraph (b)(3) of this section.

(2) Prior to the introduction of rabbits into empty primary enclosures previously occupied, such enclosures shall be sanitized in the manner provided in paragraph (b)(3) of this section.

(3) Primary enclosures for rabbits shall be sanitized by washing them with hot water (180° F.) and soap or detergent as in a mechanical cage washer, or by washing all soiled surfaces with a detergent solution followed by a safe and effective disinfectant, or by cleaning all soiled surfaces with live steam or flame. (9 C.F.R. § 3.56.)

. . . .

Subpart D—Specifications for the Humane Handling, Care, Treatment, and Transportation of Nonhuman Primates

§ 3.81 Environmental enhancement to promote psychological well-being.

Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian. This plan must be made available to APHIS upon request. . . . (9 C.F.R. § 3.81.)

. . . .

§ 3.84 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from inside each indoor primary enclosure daily and from underneath them as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent the nonhuman primates from becoming soiled, and to reduce disease hazards, insects,

pests, and odors. Dirt floors, floors with absorbent bedding, and planted areas in primary enclosures must be spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta, or as often as necessary to reduce disease hazards, insects, pests, and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, nonhuman primates must be removed, unless the enclosure is large enough to ensure the animals will not be harmed, wetted, or distressed in the process. Perches, bars, and shelves must be kept clean and replaced when worn. If the species of the nonhuman primates housed in the primary enclosure engages in scent marking, hard surfaces in the primary enclosure must be spot-cleaned daily.

.....

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair in order to protect the nonhuman primates from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents, pests, and vermin. Premises must be kept free of accumulations of trash, junk, waste, and discarded matter. Weeds, grass, and bushes must be controlled so as to facilitate cleaning of the premises and pest control. (9 C.F.R. § 3.84(a), (c).)

.....

Subpart F—Specifications for the Humane Handling, Care, Treatment, and Transportation of Warmblooded Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, and Marine Mammals

§ 3.125 Facilities, general.

(a) *Structural strength.* The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

....

(c) *Storage.* Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. . . .

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. . . . (9 C.F.R. § 3.125(a), (c), (d).)

....

§ 3.127 Facilities, outdoor.

....

(b) *Shelter from inclement weather.* Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. . . .

(c) *Drainage.* A suitable method shall be provided to rapidly eliminate excess water. . . .(9 C.F.R. § 3.127(b), (c).)

....

§ 3.130 Watering.

If potable water is not accessible to the animals at all times, it must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary. (9 C.F.R. § 3.130.)

....

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of

the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

....

(c) *Housekeeping.* Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals. (9 C.F.R. § 3.131(a), (c).)

Discussion

Respondents Andrew Burr and Carol Burr own and manage Respondent Big Bear Farm, Inc., a zoo park located in Honesdale, Pennsylvania. (Answer, ¶ I.A.; CX-4, 13; Tr. 285, 337, 344-46, 399, 404-05.) One part is a traditional zoo which contains, among other animals, tigers, foxes, raccoons, donkeys, bears, rabbits, squirrels, monkeys, buffalo, a llama, and a zebra. The other part of the park is a petting zoo for children housing sheep, goats, potbellied pigs, and other domesticated animals. There are approximately 60 to 75 animals living on Big Bear Farm, Inc. (Tr. 347.) More than half the animals, including the bears and cats, were hand-raised by the Burrs. (Tr. 400.) In addition to the zoo animals, farm animals and personal pets not subject to the requirements of the Act also live on the premises. (Tr. 347.)

Respondent Andrew Burr has worked with and maintained exotic animals since 1954 when he operated a zoo on Long Island. (Tr. 285.) During his career, he has supplied animals for Shari Lewis, Steve Allen, and the *Today* show. Presently, the Burrs consider the operation of Big Bear Farm, Inc., to be more of a retirement hobby than a money-making venture, although they do charge an entry fee for admission to the park. (Tr. 336, 340.) Persons 12 years of age and over are charged \$5.50, children from 5 years of age to 11 are charged \$3.50, and children under 5 years of age are admitted to the park for free. (Tr. 336.) During the 1994 season, Respondent Big Bear Farm, Inc., grossed approximately \$1,620; during the 1993 season, Respondent Big Bear Farm, Inc., grossed approximately \$1,870. (Tr. 336.) Andrew Burr testified

that it costs between \$15,000 and \$16,000 a year to operate the park. (Tr. 349.) In order to obtain additional income, Andrew Burr works as a mover, does odd jobs, borrows money from his children, and rents the animals. (Tr. 349-51, 353-54.)

Andrew Burr was initially issued a license by USDA in 1989, but the name on the license was subsequently changed to and remains as Big Bear Farm, Inc. (CX-4, 13; Tr. 284-85, 344-45.)

From March 27, 1990, through February 9, 1993, Respondents' facility was inspected by five different APHIS employees on seven different occasions. Numerous violations of the Act, regulations, and standards were found. They are discussed below. Paragraphs III(A), IV(A), VI(A), and VIII(A) of the Complaint allege that Respondents failed to maintain adequate records showing the acquisition, disposition, and identification of animals, as required by 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1). Although the humane treatment of animals by dealers, exhibitors, and others is a principal concern of the Act, the law is also concerned with adequate recordkeeping: "Inventory records, which show births and deaths, are also an important indicator of the level of animal husbandry, basic care and veterinary care provided by exhibitors." *In re Cecil Browning*, 52 Agric. Dec. 129, 141 (1993), *aff'd per curiam*, 15 F.3d 1097 (11th Cir. 1994) (Table).

The testimony of APHIS inspector Dr. O'Malley shows that Respondents failed to maintain proper records concerning a brown bear, a stump-tailed macaque, a silver fox, a European hedgehog, rabbits, a ringtail cat, and a rhesus macaque. (Tr. 66-67, 94, 115-17, 142; CX-2, p. 8; CX-3, p. 4; CX-7, p. 6; CX-12, p. 3.) However, Respondents' lack of adequate recordkeeping appears to be more of a misunderstanding than an attempt to deceive APHIS. For example, on September 30, 1991, Respondent Andrew Burr presented a document that he had prepared concerning the acquisition of a macaque monkey. (Tr. 307-08.) Dr. O'Malley said that the document needed to be prepared by the donor or seller of the animal and not by the person who bought the animal. Respondent Andrew Burr later obtained a document prepared by the seller in response to Dr. O'Malley's request. (Tr. 307-08; RX-5.) Nevertheless, each failure to maintain the required records constitutes a violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1).

Paragraphs IV(B)(4), V(B)(3), and VI(C)(5) of the Complaint allege that Respondents failed to develop, document, and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of nonhuman primates, in violation of 9 C.F.R. §§ 2.100(a) and 3.81. On September 30, 1991, when APHIS inspected Respondents' facility, there was no

plan for the environmental enhancement of nonhuman primates. (CX-3, p. 4.) On May 7, 1992, and July 28, 1992, however, the inspectors noted that enrichment devices and toys were contained in the primates' cages, but found that no written plan approved by a veterinarian was available for review. (Tr. 128, 250, 261; CX-5, p. 3; CX-7, p. 7.) Respondent Andrew Burr explained that:

I do remember that Dr. O'Malley he had told me that I had better prepare some kind of a program of enhancement for the non-human primates because it was going to be law and upon his next visit, I made sure I had this thing ready and I showed it to him and he said that is no good. It can't be done by you. He neglected to tell me that it had to be done by somebody else. (Tr. 363-64.)

Andrew Burr described Respondents' "program" as follows:

We have put Fisher Price baby safe what they call busy boxes. They have little whistles on them and things that you turn and telephone things that you dial and handles that you pull and all of that kind of stuff there. They are totally child safe. You can't chew them and have any paint poison or anything like that on them. Then they have balls and swings and all kinds of things like that all kinds of toys. (Tr. 309-10.)

Dr. O'Malley testified:

I didn't see anything that was harmful or detrimental.

. . . .

. . . [T]he procedures that they were doing were all beneficial and they were taking place. (Tr. 105.)

Nevertheless, the regulations require a plan as directed by the attending veterinarian. Respondents obtained the required plan, which they made available for review by the inspectors on September 2, 1992. (Tr. 394-95; CX-8, p. 2; RX-4(b).) However, for the period of time that Respondents did not have a plan as directed by the attending veterinarian, Respondents were not in compliance with 9 C.F.R. §§ 2.100(a) and 3.81.

Paragraph IV(B)(2) of the Complaint alleges that on September 30, 1991, supplies of food and bedding were not stored so as to adequately protect them against deterioration, molding, or contamination by vermin, in violation of 9 C.F.R. §§ 2.100(a) and 3.125(c). An APHIS inspector inspected Big Bear Farm, Inc., on September 30, 1991, and found that bagels were stored on the ground in open bags or in a plastic container that was not leak-proof and did not have a tight-fitting lid. (CX-3, p. 2; Tr. 91, 94-95.) The record shows that just prior to the inspection, the bagels had been left by a local baker and that the violation was corrected at the time of inspection. (Tr. 95-96; CX-3, p. 2.) Nonetheless, on September 30, 1991, Respondents were, for some period of time, in violation of 9 C.F.R. §§ 2.100(a) and 3.125(c).

Paragraphs III(B)(3) and IV(B)(3) of the Complaint allege that on August 27, 1991, and September 30, 1991, respectively, Respondents failed to provide a suitable method to eliminate excess water rapidly from outdoor housing facilities for animals, in violation of 9 C.F.R. §§ 2.100(a) and 3.127(c). On an August 27, 1991, inspection of Big Bear Farm, Inc., two APHIS inspectors found an excess accumulation of algae in both the tiger and bear enclosures, indicating that there was no suitable method to eliminate water rapidly from those enclosures. (CX-2, p. 4; Tr. 76.) Similarly, during a September 30, 1991, inspection of Big Bear Farm, Inc., an APHIS inspector found an excess accumulation of algae in the bear enclosure. (Tr. 92, 97; CX-3, p. 2.)

Paragraph III(B)(4) of the Complaint alleges that sufficient shade was not provided to allow rabbits to protect themselves from the direct sunlight, in violation of 9 C.F.R. §§ 2.100(a) and 3.52(a). On an August 27, 1991, inspection of Big Bear Farm, Inc., two APHIS inspectors found that the shelter provided for rabbits kept outdoors was not sufficient to allow all rabbits to protect themselves from the direct sunlight. (Tr. 33, 191, 199; CX-2, p. 6.) Respondent Andrew Burr disputes the number of shelters available, but states that he built additional shelters after the inspection. (Tr. 375-76.)

Paragraphs III(B)(5), VI(C)(3), and VII(B)(2) of the Complaint allege that sufficient shelter was not provided to allow rabbits to remain dry during rain, in violation of 9 C.F.R. §§ 2.100(a) and 3.52(b). On August 27, 1991, two APHIS inspectors found that "3 houses are present now but more are needed to provide for shade (or something else to provide for shade/shelter) so that all the rabbits contain [sic] in that enclosure can get relief from the weather. . . ." (CX-2, p. 6.) Both APHIS inspectors testified that there was insufficient shelter for the rabbits, and one of the inspectors specifically stated that the shelter was not sufficient for the rabbits to remain dry during rain. (Tr. 76-78, 199.)

Respondent Andrew Burr disputes the number of shelters available, but states that he built additional shelters after the inspection. (Tr. 375-76.)

During a July 28, 1992, inspection of Big Bear Farm, Inc., an APHIS inspector found that rabbits kept outdoors were not provided with access to shelter to allow them to remain dry during rain or snow. (Tr. 124; CX-7, p. 3.) Respondent Andrew Burr stated that there were barrels in rabbit pens to provide rabbits access to shelter, but acknowledges that he was told that there were not enough barrels for the number of rabbits. (Tr. 318.) Similarly, during a September 2, 1992, inspection of Big Bear Farm, Inc., two APHIS inspectors found that "there were 6 rabbits housed in an enclosure equipped with a shelter box that could reasonably be expected to accommodate 3-4 rabbits." (CX-8, p. 3; see also Tr. 134, 226.) The violation was corrected during the inspection. (Tr. 134; CX-8, p. 3.)

Paragraph III(B)(7) of the Complaint alleges that on August 27, 1991, water receptacles were not kept clean and sanitary, in violation of 9 C.F.R. §§ 2.100(a), 3.55, and 3.130. During an August 27, 1991, inspection of Big Bear Farm, Inc., two APHIS inspectors found that the "rabbit, tiger/goats & sheep watering receptacles had an accumulation of dirt and algae these need to be cleaned & kept clean and sanitary." (CX-2, p. 8; see also Tr. 79-82, 161-62.) Respondent Andrew Burr denies that there was any algae in the drinking water, (Tr. 323-24), but states that "[t]here might have been a little on the edge and the side of the bucket because on a regular interval at least once a day Carol [Burr] goes around with a toilet brush and does all of the buckets." (Tr. 324, ll. 8-11.)

Paragraphs III(B)(8) and VII(B)(5) of the Complaint allege that on August 27, 1991, and September 2, 1992, respectively, primary enclosures were not kept clean, in violation of 9 C.F.R. §§ 2.100(a) and 3.131(a); paragraph VI(C)(6) of the Complaint alleges that on July 28, 1992, primary enclosures for rabbits were not kept clean and sanitized, in violation of 9 C.F.R. §§ 2.100(a) and 3.56(a); and paragraph VIII(C)(2) of the Complaint alleges that on February 9, 1993, primary enclosures were not kept clean, in violation of 9 C.F.R. §§ 2.100(a), 3.84(a), and 3.131(a).

On an August 27, 1991, inspection of Big Bear Farm, Inc., two APHIS inspectors found that "[t]here was an (excess) accumulation [sic] of feces, hair, old food within the silver fox enclosure." (CX-2, p. 4; see also Tr. 83-84, 162-64.) On July 28, 1992, two APHIS inspectors found that "3 pens housing 10 rabbits had an accumulation of feces and straw several inches thick. Also excreta buildup inside shelter boxes in these pens was noted. In primary enclosures equipped with solid floors soiled litter shall be removed and replaced

with clean litter at least once each week (as per 9 CFR sec. 3.56a, 2). Currently soiled litter is removed and replaced approximately monthly." (CX-7, p. 5; see also Tr. 129-30.) On a September 2, 1992, inspection of Big Bear Farm, Inc., two APHIS inspectors found that "one pen housing 2 fallow deer had an accumulation of soiled bedding several inches thick," (Tr. 48, 138, 226; CX-8, p. 4; CX-9A and B); and during a February 9, 1993, inspection of Big Bear Farm, Inc., two APHIS inspectors found that the resting boards inside both the rhesus monkey and the arctic fox enclosures bore an accumulation of feces, bedding, and food waste which had been smeared into the boards. (Tr. 59-60, 149, 258, 428-29; CX-12, p. 3.) Similarly, the gray squirrel enclosure contained an accumulation of feces, food, feathers, and bedding material piled up to a height of 3-4 inches at one end of the cage, and covered the rest of the floor of the enclosure (excluding the shelter box) to a height of approximately one-half inch. (Tr. 58-59, 150, 251; CX-9(e); CX-9(f); CX-9(g); CX-12, p. 3.)

Paragraphs III(B)(9) and IV(B)(5) of the Complaint allege that on August 27, 1991, and September 30, 1991, respectively, Respondents' premises (buildings and grounds) were not kept clean and in good repair and free from accumulations of trash, in violation of 9 C.F.R. §§ 2.100(a) and 3.131(c). On an August 27, 1991, inspection of Big Bear Farm, Inc., two APHIS inspectors found that the "(1) area behind/between bears/coyotes/foxes/raccoon enclosures—had an accumulation of brush & weeds which need to be removed/trimmed back. . . . (2) Refrigerator—(walk-in)—had an excess accumulation of old, isolated pieces of fruits/vegetables/bread on the floor this storage area needs to be kept clean & sanitary." (CX-2, p. 6; see also Tr. 84-86.) On September 30, 1991, an APHIS inspector found weeds and tall grass around the cages containing the fox pup and red fox. (Tr. 106-07; CX-3, p. 4.) Andrew Burr testified that he allowed the weeds to grow in order to provide shade for the animals. (Tr. 305-07.)

Paragraphs V(B)(2) and VI(C)(4) of the Complaint allege that on May 7, 1992, and July 28, 1992, respectively, animals kept outdoors were not provided with adequate shelter from inclement weather, in violation of 9 C.F.R. §§ 2.100(a) and 3.127(b). On a May 7, 1992, inspection of Big Bear Farm, Inc., two APHIS inspectors found that "the enclosure housing 2 fallow deer did not have adequate shelter from the elements. Plywood had been placed over the top and one wall of the enclosure which is constructed of wire mesh over a wood frame. Adequate shelter should consist of a roof and at least 3 sides of mater [sic] which shelters the animals from wind and rain." (CX-5, p. 2; see also Tr. 113, 167.) On a July 28, 1992, inspection of Big Bear Farm, Inc., two APHIS inspectors found that "the petting zoo enclosure housed 1 potbellied pig, 5 sheep

and 7 goats was equipped with 2 wood shelter boxes and 1 plastic barrel. There was not enough total shelter space to accommodate [sic] all animals housed in this enclosure at the same time." (CX-7, p. 3; see also Tr. 124-28.)

Paragraph VI(C)(2) of the Complaint alleges that on July 28, 1992, Respondents did not make provisions for removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards, in violation of 9 C.F.R. §§ 2.100(a) and 3.125(d). On a July 28, 1992, inspection of Big Bear Farm, Inc., two APHIS inspectors found that a "cart full of garbage was . . . in close proximity to an enclosure housing." (CX-7, p. 2; see also Tr. 122-24, 220, 315-16.) One of the inspectors testified that the cart did not have a lid, (Tr. 122), and Respondent Andrew Burr testified that the cart is used to load food waste and that after Respondents were cited for the violation, they purchased a tarpaulin and keep the cart covered at all times, except to load it. (Tr. 315-16.)

Paragraphs V(A), VI(B), VII(A), and VIII(B) of the Complaint allege that on May 7, 1992, July 28, 1992, September 2, 1992, and February 9, 1993, respectively, Respondents failed to provide veterinary care to animals in need of such care. On the May 7, 1992, inspection of Big Bear Farm, Inc., two APHIS inspectors found that:

#48 Veterinary Care Sec. 2.40.

On 5/7/92 the following animals were noted to be in need of attention:

- (1) Juvenile Brown Bear had an approximately 1 inch diameter swelling on its muzzle. This animal should be examined by the attending veterinarian;
- (2) The yak's hooves were overgrown and in need of trimming. (CX-5, p. 2; see also Tr. 108-13, 247.)

The record clearly indicates that after the May 7, 1992, inspection, Respondents did have the bear's nose examined and that on the next subsequent inspection the yak's hooves were not identified as in need of trimming. (RX-6; CX-7.) On July 28, 1992, APHIS inspectors observed a rabbit with hair loss and a 2-inch diameter swelling on its back. (Tr. 117-18; CX-7, p. 6.) Andrew Burr testified that after the July 28, 1992, inspection, a veterinarian prescribed some ointment to put on the swelling and told him to leave it there until it

matured, at which time he was to give it a quarter-inch lance. (Tr. 316-17.) When APHIS requested a letter from a veterinarian confirming this treatment, Respondents obtained a letter from a veterinarian detailing the rabbit's treatment. (Tr. 316-17, 387-90.) On September 2, 1992, two APHIS inspectors found that "one rabbit described in the July 28, 1992, inspection report has been treated for an abscess. While the initial lesion appears to be healing well, this rabbit has developed another fluctuant swelling approximately 1½-2 inches in diameter on its back." (CX-8, p. 4; see also Tr. 48, 132, 229-30, 235-36.) On February 9, 1993, an arctic fox was found to have excessively dilated pupils. (Tr. 60, 143-45, 251, 258-59; CX-12, p. 3.) Andrew Burr and Carol Burr testified that the fox was going blind because of age, and that, when they took it to the veterinarian the next day, the doctor confirmed that the condition was due to age and that no treatment would be appropriate. (Tr. 321-22, 390-92, 402-03; RX-6(b).)

The failure to provide prompt veterinary care to an animal can constitute a serious threat to an animal's health. In this case, however, veterinary care was not deliberately withheld from the animals and it is not shown that Respondents made a practice of withholding necessary veterinary care from their animals. However, to the extent they did not provide veterinary care in four instances, Respondents were not in compliance with 9 C.F.R. § 2.40.

Paragraphs III(B)(1), IV(B)(1), and VII(B)(4) of the Complaint allege that on August 27, 1991, September 30, 1991, and September 2, 1992, respectively, Respondents' housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals, in violation of 9 C.F.R. §§ 2.100(a) and 3.125(a). On August 27, 1991, two APHIS inspectors found that Respondents' llama enclosure had "a 6-12 inch gap between the ground and bottom of fencing along gate way." (CX-2, p. 2; see also Tr. 32-33, 69.) Further, the APHIS inspectors found that on the "goats/sheep/ pig enclosure [a] 3-4 ft wide piece of fencing attached to primary fence, has begun to pull away exposing jagged edges." (CX-2, p. 4; see also Tr. 32-33, 69). The record shows further that, on September 30, 1991, gaps were found in the perimeter fencing behind the bobcat and tiger enclosures. (CX-3, p. 2; Tr. 94.) On September 2, 1992, Respondents also failed to maintain the pen housing the yak in good repair. (CX-8, p. 3.)

Paragraphs II(1), V(B)(1), VI(C)(1), VII(B)(3), and VIII(C)(1) of the Complaint allege that on March 27, 1990, May 7, 1992, July 28, 1992, September 2, 1992, and February 9, 1993, respectively, Respondents' facility lacked a perimeter fence or equivalent safeguards necessary for the containment

of dangerous, carnivorous wild animals, in violation of 9 C.F.R. §§ 2.100(a) and 3.125(a). On March 27, 1990, an APHIS inspector found that "the perimeter fence [at Big Bear Farm, Inc.,] is presently under construction around the outside facility used to house the large cats. Presently, the bobcats are the only animals in outside enclosures." (CX-1, p. 2; see also Tr. 16, 18-20.) During the May 7, 1992, July 28, 1992, September 2, 1992, and February 9, 1993, inspections of Big Bear Farm, Inc., APHIS inspectors found the perimeter fence to still be incomplete, (CX-5, p. 3; CX-7, p. 7; CX-8, p. 3; CX-12, p. 2.)

Andrew Burr testified that prior to the first APHIS inspection and before he received his initial exhibitor's license, he had a discussion with Dr. Beasley, an animal care specialist with APHIS, concerning what was necessary for a perimeter barrier:

Dr. Beasley pretty much laid the format and ground rules for the building of the enclosures and also she told us that there had to be around the bear cages there had to be eight foot high. It was six foot high at first she told us and then she came back at a later date and told us that it had to be eight foot and I complained about it and she said well you can put two more feet of barbed wire on the top and make it eight foot and we did it just as she told us. (Tr. 287.)

Andrew Burr further testified: "We later on were told that we had to have a [perimeter] fence around the total compound which encompasses 125 acres." (Tr. 288.) Andrew Burr said that he began working on the perimeter fence "right then and there," but soon ran into trouble with the town supervisors, delaying the project. (Tr. 289.) Despite these extenuating circumstances, Respondents' failure to provide adequate perimeter fencing constitutes a violation of the standards. *In re Patrick D. Hoctor*, 54 Agric. Dec. 114 (1995), *appeal docketed*, No. 95-2571 (7th Cir. July 3, 1995).

Finally, on inspection visits conducted on March 27, 1990, August 27, 1991, September 30, 1991, May 7, 1992, July 28, 1992, and September 2, 1992, APHIS inspectors found violations of the Act, regulations, and standards and gave Respondents time to correct such violations. Respondents corrected many of the violations by the time of the next APHIS inspection. However, the record establishes that on each of seven inspections Respondents were not in compliance with the Act and the regulations and standards issued under the Act.

Findings of Fact

1. Respondents Andrew Burr and Carol Burr are individuals whose mailing address is (b) (6).
2. Respondents are owners and managers of Big Bear Farm, Inc., a Pennsylvania corporation operating from the same address.
3. At all times material herein, Respondent Big Bear Farm, Inc., was licensed and operating as an exhibitor as defined in the Act and the regulations.
4. On [August 27, 1991,] September 30, 1991, [July 28, 1992,] and February 9, 1993, Respondents failed to maintain complete records showing the acquisition, disposition, and identification of animals.
5. On September 30, 1991, May 7, 1992, and July 28, 1992, Respondents failed to develop, document, and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of nonhuman primates.
6. On [August 27, 1991, and] September 30, 1991, Respondents failed to provide a suitable method to eliminate excess water rapidly from outdoor housing facilities for animals.
7. On [August 27, 1991, and] September 30, 1991, . . . Respondents failed to keep [their] premises (buildings and grounds) clean and free of accumulations of trash.
8. On [May 7, 1992,] July 28, 1992, September 2, 1992, and February 9, 1993, Respondents failed to provide veterinary care to animals in need of care.
9. On [August 27, 1991,] September 30, 1991, and September 2, 1992, Respondents' housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, and to contain the animals. . . .
10. On [March 27, 1990,] May 7, 1992, July 28, 1992, September 2, 1992, and February [9], 1993, Respondents' facility was not constructed in a manner appropriate for the animals involved, in that it lacked a suitable perimeter fence or equivalent safeguards necessary for the safe containment of dangerous, carnivorous wild animals.
11. On [August 27, 1991, July 28, 1992,] September 2, 1992, [and February 9, 1993,] Respondents failed to keep primary enclosures clean.
12. On September 30, 1991, Respondents failed to store food in facilities that adequately protect such food against deterioration, molding, or contamination by vermin.

[13. On August 27, 1991, Respondents failed to provide sufficient shade to allow all rabbits kept outdoors to protect themselves from the direct rays of the sun.]

[14. On August 27, 1991, July 28, 1992, and September 2, 1992, Respondents failed to provide rabbits kept outdoors with access to shelter to allow them to remain dry during rain or snow.]

[15. On August 27, 1991, Respondents failed to keep water receptacles clean and sanitary, and failed to sanitize water receptacles when dirty.]

[16. On May 7, 1992, and July 28, 1992, Respondents failed to provide animals kept outdoors with adequate shelter from inclement weather.]

[17. On July 28, 1992, Respondents failed to provide for removal and disposal of food waste so as to minimize vermin infestation, odors, and disease hazards.]

Conclusions of Law

1. On [August 27, 1991,] September 30, 1991, [July 28, 1992,] and February 9, 1993, Respondents violated . . . 7 U.S.C. § 2140 and . . . 9 C.F.R. § 2.75(b)(1) by failing to maintain complete records showing the acquisition, disposition, and identification of animals.

2. On September 30, 1991, May 7, 1992, and July 28, 1992, Respondents violated . . . [9 C.F.R. §§] 2.100(a) and 3.81 by failing to develop, document, and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of nonhuman primates.

3. On [August 27, 1991, and] September 30, 1991, Respondents violated . . . [9 C.F.R. §§] 2.100(a) and 3.127(c) by failing to provide a method to eliminate excess water rapidly from outdoor housing facilities for animals.

4. On September 30, 1991, Respondents violated . . . [9 C.F.R. §§] 2.100(a) and 3.131(c) [by failing to keep grounds clean;] on [August 27, 1991, and] September 2, 1992, Respondents violated . . . [9 C.F.R. §§] 2.100(a) and 3.131(a) [by failing to keep primary enclosures clean;] on [August 27, 1991, Respondents violated . . . 9 C.F.R. §§ 2.100(a) and 3.131(c) by failing to keep the buildings and grounds clean and free of accumulations of trash; on July 28, 1992, Respondents violated 9 C.F.R. §§ 2.100(a) and 3.56(a) by failing to keep primary enclosures for rabbits clean;] and on February 9, 1993, Respondents violated 9 C.F.R. §§ 2.100(a), 3.84(a), and 3.131[(a) by failing to keep primary enclosures clean.]

5. On [May 7, 1992,] July 28, 1992, September 2, 1992, and February 9, 1993, Respondents violated . . . [9 C.F.R. §] 2.40 by failing to provide veterinary care to animals in need of such care.

6. On [August 27, 1991,] September 30, 1991, and September 2, 1992, Respondents violated . . . [9 C.F.R. §§] 2.100(a) and 3.125(a) by failing to [provide] structurally sound housing facilities for animals [and failing to maintain such facilities] in good repair so as to protect the animals from injury and to contain the animals.

7. On [March 27, 1990,] May 7, 1992, July 28, 1992, September 2, 1992, and February 9, 1993, Respondents violated . . . [9 C.F.R. §§] 2.100(a) and 3.125(a) by failing to erect a suitable perimeter fence or have equivalent safeguards necessary for the safe containment of dangerous, carnivorous wild animals.

[8. On September 30, 1991, Respondents violated 9 C.F.R. §§ 2.100(a) and 3.125(c) by failing to store food in facilities which adequately protected such food against deterioration, molding, or contamination by vermin.

[9. On August 27, 1991, Respondents violated 9 C.F.R. §§ 2.100(a) and 3.52(a) by failing to provide sufficient shade to allow rabbits kept outdoors to protect themselves from the direct rays of the sun.

[10. On August 27, 1991, July 28, 1992, and September 2, 1992, Respondents violated 9 C.F.R. §§ 2.100(a) and 3.52(b) by failing to provide sufficient shelter to allow rabbits kept outdoors to remain dry during rain or snow.

[11. On August 27, 1991, Respondents violated 9 C.F.R. §§ 2.100(a) and 3.55 by failing to sanitize watering receptacles when dirty, and 9 C.F.R. §§ 2.100(a) and 3.130 by failing to keep water receptacles clean and sanitary.

[12. On May 7, 1992, and July 28, 1992, Respondents violated 9 C.F.R. §§ 2.100(a) and 3.127(b) by failing to provide animals kept outdoors with adequate shelter from inclement weather.

[13. On July 28, 1992, Respondents violated 9 C.F.R. §§ 2.100(a) and 3.125(d) by failing to make provision for the removal and disposal of food waste so as to minimize vermin infestation, odors, and disease hazards.]

Issues Raised By Respondents on Appeal to the Judicial Officer

Respondents raise six issues on appeal. First, Respondents contend that:

The violations found by the [ALJ] under Conclusions of Law numbers 1 through 4, 6 and 7, were incorrect in that Complainant is

estopped from charging the particular violations involved due to its previous admission through correspondence that these violations did not exist (see Respondents pre-marked Exhibit No. 10). By affirmatively stating that only certain violations existed at the time such letters were promulgated, the Department is precluded from raising violations at a later time which should have been recognized at the time of correspondence. (Respondents' Appeal of Decision of Administrative Law Judge, p. 1), (hereafter RA).

Respondents did not introduce Respondents' Exhibit No. 10 and no such exhibit was admitted into evidence. However, I infer from the record, (Tr. 325-30; RA, p. 1; and RX-11(a) and RX-11(b)), that Respondents' reference in their appeal to "Respondents' pre-marked Exhibit No. 10" is in error,⁴ and that Respondents meant to refer to: (1) a 2-page letter from Dr. Valencia D. Colleton, Northeast Sector Supervisor, REAC-Animal Care, APHIS, USDA, to Andrew and Carol Burr, Owners, Big Bear Farm, Inc., dated December 15, 1992, (RX-11(a)), which has been admitted into evidence; and (2) a 1-page letter from Dr. Colleton to Andrew and Carol Burr, dated January 15, 1993, (RX-11(b)), which has been admitted into evidence.

The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct. *Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986). One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his position for the worse. *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, *supra*, 965 F.2d at 418. The record does not show that Respondents acted to their detriment based on the fact that the two letters in question from the Complainant, RX-11(a) and RX-11(b), did not cite all the violations either alleged in the Complaint, or found by the ALJ in the Initial Decision and Order. Therefore, there is no factual basis for estoppel in this case.

⁴Respondents note that their appeal was prepared without benefit of the transcript. (RA, p. 1, n.1.)

Further, even if Respondents had acted to their detriment based on the letters in question, RX-11(a) and RX-11(b), it is well settled that the government may not be estopped on the same terms as any other litigant. *Heckler v. Community Health Services, supra*, 467 U.S. at 60; *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947). It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws. *Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), cert. denied, 451 U.S. 988 (1981). Equitable estoppel does not generally apply to the government acting in its sovereign capacity, as it was doing in this case, *United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 416 (1991); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979), aff'd, No. H-79-210 (D. Conn. Feb. 6, 1981), appeal dismissed, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975), aff'd, 549 F.2d 830 (D.C. Cir.) (unpublished), cert. denied, 434 U.S. 920 (1977), and estoppel is only available if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government. *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *In re All-Airtransport, Inc., supra*, 50 Agric. Dec. at 418, citing *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971). Respondents bear a heavy burden when asserting estoppel against the government and they have fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Finally, RX-11(a) and RX-11(b) neither admit that the violations alleged in the Complaint and later found by the ALJ, (Initial Decision and Order, pp. 14-15), do not exist, nor affirmatively state that only "certain violations existed at the time such letters were promulgated," as Respondents contend. (RA, p. 1.)

RX-11(a) and RX-11(b) were dated December 15, 1992, and January 15, 1993, respectively, and obviously cannot constitute an admission that violations did not occur on February 9, 1993, (25 days after the date of the latter letter). Further, by their terms, RX-11(a) and RX-11(b) specifically relate to violations revealed on inspection of Big Bear Farm, Inc., on May 7, 1992, July 28, 1992,

and September 2, 1992. Therefore, the letters cannot operate as an admission that violations did not occur on March 27, 1990, August 27, 1991, September 30, 1991, and February 9, 1993. Moreover, RX-11(a) and RX-11(b) do not in any way indicate that violations other than those cited in the letters had not been found, and they provide no basis for finding the ALJ's Conclusions of Law in error.

Second, Respondents contend that:

The violations found in Conclusion of Law No. 7 should be dismissed as they pertain to a perimeter fence, the basis of which has been ruled as unenforceable in the case of *In re Patrick D. Hocktor* [sic], AWA Docket No. 93-10, 9 C.F.R. Section 3.125. (RA, pp. 1-2.)

The ALJ found in Conclusion of Law 7 that: "On May 7, 1992, July 28, 1992, September 2, 1992, and February 9, 1993, Respondents violated section 2.100(a) of the regulations and section 3.125(a) of the standards, by failing to erect a suitable perimeter fence or equivalent safeguard necessary for the safe containment of dangerous, carnivorous wild animals." (Initial Decision and Order, p. 15.)

9 C.F.R. § 3.125(a) provides:

(a) *Structural strength.* The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

APHIS has, by memorandum, interpreted this structural strength standard to require a perimeter fence that is capable of containing wild and dangerous animals, (such as some of those kept by Respondents), and of preventing intrusion by unauthorized humans, predators, and small mammals which can carry diseases.

Respondents base their argument for dismissal of the ALJ's Conclusion of Law No. 7 on an Initial Decision and Order issued in *In re Patrick D. Hocktor*, in which an ALJ found that the perimeter fence requirement is a substantive rule which is invalid because it was not published in the *Federal Register*. The ALJ's Initial Decision and Order in *In re Patrick D. Hocktor*, as to the enforceability of the perimeter fence requirement, was reversed. *In re Patrick*

D. Hoctor, 54 Agric. Dec. 114 (1995), *appeal docketed*, No. 95-2571 (7th Cir. July 3, 1995). The Department has consistently interpreted 9 C.F.R. § 3.125(a) to require dealers and exhibitors to erect an appropriate perimeter fence for some types of animals in appropriate circumstances. *In re Patrick D. Hoctor*, *supra*, 54 Agric. Dec. at 124. See also *In re Cecil Browning*, 52 Agric. Dec. 129, 132, 143-44 (1993), *aff'd per curiam*, 15 F.3d 1097 (11th Cir. 1994) (Table); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1059 (1992), *aff'd sub nom. Wilson v. United States Dep't of Agric.*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)). *In re Gus White*, 49 Agric. Dec. 123, 129, 134, 139, 146-47 (1990). The Initial Decision and Order in *In re Patrick D. Hoctor* provides no basis for finding the ALJ's Conclusion of Law No. 7 in this case in error.

Third, Respondents contend that:

The [ALJ] erred in failing to dismiss the Complaint in its entirety in that the Complaint, as drafted, did not provide adequate notice of the specific activities claimed to be in violation of the regulations. Instead, the Complaint simply cites the regulation in question, and claims an alleged violation, without any factual allegations therein, which does not provide Respondents with an opportunity to defend and adequately prepare against the charges. *See*, USDA Complaint. (RA, p. 2.)

It is well settled that the formalities of court pleading are not applicable in administrative proceedings. *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940). Due process is satisfied when the litigant is reasonably apprised of the issues in controversy. *In re Pet Paradise, Inc.*, *supra*, 51 Agric. Dec. at 1066; *In re Dr. John H. Collins*, 46 Agric. Dec. 217, 233 n. 8 (1987). It is only necessary that the Complainant in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisfies due process in the absence of a showing that some party was misled.⁵

⁵*NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats v. United States Dep't of Agric.*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953).
(continued...)

Respondents contend that the Complaint filed in the instant case simply cites the regulations alleged to have been violated and does not set forth factual allegations regarding those violations. There is no basis for Respondents' contention. The Complaint clearly states the nature of the proceeding and identifies the Complainant and Respondents, the legal authority and jurisdiction under which the proceeding was instituted, and the nature of the relief sought. Each violation alleged in the Complaint states the date of the alleged violation, the issue in controversy, and the statute and, or, regulation violated. (Complaint.) The Complaint filed in this case fully apprised Respondents of the issues in controversy, satisfies due process, and complies with the applicable Rules of Practice, 7 C.F.R. § 1.135,⁶ and there is nothing in the record to indicate that Respondents were misled by the Complaint.

Fourth, Respondents contend that:

The [ALJ] erred in finding violations based upon testimony which was not subject to cross examination, in particular, the submission of investigation reports which were accepted by the court as substantive evidence in the case. A review of the record indicates that on the few occasions where the witness was able to testify as to the specific nature of the violation (as opposed to relying solely upon a report),

⁵(...continued)

Cir. 1953), cert. denied, 347 U.S. 1016 (1954); *American Newspaper Pub. Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), cert. denied sub nom. *International Typographical Union v. NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re James Petersen*, 53 Agric. Dec. 80, 92 (1994); *In re Pet Paradise, Inc., supra*, 51 Agric. Dec. at 1066; *In re SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 264-65 (1988), aff'd per curiam, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (ruling on certified questions), final decision, 39 Agric. Dec. 184 (1980), appeal dismissed, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re A.S. Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976).

⁶ § 1.135 Contents of complaint.

A complaint filed pursuant to § 1.133(b) shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought. (7 C.F.R. § 1.135.)

those allegations were dismissed after being subject to cross examination. For example, Paragraph III.B.10. of the Complaint turned out to be the presence of a rodent within the confines of the facility, with the witness admitting that any animal, even a field mouse, would cause him to write up a violation, Count IV.B.2., which turned out to be a bag of bagels that had just been dropped off by a friend, another allegation based upon the existence of a spider web in a barn, and another based upon a lid sitting next to a barrel which was corrected in one second by placing the lid on top. (The specific complaint numbers of the last two violations cannot be ascertained due to the deficiencies in the Complaint as outlined above.) The fact that an inspector noted a violation in a report is not substantive evidence of the violation, and all findings based upon such documents without testimony subject to cross examination should be dismissed. (RA, p. 2.)

Each of the violations alleged in the Complaint was based, in part, on inspection reports prepared on the date of inspection by the APHIS inspectors who conducted the inspections.⁷ All of the inspectors who prepared those inspection reports were called as witnesses by the Complainant and, as Respondents contend, many of the inspectors had no present recollection, at the

⁷CX-1: An inspection report prepared by an APHIS inspector, Mr. Stephen Smith, on the date of his inspection of Respondents' facility, March 27, 1990, in which he found the violation alleged in Count II of the Complaint. CX-2: An inspection report prepared by APHIS inspectors, Dr. James O'Malley and Ms. Jan Puzas, on the date of their inspection of Respondents' facility, August 27, 1991, in which they found the violations alleged in Count III.A., B.1-5, 7-10 of the Complaint. CX-3: An inspection report prepared by an APHIS inspector, Dr. O'Malley, on the date of his inspection of Respondents' facility, September 30, 1991, in which he found the violations alleged in Count IV of the Complaint. CX-5: An inspection report prepared by APHIS inspectors, Dr. O'Malley and Ms. Karla Wills, on the date of their inspection of Respondents' facility, May 7, 1992, in which they found the violations alleged in Count V of the Complaint. CX-7: An inspection report prepared by APHIS inspectors, Dr. O'Malley and Dr. Frances Miava Binkley, on the date of their inspection of Respondents' facility, July 28, 1992, in which they found the violations alleged in Count VI of the Complaint. CX-8: An inspection report prepared by APHIS inspectors, Drs. O'Malley and Binkley, on the date of their inspection of Respondents' facility, September 2, 1992, in which they found the violations alleged in Count VII of the Complaint. CX-12: An inspection report prepared by APHIS inspectors, Dr. O'Malley and Ms. Wills, on the date of their inspection of Respondents' facility, February 9, 1993, in which they found the violations alleged in Count VIII of the Complaint.

time of their testimony at the hearing, of all of the findings reflected on their respective inspection reports.⁸

Respondents did not object to the admission into evidence of the inspection report prepared by APHIS inspector Stephen Smith on March 27, 1990, in which he recorded his observations upon which the violation alleged in Count II of the Complaint is based, (CX-1), and, therefore, Respondents are not in a position to complain now. *In re Gary Edwards*, 54 Agric. Dec. 348, 352 (1995); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1942 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983). The applicable Rules of Practice provide that:

(2) *Objections.* (i) If a party objects to the admission of any evidence . . . , the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Judge.

(ii) Only objections made before the Judge may subsequently be relied upon in the proceeding. (7 C.F.R. § 1.141(g)(2)(ii) (1995).)

Respondents did, however, object to the admission of all the other inspection reports, CX-2, CX-3, CX-5, CX-7, CX-8, and CX-12. (Tr. 40, 43, 51, 64.) However, Respondents' contention that the evidence in those reports cannot be admitted and constitute the basis for a finding of a violation of the Act and regulations and standards issued under the Act is rejected. Contrary to Respondents' contention, administrative agencies are not barred from reliance

⁸APHIS inspector Stephen Smith testified that he did remember the violation reflected in his inspection report (CX-1) and alleged in Count II of the Complaint. (Tr. 16.) APHIS inspector Dr. O'Malley testified that he had some recollection of some of the violations reflected in his inspection reports and that those reports refreshed his recollection with respect to some violations reflected in his inspection reports and alleged in Counts III-VIII of the Complaint. (Tr. 28-37, CX-2; Tr. 37-40, CX-3; Tr. 41-43, CX-5; Tr. 52-55, CX-7; Tr. 46-52, CX-8; Tr. 56-63, CX-12.) APHIS inspector Jan Puzas testified that she did have some recollection of the violations reflected in her inspection report and that the report refreshed her recollection with respect to some violations reflected in her inspection report and alleged in Count III of the Complaint. (Tr. 189-95, CX-2.) APHIS inspector Karla Wills testified that she had some recollection of some of the violations reflected in her inspection reports and that those reports refreshed her recollection with respect to some violations reflected in her inspection reports and alleged in Counts V and VIII of the Complaint. (Tr. 246-50, CX-5; Tr. 250-53, CX-12.) APHIS inspector Dr. Binkley testified that her inspection reports refreshed her recollection with respect to some of the violations reflected in her inspection reports and alleged in Counts VI and VII in the Complaint. (Tr. 217-25, CX-7; Tr. 225-27, CX-8.)

on hearsay evidence. See, e.g., *Richardson v. Perales*, 402 U.S. 389, 405-06 (1971). Such evidence need only bear satisfactory indicia of reliability, *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982), and can constitute substantial evidence if reliable and trustworthy. *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.), cert. denied, 116 S. Ct. 88 (1995); *Williams v. United States Dep't of Transp.*, 781 F.2d 1573, 1578 n.7 (11th Cir. 1986); *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980). Responsible hearsay has long been admitted in the Department's administrative proceedings.⁹ Past recollection recorded is considered reliable, probative, and substantial evidence and fulfills the requirements of the Administrative Procedure Act, (5 U.S.C. § 556(d)), if made while the events recorded were fresh in the witnesses' minds. *In re Gary Edwards*, *supra*, 54 Agric. Dec. at 351-52; *In re Bill Young*, 53 Agric. Dec. 1232, 1253 (1994), rev'd, 53 F.3d 728 (5th Cir. 1995) (2-1 decision); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 284 (1994), appeal voluntarily dismissed, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1300 (1993), appeal dismissed, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims*, 52 Agric. Dec. 1243, 1264 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1236 (1993), aff'd, 50 F.3d 46 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 88 (1995). The inspection reports at issue were prepared contemporaneously with the observations made by the inspectors. All of the inspection reports reflect thoroughness. All of the inspectors who prepared the reports testified at the hearing and had some recollection of some of the findings contained in the reports. All of the inspectors who prepared the inspection reports were subject to cross-examination by Respondents who had an opportunity to challenge the reliability of the factual findings contained in the inspection reports. Accordingly, the inspection reports in question were properly admitted and relied on in this case.

Fifth, Respondents contend that:

⁹*In re Jim Fobber*, 55 Agric. Dec. ___, slip op. at 11 (Feb. 7, 1996); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), aff'd, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), aff'd, No. 82-1157 (D.N.J. Jan. 24, 1983), aff'd mem., 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), final decision, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), aff'd, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), aff'd, 524 F.2d 1255 (5th Cir. 1975).

The [ALJ] erred in failing to dismiss all allegations based upon the annual renewal of Respondents' license pursuant to the language of Regulation 2.3(a), which evidences the fact that Complainant found no legitimate violations in that the license was continually renewed. It should be noted that none of the legal arguments raised in items 1 through 5 above, although raised at the hearing, were addressed by the [ALJ] in his decision and Order. (RA, pp. 2-3.)

The annual renewal of Respondents' license under the Act is not evidence that Respondents complied with the Act and the regulations and standards issued under the Act. Section 2.3(a) of the regulations provides that:

(a) Each applicant must demonstrate that his or her premises and any animals, facilities, vehicles, equipment, or other premises used or intended for use in the business comply with the regulations and standards set forth in parts 2 and 3 of this subchapter. Each applicant for an initial license or license renewal must make his or her animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection during business hours and at other times mutually agreeable to the applicant and APHIS, to ascertain the applicant's compliance with the standards and regulations. (9 C.F.R. § 2.3(a).)

I find no language in 9 C.F.R. § 2.3(a) that suggests, as Respondents contend, that license renewal evidences that Respondents did not violate the Act, and the regulations and standards issued under the Act. Even if an inspection were conducted as a prerequisite to each annual renewal of Respondents' license and no violations were found on the date of those renewal inspections, Respondents' compliance at the time of those annual renewal inspections would not constitute a basis for dismissal of alleged violations which are based upon inspections conducted on other occasions.

Sixth, Respondents contend that:

The [ALJ] erred in finding violations and [imposing] sanctions of any nature whatsoever [because the violations were not willful]. (RA, p. 5.)

Respondents cite the ALJ's discussion in his Initial Decision and Order in which he stated, *inter alia*, that recordkeeping deficiencies appear to be "more

of a misunderstanding than an attempt to deceive APHIS" (Initial Decision and Order, p. 4); that, with respect to Respondents' efforts to provide nonhuman primates with an environment to promote psychological well-being, "the procedures that [Respondents followed] . . . were all beneficial and . . . taking place" (Initial Decision and Order, p. 6, quoting testimony of Dr. O'Malley); that, with respect to housekeeping procedures, "the record does not show that Respondents deliberately mistreated their animals" (Initial Decision and Order, p. 7); that, with respect to veterinary care, "veterinary care was not deliberately withheld from the animals and it is not shown that Respondents made a practice of withholding necessary veterinary care from their animals" (Initial Decision and Order, p. 9); and that, with respect to the perimeter fence, Respondents received conflicting advice with respect to what was required (Initial Decision and Order, p. 10).

I agree with the ALJ that Respondents willfully violated the Act and the regulations and standards issued under the Act. An action is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) cert. denied, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Julian J. Toney*, 54 Agric. Dec. ___, slip op. at 53-54 (Dec. 5, 1995); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988).¹⁰ See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973). ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent.") *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean

¹⁰The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, many of Respondents' violations would still be found willful.

with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

Respondents' facility was inspected seven times by five inspectors over the course of almost 3 years and on each occasion violations were found. While Respondents corrected some of the violations either immediately or by the time of the next subsequent inspection, many of the same violations were repeated.

Respondents were fully aware of the applicable regulations and standards. Not only were the regulations and standards published in the *Federal Register*, thereby constructively notifying Respondents of those regulations and standards, *FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976), but also Respondent Andrew Burr stated that he received the applicable regulations and standards approximately once a year. (Tr. 361-62; see also CX-4, CX-13.) Further, after each inspection, Respondents were provided with a copy of the inspection report which identified each violation observed by APHIS inspectors. (CX-1, CX-2, CX-3, CX-5, CX-7, CX-8, and CX-12.) Despite constructive and actual knowledge of the regulations and standards and full disclosure of the observations made by APHIS inspectors during each inspection, Respondents repeatedly violated the Act and the regulations and standards issued under the Act; thus, clearly supporting a finding that Respondents' violations were willful.

Further, 7 U.S.C. § 2149(a) authorizes the suspension or revocation of a license of an exhibitor if the exhibitor has violated or is violating any provision of the Act or any regulation or standard promulgated by the Secretary under the Act. The only requirement is that at least one of the violations be willful. The existence of additional violations not shown to be willful does nothing to take away the Secretary's authority to suspend or revoke an exhibitor's license. *Cox v. United States Dep't of Agric.*, *supra*, 925 F.2d at 1105 n.10.

Finally, even if the Respondents had been able to show that none of their violations were willful, it would not support their contention that the ALJ erred in "assessing sanctions of any nature whatsoever."

The Act provides that:

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. (7 U.S.C. § 2149(b).)

Thus, there is no requirement that the Secretary prove that the violations were willful in order to assess either a civil penalty or issue a cease and desist order under the Act. Willfulness, therefore, is only relevant with respect to that part of the sanction that affects Respondent Big Bear, Inc.'s, license.

Further, in this case, even the suspension of Respondent Big Bear Farm, Inc.'s, license would be proper without proof of willfulness. The Act itself does not require proof of a willful violation in order to suspend or revoke a license. The requirement is in 5 U.S.C. § 558(c) which provides, in pertinent part, as follows:

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements. (5 U.S.C. § 558(c).)

Willfulness need not be proven in proceedings under 5 U.S.C. § 558(c) to withdraw, suspend, revoke, or annul a license if the agency has given the licensee written notice that comports with 5 U.S.C. § 558(c)(1) and the licensee has had an opportunity to demonstrate or achieve compliance with lawful requirements as provided in 5 U.S.C. § 558(c)(2). The record clearly demonstrates that the Respondents were repeatedly notified in writing by APHIS of the facts that would warrant suspension of Respondent Big Bear, Inc.'s, license, and Respondents were repeatedly given an opportunity to achieve

compliance with the Act and the regulations and standards issued under the Act.¹¹

Respondents contend in their Response to Complainant's Appeal of Decision and Order and Opposition to Respondent's [sic] Appeal, (hereafter RRCA), that:

The amount of fines sought by the Department will effectively close down the facility in question. The Department admits the small scale nature of the operation in question, while at the same time requesting fines that are approximately five times the amount of the annual gross income of Big Bear Farms [sic]. The net effect of such a fine would be to forever close down the facility. Based upon the findings of the [ALJ] that any alleged violations were ones of omission rather than commission, and of negligence rather than wilful intent, and that none of the animals had been specifically harmed by the alleged violations, the relief sought is Draconian, and not proportionate to the types of violations alleged. (Emphasis in the original.) (RRCA, ¶ 2.)

Based upon the considerations required by the Act to be made regarding the appropriateness of the penalty, (7 U.S.C. § 2149(b)), the Department's sanction policy, and the facts in this case, I did not assess Respondents Andrew Burr and Carol Burr the full civil penalty requested by the Complainant. The issues raised by Respondents in RRCA, ¶ 2 are addressed below under the heading "Sanction."

Issue Raised By Complainant on Appeal to the Judicial Officer

Complainant appeals the ALJ's dismissal of "27 violations alleged in the Complaint." (Complainant's Appeal of Decision and Order, Opposition to Respondent's [sic] Appeal, and Its Brief in Support Thereof, p. 8) (hereafter CA). Complainant believes that the ALJ dismissed 27 violations alleged in the

¹¹As stated above, Respondents had actual and constructive notice of the applicable regulations and standards. Further, after each inspection, Respondents were provided with a copy of the inspection report which identified each violation observed by APHIS inspectors. Nonetheless, Respondents continued to violate the regulations and standards under the Act, and, often, Respondents continued to engage in violations identical to those previously found by APHIS inspectors and reported to Respondents.

Complaint because Respondents corrected many of the violations by the time of the next APHIS inspection. (CA, p. 8, quoting the ALJ's Decision and Order, p. 11.) However, the ALJ's Decision and Order does not state that Respondents' subsequent correction of violations by the time of the next APHIS inspection is the basis for his dismissal. This Department's policy is that the subsequent correction of a condition not in compliance with the Act or the regulations or standards issued under the Act has no bearing on the fact that a violation has occurred. *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047 (1992), *aff'd sub nom. Wilson v. United States Dep't of Agric.*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)). Each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the regulations in 9 C.F.R. Part 2 and the standards in 9 C.F.R. Part 3. (9 C.F.R. § 2.100(a).) This duty exists regardless of a "correction date" suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation, as occurred in the instant case on a number of occasions, does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation.

The Department's policy regarding corrections of violations of the Act and the regulations and standards issued under the Act was clearly articulated in *In re Pet Paradise, Inc., supra*, which was issued September 16, 1992. Further, the record shows that many of the violations dismissed by the ALJ were not corrected by the next subsequent inspection. Therefore, Complainant may be under a misapprehension regarding the reason for the ALJ's dismissal of "27" alleged violations.

I infer from the ALJ's Decision and Order that the ALJ did not find that Complainant proved its case by a preponderance of the evidence with respect to those violations which he dismissed. As I stated above, I agree with all of the violations that the ALJ did find, and I further find that the record as a whole also shows Complainant carried its burden of proof by a preponderance of the evidence with respect to the violations alleged in paragraphs II(1); III(A); III(B)(1), with respect to violations of 9 C.F.R. §§ 2.100(a) and 3.125(a); III(B)(3); III(B)(4); III(B)(5); III(B)(7); III(B)(8); III(B)(9), with respect to violations of 9 C.F.R. §§ 2.100(a) and 3.131(c); IV(B)(2); V(A); V(B)(2); VI(A); VI(C)(2); VI(C)(3); VI(C)(4); VI(C)(6), with respect to violations of 9 C.F.R. §§ 2.100(a) and 3.56(a); and VII(B)(2) of the Complaint.

While the Complainant has a *prima facie* case with respect to the violations alleged in paragraphs III(B)(1), with respect to violations of 9 C.F.R. §§ 3.53(a)

and 3.80(a); III(B)(2); III(B)(9), with respect to a violation of 9 C.F.R. § 3.84(c); III(B)(10); IV(B)(1), with respect to violations of 9 C.F.R. §§ 3.53(a) and 3.80(a); IV(B)(5), with respect to a violation of 9 C.F.R. § 3.84(c); VI(C)(6), with respect to a violation of 9 C.F.R. § 3.56(b); VI(C)(7); and VII(B)(1) of the Complaint, I do not find that the evidence is strong enough to reverse the ALJ. Further, Complainant has not appealed the ALJ's dismissal of the violation alleged in paragraph III(B)(6) of the Complaint.

Sanction

As to the appropriate sanction, the Act provides:

§ 2149. Violations by licensees

(a) If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. (7 U.S.C. § 2149(a), (b).)

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

The sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

While the annual gross revenue of Respondent Big Bear Farm, Inc., was under \$2,000 in 1993 and 1994, (Tr. 336), the facility covers 125 acres, and by February of 1993, Respondents exhibited between 60 and 75 animals, (Tr. 347). The annual licensing fee regulations, (9 C.F.R. § 2.6), classify exhibitors by the number of animals exhibited. Under this scheme, Respondents' facility is considered fairly large. Thus, I conclude that Respondents operated at least a moderate-sized facility, and certainly one where the civil penalty requested by Complainant would be appropriate.

Respondents state that the "net effect" of the assessment of the civil penalty requested by Complainant, \$9,000, "would be to forever close down [Big Bear Farm, Inc.]" (RRCA, ¶ 2.) The effect of the assessment of a civil penalty on the ability of the Respondents to continue to operate as exhibitors is not one of the criteria required to be examined under the Act, and I have not taken it into account in determining the amount of the civil penalty to assess Respondents Andrew Burr and Carol Burr. See generally *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992), *aff'd sub nom. Wilson v. United States Dep't of Agric.*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)) ("To [the four criteria in the Animal Welfare Act], the Judicial Officer once added a fifth, i.e., a requirement that consideration be given to Respondents' ability to pay civil penalties, but that has since been removed as a criterion, since the [Animal Welfare Act], unlike some other statutes, does not require it." [Footnote omitted]); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) ("[A]bility to pay is not a relevant consideration in Animal Welfare Act cases."); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) ("Ability to pay is a relevant circumstance under a number of civil penalty provisions administered by this Department, e.g., 15 U.S.C. § 1825(b)(1); see also 7 U.S.C. §§ 193(b), 213(b), but since that statutory factor

is not specified in the Animal Welfare Act, it will not be considered in determining future civil penalties under the Animal Welfare Act.").

There is no evidence that Respondents deliberately mistreated the animals. However, Respondents repeatedly and willfully violated the Act and the regulations and standards issued under the Act. Many of the violations were serious and could have impaired the health of the animals.

The Complainant could have sought \$2,500 for each violation.¹² In light of the amount that Complainant could have requested and the number of violations and serious nature of many of the violations, the requested sanction of a civil penalty of \$9,000, and of a 60-day suspension of Big Bear Farm, Inc.'s, license, is modest, not Draconian as Respondents contend. (RRCA, ¶ 2.)

Moreover, an examination of other cases brought by APHIS for similar violations reveals that civil penalties and suspension periods similar to those sought by Complainant in this case have been assessed in the past. See, e.g., *In re Ronald D. DeBruin*, 54 Agric. Dec. ____ (June 29, 1995) (\$5,000 civil penalty and 30-day suspension of a license for 21 violations of the Act and regulations and standards issued under the Act); *In re Patrick D. Hoctor*, 54 Agric. Dec. 114 (1995) (\$7,500 civil penalty and 40-day suspension of a license for "more than" 15 violations of the Act and regulations and standards issued under the Act), *appeal docketed*, No. 95-2571 (7th Cir. July 3, 1995); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (\$2,000 civil penalty and 60-day suspension of a license for numerous violations on four different dates over a 13-month period); *In re James Petersen*, 53 Agric. Dec. 80 (1994) (\$5,000 civil penalty and 1-year license disqualification); *In re Alex Pasternak*, 52 Agric. Dec. 180 (1993) (\$10,000 civil penalty and minimum 1-year license suspension); *In re Dwight Carpenter*, 51 Agric. Dec. 239 (1992) (\$3,000 civil penalty and minimum 6-month license suspension); *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476 (1991) (\$10,000 civil penalty and minimum 1-year license suspension), *aff'd*, 991 F.2d 803 (9th Cir.), 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

¹²I found that Complainant proved its case by a preponderance of the evidence with respect to 36 paragraphs in the Complaint. Complainant could have sought and had assessed a maximum civil penalty of \$2,500 for each paragraph in the Complaint that I found Respondents violated, for a total civil penalty of \$90,000.

Nonetheless, considering the statutory criteria, the Department's sanction policy, the record regarding Respondents' correction of some violations and attempts to correct other violations, the number of violations alleged which I do not find Complainant proved by a preponderance of the evidence, and Complainant's recommendation regarding sanction, I believe a civil penalty of \$6,750 and a suspension of 45 days is appropriate.¹³ Finally, I believe that Respondents should be ordered to cease and desist from further violations.

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

Order

Paragraph I

Respondents Andrew Burr and Carol Burr, as the alter egos of Respondent Big Bear Farm, Inc., are jointly and severally assessed a civil penalty of \$6,750. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded within 120 days of service of this Order to:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Room 2014 South Building
Washington, DC 20250-1400

The certified check or money order should indicate that payment is in reference to AWA Docket No. 93-32.

Paragraph II

Respondent Big Bear Farm, Inc.'s, license under the Animal Welfare Act is hereby suspended for 45 days and thereafter until Respondents' facility is found by APHIS to be in compliance with the Act and the regulations and standards issued under the Act.

¹³Based on the testimony of APHIS inspector Dr. O'Malley and the unique circumstances surrounding the violation, no part of the sanction is based on Respondents' September 30, 1991, violation of 9 C.F.R. §§ 2.100(a) and 3.125(c) alleged in paragraph IV(B)(2) of the Complaint.

Paragraph III

Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued under the Act, and in particular, shall cease and desist from:

1. Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required;
2. Failing to develop, document, and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of nonhuman primates;
3. Failing to provide for the rapid elimination of excess water from housing facilities for animals;
4. Failing to keep the premises (buildings and grounds) clean and in good repair and free of accumulations of trash;
5. Failing to provide adequate veterinary care to animals in need of such care;
6. Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, and contain them securely;
7. Failing to erect a perimeter fence or other equivalent safeguards necessary for the safe containment of dangerous, carnivorous wild animals;
8. Failing to store food in facilities which adequately protect such food against deterioration, molding, or contamination by vermin;
9. Failing to provide sufficient shade to allow rabbits kept outdoors to protect themselves from the direct rays of the sun;
10. Failing to provide sufficient shelter to allow rabbits kept outdoors to remain dry during rain or snow;
11. Failing to sanitize water receptacles when dirty and failing to keep water receptacles clean and sanitary;
12. Failing to provide animals kept outdoors with adequate shelter from inclement weather;
13. Failing to make provision for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards; and
14. Failing to keep primary enclosures clean.

Paragraph II of this Order shall become effective on the 30th day after service of this Order on Respondents. Paragraph III of this Order shall become effective on the day after service of this Order on Respondents.

**In re: WILLIAM JOSEPH VERGIS.
AWA Docket No. 93-25.
Decision and Order filed April 1, 1996.**

Cease and desist order — Civil penalty — License disqualification — Sanction policy — Violation of consent decision — Violation of handling requirements — Credibility — Employees of licensees — Independent contractors working for licensees.

The Judicial Officer affirmed Judge Kane's (ALJ) Decision and Order assessing a civil penalty against Respondent and directing Respondent to cease and desist from violating the Animal Welfare Act (Act) and the regulations and standards issued under the Act. However, the Judicial Officer increased the civil penalty from \$500 to \$2,500; disqualified Respondent from becoming licensed for a period of 1 year; found that Respondent's violation of a regulation issued under the Act constitutes a violation of the cease and desist provisions of the Consent Decision issued in *In re Studio Animal Rentals, Inc.*, AWA Docket No. 88-7 (Feb. 9, 1989); and, in accordance with the Consent Decision, prohibited Respondent from engaging in any activity for which a license is required under the Act until February 11, 1999. Respondent could have been found to have engaged in business as an exhibitor without a license. However, distinctions unique to this record were made between employees of licensees and independent contractors working for licensees, such that it would have presented a reviewing court with too ambiguous a record. Neither the ALJ's Finding of Fact regarding Respondent's credibility nor the ALJ's basis for finding that Respondent had violated 9 C.F.R. § 2.131(b)(1) are adopted. The sanction imposed is appropriate.

Robert A. Ertman, for Complainant.

James J. Lawton, III, St. Paul, Minnesota, for Respondent.

Initial decision issued by Paul Kane, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding under the Animal Welfare Act, as amended, (7 U.S.C. § 2131 *et seq.*), (hereafter Act), and the regulations issued under the Act, (9 C.F.R. § 1.1 *et seq.*). The proceeding was instituted by a Complaint filed on June 24, 1993, by the Acting Administrator of the Animal and Plant Health Inspection Service, (hereafter APHIS), United States Department of Agriculture, (hereafter USDA).

The Complaint alleges that Respondent engaged in business as an exhibitor and dealer under the Act without being licensed, and failed to handle an animal so that there was minimal risk of harm to the animal and to the public, in violation of 9 C.F.R. § 2.131(b)(1). Respondent filed an Answer to the Complaint, and a hearing was held in St. Paul, Minnesota, on September 8-9, 1994. Robert A. Ertman, Esq., represented Complainant. James J. Lawton, III, Esq., represented Respondent.

On June 22, 1995, Administrative Law Judge Paul Kane, (hereafter ALJ), issued an Initial Decision and Order assessing a civil penalty of \$500 against

Respondent and directing that Respondent cease and desist from violations of the Act and the regulations and standards issued under the Act; on August 29, 1995, Complainant appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35);¹ and on November 6, 1995, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, I agree with the ALJ that on November 5, 1990, at Phoenix, Arizona, Respondent willfully violated 9 C.F.R. § 2.131(b)(1) by failing to handle a Bengal tiger so that there was minimal risk of harm to the animal and to the public, as alleged in paragraph III of the Complaint. However, I also find that Respondent's willful violation of 9 C.F.R. § 2.131(b)(1) constitutes a violation of the Consent Decision and Order issued in *In re Studio Animal Rentals, Inc.*, AWA Docket No. 88-7 (Feb. 9, 1989). (CX-1.)

Paragraph II of the Complaint alleges that "[f]rom February 11, 1989, and continuing to the present, the [R]espondent has engaged in business as an exhibitor and dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134), section 2.1 of the regulations (9 C.F.R. § 2.1 (1989, 1992)), and the Decision and Order issued in AWA Docket No. 88-7 on February 9, 1989." Complainant withdrew the allegation in paragraph II of the Complaint that "[f]rom February 11, 1989, and continuing to the present, [R]espondent has engaged in business as a . . . dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134), section 2.1 of the regulations (9 C.F.R. § 2.1 (1989, 1992)), and the Decision and Order issued in AWA Docket No. 88-7 on February 9, 1989." (Complainant's Appeal and Memorandum in Support Thereof, p. 2. n. 1, hereafter CA.) Based upon the unique circumstances in this case, I agree with the ALJ's dismissal of paragraph II of the Complaint.

Applicable Statute and Regulations

7 U.S.C.:

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

§ 2132. Definitions

When used in this chapter—

....

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.] (7 U.S.C. § 2132(h).)

9 C.F.R.:.

PART 1 - DEFINITION OF TERMS**§ 1.1 Definitions.**

....

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary. (9 C.F.R. § 1.1.)

PART 2 — REGULATIONS

Subpart I — Miscellaneous

§ 2.131 Handling of Animals.

....

(b)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public. (9 C.F.R. § 2.131(b)(1).)

....

Discussion

Respondent, is an individual whose address is 3669 Bear Creek Road East, Askov, Minnesota 55704. (Respondent's Brief in Support of Proposed Findings of Fact, Conclusions of Law and Order, p. 25, ¶ 1, hereafter RB.) In connection with a disciplinary proceeding previously instituted under the Act, Respondent, Studio Animal Rentals, Inc., and Complainant agreed to the entry of a Consent Decision and, in accordance with that agreement, Administrative Law Judge James W. Hunt issued a Decision and Order in *In re Studio Animal Rentals, Inc.*, AWA Docket No. 88-7 (Feb. 9, 1989), (hereafter Consent Decision). (CX-1.) The Consent Decision provides, in pertinent part, that:

Order

1. Respondents [Studio Animal Rentals, Inc., and William Joseph Vergis], their agents, employees, successors and assigns, and all persons acting in concert with them, directly or indirectly, shall cease and desist from violating the Act [Animal Welfare Act, as amended, (7 U.S.C. § 2131 *et seq.*)] and the regulations and standards issued thereunder (CX-1, p. 3.)

....

2. Respondent William Joseph Vergis shall not, directly or indirectly, through any agent, employee, corporation, or other device, engage in any activity for which a license is required under the Act and regulations for a period of ten years; provided however, that six years of this ten year period shall be suspended and held in abeyance unless it is found after notice and an opportunity for hearing that he has violated any provision of this order within four years. (CX-1, p. 4.)

In August 1990, Respondent, acting on behalf of Ms. Anne Mackenroth, (then known as Ms. Anne Frantzen), a licensed exhibitor under the Act, (USDA license number 41-C-63; RX-5), entered into a contract with Dun & Bradstreet Software Services, Inc., to exhibit a tiger at the Pointe Resort, Phoenix, Arizona, on November 5, 1990. (Tr. 224-25, 328-31; CX-116A, p. 1; see also CX-104A, pp. 2-4; CX-117A; CX-118.) Dun & Bradstreet Software Services, Inc.'s, Chairman, John P. Imlay, Jr., paid Respondent for the exhibition, (Tr. 330-31; CX-116A, pp. 1-2; CX-119), and Respondent moved one 450-pound male Bengal tiger named Sarang owned by Ms. Mackenroth, (Tr. 174-75), from Ms. Mackenroth's Hinckley, Minnesota, facility to Phoenix, Arizona, in early November 1990. (Tr. 331, 340-42; CX-116A, p. 2.) On the afternoon of November 5, 1990, Respondent exhibited Sarang in the courtyard of the Pointe Resort, Phoenix, Arizona. (CX-101A; CX-104A, p. 2.) During this exhibition, Respondent had Sarang on a leash and stood close to the tiger. (Tr. 139, 147; CX-104A, p. 2.) Ms. Adele Revella, then known as Ms. Adele Kalas, who was at the hotel for a conference, asked Respondent if she could pet the tiger. (Tr. 130, 140, 148; CX-101B, p. 1; CX-104A, p. 2; CX-108, p. 2.) Respondent replied that the tiger was tame and she could pet the tiger. (Tr. 130, 140, 148; CX-101B, p. 1; CX-102, pp. 2-3; CX-104A, p. 2.) Respondent then indicated the manner in which Ms. Revella should approach the tiger. (Tr. 130, 141-43, 148; CX-101B, p. 1; CX-102, p. 3.) As Ms. Revella reached down to pet Sarang, the tiger grabbed Ms. Revella's right leg with his paw, placed Ms. Revella's leg in his mouth, bit down, and stood up, causing Ms. Revella to fall to the ground. (Tr. 130, 143-44, 148; CX-101B, pp. 1-3; CX-102, pp. 1-2; CX-116A, p. 2.) Respondent placed a stick on Sarang's nose and instructed Sarang to release Ms. Revella. (Tr. 131, 144, 148; CX-101B, p. 2; CX-102, p. 4.) When Sarang did not obey, Respondent repeatedly struck Sarang with the stick until it broke. (Tr. 131, 144, 148; CX-101B, p. 2; CX-102, pp. 3-4; CX-104A, p. 2.) For a number of minutes, Sarang dragged Ms. Revella around the grounds of the hotel. (Tr. 131; CX-101B, p. 2; CX-102, p. 3; CX-104A, p.

1.) Respondent asked those present to obtain and strike the tiger with a shovel. (Tr. 131; CX-101B, p. 2.) In an attempt to comply with Respondent's request, Mr. Michael Yazbak, one of the hotel guests, found a metal tube and repeatedly struck Sarang on the head with the tube; two hotel employees inserted a broom handle in Sarang's mouth and attempted to pry Sarang's mouth open; and other persons repeatedly hit Sarang with various objects, often on the head. (Tr. 131-32, 145, 148-49; CX-101B, p. 2; CX-102, pp. 3-4; CX-104A, pp. 2-3; CX-108, pp. 8-9.) For some period of time, Sarang bit Ms. Revella's leg harder each time he was hit, but eventually he stopped dragging Ms. Revella and let go of her leg. (Tr. 131; CX-101B, p. 2.) Ms. Revella had been placed in fear of loosing her leg and even her life; Ms. Revella's leg was broken; Ms. Revella sustained a number of cuts and puncture wounds; and Ms. Revella suffered great pain and inconvenience over an extended period of time. (CX-101B, pp. 2-16; CX-102, pp. 2, 4; CX-104A, pp. 1, 3.)

Sarang was seized from Respondent for brief period of time by Arizona state officials, (CX-104A, p. 4; CX-104B), and the Arizona Game and Fish Department issued a citation to Respondent for failing to keep the tiger from public contact and failing to keep the tiger in complete control. (CX-103, p. 4; CX-104A, pp. 1, 4; CX-104D; CX-108, p. 1.) After the incident, Respondent moved Sarang back to Ms. Mackenroth's Hinckley, Minnesota, facility. (CX-116A, p. 2.)

Respondent testified that on November 5, 1990, he handled Sarang in as careful a manner as possible, (Tr. 446-47, 454), he did not handle Sarang negligently, (Tr. 454), and he provided as safe an environment as possible so that there would be minimal risk for the people that were around Sarang. (Tr. 447-49.) Respondent further testified that, during his exhibition of Sarang, he never gave anyone permission to touch or pet Sarang, (Tr. 450-51), he at all times kept his body between Sarang and the patrons that were viewing Sarang, (Tr. 447), and he was never even a foot away from Sarang, (Tr. 449). Specifically, Respondent testified that: "[h]is [Sarang's] hind feet were probably touching my leg or my foot." (Tr. 449, ll. 20-21.) Despite this testimony regarding his proximity to Sarang, Respondent testified that he was not sure of the direction from which Ms. Revella approached Sarang, but believes that "she had to have approached from the front because it was the only opening, so to speak." (Tr. 452, ll. 11-12.) Respondent also testified that he did not know where Ms. Revella came from, (Tr. 453, ll. 15-16), that he did not see Ms. Revella go around behind Sarang, (Tr. 453, l. 19), and that the incident occurred "behind the tiger and behind me." (Tr. 453, ll. 21-22.) Further,

Respondent testified that he did not see Ms. Revella reach out and try to pet Sarang until after Sarang moved to grab Ms. Revella's leg. (Tr. 451-52.)

Even if I found Respondent's version of the facts surrounding his handling of Sarang on November 5, 1990, convincing, which I do not, I would not agree with Respondent's conclusions regarding the manner in which he handled Sarang and the risk of harm to the public and Sarang posed by Respondent's handling of Sarang. It appears from Respondent's testimony that Respondent did not see Ms. Revella approach Sarang, and that there was neither sufficient distance nor any barriers between Ms. Revella and Sarang to assure the safety of Sarang and Ms. Revella. The record clearly demonstrates that Respondent, in willful violation of 9 C.F.R § 2.131(b)(1), failed to handle Sarang so that there was minimal risk of harm to Sarang, Ms. Revella, and other members of the public (particularly those members of the public upon which Respondent called, and those which felt compelled, to assist Ms. Revella); and that Respondent's violation caused the very harm to a member of the public that the regulation is designed to prevent. Further, although the record does not reflect that Sarang suffered any physical injuries, the tiger was struck several times with hard objects, often on the head, by Respondent and employees and patrons of the Pointe Resort. For a period of time, Sarang reacted to each blow by biting Ms. Revella's leg harder than he had just prior to the blow, indicating that Sarang was fully aware that he was being hit. Further, a broom handle was inserted into Sarang's mouth and pressure was applied in an attempt to pry open his mouth. The events of November 5, 1990, could not have been pleasant for Sarang, and I infer from the facts that Sarang was harmed.

Respondent's violation of 9 C.F.R. § 2.131(b)(1) also constitutes a violation of the Consent Decision, (CX-1), which specifically provides that "Respondents [Studio Animal Rentals, Inc., and William Joseph Vergis] . . . shall cease and desist from violating the Act [Animal Welfare Act, as amended, (7 U.S.C. § 2131 *et seq.*)] and the regulations and standards issued thereunder. . ." (CX-1, p. 3.) 9 C.F.R. § 2.131(b)(1) is a regulation issued under the Act. The Consent Decision further provides that "Respondent William Joseph Vergis shall not . . . engage in any activity for which a license is required under the Act and the regulations for a period of ten years; provided however, that six years of this ten year period shall be suspended and held in abeyance unless it is found after notice and opportunity for hearing that he has violated any provision of this order within four years." (CX-1, p. 4.)

Respondent was provided the requisite notice and opportunity for a hearing in the instant proceeding (record of the instant proceeding), and Respondent's violation of 9 C.F.R. § 2.131(b)(1) on November 5, 1990, is a violation of the

Order in the Consent Decision that occurred within 4 years of the effective date of that Order. Therefore, in accordance with the Consent Decision, Respondent is prohibited from engaging in any activity for which a license is required under the Act and the regulations for the 10-year period beginning, as provided in the Consent Decision, on the first day after service of the Consent Decision on Respondent, which was February 11, 1989. (CX-1, p. 5; CA, p. 1.)

Findings of Fact

1. Respondent William Joseph Vergis is an individual whose mailing address is (b) (6).
2. In connection with a previous disciplinary proceeding, *In re Studio Animal Rentals, Inc.*, AWA Docket No. 88-7 (Feb. 9, 1989), Respondent agreed with Complainant to the entry of a Consent Decision.
3. In accordance with the Consent Decision, Administrative Law Judge James W. Hunt ordered Respondent to cease and desist from violating the Act and the regulations and standards issued under the Act.
4. The Consent Decision provides that Respondent shall not, directly or indirectly, through any agent, employee, corporation, or other device, engage in any activity for which a license is required under the Act and regulations for a period of 10 years; provided however, that 6 years of this 10-year period shall be suspended and held in abeyance unless it is found after notice and an opportunity for hearing that Respondent has violated any provision of the order within 4 years.
5. On November 5, 1990, at Phoenix, Arizona, while exhibiting a Bengal tiger, Respondent failed to handle the animal so that there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of the animal and the public.

Conclusions of Law

1. On November 5, 1990, Respondent willfully violated 9 C.F.R. § 2.131(b)(1) by failing, during the public exhibition of a Bengal tiger, to handle the animal so that there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of the animal and the public.

2. On November 5, 1990, Respondent violated the cease and desist provisions of the Consent Decision, by violating the Act and a regulation issued under the Act.

Issues Raised By Complainant on Appeal to the Judicial Officer

Complainant raises four issues on appeal. First, Complainant contends that:

The [ALJ] erred in finding that the Respondent was not an exhibitor [required to be licensed under the Act]. (CA pp. 2-7.)

I agree with the ALJ's dismissal of paragraph II of the Complaint, based upon the unique circumstances in this case.

The record clearly establishes, and Complainant and Respondent agree, that since February 1989, Respondent has not been licensed as an exhibitor under the Act, and that, during this period, Respondent repeatedly acted as a booking agent for licensed exhibitors, trained animals for exhibition, handled animals during exhibitions, moved animals in commerce to and from exhibitions, and exhibited animals to the public for compensation. (RB, pp. 6-7, 15; Complainant's Brief in Support of Proposed Findings of Fact, Conclusions of Law, and Order, p. 13, hereafter CB; CA, pp. 3-4.)

Respondent contends that, since he was not the owner of the animals being exhibited and since he always acted as an independent contractor for another person that was licensed under the Act, Respondent was not required to be licensed. (RB, pp. 6-8, 15-23.) Complainant states that, while the record strongly suggests that Respondent owned some of the animals which Respondent trained, handled, moved, and exhibited during the period in which he did not have a license, (CA, p. 4), "[o]wnership of the . . . animals being exhibited is not an element of being an exhibitor." (CB, p. 13; see also CA, pp. 4-5.) Further, Complainant states "that a license under the Animal Welfare Act is not required to operate as a booking agent or trainer", (CB, p. 14; CA, p. 5), and that "APHIS does not require that each circus animal trainer be licensed." (CA, p. 3.) Further still, two of Complainant's witnesses, Mr. John Kirchberg, APHIS Investigator, and Mr. Mark Kurland, Enforcement Specialist, USDA, Regulatory Enforcement, testified that Respondent could act as a booking agent, handler, trainer, and even exhibit animals as a trainer without a license under the Act. (Tr. 57, 78-79, 273-74.) Finally, Ms. Mackenroth testified that she was informed by Mr. Kirchberg and Dr. Magid, Area Supervisor for Regulatory

Enforcement and Animal Care, APHIS, that Respondent could continue to work as a trainer. (Tr. 200-01.)

Complainant contends, however, that by virtue of being an independent contractor, Respondent could not exhibit animals without a license. (CA, p. 4.) Complainant characterizes Respondent's defense (that he was acting as an independent contractor for owners of the animals) as an "admission" not a "defense." (CB, p. 13; CA, p. 4.) Thus, the issue posed both by Respondent and Complainant is whether an independent contractor, working for a licensee, must personally be licensed under the Act, in order to exhibit animals to the public for compensation.

Neither the Act nor the regulations exempt persons from the definition of the term "exhibitor" based on the legal relationship those persons have to licensees for whom they work. Moreover, the Secretary could require all those who meet the definition of "exhibitor" to be licensed. However, Complainant's briefs (CB and CA) and the testimony offered by Messrs. Kirchberg and Kurland, two APHIS employees called as witnesses by Complainant, indicate that, at the very least, APHIS exempts employees of licensees from having to be licensed under the Act if those employees only exhibit animals on behalf of their employers. The record does not indicate that Respondent was made aware of any distinction drawn by APHIS between independent contractors and employees of licensees.

The record clearly shows that Respondent was an "exhibitor" as that term is defined in the Act and regulations. However, Complainant has not shown by a preponderance of the evidence that Respondent was working only for himself. Instead, the record indicates that Respondent was working as a (self-described) independent contractor on behalf of persons who were properly licensed under the Act. I agree with Complainant that Respondent could, under the Act and the regulations, be found to be engaged in business as an exhibitor without a license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1, and in violation of the Consent Decision. However, I reluctantly do not do so here because distinctions unique to this record, which were made between employees of licensees and independent contractors working for licensees, are such that a reviewing court would be presented with too ambiguous a record. Nonetheless, I agree with Complainant that, if Respondent's actions had been for himself or for a person who was not licensed under the Act, Respondent would be found to have engaged in business as an exhibitor without a license, in willful violation of 7 U.S.C.

§ 2134 and 9 C.F.R. § 2.1, thereby contravening the Consent Decision. For the foregoing reasons, on this record, I agree with the ALJ's dismissal of paragraph II of the Complaint.

Second, Complainant contends that:

The [ALJ] erred in finding that the Respondent was a credible witness. (CA p. 10.)

The ALJ found that:

Based upon visual and aural observations of Mr. Vergis' appearance and demeanor during the presentation of his testimony at the hearing, all facts presented by him relating to relevant issues establish the truth of matters therein described. [Footnote omitted.] The evidence presented by Mr. Vergis in this hearing is worthy of belief and entitled to credit. (Initial Decision and Order, Finding of Fact 8, p. 18.)

Complainant contends that the ALJ's finding regarding Respondent's credibility is itself "hopelessly incredible." (CA, p. 22.) Complainant's basis for this contention is the inconsistencies which Complainant finds when comparing Respondent's testimony in the instant case with Respondent's deposition testimony given in connection with *Adele Kalas v. Dun & Bradstreet Software Services, Inc., et al.*, No. CV 92-01867 (Ariz. Super. Ct. June 9, 1992). (CX-201.)

It is the consistent practice of the Judicial Officer to give great weight to the findings by ALJs since they have the opportunity to see and hear witnesses testify.² However, in some circumstances, the Judicial Officer has reversed as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved, *In re Gerald F. Upton*, 44 Agric. Dec. 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R

²E.g., *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); compare *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426-28 (Remand Order), final decision, 38 Agric. Dec. 1539 (1979) (affirming Judge Baker's dismissal of Complaint on remand where she had originally accepted the testimony of Respondent's wife, Respondent's employee, and Respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

(N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); (2) the record is sufficiently strong to compel a reversal as to the facts, *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); or (3) an ALJ's findings of fact are hopelessly incredible, *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986).

Moreover, the Judicial Officer is not bound by the ALJ's credibility determinations, and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. ___, slip op. at 45-46 (Aug. 16, 1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992). See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

I agree with Complainant that a comparison of Respondent's testimony in the instant case with Respondent's deposition testimony as evidenced by CX-201 reveals inconsistencies. Further, I find that Respondent's testimony regarding his handling of Sarang on November 5, 1990, lacks credibility. On the other hand, I find that much of Respondent's testimony is credible.

Consequently, I have not adopted the ALJ's Finding of Fact Number 8 as part of this final Decision and Order. But, I do not go so far as to find that the ALJ's decision (to credit Respondent's evidence) was erroneous to the point of being hopelessly incredible.

Third, Complainant contends that:

Although the ALJ found that the [R]espondent violated the handling regulations during the exhibition of a tiger, [the ALJ's] discussion of this issue should be rejected because the theory under which [Respondent] was found liable although not an exhibitor is not a correct statement of the law. (CA, p. 22.)

Complainant fails to identify those statements of law in the ALJ's discussion which Complainant believes are incorrect. Instead, Complainant primarily appears to take issue with the ALJ's discussion of the facts surrounding Respondent's November 5, 1990, violation of 9 C.F.R. § 2.131(b)(1). Complainant states as follows:

During a break in rehearsals the respondent took a bengal tiger to a patio area at The Pointe hotel so that people could see it (TR 448). Mr. Vergis was required by section 2.131 of the regulations (9 C.F.R. § 2.131) to handle the tiger as "carefully as possible" to avoid physical harm to the animal. He did not do so. Even if the events occurred as he described them at the hearing (TR 446-454), he did not handle the tiger as carefully as possible. He brought it to a place where people congregated and passed by, and people could get close enough that they were in danger, and as a result, the tiger was in danger. In his version, he placed himself and the tiger so that someone could and did approach from behind, upset the tiger, and be attacked.

However, because the testimony of the respondent is not creditable, it should be found that Ms. Kalas (now Ms. Revella) asked if she could approach the tiger and pet it and that Mr. Vergis invited her to do so and directed her in how to approach, just [sic] as Ms. Revella and another witness, Mr. Noerr, testified (TR 129-130, 138-145, 147-155). The tiger was on a leash but was a danger to anyone within lunging distance; it was in danger of being beaten with heavy objects (which it was) or being shot. There is no excuse for the manner in which the respondent handled the tiger. (CA, p. 23.)

I agree with the ALJ and Complainant that on November 5, 1990, Respondent willfully violated 9 C.F.R. § 2.131(b)(1). However, I disagree with the Complainant that Respondent "was required by section 2.131 of the regulations (9 C.F.R. § 2.131) to handle the tiger as 'carefully as possible' to avoid physical harm to the animal." (CA, p. 23.) Instead, I find that Respondent willfully violated 9 C.F.R. § 2.131(b)(1) because Respondent failed to handle a Bengal tiger so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of the animal and the public.

Nonetheless, I have not adopted the ALJ's discussion of Respondent's violation of 9 C.F.R. § 2.131(b)(1) because the ALJ appears to base his finding that Respondent is responsible for the violation of 9 C.F.R. § 2.131(b)(1) upon Respondent's legal relationship to Ms. Mackenroth, who, on November 5, 1990, was both the owner of the Bengal tiger in question and the licensed exhibitor. Specifically, the ALJ states:

The remaining allegation to be resolved addresses the specifics of Mr. Vergis' employment on the afternoon of November 5, 1990. It was on this day that the tiger "Sarang" injured a member of the public. Mr. Vergis testified that he was surprised that a casual spectator approached this heavy animal, even though he had placed it in an area of semi-reclusion and was himself standing in such close proximity to the animal as to be touching it. However, uninvited, the witness, Ms. Revella, testified that she approached "Sarang," which suddenly clamped Ms. Revella's leg, and broke it. During this attack, bystanders struck the animal with an object. (Finding 7) Although this caused no reported trauma to the animal, Mr. Vergis must be sanctioned upon his failure to protect both the animal and the public. It is found that his action and omission was beyond the scope of his employment for Mrs. Mackenroth had certified upon her license applications, (CX 126-A, B) that she would comply with the Department's regulations and standards expressed at ". . . 9 CFR chapter 1, subpart A . . ." which included 9 C.F.R. § 2.131(b)(1) (54 Fed. Reg. 36162 (August 31, 1989)). This regulation, in part, provides that animal handlers shall provide sufficient distance or barriers so as to provide the safety [footnote omitted] of separation to animals and spectators. However, as found, Mr. Vergis did not provide this element of safety as both Mrs. Mackenroth and the Department required. His inability to do so was a reflection of his rejection of responsibility, permitting him to be severed from the principal-agent relationship recognized at 7 U.S.C.A. § 2139 (West 1988 & Supp. 1995), and to be assessed a sanction for the performance of an illegal act. Since Mr. Vergis retained the authority to select the details in the performance of his work, *Aurora Packing Co. v. N.L.R.B.*, 904 F.2d 73, 76 (D.C. Cir. 1990) he aborted, in this particular, any common-law employer-employee relationship. While it is recognized that Mrs. Mackenroth engaged Mr. Vergis to perform with her investment, to stand with her tiger in the public eye, she

certainly had no discernable right to tell Mr. Vergis how close he should stand to the tiger's weapons, nor what chains or other tools might be appropriate to prevent bodily harm from the animal's natural attributes. The lack of this right describes Mr. Vergis' independent status in the handling of these animals, and when he permitted the mishandling of "Sarang", he did so independently. *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378 (7th Cir. 1991). The facts found (Finding 7) thus require the imposition of sanctions upon this violation of the regulations at 9 C.F.R. § 2.131(b)(1) (54 Fed. Reg. 36162 (August 31, 1989)), a regulation in effect as of November 5, 1990. (Initial Decision and Order, pp. 26-27.)

I do not agree with the ALJ that Respondent's failure to comply with 9 C.F.R. § 2.131(b)(1) severed his legal relationship with Ms. Mackenroth. Moreover, while Respondent's relationship to Ms. Mackenroth may be critical with respect to Ms. Mackenroth's responsibility for the November 5, 1990, violation of 9 C.F.R. § 2.131(b)(1), it is not relevant with respect to whether Respondent violated 9 C.F.R. § 2.131(b)(1). The controlling considerations are that Respondent was responsible for exercising control over Sarang and the manner in which Sarang was handled. During Respondent's public exhibition of Sarang, Respondent did not handle Sarang so that there was minimal risk of harm to Sarang and to members of the public; and, Respondent did not keep sufficient distance and/or barriers between Sarang and the general viewing public so as to assure the safety of Sarang and the public. *See generally In re Hank Post*, 47 Agric. Dec. 542, 547 (1988).

Fourth, Complainant contends that:

The limited sanctions imposed by the ALJ should not be followed because . . . the ALJ incorrectly dismissed the most serious allegations. (CA, p. 23.)

As discussed above, I do not here reverse the ALJ's dismissal of paragraph II of the Complaint, because of the unique circumstances in this case. Nonetheless, I agree with Complainant that the \$500 civil penalty that the ALJ assessed Respondent is inappropriate in light of: (1) the considerations required by the Act to be made regarding the appropriateness of the penalty, (7 U.S.C. § 2149(b)); (2) the Department's sanction policy; and (3) the Respondent's serious, willful violation of 9 C.F.R. § 2.131(b)(1) on November 5, 1990, which resulted in harm to Sarang, the tiger being exhibited, and serious injury to Ms. Revella, a member of the viewing public. In addition, Respondent's

violation of 9 C.F.R. § 2.131(b)(1) constitutes a violation of the Consent Decision. The sanction imposed on Respondent is discussed immediately below.

Sanction

As to the appropriate sanction, the Act provides:

7 U.S.C.:

§ 2149.

(a) If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. (7 U.S.C. § 2149(a), (b).)

§ 2151.

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter. (7 U.S.C. § 2151.)

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3]):

The sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondent has at least a moderate-sized operation, and certainly one where the maximum civil penalty would be appropriate. In 1994, Respondent was involved in the exhibition of animals at least a half dozen times, including the training of animals for use in movies, commercials, and photography sessions. (Tr. 353-59.) In 1993, Respondent was involved in the exhibition of animals on at least three occasions, including the training of animals for three motion pictures. (Tr. 359-60.) The period that Respondent was occupied for just one of these 1993 motion pictures, *Iron Will*, was from November 1992, to the beginning of April 1993, during which period Respondent was paid \$1,850 per week. (Tr. 360-62.)

Respondent willfully violated 9 C.F.R. § 2.131(b)(1). Respondent's violation was extremely serious and resulted in the very harm that compliance with the regulation is designed to prevent. The record clearly demonstrates that Respondent failed to handle Sarang, a 450-pound male Bengal tiger, so that there was minimal risk of harm to Sarang and to members of the public, in willful violation of 9 C.F.R. § 2.131(b)(1). Respondent's violation was the direct cause of the severe injuries, including a broken leg and numerous lacerations and puncture wounds, suffered by Ms. Revella on November 5, 1990, at the Pointe Resort. The record does not reflect that Sarang suffered any physical injuries. However, Sarang was repeatedly struck with hard objects, often on the head, by Respondent and employees and patrons of the Pointe

Resort. For a period of time, Sarang reacted to each blow by biting Ms. Revella's leg harder than he had just prior to the blow, indicating that Sarang was fully aware that he was being hit. Further, a broom handle was inserted into Sarang's mouth and pressure was applied in an attempt to pry open his mouth. The events of November 5, 1990, could not have been pleasant for Sarang and I infer from the facts that Sarang was harmed.

Considering the statutory criteria, the Department's sanction policy, and Complainant's recommendation regarding sanction, I believe a civil penalty of \$2,500 should be assessed against Respondent, that Respondent should be ordered to cease and desist from further violations of the Act and regulations and standards issued under the Act, and that Respondent should be prohibited from obtaining a license under the Act for one year.³ Further, since Respondent violated a regulation under the Act, he has violated the Consent Decision. As provided in the Consent Decision, Respondent shall be prohibited from engaging in any activity for which a license is required under the Act and regulations for a period of 10 years from the first day after service of the Consent Decision on Respondent, which was February 11, 1989.

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

Order

Paragraph I

Respondent shall cease and desist from violating the Act and the regulations and standards issued under the Act, and in particular, shall cease and desist from:

During public exhibition, failing to handle any animal so that there is minimal risk of harm to the animal and the public, with sufficient distance

³Except as provided in 9 C.F.R. § 2.11, neither the Act nor the regulations issued under the Act specifically provide for an order prohibiting a person who is unlicensed from obtaining a license. Nevertheless, the Act provides that the Secretary has the general authority to promulgate such "orders" as well as such rules and regulations, as may be necessary to effectuate the purposes of the Act. (7 U.S.C. § 2151.) In view of this broad authority, the Secretary does have the power to order that an unlicensed person who violates the Act or the regulations or standards under the Act be barred from licensure. See generally *In re James Petersen*, 53 Agric. Dec. 80, 86 (1994); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

and/or barriers between the animal and the general viewing public so as to assure the safety of the animal and the public.

Paragraph II

Respondent is assessed a civil penalty of \$2,500. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded within 120 days of service of this Order to:

Robert A. Ertman
United States Department of Agriculture
Office of the General Counsel
Room 2014 South Building
Washington, DC 20250-1400

The certified check or money order should indicate that payment is in reference to AWA Docket No. 93-25

Paragraph III

Respondent shall not, directly or indirectly through any agent, employee, corporation, or other device, engage in any activity for which a license is required under the Act and regulations until February 11, 1999.

Paragraph IV

Respondent is disqualified from becoming licensed under the Act and regulations for a period of 1 year. This 1-year disqualification period shall begin on February 11, 1999, and end February 10, 2000.

This Order shall become effective on the day after service of this Order on Respondent.

HORSE PROTECTION ACT

COURT DECISION

JOHNNY E. LEWIS and JERRY M. MORRISON v. SECRETARY OF AGRICULTURE, UNITED STATES DEPARTMENT OF AGRICULTURE. No. 94-7044.

Filed January 22, 1996.

(Cite as: 73 F.3d 312)

Horse soring - Entering - Substantial evidence - Knowledge of soreness on part of trainer not required - USDA veterinarians more qualified than DQPs in making determinations of soreness - Owner may escape liability for allowing entry of sore horse by satisfying *Burton* test.

The United States Court of Appeals for the Seventh Circuit affirmed the decision of the Secretary that the horse was sore and the decision that trainer Lewis violated the Act by entering the sore horse. The court found that substantial evidence based on thorough examinations by two USDA veterinarians supported the decision that the horse was sore. Veterinarians are more qualified than DQPs to make a determination of soreness. There is no requirement that a trainer have knowledge that a horse is sore. The Seventh Circuit, however, reversed the decision that owner Morrison violated the Act by allowing the entry of a sore horse and remanded for further proceedings. Following the Eighth Circuit decision in *Burton*, the court held that an owner could escape liability for "allowing" entry of a sore horse if 1) the owner had no knowledge that the horse was sore; 2) a DQP examined and approved the horse before it entered the ring; and 3) the owner had meaningfully directed the trainer not to show the horse.

Before: HATCHETT and BIRCH, Circuit Judges, and GODBOLD; Senior Circuit Judge.

UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

GODBOLD, Senior Circuit Judge:

Jerry M. Morrison, a horse owner, and Johnny E. Lewis, a horse trainer, seek review of a final order of the Secretary of Agriculture entered in an administrative proceeding under the Horse Protection Act, 15 U.S.C. §§ 1821-1831. A Judicial Officer (JO), acting for the Secretary of Agriculture, determined that the horse "Senator's Mr. Big" was sore when entered in the Northport (Alabama) Horse Show, that trainer Lewis violated the Act by entering the sore horse and that owner Morrison violated the Act by allowing the entry of a sore horse. Each was given the maximum civil penalties allowed

under 15 U.S.C. § 1825(b)(1) and (d), a \$2,000 penalty and disqualification from showing or exhibiting a horse for a year.

We affirm the decision of the Secretary that the horse was sore and the decision that trainer Lewis violated the Act by entering the sore horse. We reverse the decision that owner Morrison violated the Act by allowing the entry of a sore horse and remand for further proceedings.

"Senator's Mr. Big" is a Tennessee Walking Horse. Such horses are prized for their unique gait. Striving for this high-stepping gait, some horse owners participate in the inhumane practice of soring, which involves applying mechanical devices or chemical substances to the forelimbs of the horse.

15 U.S.C. § 1821(3)(1982).¹ Soring causes pain to the horse when it attempts to place a forefoot on the ground, and the forelimb is then thrust forward. This artificially produces the unique gait naturally produced through years of training and championship bloodlines.

Congress reacted to the soring practice by enacting the Horse Protection Act. The Act prohibits:

2. The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering

¹A horse is sore under the Act if:

- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
- (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
- (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse,
- (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2).

Lewis entered "Senator's Mr. Big" in the Northport Show. Ashley, owner Morrison's daughter, planned to show the horse in three separate events. In the first event Rickey Statham, a Designated Qualified Person ("DQP"), examined the horse. A DQP is a person employed by the horse show management to examine horses and to determine if the horses are sore. The appointment of DQPs protects the show's management from liability under 15 U.S.C. § 1824(3). The horse was passed and participated in the first event. Before the second event Statham again examined the horse, and it again passed. Department of Agriculture (USDA) veterinarians observed these examinations.

However, before the horse participated in the second event the show sponsors announced that the horse, and Ashley as a rider, were disqualified because of Ashley's young age. Morrison prepared to leave the show with the horse, but after he had loaded the horse on the trailer the sponsors decided that Ashley was eligible for the event. The horse was quickly removed from the trailer and again examined by Statham. This time he wrote up a ticket noting that the horse was disqualified from showing because it was "sensitive in both front feet." Two USDA veterinarians, Dr. Hugh Hendricks and Dr. Lowell Wood, then examined the horse by performing a digital palpation test on the pastern areas. Both doctors determined that the horse was sore. The two departmental veterinarians completed a form, recording their findings.

About an hour after the horse was written up by Statham it was examined by Dr. James W. St. John, Jr., the horse's regular veterinarian, who found that the horse was not sore. Later that evening Dr. Hendricks wrote an affidavit describing his examinations and findings, and Dr. Wood completed a similar affidavit a day or two later. Dr. St. John also gave an affidavit.

The Morrison family participates in horse shows as a hobby, not as a business undertaking. Morrison contends that he instructed trainer Lewis that if the horse exhibited sensitivity or soreness he was not to show the horse and that the horse should not be sored. Lewis acknowledges that he received such instructions.

A complaint was issued charging trainer Lewis with a violation of § 1824(2)(B) and charging owner Morrison with a violation of § 1824(2)(D). A hearing was held before an ALJ who found that Lewis violated the Act by entering in the show a horse that was sore and that Morrison violated the Act by allowing the entry of a sore horse. Both appealed and a JO, acting for the Secretary, affirmed. With minor variations he adopted the ALJ's decision. He found that the horse was sore and, additionally, relied on the statutory presumption of § 1825(d)(5) that a horse is presumed to be sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs.

I. SUFFICIENCY OF THE EVIDENCE

Our standard of review under the Act is a narrow one--determining whether the JO employed the proper legal standards and whether substantial evidence supports the decision. *Fleming v. United States Dept. of Agric.*, 713 F.2d 179, 188 (6th Cir. 1983) "Substantial evidence is more than a scintilla but less than a preponderance." *Elliott v. Administrator, Animal & Plant Health Inspection Serv.*, 990 F.2d 140, 144 (4th Cir. 1993), cert. denied, 114 S. Ct. 191 (1993). We hold that sufficient evidence supports the Department's conclusion that the horse was sore. Also, as an alternative ground, the JO relied upon the rebuttable presumption of soring set out in § 1825(d)(5). The two USDA veterinarians were highly experienced, they used accepted testing procedures, and they conducted thorough examinations. The DQP determined that the horse was not sore on two examinations, but we cannot say that the Secretary erred in concluding that veterinarians are better qualified to make the determination of soreness.

Dr. St. John is a federally qualified veterinarian who specializes in equine practice and examines horses using the same palpation tests used by the departmental veterinarians. His testimony differs from theirs—he thought the horse was merely nervous, and he was troubled by its having passed two DQP exams. But we cannot say that the Secretary erred in giving less weight to his testimony on the ground that he was not impartial, that he lacked experience with the requirements of the Act, that he misunderstood the requirements for soreness, that an affidavit he had given was inconsistent with his testimony, and that his observations of mere nervousness by the horse were disputed by other observers. Also his examination was made some 40 to 50 minutes after the USDA veterinarians completed their examinations, and it was done in the horse trailer where lighting conditions were less than desirable.

II. VIOLATION BY THE TRAINER

The fact of the entry of the horse by trainer Lewis and owner Morrison is admitted. The evidence of soring was sufficient. Lewis urges, however, that he had no knowledge that the horse was sore. But there is no knowledge requirement. *Thornton v. United States Dep't of Agric.*, 715 F.2d 1508, 1511 (11th Cir. 1983). Congress amended the Act in 1976 with that intention. We must, therefore, affirm the finding of a violation by the trainer.

III. VIOLATION BY THE OWNER

Proof of four elements is necessary to establish a violation of § 1824(2)(D) by an owner:

- (1) the person charged is the owner of the horse in question;
- (2) the horse was shown, exhibited, or entered in a horse show or exhibition;
- (3) the horse was sore at the time it was shown, exhibited, or entered; and
- (4) the owner allowed such showing, exhibition, or entry.

Baird v. United States Dep't of Agric., 39 F.3d 131, 135 (6th Cir. 1994). The Secretary agrees that these four elements must be proved.

Our decision with respect to the owner turns on the meaning of the fourth element and the word "allow." In *Thornton* we held that an owner could "allow" the entry of a sore horse into competition even if the owner had no knowledge that the horse was sore. But determination that knowledge is irrelevant solves only half the problem. Still left is a question of first impression in this circuit: Accepting that the owner need not have knowledge, what standard of liability does the fourth element impose on him? The Secretary's position is straightforward and unequivocal: entry (by the owner or by one acting for him) plus ownership and soreness are the only required elements for a violation. "Allowing" is made an ineluctable consequence of entry plus soring--if the horse is sore and is entered the owner has "allowed" under factor four, and, all factors being met, there is a violation. Stating it another way, "allowing" by an owner is subsumed in factors two and three.

The Eighth Circuit has described the Secretary's position as "strict liability." *Burton v. United States Dep't of Agric.*, 683 F.2d 280, 282 (8th Cir.

1982). The Sixth Circuit describes the Department's interpretation as effectively rewriting the statute, making a nullity of the requirement that the owner "allow" the horse to be entered, shown, or exhibited while sore. *Baird v. United States Dep't of Agric.*, 39 F.3d 131, 136 n. 10 (6th Cir. 1994). That court describes the statute as not establishing strict liability, *id.* at 136 n. 9, but the government as arguing for "something akin to strict liability." *Id.* at 135.

The Eighth Circuit, in *Burton*, focused on the definition of "allow." The court explained that an owner could escape liability under § 1824 (2)(D) if the following three factors are shown:

- (1) there is a finding that the owner had no knowledge that the horse was in a "sore" condition,
- (2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and
- (3) there was uncontradicted testimony that the owner had directed the trainer not to show a "sore" horse.

Burton, 683 F.2d at 283. Under *Burton* the presence of these three factors, taken together, excuses liability. The Department declines to follow *Burton* except in cases in which an appeal would lie to the Eighth Circuit.

In *Baird* the Sixth Circuit attempted to give meaning to the "somewhat protean character" of the word "allow." It indicated that an owner may "allow" by condoning or authorizing the conduct in question or failing to prevent it by looking the other way" or "burying one's head in the sand," and one who does not "know" may "allow" by cultivating a training atmosphere conducive to soring or doing nothing to dissuade it. *Baird*, 39 F.3d at 137.

The *Baird* court then formulated a burden-shifting test. It held that the government must, as an initial matter, make out a *prima facie* case of a § 1824(2)(D) violation by establishing ownership, entry, and soreness. Once the government establishes a *prima facie* case the owner may offer evidence that he took an affirmative step in an effort to prevent the soring that occurred. If the owner presents such evidence and the evidence is "justifiably credited," it is then up to the government to prove that the effort of the owner concerning soring of horses was merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of § 1824. But we can find no support in the Act for a burden-shifting test. Rather it seems to us that analysis of the Act does not focus on an allocation of evidentiary burdens but instead on definition of the term "allow."

The Department urges this court to adopt the reasoning of the D.C. Circuit in *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1995). That court held that "allow" has a passive meaning, i.e., "to permit by neglecting to restrain or prevent." And, if an owner allows his sore horse to enter a competition, the Secretary may assume that the owner has not prevented the trainer from soring the horse. According to *Crawford*, the owner may rebut the assumption and escape liability if a stranger was responsible for the soring or if the trainer was responsible and was discharged. Thus the consequence of ownership plus entry plus soreness is made ineluctable but for a small escape hatch--a stranger did it or the trainer was fired. Recognition by the Department of the first prong--"the owner didn't 'allow' what a stranger did"--is in itself a recognition that ineluctable consequences simply does not fit as a standard. The second prong is a throwaway rationale that may make one feel that the Secretary's position is not entirely arbitrary. But, though an owner's post-event punishment of an erring trainer may be prophylactic, it has no relation to whether the owner allowed the event. We do not follow *Crawford*.

With a slight caveat we find the *Burton* test persuasive. The test fits neatly into traditional judicial analysis. It carries out the purposes of the Act while providing some protection for horse owners who are cooperating in seeking compliance. The first part of the *Burton* test does not conflict with this court's holding in *Thornton*. That part requires a finding that the owner had no knowledge of the soring. *Thornton* held that an owner violated § 1824 by allowing the entry of a sore horse into a show even if the owner did not know the horse was sore. The *Burton* test only protects an owner who does not know the horse was sore if a DQP examined the horse and if the owner had directed the trainer not to sore. Though an owner lacks knowledge, he may still be liable if he fails to meet the two other factors.

The second element of the *Burton* test emphasizes the importance of DQPs. Congress expressly recognized this importance in 15 U.S.C. § 1823(c):

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified [i.e., DQPs] to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter.

A horse show may be liable for not providing DQPs at horse shows. 15 U.S.C. § 1824(4).

Here, the owner fulfilled this second factor. The horse passed two DQP examinations but failed the third, and the third led to further examination and the filing of the charge. The JO considered these examinations irrelevant except the third. A DQP examination may be too remote to be accepted as probative, but it seems to us that all DQP examinations at the same show on the same day are relevant. The JO relied upon cases in which the owner attempted to show that the horse was not sore on the day in question because it had competed in other shows at other times and had not been found sore. *See In re A.P. Holt*, 52 Agric. Dec. 233 (1993) ("[T]he fact that 'Flashing Gold' had competed in other shows and had not been found sore is essentially irrelevant to the question of whether he was sore at the Celebration show."), *aff'd per curiam*, 32 F.3d 569 (6th Cir. 1994); *In re Larry Edwards*, 49 Agric. Dec. 188, 197 (1990) ("The fact that the Respondents had shown horses many times before with only a few being written up is also not relevant to whether the horses in this case were sore on the nights in question."), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992); *In re Richard L. Thornton*, 41 Agric. Dec. 870 (1982) ("Since any horse owner or trainer could have a motive to sore a horse for a particular show, or could accidentally sore the horse a little more than planned on a particular occasion, I do not attach any weight to the fact that a horse was not written up as sore in examinations by USDA personnel at shows other than the one at issue in a particular case.")

The caveat we put on *Burton* relates to the third factor. Compliance with it (along with the other two factors), frees the owner of the ineluctable consequences of entry plus the fact of soreness and it frees him of being found to "allow" in the passive sense described in *Baird* by "hiding his head" or doing nothing. But compliance with the third element must be meaningful rather than purely formal or ritualistic. The owner may give firm and certain and suitably repeated directions not to sore and not to show a horse that is in sore condition. He may maintain a training environment that discourages soring or makes it impossible. He may carry out inspection practices that tend to reveal any efforts to sore. But, whatever the form, his efforts must be meaningful and not a mere formalistic evasion.

The record developed by the ALJ is not sufficient to evaluate the first and third factors under the *Burton* test. The second factor must be reconsidered with appropriate weight given to the three findings by the DQPs.²

AFFIRMED in part, REVERSED and REMANDED in part.

²The petitioners have listed as issues that the statutory definition of soreness is so vague that the application of it deprives the petitioner of due process. This issue has not, however, been briefed and we do not consider it.

HORSE PROTECTION ACT**DEPARTMENTAL DECISIONS**

**In re: KIM BENNETT and MR. & MRS. DAVID BRODERICK.
HPA Docket No. 93-6.**

Decision and Order filed January 3, 1996.

Complaint dismissed — Palpation alone is a highly reliable method of determining if a horse is sore — Remand authority — Presumption of regularity as to official acts — *Young v. USDA* (5th Cir. 1995) not to be followed by USDA — Weight to be given to Summary of Alleged Violations forms and affidavits — Atlanta Protocol — Learned avoidance — Independence of Judicial Officer.

The Judicial Officer affirmed the Order by Judge Kane (ALJ) dismissing the Complaint, which alleged that Kim Bennett, as trainer, entered a horse for exhibition while it was sore, and Mr. & Mrs. David Broderick allowed the entry of the horse, while the animal was sore. The Judicial Officer stated that if the ALJ had not retired, he would have issued a Second Remand Order, since it seems to the Judicial Officer that the ALJ did not comply with the first Remand Order. The Judicial Officer believes, however, that Complainant's case is not quite strong enough to justify remanding the case for a new trial before a different ALJ, so he dismissed the Complaint. The Judicial Officer has authority to remand a case to an ALJ under the Department's Rules of Practice. Palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act. Contrary views in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision) will not be followed by this Department in any future case, including a case in which an appeal would lie to the Fifth Circuit. The expert testimony and Atlanta Protocol relied on by the Court in *Young v. United States Dep't of Agric.* is devoid of merit. The training given to Department veterinarians by the Department's attorneys and investigators is not a basis for discrediting the veterinarians' opinions. There is a presumption of regularity with respect to the official acts of public officers. The fact that the veterinarians prepare Summary of Alleged Violations forms and affidavits only when violations are found, and when administrative proceedings are anticipated, does not discredit such documents. Such documents are admissible under the Department's Rules of Practice and the Administrative Procedure Act. They would even be admissible in a court proceeding under Federal Rule of Evidence 803(8)(C). The technique employed by the USDA veterinarians rules out "learned avoidance" as a cause of reaction to palpation. The ALJ's suggestion that the Judicial Officer lacks independence from those who evaluate the performance of the office has no basis in fact.

Colleen Carroll, for Complainant.

Pamela C. Bratcher, Bowling Green, KY, for Respondents.

Second initial decision issued by Paul Kane, Administrative Law Judge.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. § 1821 *et seq.*). On October 20, 1995,

Administrative Law Judge Paul Kane (ALJ) filed a Second Initial Decision and Order (after my Remand Order filed Sept. 28, 1995) in which he dismissed the Complaint, which alleged that Kim Bennett, as trainer, entered a horse for exhibition while it was sore, and Mr. & Mrs. David Broderick allowed the entry of the horse, while the animal was sore.

On November 9, 1995, Complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).¹ On December 6, 1995, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the entire record in this case, I agree with the result of the ALJ, even though I disagree with practically everything stated in his 47-page Initial Decision and Order. Complainant's evidence, when considered in the light of Respondents' evidence, is adequate, considering the written record and exhibits alone, to sustain Complainant's burden of proof that the horse was sore by a preponderance of the evidence. If the ALJ had found a violation, on remand, as he did in *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1995), I would have affirmed. However, the record is not strong enough to justify a reversal of the ALJ's adverse findings of fact. (In these circumstances, there is no need to consider whether, if the horse was sore, the owners allowed the entry of the horse, while sore.)

If the ALJ had not retired, I would have issued a Second Remand Order, since it seems to me that the ALJ did not comply with the First Remand Order. However, inasmuch as a Second Remand Order is not possible, and I do not believe that Complainant's case is quite strong enough to justify remanding the case for a new trial before a different ALJ, I am dismissing the Complaint.

Since no other ALJ has expressed the same views as this ALJ, no useful purpose would be served by setting forth my disagreement with the ALJ's views. However, a few issues are worth mentioning. First, the ALJ questions the authority of the Judicial Officer to remand a proceeding to an ALJ. That

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988), and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (Pub. L. No. 103-354, § 212(a)(1), 108 Stat. 3178, 3210 (1994)). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

authority is contained in the Department's Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, which authorize the Judicial Officer to "rule on the appeal" (7 C.F.R. § 1.145(i)). There is nothing in the Rules of Practice to limit the type of ruling that can be issued by the Judicial Officer. My ruling on the original appeal was to order a remand because the ALJ "gave little weight to the past-recollection-recorded evidence by the Department's veterinarians, in part, because they had no present recollection of their examinations" (Remand Order filed Sept. 28, 1995, at 1). Although some grants of authority to reviewing tribunals itemize the types of action that can be taken,² there is no need to spell out in detail what type of rulings can be issued by the Judicial Officer, as long as there are no limitations on that authority specified in the rules. I was a member of the group that worked on drafting the Department's Rules of Practice (in a reviewing capacity), and none of the drafters or reviewers thought that there was any limitation in the rules as to the Judicial Officer's power to remand a proceeding to an ALJ. Remands to ALJs have been commonplace, both before and after the new rules were adopted in 1977 (42 Fed. Reg. 743 (1977)), without any question as to the

²See, e.g., 28 U.S.C. § 2106, which provides:

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Judicial Officer's authority to remand.³ An agency's construction of its own procedural rules is entitled to great weight.

Respondents contend (Response to Complainant's Appeal of Second Decision and Order at 8):

15 USC § 1825 provides the only authority within the Horse Protection Act for an action to be taken by the Secretary in Section (4) of that Statute [15 U.S.C. § 1825(b)(4)], and it provides "[t]he Secretary may, in his discretion, compromise, modify, or remit, with or without conditions, any civil penalty assessed under this subsection." Because Judge Kane dismissed the petition and did not assess a civil penalty, that provision would be applicable.

Respondents are mistaken as to the Judicial Officer's statutory authority for issuing a disciplinary order under the Horse Protection Act. The authority of the Judicial Officer to issue a civil penalty in a Horse Protection Act case is in 15 U.S.C. § 1825(b)(1), which provides that the "amount of such civil penalty shall be assessed by the Secretary by written order," and specifies the factors to be considered in assessing the civil penalty. It is only after the Judicial Officer has issued a civil penalty under 15 U.S.C. § 1825(b)(1) that 15 U.S.C. §

³See, e.g., *In re Kim Bennett*, 54 Agric. Dec. ____ (Sept. 28, 1995); *In re Gary R. Edwards*, 54 Agric. Dec. 348 (1995); *In re Sofia Barrios-Aguilar*, 53 Agric. Dec. 426 (1994); *In re Gary R. Edwards*, 52 Agric. Dec. 1365 (1993); *In re Monte Wise*, 52 Agric. Dec. 1326 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315 (1993); *In re Cecil Jordan*, 51 Agric. Dec. 1229 (1992); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412 (1991); *In re Veg-Mix, Inc.*, 47 Agric. Dec. 1486 (1988); *In re Holiday Food Service, Inc.*, 47 Agric. Dec. 225 (1988); *In re Sequoia Orange Co.*, 45 Agric. Dec. 11 (1986); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748, 797 (1985); *In re Miguel A. Machado*, 42 Agric. Dec. 793 (1983); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983); *In re Eldon Stamper*, 41 Agric. Dec. 1935 (1982); *In re John Waller*, 40 Agric. Dec. 1017, 1017, 1021 (1981); *In re Oklahoma Beef & Provision Co.*, 40 Agric. Dec. 919 (1981); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981); *In re King Meat Co.*, 39 Agric. Dec. 353 (1980); *In re Castleberry's Food Co.*, 39 Agric. Dec. 110 (1980); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425 (1979); *In re Unionville Sales*, 38 Agric. Dec. 1207 (1979); *In re Borden, Inc.*, 38 Agric. Dec. 1061 (1979); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789 (1978); *In re Western Iowa Farms Co.*, 38 Agric. Dec. 209 (1979); *In re Steve Beech*, 37 Agric. Dec. 1181, 1185 (1978); *In re Corona Livestock Auction, Inc.*, 36 Agric. Dec. 1169 (1976); *In re George Townsend*, 34 Agric. Dec. 363 (1975); *In re Professional Commodity Service, Inc.*, 32 Agric. Dec. 585 (1973); *In re Samuel Simon Petro*, 16 Agric. Dec. 901 (1957). Case histories have been omitted in this footnote since the cases are cited only as examples of remand orders, and not for the points of law involved in the cases.

1825(b)(4), relied on by Respondents in the quotation above, becomes relevant. Furthermore, when the Secretary, in his discretion, compromises, modifies, or remits any civil penalty, that action is taken by the administrative officials charged with enforcement of the Horse Protection Act.⁴ The Judicial Officer takes action under this subsection only if the parties present a Consent Decision to modify or change an existing penalty. That is because, once the Judicial Officer issues a decision in a case, and the 10-day period for filing a petition to reconsider has expired (7 C.F.R. § 1.146), there is no authority in the Rules of Practice or the delegation to the Judicial Officer for the Judicial Officer to enter into negotiations to compromise, modify, or remit a civil penalty.

The authority of the Judicial Officer to issue a disqualification order is in 15 U.S.C. § 1825(c), which merely provides that a person who paid a civil penalty under subsection (b) or is subject to a final order assessing a civil penalty "for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary. . . ." Nothing is said in that subsection as to how the Secretary is to issue such an Order. Accordingly, the Judicial Officer, in issuing a disqualification order, has all of the authority provided for by the Horse Protection Act, the Administrative Procedure Act and the Rules of Practice, which authority is broad enough to permit a remand to an administrative law judge, where appropriate.

Turning to another issue, the ALJ challenges the reliability of palpation alone to prove soreness under the Act. In addition, the majority decision in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision), discussed at great length below, also questions the reliability of palpation evidence alone to prove a soring violation. But it has been held by the Judicial Officer in every case in which the issue was relevant that palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act. See, e.g., *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994) ("Based upon my examination of the record in this case, in addition to my examination of the records in 57 other Horse Protection Act cases, I am convinced that palpation alone is a highly reliable method of determining whether a horse is sore, within

⁴The Secretary has delegated the authority to exercise the functions of the Secretary under the Horse Protection Act to the Assistant Secretary for Marketing and Inspection Services (7 C.F.R. § 2.17(b)(22)), who, in turn, has delegated that authority to the Administrator, Animal and Plant Health Inspection Service (7 C.F.R. § 2.51(a)(22)).

the meaning of the Horse Protection Act" (*Ibid.*)), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994). As shown below, my view is not based simply on "the agency's policies and the agency's prior decisions," as suggested by the Court in *Young v. United States Dep't of Agric.*, 53 F.3d at 731, but, rather, on the accumulated knowledge gained from reading the testimony of a large number of veterinarians, many of whom had 10 to 20 years of experience in examining many thousands of horses for soreness under the Horse Protection Act. That view has been accepted by both circuits to which an appeal would lie in this case. *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1411-13 (6th Cir. 1995); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49-50 (D.C. Cir. 1995). Moreover, in *Bobo*, the Sixth Circuit rejected the same type of evidence (including evidence as to the Atlanta Protocol, discussed below) presented by two of the same expert witnesses relied on by Respondents in the present case, stating (52 F.3d at 1412):

The witnesses presented by petitioners, particularly Drs. Proctor and Johnson, testified that other factors, in addition to palpation, should be considered when determining whether a horse is "sore." These witnesses expressed the view that other signs, such as lameness or inflammation, must be present in addition to a reaction to digital palpation, before a horse can be found to be "sore." However, pursuant to 15 U.S.C. § 1821(3), a horse need only "reasonably be expected to suffer, physical pain or distress, inflammation, or lameness," to be considered "sore" within the meaning of the HPA. Thus, pursuant to the statute, the agency need not show inflammation or lameness in addition to a pain reaction in order to conclude that a horse is "sore" under the HPA.

Just as in criminal cases, where there is a small group of expert witnesses with excellent credentials who testify repeatedly that DNA evidence is not a reliable means of determining the identity of a person who left blood at a murder scene, in Horse Protection Act cases, there is a small group of expert witnesses (including Drs. D.L. Proctor, Jr., Jerry H. Johnson, and Raymond C. Miller) with excellent credentials who testify repeatedly that palpation alone is not a reliable method of determining soreness under the Horse Protection Act. The primary additional indicator they demand is lameness, i.e., a gait dysfunction. But as explained by the Sixth Circuit in *Bobo, supra*, their view is squarely contrary to the explicit language of the Horse Protection Act.

The small group of experts, who misread the Horse Protection Act and who erroneously believe that gait dysfunction is a necessary element of soreness, met in Atlanta in 1991 and developed a "Recommended Protocol for DQP Examinations" (RX 10), which is referred to in HPA hearings as the Atlanta Protocol. That is the "written protocol" relied on by the majority opinion in *Young v. United States Dep't of Agric.*, 53 F.3d at 731. The Atlanta Protocol states, *inter alia*, "It should be further noted that digital palpation, in and of itself, is not a reliable diagnosis of soring" (RX 10, p. 2). Dr. Raymond C. Miller, one of the members of the group who developed the Atlanta Protocol, testified in this case that he and the other experts who wrote the Atlanta Protocol believe that gait dysfunction is a necessary element of soreness, stating (Tr. 462-64, 471-72, 476):

Q. There has been within the Walking Horse area of observing horses a document that's been called the Atlanta Protocol, has it not?

A. Yes.

Q. What is that?

A. It was a group of veterinarians made up of myself [Dr. Raymond C. Miller], Dr. Joe Tom Vaughan, who is the Dean of the Veterinary School at Auburn University, Dr. Ram Purohit, who is a Staff Veterinarian at Auburn University, who did the research to write -- to help train the VMO's in the early '70's for the purpose of training VMO's, sending them out to detect sore horses, Dr. John Ragan, State Veterinarian for the State of Tennessee, Dr. Dewitt Owen, Keeneland yearling sale veterinarian, private practitioner in Franklin, Tennessee and past president of the Equine Practitioners Association, and Dr. D. L. Proctor, past president of the Equine Practitioners Association and world renown recognized equine expert, and Dr. Joan Arnoldi, the Deputy Director of APHIS in charge of the Horse Protection Act at that time.

We met in Atlanta to try to come up with a protocol that could be followed to systematically detect the sored horse, primarily for instruction of DQP's in the Walking Horse Commission.

[Q.] And as part of that protocol, that is a systematic way to determine whether or not a horse is sored, did you conclude that digital palpation, in and of itself, by way of agreement of all of the veterinarians, was a legitimate basis for determining whether or not a horse is sore.

A. We concluded that it, in and of itself, was not. Each individual veterinarian agreed, as did all of the past literature written, agreed that it was not the sole basis for diagnosing a sored horse.

Q. Is movement important to determine whether or not a horse is sore?

A. Movement is very important.

Q. If a horse can turn freely in both directions, what does that indicate?

A. It indicates to me if he stops, leads, turns freely, starts normally, that he can't be -- in my opinion he can't be in violation of the Horse Protection Act based on, not only my opinion, what the literature says, what the USDA's research indicates, that there has to be some loss of function in movement. And if you don't have that, then he can't be in violation, he can't be sore as Deconlers defined the sored horse or as Nelson defined the sored horse, either, and that's the only two definitions written that I know of of a sore horse. But they both demand that he have some loss of function.

Q. Who is Nelson?

A. Nelson is a Iowa researchist employed by USDA that did a lot of the sore horse research in the '70's, and the basis for a lot of, if not most of your pain detection techniques.

. . .

Q. And you did you -- you watched this horse move before you palpated it?

A. I watched him before and afterwards.

Q. Did you make a determination before you palpated the horse that it was not sore?

A. I made a determination that he had no ascertainable gait dysfunction.

Q. And does a horse -- and I think you testified the horse needs to have a gait deficit to be sore?

A. The law dictates that.

Q. Okay. And that's your understanding too --

A. That's --

Q. -- of the law?

A. That's my understanding, all of the literature's understanding, and the experts that met in Atlanta's understanding.

. . .

Q. Oh, okay. Does the Act -- the Act doesn't specify any level of pain, does it?

A. Yes and no. What the Act specifies is there has to be enough pain to indicate that there is dysfunction in motion. And Nelson, the USDA researchist, when he was defining a sore horse, used the term severe pain even on standing. So the two definitions of a sore horse that I know about, both of them address that there will be dysfunction in movement.

My reasons for rejecting the views of the "Atlanta Protocol" experts were set forth at length in *In re Bill Young*, 53 Agric. Dec. 1232, 1267-83 (1994), *rev'd*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision), as follows:⁵

A. Abnormal Way of Going, or Gait Deficit, Not Required.

Respondents' expert witnesses expressed their professional opinions that an examination of a horse for soreness should consider many factors, other than reaction to palpation, a number of which relate to the way the horse appears and moves. However, the USDA veterinarians observed how the horse appeared and moved, but found nothing abnormal (Tr. 41-42, 50, 128-29, 178-79, 206). Both USDA veterinarians determined that "A Mark For Me" was sore, as defined by the Horse Protection Act, irrespective of the fact that its way of going was normal (CX 5, 6; Tr. 203; see also Tr. 82, 103-06). From my examination of the records in more than 60 Horse Protection Act cases, I have concluded that in most cases, soring does not cause a horse to have a gait deficit, i.e., an impairment in its ability to move normally (see § II(B), *infra*). Indeed, if that were not the case, there would be no need for the Horse Protection Act, because soring would not be practiced to improve the gait of Tennessee Walking Horses. As stated in *In re McConnell*, 44 Agric. Dec. 712, 725 (1985), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992).

Dr. O'Brien's testimony suggests that he was looking more for a "bad image" horse (*i.e.*, one that would present a bad image in the show ring), rather than for a horse that was in some degree of pain. For example, he testified that

⁵The Department's decision in *Bill Young* sets forth the views that will be followed by this Department in all future cases, including cases in which an appeal would lie to the Fifth Circuit, for the reasons set forth below. As shown in this lengthy quotation, my basis for rejecting the views of the Respondents' experts who testified in *Bill Young*, and who were part of the small group that developed the Atlanta Protocol, were not "simply that [their views are] contrary to the agency's policies and the agency's prior decisions," as suggested by the Court in *Young v. United States Dep't of Agric.*, 53 F.3d at 731.

"a sored horse really should be reluctant to move on any type of surface if he is sore enough to be sore as pertains to the Act" (Tr. 542). But the remedial purposes of the Act would be thwarted if such a narrow interpretation of the Act were followed. The legislative history of the Act shows that Congress wanted to prevent the type of soring which *improves* the performance of a horse in the show ring—not merely excessive soring making the horse reluctant to move (Appendix, *Stamper*, slip op. at 56-58).

Furthermore, the Act expressly defines a "sore" horse as one that "suffers, or can reasonably be expected to suffer, physical *pain* . . . or lameness when walking, trotting, or otherwise moving" because of a man-made cause (15 U.S.C. § 1821(3)(D) (emphasis added)). "In statutory construction 'or' is to be given its normal disjunctive meaning unless such a construction renders the provision in question repugnant to other provisions of the statute." *In re Beef Nebraska, Inc.*, 44 Agric. Dec. 2786, 2811-12 (1985), *aff'd*, 807 F.2d 712 (8th Cir. 1986), quoting from *Gay Union Corp. v. Wallace*, 112 F.2d 192, 197 n.15 (D.C. Cir.), cert. denied, 310 U.S. 647 (1940). *Accord United States v. Field*, 255 U.S. 257, 262 (1921). Hence, lameness, in addition to pain, is not required.

It is quite clear that Respondents and their expert witnesses are trying, in this case and by other means (see, *infra*), to change the word "or" in the statutory definition to "and." They would require that a horse, to be "sore," must suffer pain *and* lameness. For that drastic change to come about, they must convince Congress to amend the Act. No amount of expert testimony can change the statutory definition of "sore."

B. Ames and Auburn Studies, Relied on by Respondents, Are Outdated.

Respondents' experts relied on a study done at Ames, Iowa, in 1975, describing the signs of inflammation caused by soring, as follows (RX 3, p. 3 of 16):²⁴

²⁴H.A. Nelson, D.V.M. & D.L. Osheim, B.A., *Soring in Tennessee Walking Horses: Detection By Thermography* (USDA, APHIS, Veterinary Services Lab., Ames, Iowa, Aug. 1975).

As a severe inflammatory reaction is caused by the process of soring, inflammation was considered in finding a diagnostic aid to assist in diagnosing soring. Inflammation is defined as the complicated vascular and cellular reaction of an individual to an irritant. The five cardinal signs of inflammation are described as (5):

1. Redness
2. Swelling
3. Heat
4. Pain
5. Impaired function

Of these five cardinal signs, the ones which are readily and unequivocably [sic] detectable may vary with the individual and the degree of soring. While redness may be quite visible in a light pigmented horse, it is very difficult or impossible to detect in a dark pigmented horse. The degree of swelling will vary according to the individual, the degree and method of soring. Unless swelling is marked, it is difficult to detect. It is no doubt present to some degree in all cases of soring, but difficult to quantify. Pain is very difficult to measure and again varies according to the individual animal. Digital palpation of the affected area may illicit a response in one animal and not another. Sore areas may also become temporarily insensitive to pain after a period of continual irritation such as the horse experiences when wearing boots during a performance class. Impaired function is a response which should be visible in that the sored horse is reluctant to move and shows a deviation from the normal gait. Again it is a response that is difficult to measure, as normal "way of going" varies with the individual according to natural ability, training, and skill of the rider. Another complicating factor is that the sored

horse tends to warm out of the severe symptoms with exercise and is usually warmed up sufficiently by the time it is taken in the ring, therefore, the severe symptoms of lameness which would be evident when led out of the stall are not present. What remains is the degree of soreness that is responsible for the "Big Lick." The one sign of inflammation that seemed amendable to a quantitative measurement is the degree of heat associated with inflammation.

As the study states, redness, swelling, and impaired function may not be detectably present on a particular horse. That leaves just heat and pain to be possibly detected, according to the study. Heat could not be detected with the hand unless the soring were so pronounced as to make enough difference in the temperature of the area (Tr. 93-94). Accordingly, in many, if not most cases, without thermovision, which has not been used since about 1981 (*Edwards, supra*, 49 Agric. Dec. at 204), pain is the only condition that will be detectable to prove soring.

Furthermore, the Ames study (RX 3) and a similar study done a few years later at Auburn University, both of which are relied on by Respondents' experts (Tr. 501-07, 557-59, 563-64, 589-90, 596-99), are no longer relevant to today's soring practices because both studies were done before the Scar Rule was promulgated in 1979 (9 C.F.R. § 11.3 (1993)). The Scar Rule creates an irrebuttable presumption of law that a horse born on or after October 1, 1975, having specified lesions, is a sore horse, in violation of the Act.²⁵ As a result of the Scar Rule, the soring that is seen today is completely different from the soring seen in the mid-1970's, which formed the basis for the Ames and Auburn studies. The present soring is far more subtle, "mainly of the skin and the immediate underlying tissues, the subcutaneous tissues there, not involving the deeper tissues of muscle or bone or tendons" (Tr. 125), which were involved during the 1970's (Tr. 124-26).²⁶ Dr. Knowles testified (Tr. 124-26):

²⁵See *In re Rowland*, 52 Agric. Dec. 1103, 1119-30 (1993), [aff'd, 43 F.3d 1112, 1995 WL 10829 (6th Cir.), cert. denied, 115 S.Ct. 2610 (1995)].

²⁶Congress recognized as early as 1976 that "[d]evious soring methods have been developed that cleverly mask visible evidence of soring." H.R. REP. No. 1174, 94th Cong., 2d Sess. 4 (1976), reprinted in 1976 U.S.C.C.A.N. 1696, 1698-99.

THE WITNESS: Yes. This study, the Aimes [sic] Study, was done -- was completed, apparently in August of '75.

At that particular point in the soring of Walking Horses, there was a lot of traumatic damage that had been done.

That was prior to the Scar Rule being initiated. And the -- the areas of the pastern were pretty severely messed up.

And the soring that they were trying to create was pretty severe, compared to what we have seen, in more recent times.

The soring was to a level that involved tissues other than the skin and the immediate subcutaneous areas. And it involved inflammation that was pretty deep.

And the soring that we see nowadays is a completely different technique than what they were trying to reproduce in these studies.

We'd see what would be more of a generalized soring. And this soring is mainly of the skin and the immediate underlying tissues, the subcutaneous tissues there, not involving the deeper tissues of muscle or bone or tendons.

And, for this study, in my opinion, to be totally valid, it would have to be reproduced more in with the times that we have now.

And that's what I wanted to get across, times have changed somewhat.

Q. (By Ms. Deskins) Right. Now, Doctor, would that also apply to any other studies that were done during that time period?

A. Well, both of these studies were done at about that same time period. I -- this was done in August, '75, the Aimes [sic] Study. And the -- I don't -- we got the other study [Auburn] somewhere here.

Q. Well --

A. I don't know the date on it. It was in the 70's though.

Q. Okay. So, it -- we'll just -- that other study isn't part of the exhibits, but --

A. Okay.

Q. Okay. I'm just -- another study that was done during that same time period, your comments that you made on the Nelson Report [i.e., the Ames Study] would apply to any other studies during that time?

A. I just wanted to point out that the criteria of soreness, that's listed here, the redness, swelling, heat, pain and impaired function haven't changed.

But, the way that these things are put on a horse, and the techniques that are being used, have. So, I think that needed to be noted.

Similarly, Dr. Crichfield testified that in the latter years of the Horse Protection Act work that he did, the visible signs of soring were different from those detected in the early years, stating (Tr. 203-05, 213-14):

Q. (By Mr. Blankenship) And, directing your specific attention to Respondent's Exhibit 8, which is the old 19-7, and directing your attention to the box, which is number 29, "Way-of-going". Do you consider the way-of-going of a horse to be an important factor in your diagnosis of a horse, whether it's sore or not?

A. Not in the latter years of the work that I did in Horse Protection.

Q. You don't consider way-of-going?

A. I do consider it. And if it's abnormal, we'll take it into consideration. But, I don't consider it to be critical, the way the horse goes, as to whether or not he's going to be classified as a sored horse, in the latter years of the Horse Protection work that I did.

Q. Okay. What about Doctor -- and that is not on the new form?

A. That is --

Q. It has been removed from the new form?

A. That's right.

Q. Is that correct?

A. Yes.

Q. The next item, item number 30, "General Appearance, Attitude and Stance," do you consider that an important factor?

A. Here again, no, sir.

Q. Okay.

A. Not being critical, as the determining factor as to whether or not we're going to write the horse up.

Q. Do you consider that a factor?

A. Only if there's something abnormal about it, would I add it to the case.

Q. Okay. And that is not on this form?

A. No, sir, it is not.

Q. And, items 31 and 32, "Respiration and Perspiration," is not on the new form; is that correct?

A. That's right.

Q. And do you consider those factors in determining whether or not a horse is sore?

A. Same answers I gave for the others, I do not consider them as the critical or determining factors.²⁷

²⁷Although Dr. Knowles testified that "way of going," "general appearance, attitude and stance," and "respiration rate" were "important" (Tr. 82-83), that is not in real conflict with Dr. Crichfield's testimony quoted above. Dr. Crichfield did not consider them important, but he would note them if abnormal (Tr. 203-04). Dr. Knowles considered them important, but, as shown by the present case, he did not let the absence of any abnormality in those factors deter him from concluding that "A Mark For Me" was sore, in violation of the Act. The difference in their testimony is semantical, not involving a difference in the result they would reach. Both would note those factors if they were abnormal--neither considers

abnormality in those factors necessary to a determination of a sore horse.

Q. Okay. And do you, again, have the qualifier, not in the later years?

A. Yes, I -- by that I mean I saw a lot more of this kind of condition in the early years, where you would have these things being in an abnormal state, involving sored horses, but not in the latter years.

Q. Okay. Now, directing your attention to item number 36, which is a small box, where it talks about forelegs, digital pulse, hoof, pastern, frog, fetlock, tendon, all of those have been removed from the 7077 form. Do you consider any of those factors in considering your diagnosis of a horse?

A. I consider the pastern area, only, probably as a -- that, to me, is the critical area in determining the horse to be sore.

. . . .

Q. Did you -- if you would look at your affidavit and look at the Complainant's 4 and upon a review of both, tell me if you determined that this horse was lame?

A. I don't make any mention of this horse being lame anywhere.

Q. Did you find this horse to be inflamed, suffer inflammation?

A. Here again, I'm not looking, per se, for inflammation, because most of the time it's not visible on these horses anyway.

Q. What would you expect to see if a horse was suffering inflammation?

A. Well, here again, most of the time you won't see anything because the inflammation is going to be in the subcutaneous tissue.

And even if it's on the skin, the skin of most of these horses I'm dealing with is black, and it's not visible.

Q. Okay. So, you can't see the inflammation, is that right?

A. Not unless you really -- you know, the horse has really been abused bad, then you can get a -- and it depends, here again, the color of the horse.

You give me a white horse, with a light pink like skin, and yeah, I can see some inflammation in those. Some of the Sorrels and Chestnuts, you can.

Q. What are the signs of inflammation, Doctor?

A. Well, redness, swelling, increased heat, if you want the text book, you know, all those kind of things.

Q. Would you have --

A. And pain usually goes along with inflammation.

Q. Would you agree that the practice of soring causes a severe inflammatory reaction in the pastern of a horse?

A. Well, it causes, in various degrees, an inflammatory reaction, yes, some of them mild, some of them severe, some of them --

Q. Okay. So --

A. -- in between.

Q. So, when you testified about the color, you were only referring to redness, I'm assuming?

A. Yeah. I'm talking about what I can visually see with my eye. And most of the time, it's been my experience, I couldn't detect it with my eyes.

Respondents' expert, Dr. Proctor, did not know whether the methods of soring horses have changed from the mid-1970's to the 1990's (Tr. 551), but he "believe[d]" that even if the methods had changed, the physical responses would be the same (Tr. 571). He testified (Tr. 551, 571):

Q. . . .

Now, referring, again, to RX-3 [the Ames study], the date of that study is August, 1975?

A. Yes.

Q. Doctor, would you agree that the type of sore horse that was being observed in 1975 is quite different from the type of sore horse that's being seen in the '80 -- I'm sorry, in the '90s?

A. No.

Q. You would not agree?

A. We have the same drugs available, we have the same horse.

Q. To your knowledge, Doctor, have the methods of soring horses changed from the mid-'70s to the 1990s?

A. I can't speak to that. I'm not --

....

REDIRECT EXAMINATION

BY MR. BLANKENSHIP:

Q. I want to just make a couple of points clear, Dr. Proctor. Even if the methods of soring have changed, the clinical signs that you testified to as to what a sore horse is, and the physical responses you would expect to see would remain the same; is that true?

A. I believe so.

Q. And the physical pain, distress, inflammation and lameness, as they're applied in the Horse Protection Act, are very fundamental principles; are they not?

A. Yes, sir.

I give far greater weight to the testimony of the USDA veterinarians who have been extensively engaged in the detection of soreness under the Horse Protection Act since 1973 and 1974 (Tr. 12, 139) than to the testimony of Dr. Proctor, whose experience is limited to his private veterinary practice (Tr. 493-500). Even though Dr. Proctor treats horses in pain almost daily (Tr. 500), one who had sored a horse to improve its gait would not likely take the horse to Dr. Proctor to treat the soring inflicted on the horse. Hence his views do not detract from the views of the USDA experts who were in a far superior position to observe the changes since the mid-1970's.

Accordingly, the mid-1970 studies, and the present views of Respondents' experts based on those studies, are no longer valid. Of even greater significance is the fact that the express words of the Horse Protection Act show that pain, without other indicia of inflammation or lameness, is sufficient. That is, a horse meets the statutory definition of "sore" if, "as a result of such application, infliction, injection use, or practice, such horse suffers, or can reasonably be expected to suffer, physical *pain* or distress,

inflammation, *or* lameness when walking, trotting, or otherwise moving" (15 U.S.C. § 1821(3)(D) (emphasis added)).

C. General Consensus of July 24, 1991, Atlanta Meeting, Relied on by Respondents, Is Not Persuasive.

Respondents and their experts rely on a summary of the "general consensus" of a meeting held in Atlanta, Georgia, on July 24, 1991 (RX 4), by the participants (other than Dr. Arnoldi of APHIS (Tr. 557)), which concludes that digital palpation is not in itself a reliable diagnosis of soring, and that a number of criteria are necessary to make a diagnosis of soring, including inflammation, indicated by redness, swelling, pain, heat and interference with function. The summary, which was prepared by Mr. Blankenship, Respondents' attorney and one of the participants in the meeting (Tr. 557), does not on its face state that the consensus relates solely to soring under the Horse Protection Act. But Dr. D. L. Proctor, one of Respondents' witnesses in this case, and a participant of the meeting, testified that the meeting related to soring under the Horse Protection Act. He testified (Tr. 560, 572-73):

Q. What was their [Mr. Blankenship and Mr. Hunnicutt, Tennessee Walking Horse Breeders & Exhibitors Association] purpose in being at this meeting of veterinarians?

A. Because, my understanding is that in '88 and '89, the number of write-ups, of violations, increased four or five fold, and the Walking Horse industry was upset because of a perceived lack of uniformity in examination.

And this was a proactive attempt by the Walking Horse industry to get a uniform acceptable, scientifically credible means of examination of these horses.

. . . .

[Q. By Mr. Blankenship] . . .

Isn't it a fact, Dr. Proctor, that myself and Mr. Bob Hunnycutt [sic], with the assistance of Dr. Tom Vaughn [sic], Dean Vaughn [sic], from Auburn, tried to assemble a group of independent, highly qualified equine veterinarians to establish what a reasonable, fair inspection guideline to determine compliance under the Horse Protection Act. Wasn't that the purpose of --

. . .

THE WITNESS: That was my understanding, that this was in answer to a problem of the Walking Horse industry and it was your proactive stance in trying to remedy it.

Q. (By Mr. Blankenship) But, I'm afraid what the record's unclear about, Doctor, it wasn't an intent by you independent physicians to assist the industry to come up with some way to circumvent the Horse Protection Act, was it? Wasn't it an attempt to enforce the Horse Protection Act fairly?

A. We -- those gentlemen, and I speak especially for myself, but for Tom Vaughn [sic] and Dewitt Owen, we're on the record as aploring [sic] any kind of cruelty to any type of animal.

That's one of the most foremost tenants of organized veterinary medicine. And, as such, there's no amount of pressure to get those gentlemen, with their background, to do anything that they thought would encourage inhumane practices in the Walking Horse industry.

The memorandum of the meeting, prepared by Mr. Blankenship, which is unsigned, states in its entirety (RX 4) (emphasis added):
July 24, 1991

The meeting was attended by the following:

Dr. Tom Vaughan, Dean

College of Veterinary Medicine
Auburn University

Dr. John R. Ragan
State Veterinarian
Tennessee Department of Agriculture

Dr. D. L. Proctor
Proctor & Proctor

Dr. DeWitt Owen
Owen Veterinary Clinic

Dr. Joan Arnoldi
Deputy Administrator
Regulatory Enforcement & Animal Care [APHIS]

Dr. Ray Miller
Brogli, Miller, & Lane
Animal Hospital

Mr. Tom Blankenship
Attorney
7050 Madison Avenue
Indianapolis, Indiana

Robert Hunnicutt
Tennessee Walking Horse Breeders
& Exhibitors Association
Ashburn, Georgia

Dr. Ram C. Purohit
Professor of Large Animal Surgery
Auburn University

The general consensus of the meeting was as follows:

- 1) Diagnosis of Lameness is highly technical.

- 2) Movement through leading, riding and turning is an integral part of diagnosis.
- 3) Pain tolerance threshold and reactions vary in individual animals.
- 4) A Doctor of Veterinary Medicine does not insure that one is qualified to detect lameness in a horse.
- 5) It is important that any inspection on digital palpation be done within the comfort level of the individual animal, and not extending or flexing the animal's limbs beyond normal limits, and in a manner which will not compromise the balance or normal stance of an individual horse.
- 6) Soreness and pain are not synonymous with sensitivity.
- 7) *A number of criteria are necessary to make a diagnosis and there must be a reasonable agreement among the criteria to make a diagnosis.*
- 8) *Inflammation indicated by redness, swelling, pain, heat and interference with function.*

FACTORS TO BE RECOGNIZED:

- 1) Variance of pain tolerance threshold versus pain detection threshold.
- 2) Recognizing learned avoidance -- conditional reflex.
- 3) Recognizing aversive response -- immediate reaction.
- 4) On digital palpation -- recognizing the horse's comfort level, taking care not to flex or extend limbs beyond normal limits.
- 5) *Digital palpation is not in itself a reliable diagnosis.*

- 6) In the event of uncertainty in evaluation, the benefit of the doubt should go to the favor of the horse.

Two of the participants at the meeting, Dr. Vaughan and Dr. Purohit, had done basic research in the mid-1970's for the (outdated) Auburn study, discussed above (Tr. 558-59, 564), which is similar to the (outdated) Ames study in 1975 (RX 3), discussed above. At least Dr. Proctor, if not all of the private veterinarian participants, agreed with the (outdated) 1975 Ames study (RX 3). (Tr. 503-04.)

The July 24, 1991, consensus, just quoted (RX 4), is squarely contrary to the Horse Protection Act, which requires no more than that a horse can reasonably be expected to suffer pain (produced by man) when moving (15 U.S.C. § 1821(3)(D)). There is no requirement in the Act that the horse exhibit redness, swelling, heat or interference with function. The general consensus of the July 24, 1991, meeting (RX 4) is, in effect, a prescription for repealing the Horse Protection Act, while leaving in its place a facade to give lip-service to the purposes of the Horse Protection Act. If the Department were to accede to the principles set forth in RX 4, soring, as it exists today, could be practiced virtually with impunity. To be sure, a few cases could still be brought, e.g., if someone abused a horse to the extent that it violated the Scar Rule, or if the soring was so inept that it caused a gait deficit. Considering all of the Horse Protection Act cases decided by the Judicial Officer from June 29, 1990, to the present²⁸ (not involving the irrebuttable

²⁸No Horse Protection Act cases were decided by the Judicial Officer from September 12, 1985, through June 28, 1990.

presumption created by the Scar Rule), [in which the horses were found to be sore by the Judicial Officer,] the evidence as to 19 of the 25 horses, or 76%, consisted entirely of the reaction of the horses to palpation.²⁹ Even as to the other six horses in which there was some evidence of a slight gait deficit (usually failing to lead freely with a loose rein, and sometimes tucked under),³⁰ the primary evidence in each case was the palpation evidence. There can be no doubt about

the fact that under the general consensus of the 1991 Atlanta meeting (RX 4), the sophisticated, subtle practice of soring practiced today to improve the gait of Tennessee Walking Horses would be untouchable.

²⁹*In re Burks*, 53 Agric. Dec. [322, 328-29, 339-42 (1994)]; *In re Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. [261, 269-78, 283-84, 286-94 (1994) (two horses), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994)]; *In re Martin*, 53 Agric. Dec. [212, 223-24 (1994), *rev'd per curiam*, 57 F.3d 1070 (Table), 1995 WL 329255 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24)]; *In re Bobo*, 53 Agric. Dec. [176, 198-201 (1994) (same horse, two shows), *aff'd*, 52 F.3d 1406 (6th Cir. 1995)]; *In re Kelly*, 52 Agric. Dec. 1278, 1288-95 (1993), [*appeal dismissed*, 38 F.3d 999 (8th Cir. 1994)]; *In re Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-62 (1993); *In re Watlington*, 52 Agric. Dec. 1172, 1187-92 (1993) (one of two horses); *In re Roach* (Decision as to Calvin L. Baird, Sr.), 52 Agric. Dec. 1092, 1101-02 (1993), [*rev'd*, 39 F.3d 131 (6th Cir. 1994)]; *In re Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 308-13 (1993), *aff'd*, [28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994)]; *In re Callaway*, 52 Agric. Dec. 272, 284-89 (1993); *In re Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 262-66 (1993); *In re Holt* (Decision as to Richard Polch & Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, [32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24)]; *In re Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *In re Smith*, 51 Agric. Dec. 327, 328-31 (1992); *In re Sparkman*, 50 Agric. Dec. 602, 612-14 (1991); *In re Holt*, 49 Agric. Dec. 853, 856-57 (1991); *In re Edwards*, 49 Agric. Dec. 188, 195-97, 204-06 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, [503 U.S. 937 (1992)].

³⁰*In re Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1229, 1235 (1993), [*aff'd*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995)]; *In re Watlington*, 52 Agric. Dec. 1172, 1192 (1993) (one of two horses); *In re McConnell*, 52 Agric. Dec. 1156, 1160 (1993), *aff'd*, 23 F.3d 407, [1994 WL 162761 (6th Cir.

1994), *printed in* 53 Agric. Dec. 174 (1994)]; *In re Crowe*, 52 Agric. Dec. 1132, 1152 (1993); *In re Roach* (Decision as to Calvin L. Baird, Sr.), 52 Agric. Dec. 1092, 1101-02 (1993) (one of two horses), [rev'd, 39 F.3d 131 (6th Cir. 1994)]; *In re Gray*, 52 Agric. Dec. 1044, 1073-74 (1993), [aff'd, 39 F.3d 670 (6th Cir. 1994)].

**D. Recommended Protocol for DQP Examinations
Dated August 7, 1991, Relied on by Respondents, Is
Not Persuasive.**

Respondents also rely on a memorandum dated August 7, 1991, setting forth the recommended protocol for DQP examinations (RX 5). This memorandum is signed by all six of the private veterinarians who participated in the July 24, 1991, Atlanta meeting, just discussed. This memorandum is similar in nature to the general consensus just discussed, and repeats the view that "digital palpation, in and of itself, is not a reliable diagnosis of soring" (RX 5, p. 2). However, this memorandum suffers from the same weaknesses just discussed as to the July 24, 1991, Atlanta general consensus (RX 4).

Footnotes 29 and 30 quoted above list all the cases decided by the Judicial Officer from September 12, 1985, to August 31, 1994, under the Horse Protection Act (not involving the irrebuttable presumption created by the Scar Rule) in which the horses were found by the Judicial Officer to be sore, and the accompanying text explains that the evidence as to 19 of the 25 horses, or 76%, consisted entirely of the reaction of the horses to palpation. To bring those statistics up to date, there have been six subsequent cases, and in all six cases, the evidence that the horses were sore consisted entirely of the horses' reactions to palpation.⁶ Hence, as to 25 of the 31 horses found sore by the Judicial Officer from September 12, 1985, to the present, or 80.6%, the sole evidence was the horses' reaction to palpation.

⁶*In re Keith Becknell*, 54 Agric. Dec. 335, 337-38, 339-40, 344-45 (1995); *In re C.M. Oppenheimer*, 54 Agric. Dec. 221, 287 (1995); *In re Tracy Renee Hampton*, 53 Agric. Dec. 1357, 1363-65, 1367-70 (1994); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1337-42, 1345-46 (1994), appeal docketed, No. 94-7044 (11th Cir. Oct. 28, 1994); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1305-06 (1994), appeal docketed, No. 94-9202 (11th Cir. Oct. 26, 1994); *In re Bill Young*, 53 Agric. Dec. 1232, 1253-67 (1994), rev'd, 53 F.3d 728 (5th Cir. 1995) (2-1 decision).

To require additional evidence, e.g., a gait deficit (lameness) would totally defeat the purpose of the Act. As the court noted in *Elliott v. Administrator, Animal & Plant Health Inspection Service*, 990 F.2d 140, 144 (6th Cir.), *cert. denied*, 114 S. Ct. 191 (1993):

Congress enacted the Horse Protection Act to end the practice of deliberately making Walkers "sore" for the purpose of altering their natural gait and improving their performance at horse shows. When the front limbs of a horse have been deliberately made "sore," usually by using chains or chemicals, "the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker]." H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. [Bracketed material by the court.]

If horses had to be sore enough to cause a gait deficit, that would totally defeat the congressional purpose to prevent the soring of horses done to improve their gait.

Although the horses' reaction to palpation constituted the only evidence that the horses were sore in 80.6% of the cases since September 12, 1985, that is not to suggest that in any of those cases, digital palpation was the only diagnostic test employed by the APHIS veterinarians to determine whether or not the horses were sore. As stated in my decision in *Bill Young, supra*, 53 Agric. Dec. at 1286:

USDA veterinarians never conduct an examination based solely on digital palpation, without also looking at the general appearance of the horse, and its way of going, etc. (Findings 14, 30). However, after considering various diagnostic tests, including the general appearance and way of going of the horse, it will frequently be the case that palpation will be the only diagnostic test actually used to prove a case under the Act. That is, even though the horse's general appearance, etc., and way of going was normal, if digital palpation demonstrated that the horse could reasonably be expected to suffer pain when moving, that would be enough under the express terms of the Act to bring a case for soring.

This same view was stated in a letter dated May 29, 1991, from Dr. Joan M. Arnoldi, Deputy Administrator, APHIS, to Dr. Raymond C. Miller, as follows (RX 14, p. 1):

All APHIS veterinarians involved in horse protection are carefully instructed on the clinical signs exhibited by a sore horse. The use of palpation is only one means of making a determination. Several clinical considerations are reviewed in taking action on an alleged sore horse.

The views quoted above from my decision in *Bill Young* will be followed by this Department notwithstanding the split decision by the Court of Appeals reversing *Bill Young*. The "expert testimony and a written protocol [i.e., the Atlanta Protocol]" relied on by the Court in *Young v. United States Dep't of Agric.*, 53 F.3d at 731, is devoid of merit, for the reasons quoted above. One Circuit Judge dissented in *Young v. United States Dep't of Agric.*, 53 F.3d at 732, and only one Circuit Judge reversed, since a District Judge sitting by designation was the third Judge on the panel. Hence the case is not a strong precedent even in the Fifth Circuit. Moreover, the Court explained (53 F.3d at 732):

In cases where the Secretary of an agency does not accept the findings of the ALJ, this court "has an obligation to examine the evidence and findings of the [JO] more critically than it would if the [JO] and the ALJ were in agreement." *Pinkston-Hollar Const. Services, Inc.*, 954 F.2d at 309-10 (citation omitted); *Garcia v. Secretary of Labor*, 10 F.3d 276, 280 (5th Cir. 1993) (stating that "[a]lthough this heightened scrutiny does not alter the substantial evidence standard of review, it does require us to apply it with a particularly keen eye, especially when credibility determinations are in issue. . . .").

....

.... We hold that in light of the significant evidence calling into question the probative value and reliability of that documentary evidence where we are required to apply stricter scrutiny to the JO's conclusions which contradict the ALJ and in light of the substantial counter-evidence indicating that the horse was not sore, the JO's

determination was not supported by substantial evidence and his decision should be reversed and judgment should be rendered in favor of Young and Sherman. (Footnote omitted.)

Since an important basis for the Court's reversal in *Young v. United States Dep't of Agric.* was the ALJ's adverse findings of fact, the Court's decision in *Young v. United States Dep't of Agric.* would not be in point if the ALJ in a future case finds the facts against the Respondent.

It is worth discussing other aspects of the Court's decision in *Young v. United States Dep't of Agric.*. The Court states (53 F.3d at 729-30):

At this time the USDA's sole technique for determining whether a horse was sore in violation of the HPA was digital palpation (digital palpation consists of pressing the ball of the thumb into the horse's forelimbs to test for pain).

As stated above, digital palpation has never been the sole technique for determining whether a horse was sore. But, in about 80% of the cases, after looking at other factors, the only proof that the horse was sore was the horse's reaction to palpation.

The Court further stated in *Young v. United States Dep't of Agric.*, 53 F.3d at 730-31:

There is significant evidence in the record indicating that the evidence relied on by the JO and the USDA to support a finding of soreness is lacking in probative value and reliability. See *Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct. at 464 (holding that in determining whether an administrative order is based on substantial evidence, the reviewing court must consider "whatever in the record fairly detracts from [the] weight" of the evidence). The VMO's testimony in this case revealed that as a general practice VMOs prepare summary reports and affidavits only when administrative proceedings are anticipated. See *Palmer v. Hoffman*, 318 U.S. [109], 63 S.Ct. [59], 87 L.Ed. [496] (1943) (holding that an accident report prepared by a railroad did not carry the indicia of reliability of a routine business record because it was prepared at least partially in anticipation of litigation); *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979) (holding that an affidavit prepared by an official of the United States Treasury Department was unreliable

because it was prepared in anticipation of litigation). More important, the VMOs admitted that they only included observations indicating that a horse was sore and did not include evidence indicating that a horse was not sore. The VMOs also indicated that they were given instructions regarding how to prepare the documents by USDA attorneys so that the documents would support a USDA complaint under the HPA. Thus, although the authors of the documents may have been objective in forming their opinion (as the JO found), the documents themselves admittedly recorded a biased account of the results of the inspection. We conclude that their probative value is limited.

The various points quoted immediately above will all be discussed, but not in order. The Court's observation that the "VMOs admitted that they only included observations indicating that a horse was sore *and did not include evidence indicating that a horse was not sore*" (emphasis added) is not accurate. To be sure, the VMOs testified that they only recorded abnormal conditions, i.e., conditions that would indicate that the horse was sore, but *the normal conditions that were not noted did not in the slightest degree indicate that the horse was not sore*. Consider "way-of-going," for example. The VMOs would note if the horse had an abnormal way of going, i.e., a gait deficit, but would frequently not note that the horse had a normal way-of-going. However, as explained above, a normal way-of-going does not tend in the slightest degree to prove that the horse was not sore.

The *Bill Young* record shows that many types of normal circumstances would ordinarily not be noted in the affidavits and forms, such as general appearance, attitude and stance (Tr. 82), respiration rate (Tr. 83), perspiration (Tr. 84), digital pulse, hoof condition, frog, fetlock or tendon condition (Tr. 85), swelling (Tr. 93), signs of inflammation, other than pain (Tr. 101), and distress (Tr. 101). Again, any of these circumstances, if abnormal, could be an indication of a sore horse. But the *Bill Young* record, and scores of other records, show that not one of these circumstances, if normal, tends to prove in even the slightest degree that the horse was not sore, particularly in view of the change that has occurred in the soring of horses in recent years. As early as 1978, the Department recognized the change in soring practices from the earlier years stating (43 Fed. Reg. 18,514, 18,521-22 (1978)):

Prior to and immediately after passage of the Horse Protection Act of 1970, it required little knowledge or skill to recognize a sored horse.

Soring was flagrant and obviously visible to the naked eye. However, the horse with bloody legs and open sores on the pasterns is a thing of the past. Soring today is devious and is seldom evident to the untrained or inexperienced observer.

As Drs. Knowles and Crichfield testified in *Bill Young* quoted above, in recent years the soring methods have become even more sophisticated. Therefore, the VMOs do not see many of the signs of soring that used to be prevalent, and frequently all signs will be normal except the horse's reaction to palpation. As shown below, when the horse consistently and repeatedly gives a pain reaction to palpation on both front feet only on particular spots of the pastern area (almost always symmetrically located on the pasterns where the chains will hit them), and the veterinarians have used techniques to determine that the reaction is not due to natural factors, excitement, nervousness, or a horse skittish about its feet, etc., veterinarians can reliably conclude that the horse is sore because of chemical or mechanical devices. Their failure to record irrelevant data, i.e., the fact that other circumstances were normal, does not tend even in the slightest degree to prove that the horse was not sore. Thus, the Court's observation that "the documents themselves admittedly recorded a biased account of the results of the inspection" (53 F.3d at 731) is unfounded.

Another reason given by the Court as to why the USDA documents were lacking in probative value and reliability is that the "VMOs also indicated that they were given instructions regarding how to prepare the documents by USDA attorneys so that the documents would support a USDA complaint under the HPA" (53 F.3d at 731). In this respect, Dr. Crichfield testified in *Bill Young* (Tr. 198):

Q. (By Mr. Blankenship) Have you received training, insofar as the preparation of the paperwork necessary to document an alleged violation?

A. Yes. I believe I'm well versed in that.

Q. Who gave you that training?

A. Well, through the years, as the documents evolved, they evolved as I was working this Act, from the very start.

And, we were given various documents to fill out, and explained by, sometimes it would be compliance officers, sometimes it would be lawyers with the Department of Agriculture, to explain it to us.

Q. Have lawyers from the Department ever told the VMOs, in general, and you, in particular, what is necessary for you to put on an affidavit, in order to sustain a finding of a sore horse?

A. I don't recall them ever specifically saying that I had to put down specific things. I've heard them lecture, lawyers have, on what they considered to be the pertinent points that's involved, insofar as is involved, and what they consider to be a horse that would meet the criteria to be sore.

I see nothing sinister or improper in the training given to Department veterinarians by Department lawyers and investigators as to the precise elements of a sore horse, as defined by the Horse Protection Act. As explained above, Dr. Raymond C. Miller and the other veterinarians involved in the Atlanta Protocol erroneously believe that lameness is an indispensable element under the statutory definition of sore. If the Department's veterinarians were similarly misinformed as to the statutory definition, over 80% of the sore horses would be overlooked, as explained above. Only if there were a basis for believing that the Department's lawyers and investigators teach the veterinarians to lie and falsify documents in order to prove a non-existent violation would there be any basis whatever for discrediting the probative value and reliability of the documents merely because the Department engages in such training. Presumably (since it occurs in every case), the veterinarians are taught by lawyers or investigators to record the events immediately on the Summary of Alleged Violations form (generally within 10 minutes after the two veterinarians have agreed that the horse is sore), and to write an affidavit while the events are fresh in their minds (generally the same day of the investigation, or within a day or two, using the notes that they made within a few minutes after the violation was detected). Presumably, and hopefully, they are taught by the lawyers about the conduct of an administrative hearing, e.g., that they will be testifying under oath and required to tell the entire truth, that they have to wait for a ruling on an objection, before answering, and that they must respond to the question asked, rather than volunteering what they want to talk about.

In the 75 cases that I have reviewed under the Horse Protection Act, I have not detected the slightest basis for inferring or suspecting that the Department's

veterinarians have been trained to be anything but completely objective in their enforcement of the Horse Protection Act. In fact, they have stated again and again in case after case that they give the benefit of the doubt to the horse trainer and owner, and only bring cases where both veterinarians are convinced that artificial means have been used to sore the horse. As Dr. Hendricks testified in the case *sub judice* (Tr. 136):

Q. Now, if there's any doubt in your mind that a horse is sore as defined by the HPA, to whom do you give the benefit of the doubt?

A. We give it to the horse.

Finally, on this point, as stated above, the majority decision by the court in *Young v. United States Dep't of Agric.* seems to be based on a presumption that the attorneys and investigators have so tainted the veterinarians (by their training sessions) that documents prepared by the veterinarians are not reliable and probative. However, the Supreme Court and the Fifth Circuit, along with other circuits, have recognized that there is a presumption of regularity as to the official acts of public officers. As stated in *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1633, 1701-02 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), printed in 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976):

There is a presumption of regularity with respect to the official acts of public officers and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15. Accord: [*Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953);] *Reines v. Woods*, 192 F.2d 83, 85 (Emerg. C.A.); *National Labor Relations Board v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (C.A. 5); *Woods v. Tate*, 171 F.2d 511, 513 (C.A. 5); *Pasadena Research Laboratories v. United States*, 169 F.2d 375, 381 (C.A. 9), certiorari denied, 335 U.S. 853; *Laughlin v. Cummings*, 105 F.2d 71, 73 (C.A.D.C.).

Accordingly, instead of presuming that the attorneys and investigators warped the viewpoint of the VMOs to the point that the VMOs' documents are presumptively unreliable, the Court should have presumed that the training was

conducted in a proper manner, so that all *relevant* facts could be presented in a fair and impartial manner.

The Court in *Young v. United States Dep't of Agric.* further states (53 F.3d at 730-31):

The VMO's testimony in this case revealed that as a general practice VMOs prepare summary reports and affidavits only when administrative proceedings are anticipated. *See Palmer v. Hoffman*, 318 U.S. [109], 63 S.Ct. [59], 87 L.Ed. [496] (1943) (holding that an accident report prepared by a railroad did not carry the indicia of reliability of a routine business record because it was prepared at least partially in anticipation of litigation); *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979) (holding that an affidavit prepared by an official of the United States Treasury Department was unreliable because it was prepared in anticipation of litigation).

Hence the Court is suggesting, or holding, that the veterinarians' Summary of Alleged Violations forms and affidavits are lacking in probative value and reliability, in part, solely because they do not prepare reports when they find no violations, but only when they find violations and, thus, are anticipating litigation. However, the cases relied on by the Court are clearly distinguishable from *Young v. United States Dep't of Agric.* In *Palmer v. Hoffman*, the issue was whether a statement signed by the engineer of a train involved in an accident, who died before the trial, was admissible under the business record exception to the hearsay rule, under an Act which provided (318 U.S. at 111, n.1):

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business"

shall include business, profession, occupation, and calling of every kind.

The Court held that the statement was not admissible because the statement was "not for the systematic conduct of the enterprise as a railroad business," and that the primary utility of the statement was "in litigating, not in railroading" (318 U.S. at 114). Specifically, the Court held (318 U.S. at 113-15):

The engineer's statement which was held inadmissible in this case falls into quite a different category. (Footnote omitted.) It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner v. Seattle, R. & S. Ry. Co.*, 56 Wash. 310, 312-313, 105 P. 634. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co. v.*

United States, 250 U.S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

. . . .

The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But "regular course" of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

In *Young v. United States Dep't of Agric.*, there was no question about the admissibility of the affidavits and Summary of Alleged Violations forms under the Department's Rules of Practice. The documents were properly admitted. The only issue was whether they were inherently unreliable and lacking in probative value. Furthermore, unlike the railroad business involved in *Palmer v. Hoffman*, the business of the Animal and Plant Health Inspection Service under the Horse Protection Act is investigating and litigating, where violations are found. As law enforcement officers, it is the duty of VMOs to detect

violations of the federal statute and to initiate the procedure for bringing disciplinary complaints against the violators. Hence, litigating is "the inherent nature of the business in question" (318 U.S. at 115), and the preparation of the Summary of Alleged Violations forms and affidavits is the most important of the "methods systematically employed for the conduct of the business as a business" (*Ibid.*).

This issue is of the utmost importance to the Executive Branch of the Federal Government. There are undoubtedly law enforcement officials throughout the Federal Government who, like the APHIS veterinarians, "prepare summary reports and affidavits only when administrative proceedings are anticipated" (53 F.3d at 730). And, like the APHIS veterinarians, there are undoubtedly law enforcement officers throughout the Federal Government who handle such a high volume of work that they could not possibly remember the details of a particular violation by the time they appear at an administrative hearing several years later, and who are, therefore, totally dependent on past records made while the events were fresh in their minds. If the judicial branch of the Government is to create a judicial rule of law that all such records, made in contemplation of litigation by agencies whose business is to litigate with respect to violations detected, are to be regarded as inherently lacking in indicia of reliability, that is a judicially-constructed rule so destructive of law enforcement in the United States that it should be reviewed by the Supreme Court of the United States.

United States v. Stone, also relied upon by the Court in *Young v. United States Dep't of Agric.*, is similar in nature to *Palmer v. Hoffman*, just discussed. The issue in *United States v. Stone* was "whether the government violated the hearsay rule and the defendant's right of confrontation when the government used an affidavit instead of live testimony for the purpose of explaining how an official record demonstrated that the Treasury Department mailed a check that the defendant later had in his possession" (604 F.2d at 924). The Government argued that the affidavit was admissible under Federal Rule of Evidence 803(8)(A) as a public record or report setting forth "the activities of the office or agency" (604 F.2d at 925). The Court held, however, that the affidavit "violates the hearsay rule and the defendant's confrontation right" (604 F.2d at 924). The Court held (604 F.2d at 925-26):

This hearsay exception is designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation. See, e.g., *Ellis v. Capps*, 500 F.2d 225, 226 n.1 (5 Cir. 1974) (allowing admission of official

records compiled in prison's "regular course of business"); *United States v. Newman*, 468 F.2d 791, 795-96 (5 Cir. 1972), *cert. denied*, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973) (same). This exception for an agency's official records does not apply to Ford's personal statements prepared solely for purposes of this litigation. Ford's statements are likely to reflect the same lack of trustworthiness that prevents admission of litigation-oriented statements in cases such as *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed.2d 645 (1943).

As stated above, under the decision in *Palmer v. Hoffman*, the lack of trustworthiness precluding admission of the engineer's statement as a business record arose only because the business involved in *Palmer v. Hoffman* was railroading, not litigating. That was not true in *Young v. United States Dep't of Agric.*. Furthermore, here, again, we are not concerned with trying to have the VMOs' affidavits and forms admitted as business records, since they were properly admitted under the Department's Rules of Practice and the Administrative Procedure Act (5 U.S.C. § 556(d); 7 C.F.R. § 1.141(h); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1339 (1994), *appeal docketed*, No. 94-7044 (11th Cir. Oct. 28, 1994); *In re James W. Hickey*, 47 Agric. Dec. 840, 850 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1222-24 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980)).

Moreover, even under the Federal Rules of Evidence, it appears that the documents at issue in *Young v. United States Dep't of Agric.* would have been admissible under Rule 803(8)(C), which provides:

The following are not excluded by the hearsay rule,
even though the declarant is available as a witness:

. . . .

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of

information or other circumstances indicate lack of trustworthiness.

Under Federal Rule of Evidence 803(8)(C), factual findings by VMOs resulting from an investigation made pursuant to authority granted by the Horse Protection Act would be admissible, even though the declarant is available as a witness, unless the sources of information or other circumstances indicate lack of trustworthiness. That is, they would have sufficient indicia of reliability to be admissible in a Federal Court even though they were prepared in anticipation of litigation, and even though the declarant was available as a witness, unless some other circumstance indicated lack of trustworthiness. Hence there is no basis for the Court's view in *Young v. United States Dep't of Agric.* that the VMOs' documents lacked evidence of trustworthiness merely because they were prepared in anticipation of litigation. They would only be inadmissible if "the sources of information or other circumstances indicate lack of trustworthiness" (FED. R. EVID. 803(8)(C)). As shown above, the Court's view in *Young v. United States Dep't of Agric.* that the VMOs' documents lacked reliability because the veterinarians did not include evidence indicating that a horse was not sore is unfounded.

Furthermore, as stated above, no issue was involved in *Young v. United States Dep't of Agric.* as to whether the VMOs' documents were admissible as an exception to the hearsay rule. They were properly received in evidence under the applicable administrative practice and rules of evidence. In addition, the authors of the documents testified at the administrative hearing. In *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer, d/b/a Oppenheimer Stables), 54 Agric. Dec. 221, 246-51 (1995), I explain at length why the affidavits and Summary of Alleged Violations forms are reliable and probative, including the following quotation from *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 675-76 (6th Cir. 1994):

In challenging the Secretary's decision, Gray disputes the reliability, probativeness, and substantiality of the evidence against him. For instance, he makes much of the fact that the government's key witnesses at his June 1991 hearing -- Hester, Rushing, and Sutton -- could not independently recall the facts and circumstances surrounding his alleged violation. As such, Gray insists, the primary evidence the ALJ and the Secretary relied upon to find a § 1824(2)(B) violation -- comprised of the doctors' affidavits, the Summary of Alleged Violation[s] form, and the interview summary prepared by

Sutton -- is suspect and cannot support the Secretary's ultimate decision.⁵

⁵This same argument was considered and rejected by the Third Circuit in *Wagner v. Department of Agric.*, 28 F.3d 279, 280 (3d Cir. 1994). In *Wagner*, the court observed:

In spite of petitioners' protestations to the contrary, it is well settled that affidavits are a form of probative evidence. Though live testimony may generally be favored over affidavits because the former permits cross-examination and credibility assessment, these interests are adequately safeguarded when, as in this case, the affiant appears in court. Though the doctors' inability to recall their respective examinations of Sir Shaker impaired petitioners' ability to cross-examine as to examination itself, this does not upset our determination that the finding of soreness is supported by substantial evidence.

Id. at 282-83 (citations omitted).

The Administrative Procedure Act (APA) provides that an agency conducting a hearing may receive "[a]ny oral or documentary evidence." 5 U.S.C. § 556(d). The APA adds, however, that "the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." *Id.* On this point, the USDA's implementing regulations state: "Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable." 7 C.F.R. § 1.141(g)(iv) (1994).

The documentary evidence of which Gray complains is clearly the sort of evidence "upon which responsible persons are accustomed to rely." That this evidence is technically hearsay does not alter our conclusion. See *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980) ("Not only is there no administrative rule of automatic exclusion for hearsay evidence, but the only limit to the admissibility of hearsay

evidence is that it bear satisfactorily indicia of reliability."), *cert. denied*, 452 U.S. 906 (1981). The *Calhoun* court commented: "We have stated the test of admissibility as requiring that the hearsay be probative and its use be fundamentally fair." *Id.* The documents at issue here satisfy these criteria. They were signed and/or prepared by individuals who were experienced in their tasks and who had no reason to record their findings in other than an impartial fashion. Moreover, the documents were created almost contemporaneously with the observations they relay.⁶

⁶At Gray's hearing, Hester and Rushing both testified that their affidavits reflected what they had found during their examination of Night Prowler.

To determine that this evidence was probative and reliable, of course, is not to say that it also is substantial. Again, as our decision in *Murphy* makes clear, "[s]ubstantiality of the evidence must be based upon the record taken as a whole." 801 F.2d at 184.

For the foregoing reasons, the majority opinion in *Young v. United States Dep't of Agric.* erred in failing to regard the VMOs' documents as reliable and probative, and that decision will not be followed by this Department.

The majority decision in *Young v. United States Dep't of Agric.* further states, 53 F.3d at 731:

The reliability of the veterinarians' conclusions recorded in the hearsay documents, based almost exclusively on the results of digital palpation, are also called into question by significant evidence presented at the hearing supporting the conclusion that an observed reaction to digital palpation alone is not a reliable indicator of a sore horse. Several highly qualified expert witnesses for the petitioners testified that soring could not be diagnosed through palpation alone. Petitioners also offered a written protocol [the Atlanta Protocol] signed by a group of prominent veterinarians coming to the same conclusion. The JO's basis for rejecting this evidence seems to be simply that it is contrary to the agency's policies and the agency's prior decisions.¹ The JO does not point to scientific or medical data supporting the

agency's chosen diagnostic technique. *See Veal v. Bowen*, 833 F.2d 693, 699 (7th Cir. 1987) (holding that "[w]here diagnoses are not supported by medically acceptable clinical and laboratory diagnostic techniques, this court need not accord such diagnoses great weight").

¹The JO pointed out that the experts' testimony and the protocol stated that factors other than a negative response to palpation must be observed before a sore diagnosis can be made. He concludes that these other factors would require the examiner to look for signs such as redness, swelling, heat or interference with function which the JO contends would amount to a rewriting of the HPA by requiring symptoms of soring other than a reasonable expectation of pain. The expert testimony and protocol indicate that the other observations should be made in order to determine whether the horse has propensity for pain and are indicia of pain or repercussions of pain as well as additional symptoms of soring.

My reasons for rejecting the views of the Respondents' experts and the Atlanta Protocol are set forth at great length above, in the quotation from my decision in *Bill Young*. My reasons for accepting the views of the USDA experts over the opposing views are not based simply on the "agency's policies and the agency's prior decisions." Rather, they are based on the testimony presented in the particular case, as well as my accumulated experience in reading the record of every Horse Protection Act case appealed to the Secretary. In about 65 Horse Protection Act cases, many experts, with decades of experience in examining many thousands of horses for soreness, have testified as to the reliability of making a determination of soreness when the only evidence that the horse is sore is the horse's reaction to palpation. In reaching that conclusion, the USDA experts always examine other circumstances, but usually the only evidence of soring is the horse's reaction to palpation. Specifically, that was explained in *Bill Young*, as follows (53 Agric. Dec. at 1253-67):

C. Complainant's Palpation Evidence Established a *Prima Facie* Case and Also a Statutory Presumption That "A Mark For Me" Was Sore When Entered.

Usually in Horse Protection Act cases, as in the present case, the evidence that the horse was sore relates solely to observations based on palpation. As stated in *In re Edwards*, 49 Agric. Dec. 919, 919 (1990) (Order Denying Petition for Reconsideration of *In re Edwards*, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 112 S.Ct. 1475 (1992)), "[i]n many prior cases, the only evidence that a horse was sore was the professional opinion of the Department's veterinarians, based upon their palpation of the horse's pasterns." In the original decision in *Edwards*, in affirming the finding of the Chief ALJ that the horses involved in the case were sore, based solely on evidence of the horses' reaction to palpation, the Judicial Officer stated (49 Agric. Dec. at 204-06):

Respondents contend, in particular, that no thermovision was used here, but thermovision has not been used by the Department at a horse show since about 1981 (Tr. 485-86). Ample precedent exists for finding that a horse was sored, based on the horse's reaction to palpation by the Department's veterinarians, without any thermovision evidence. See, e.g., *In re Purvis*, 38 Agric. Dec. 1271, 1274-79 (1979); *In re Whaley*, 35 Agric. Dec. 1519, 1523 (1976). As stated in *Purvis*, *supra*, 38 Agric. Dec. at 1273-74:

Both veterinarians determined that the horse was sored primarily because mild or light palpation of the pastern area of each front foot revealed a sensitive spot about the size of a dime on the medial surface of the bulb of the heel on the rear portion of each front foot. The sensitive spots were almost identically located on each foot, and were in the exact spot where the collar worn on the feet during the Show would "bang" as the feet moved up and down.

In *In re Whaley*, *supra*, 35 Agric. Dec. at 1523, it is stated:

Respondent Groover testified that the horse was not sored. In addition, the respondents argued that complainant did not use a swab test, photographs or thermographs. . . .⁵

⁵As held in *In re A.S. Holcomb*, HPA Doc. No. 18, 35 Agric. Dec. [1165, 1167] (decided July 26, 1976), the professional opinion of a Department veterinarian based on his physical examination of a horse is sufficient to support a finding that a horse was sored.

In *In re Gray*, 41 Agric. Dec. 253, 254-55 (1982), it is stated:

Experience in many Horse Protection Act cases over the years demonstrates that many horses which have been sored show evidence of pain only on the anterior portion of the legs or only on the posterior portion of the legs. This is not unusual and does not discredit evidence that the horse was sore. It is not a necessary part of complainant's proof for the Department's veterinarians to guess or determine accurately the exact procedure used to sore a horse, e.g., whether by chains, chemicals or a combination of both. It is sufficient if the proof adequately demonstrates that the horse was sore. [Footnote omitted.] Moreover, the statute raises a presumption that a horse is sore "if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs" (15 U.S.C. § 1825(d)(5)). There is no requirement that the horse manifest abnormal sensitivity on both the anterior and posterior surfaces of its forelimbs or hindlimbs.

In *In re Holcomb*, 35 Agric. Dec. 1165, 1167 (1976), it is stated:

It is to be expected that in many, if not most, cases under the Horse Protection Act, the only evidence of soring will be the expert opinion of a veterinarian who testifies on

the basis of his observation or examination that in his professional opinion, a particular horse was sored by the use of some chemical or mechanical agent, for the purpose of affecting its gait. It should be further expected that the veterinarian will frequently not be able to tell whether the soring agent used was mechanical, or chemical, or both. Unless this remedial statute is to be rendered sterile, the Government should not be required to prove the soring device or agent applied in a particular case.

Respondents also contend that horses are typically sored on the anterior portion of the front legs, but the quotations above show that it is not unusual to have a horse sored only on the posterior portion of the front legs.

In *Edwards*, it is also explained that veterinarians can distinguish between a pain reaction from palpation and a high-strung or nervous horse, or a horse that is silly about its feet, as follows (49 Agric. Dec. at 202-03):

Respondents' reply to the section 1825(d)(5) presumption, and the Complainant's evidence, is the wholly untenable assertion that *both* horses were silly about their feet and that was the cause of their responses. This assertion is without any basis. All four United States Department of Agriculture doctors testified that they are familiar with high-strung, or nervous, or silly horses and follow a simple procedure to distinguish such horses from those that are experiencing pain. That is, they look for, and in both cases found, specific spots which were painful when palpated.

As testified to by Drs. Riggins and Jordon, they conduct their examinations in a consistent fashion palpating different areas of the horse's front legs looking for indications of pain.

After finding what appear to be pain responses evidenced by the horse trying to jerk its foot away, they move to other parts of the leg and then return to the spot

where they previously got a response. If the horse again gives a pain response they will go away from that spot and come back. This is done to be certain it is a pain response and not just a "silly" reaction. (Tr. 61, 103). As Dr. Riggins testified:

. . . if a horse is silly about his foot, you can be holding it and you can touch him anywhere and the horse is going to move. And the way to differentiate if he's sore or not is I will -- a certain spot -- if that horse is moving when I touch that certain spot, I'll go around to other places. I might even go further on his leg and palpate it. And the horse, if he's silly about it, you can tell other places where I know there is no pain, he exhibits some response, I know he's kind of silly. But then I can go back, if you get pain response every time you go back there, well, then, you know it's pain instead of being silly about his foot. (Tr. 61-62).

A nervous or silly horse will have a reaction upon palpation anywhere. "Eb's Little Princess" and "Great Big Country" both responded only when a small area was palpated and both showed the response repeatedly when palpated there, but showed no response when palpated elsewhere.

The record in the present case similarly shows that the Department's veterinarians--both of whom had helped put on training courses to train USDA veterinarians (and DQPs) in detecting soring (Tr. 11, 139), and one of whom (Dr. Knowles) had checked over 8,000 to 10,000 horses for Horse Protection Act violations since 1974 (Tr. 12), and the other of whom (Dr. Crichfield) had also checked several thousand horses for HPA violations since 1973 (Tr. 139, 161)--could distinguish between a pain response to palpation and some other condition or circumstance, such as being excited, nervous, or "silly" about the feet (Tr. 40-49, 91, 96-99, 102, 126, 176-83, 205-13, 222).

Dr. Crichfield explained his examination procedure, which is "the same on all horses, to the best humanly possible" (Tr. 205), as follows (Tr. 178-80, 183, 205):

A. Okay. My usual examination consists of actual hands-on examination. Before I examine the horse, I just look at him, in general, observe some general things about the horse.

And I try to see the horses, at some point in time, while they're moving, either coming towards me or going away, or maybe both, if the opportunity presents itself.

But then, for the hands-on examination, I'll approach the horse on the left side. I make a habit of starting on the left side. And I usually touch the horse up around the neck or shoulder region with my left hand and then proceed down the left forelimb of the horse, get down around the knee or carpal joint there.

I'll start observing and palpating the tendons down the posterior or rear surface of the canon bone and go down into the area of the fetlock and ask the horse to give me his foot by kind of scratching him or tickling him or maybe just lightly apply a little pressure to the back of the fetlock joint there with my thumb and forefinger.

A lot of these horses will pick their foot up and give it to you, some of them won't, and you'll have to just reach down and pick it up.

But, I get the horse's front foot in my hand, in a flexed position, where I can observe the posterior surface of the pastern and I look at -- look at it visually for signs of loss of hair, abuse, thickening of the skin, whatever.

And, at the same time, I will start to palpate the posterior surface of the pastern. And I'll palpate that

thoroughly, over the bulbs, the heels, and then sulcus or pocket of the pastern.

And then I'll change positions and move the limb forward across my right thigh and hold it with the canon bone area above the fetlock with my left hand, and palpate the pastern area, then, with my right hand on the lateral, which is the outside surface and the anterior surface, which is the front surface and the medial surface, which is the inside surface.

And when I've finished with that limb, examining it -- at the same time I'm palpating this limb, I'm observing the horse for any signs that he might give that I've detected a sore spot on him.

And then I'll -- when I finish that limb, I'll put that limb down on the ground and go over and do the exact same thing to the right limb.

. . .

Q. All right. Dr. Crichfield, when you're palpating a horse, can you show us what portions of your thumb you would use to examine the horse?

A. Yeah. I use the under surface of the thumb, commonly called the ball of the thumb, the flat of the thumb.

We teach in the courses not to palpate these horses with the points of your thumb or the ends of your fingers, not to probe into them, but to just apply pressure with the flats of your fingers and the flats and ball surfaces of your thumbs.

Q. Dr. Crichfield, in regards to Tennessee Walking Horses, can you describe to us whether or not they're used to being handled by people?

A. Yes. I'd say the Tennessee Walking Horse is used to being handled. He's put into training, usually, at about 18 months. And he gets a lot of handling, a show-type Walking Horse does.

. . . .

Q. And you conduct exactly the same exam on all horses, to the best humanly possible?

A. Yes, sir, that's correct.

Q. And you apply the same amount of digital pressure, to all horses, to the extent possible?

A. Yes, sir.

Dr. Crichfield testified that he can differentiate between a horse that is nervous, anxious, or silly about its feet from a horse in pain, because the pain responses are always coordinated with his palpation and repeatable, as follows (Tr. 176-78, 182, 222-23):

Q. Dr. Crichfield, can you tell us what the term "silly about his feet," means?

A. Well, it's a term used about horses that are nervous and they don't stand still. They are resentful of their limbs, their feet and limbs being handled, maybe a hyper-type horse.

Q. Dr. Crichfield, can you tell us what the difference is between a horse that's silly about his feet and a horse that's sore?

A. Well, before I would -- a silly horse, he's not experiencing pain to your palpation. He may be jerking and moving and twitching and have all kinds of take away responses and things, but they're not coordinated to your palpation.

And this is easily detected because before I'm going to call a response that I get out of a horse a pain response, it's got to be coordinated with my palpation.

When I press the horse, the horse has got to respond with these involuntary signs like withdraw of the limb, head jerk, sagging backward, tightening abdominal muscles and various other things, I look for.

And the criteria is, the horse that's got the pain response, it will always be coordinated with your palpation.

It will be repeatable, every time you palpate him in that spot, he'll do it. And, you go away from these areas and spots and you don't -- and apply the same techniques and pressures, palpating the horse, and you don't get them.

And a silly horse, you're liable to get reactions out of that horse anytime you're handling him or you may be not touching him at all, just holding his limb and he'll still be jerking and twisting on you.

. . . .

Q. Now, Dr. Crichfield, if a horse is anxious, can you tell the difference between an anxious horse and a horse that's sore?

A. Well, here again, anxious, to me, you know, horses that have sort of an anxious expression, I think I know, in my own mind, what an anxious expression in a horse would be. But some people might equate an anxious horse with a nervous horse or a fearful horse or some horse that was maybe in a disturbed mental state.

But I don't know exactly what you're -- I have confidence that a horse in that type of a state, I'm not going to confuse him and call anything that he does a pain

response. I have confidence in my ability to discern the difference.

. . .

Q. . . . It's true, is it not, that pain is very difficult to measure and varies according to the individual animal?

A. Well, in general, I'd say that's a fair statement. I don't have measuring devices, per se, to measure pain.

Q. Is there any reason a horse would react to palpation other than pain?

A. Not the tech -- palpation technique that I put on one, I don't believe.

Q. But I -- if you can't answer my question -- I understand, but the question is, is there any reason a horse would react to palpation other than pain?

A. There might be, you know. Here again, you deal with silly, nervous, fractious horses that might react from any external stimuli. But here again, we have methods of determining whether that's a reaction from that or whether we're getting a pain response. And I can explain those ways.

Q. Well, I mean, I understand, and you've gone through some testimony, but my point is, and you -- if you could either agree or disagree, is there any reason a horse would react to palpation other than pain?

A. Well, if you want just a yes or no answer, I've already said that there is a -- is certain horses that will react to any external stimuli, such as palpation.

Q. The --

A. So the answer would be yes, I guess, if that's -- and that's the context you want it in.

Dr. Crichfield expressed his professional opinion that the responses he got from the horse were not natural, but were "something produced by man," as follows (Tr. 176):

Q. Dr. Crichfield, looking at both the 7077, CX-4, and your affidavit, which is CX-6, can you tell us what sort of natural diseases would have caused what you noted on those forms?

A. I don't believe anything would have naturally produced these type of findings that I found. If I had of felt that, we would of never written the case.

Q. Dr. Crichfield, looking at those documents again, can you tell me what type of injuries would have caused what you noted in those documents?

A. Here again, that's part of my examination. I'm going to rule those out in my mind. And we -- if we think injury or disease condition, or something other than something produced by man produced these pain responses, we wouldn't have written this up.

Dr. Crichfield further testified that a horse merely attempting to withdraw its foot for any reason (other than pain) would not, of necessity, show the same signs of pain observed on his examination, as follows (Tr. 211-12):

Q. Would a horse, any horse -- let's eliminate the Horse Protection Act, for this moment. Would any horse, if you had its foot in the air, as you've demonstrated, is your palpation technique, if it attempted to withdraw that foot from you, for any reason, would that horse, physically, by necessity, when it was withdrawing that foot from you, raise its head, tighten its abdominal muscles and shuffle its hind feet to gain its balance?

A. No. It would depend on how strong the withdrawal was.

Q. Would a mild withdraw cause that to happen?

A. No. I've seen horses where all we had as a sign was just the take away response of the full foot. And the other signs of body english, as we call them, weren't there.

Finally, Dr. Crichfield expressed the professional opinion that "A Mark For Me" would have experienced pain while in motion (Tr. 168-70).

Dr. Knowles testified similarly as to his examination procedure (Tr. 41-42), how he differentiates between a painful response and a response from a nervous or anxious horse, or one "silly" about its feet, on the basis of repeatable, consistent reactions coordinated with his palpation of a particular area (Tr. 41-42, 47-49, 91, 102, 126), and that the "pain that we found, on this horse, was from some type of source, with chemicals or training devices or something of that nature, an intentional process of some kind" (Tr. 40). In this respect, he testified (Tr. 47; see also Tr. 45-46):

A. These painful areas were bilateral and they were nearly symmetrical in their locations. What we found in one foot was almost identical to what we found in the other foot. It's not always the case, but in this particular case, it was.

And I just can't think of anything that would have caused those conditions to exist, accidentally or a disease condition that would cause them to appear that way.

Dr. Knowles also testified that a horse merely attempting to withdraw its foot for any reason (other than pain) would not, of necessity, show the same signs of pain observed on this horse unless it was trying hard enough to completely withdraw its foot (Tr. 96-99).

Finally, Dr. Knowles expressed the professional opinion that "A Mark For Me" would have experienced pain while in motion (Tr. 42-44).

Based upon my examination of the record in this case, in addition to my examination of the records in 59 other Horse Protection Act cases,¹² I am convinced that palpation alone, as

¹²This number of cases is slightly less than the total number of Horse Protection Act cases I have decided because I am including here only those records where a strong record was made as to the reliability of palpation to detect soreness.

practiced by the USDA veterinarians to differentiate between a horse that is nervous, excited, silly about its feet, etc., from a horse in pain from man-made causes, is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act. The 59 other cases upon which I rely include expert testimony, similar to that of Dr. Knowles and Dr. Crichfield in the present case, of numerous other USDA veterinarians who had examined thousands of horses for compliance with the Horse Protection Act, including the testimony of Dr. Riggins (6,000 to 10,000 horses),¹³ Dr. Clawson (8,000 to 10,000 horses),¹⁴ Dr. Hester (thousands of horses),¹⁵ Dr. Kelley (1,000 to 2,000 horses),¹⁶ Dr. Wood (2,000 horses),¹⁷ Dr. Hendricks (4,000 to 6,000 horses),¹⁸ Dr. Clifford (1,000 horses),¹⁹ Dr. Rushing (thousands of horses),²⁰ Dr. Jordon (thousands of horses),²¹ Dr. Burkholder (10 years' experience),²² and Dr James (8 years' experience, over 2,000 horses).²³

¹³*In re Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. [261, 291 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994)].

¹⁴*In re Bobo*, 53 Agric. Dec. [176, 200-01 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995)].

¹⁵*In re Burks*, 53 Agric. Dec. [322, 328 (1994)].

¹⁶*In re Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. [261, 291 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994)].

¹⁷*In re Bobo*, 53 Agric. Dec. [176, 200-01 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995)].

¹⁸*In re McConnell*, 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407[, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994)].

¹⁹*In re Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259 (1993).

²⁰*In re Gray*, 52 Agric. Dec. 1044, 1072 (1993), [*aff'd*, 39 F.3d 670 (6th Cir. 1994)].

²¹*In re Edwards*, 49 Agric. Dec. 188, 196 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 112 S.Ct. 1475 (1992).

²²*In re Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259 (1993).

²³*In re Watlington*, 52 Agric. Dec. 1172, 1190 (1993); *In re McConnell*, 44 Agric. Dec. 712, 727 n.4 (1985), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992).

In *In re Bobo, supra*, it is stated ([53 Agric. Dec. at 190]) (Mr. Blankenship was also Respondents' attorney in *Bobo*):

[A]ll four veterinarians who testified for Respondents[, including Dr. Proctor and Dr. Johnson,] acknowledged that repeated reaction to palpation of specific locations on a

horse's pastern can be an authentic indication of soreness (Tr. 393, 440, 763-764, 841, 862). . . .

Respondents' veterinarians agreed that in the absence of other explanations, a repeated withdrawal of a limb in response to palpation of specific spots is likely to indicate pain in the localized areas. (Tr. 393, 440, 765, 841-842, 862) Dr. Johnson acknowledged that the determination of whether behavior such as withdrawing a foot in response to palpation is a manifestation of pain, or the result of some other circumstance, is a clinical judgment to be made by the examining veterinarian at the time the conduct occurs. (Tr. 842) Dr. Proctor agreed with the USDA veterinarians that he would expect a horse which reacted repeatedly to palpation on specific spots of its pastern to experience pain in the show ring when action devices hit those spots. (Tr. 765)

In addition, it is not significant that horses, as humans, have different pain thresholds. As stated in *In re Rowland*, 40 Agric. Dec. 1934, 1994 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983):

Respondents argue (Original Brief 18-19) that the Department's veterinarians must, in conducting their post-show examination, consider many variables, such as the threshold of pain of the individual horse, the action devices used on the horse, the length of time the horse has been worked and the track condition of the show ring. Nonsense! It is not the Department's veterinarians who must consider such variables. Rather, the horse's owner and trainer must consider such variables when they make the voluntary decision to use action devices on the horse during training or exhibitions.

Virtually all Respondents in these types of cases complain that USDA's palpation evidence consists of subjective conclusions to determine whether horses are sore. However, such subjective conclusions by USDA veterinarians in Horse Protection Act cases are not actually dispositive of this issue. In fact, USDA veterinarians are

Although the ALJ cited the presumption, his opinion clearly shows he determined, based on the evidence presented, that the animals were "sore" on the days they were "entered." Unquestionably, substantial evidence supports those conclusions. [Footnote omitted.] Where there is a factual finding that a horse was "sore", even in the absence of the presumption, it is irrelevant that there may have been reliance on a presumption. Thornton v. United States Dep't of Agric., 715 F.2d 1508, 1511 (11th Cir. 1983) (citing Fleming v. United States Dep't of Agric., 713 F.2d 179, 188 (6th Cir. 1983)). We, therefore, find it unnecessary to examine whether or not the presumption passes constitutional muster. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). [Parallel citations omitted.]

In this proceeding, I rely on the *prima facie* case as well as the presumption that the horse was sore on the occasion involved here.

The Respondents' experts in *Bill Young* and in other Horse Protection Act cases frequently testify in general terms as to "learned avoidance," i.e., they testify that, because of some prior painful experience, a horse that is *not* presently in pain *may*, nonetheless, react to palpation because it has learned to avoid pain. However, none of those experts has ever testified with specificity that a horse, experiencing no present pain, could, because of learned avoidance, react to palpation only on particular spots, *in a consistent and repeated manner*, without reacting at all when palpated to the right of those spots, to the left of those spots, above those spots, or below those spots. The technique employed by the USDA veterinarians rules out "learned avoidance" as a cause of reaction to palpation. When USDA veterinarians find reactions from palpating particular spots on a horse's pasterns, they palpate all other areas of the horse's pasterns, and ascertain that there is no reaction except on the particular spots (almost always symmetrically located), and that the horse consistently and repeatedly shows a pain response when palpated on those spots, but does not show a pain response when palpated on any other spots of the horse's pasterns. The defense of "learned avoidance," as applied to the particular palpation techniques routinely employed by the USDA veterinarians, is "learned nonsense."

For all of the foregoing reasons, I am convinced that when USDA veterinarians have considered all of the circumstances they routinely consider, if they find that the horse reacts strongly when palpated only on particular spots

of the horse's pasterns, in a consistent and repeated manner, with no reaction on any other spots, that is highly reliable and substantial evidence that the horse is sore, within the meaning of the Horse Protection Act, without any other circumstances, such as a gait dysfunction, swelling, heat, redness, etc.

The majority opinion in *Young v. United States Dep't of Agric.* relies on the 1993 and 1994 appropriations language, as follows (53 F.3d at 731):

Petitioners also point out that Congress noted its disapproval, in an appropriation bill, of soring diagnoses based solely on palpations. See Pub. L. No. 102-341, 106 Stat. 873, 881-82 (1992); see also H.R. Rep. No. 617, 102d Cong., 2d Sess. 48 (1992); S. Rep. No. 334, 102d Cong., 2d Sess. 49 (1992). Congress' new dictates do not retroactively bind an ALJ or a JO, but they do support a conclusion that a diagnosis based solely on palpation and recorded only in documents constituting hearsay where no significant cross-examination can be done do not constitute reliable evidence.²

²In a recent opinion, the D.C. Circuit rejected the argument that palpation alone is not an accurate diagnostic technique, and that therefore, summary reports by USDA VMOs do not constitute substantial evidence. *Crawford v. Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995). That court noted that the fact that horse owners subsequently succeeded in convincing Congress that digital palpation is unreliable is not relevant to the question of whether the USDA appropriately relied on palpation as a technique in the past. In the present case, however, the petitioners also offer medical evidence—expert testimony and a written protocol—to support the conclusion that digital palpation is not a reliable diagnostic technique.

My discussion in *Bill Young* of the 1993 and 1994 appropriations language is as follows (53 Agric. Dec. at 1283-86):

E. Fiscal Years 1993 and 1994 Appropriations Language, Relied on by Respondents, Is Not Applicable.

Respondents rely on language relating to the APHIS appropriations for Fiscal Years 1993 and 1994, indicating criticism of digital palpation as the only diagnostic test to determine whether a horse is sore under the Horse Protection Act. The following explanation has appeared in all of my decisions in recent years under the Horse Protection Act in which palpation evidence has been used:

The Congress acted concerning the enforcement of the Horse Protection Act in Fiscal Year 1993. A proviso in the Animal and Plant Health Inspection Service's (APHIS) "salaries and expenses" appropriation for Fiscal Year 1993, reads, in pertinent part, as follows (Pub. L. No. 102-341, 106 Stat. 873, 881-82 (1992)):

ANIMAL AND PLANT HEALTH INSPECTION SERVICE
SALARIES AND EXPENSES
(INCLUDING TRANSFERS OF FUNDS)

For expenses, . . . to carry out inspection, quarantine, and regulatory activities; . . . \$432,900,000, . . .: *Provided further*, That none of these funds shall be used to pay the salary of any Department veterinarian or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act.

APHIS' Fiscal Year 1993 appropriation for enforcement of the Horse Protection Act was \$358,000 (H.R. CONF. REP. NO. 815, 102d Cong., 2d Sess. at 20 (1992)).

An examination of the proceedings reported in the Congressional Record during the pendency of H.R. 5487 reveals no discussion of this proviso (138 CONG. REC. H5548, H5576 (daily ed. June 30, 1992); 138 CONG. REC.

S10,417, S10,420 (daily ed. July 28, 1992); 138 CONG. REC. H7686, H7697, H7708 (daily ed. Aug. 6, 1992); 138 CONG. REC. H7727, H7732 (daily ed. Aug. 7, 1992); 138 CONG. REC. H7900, H7924-26 (daily ed. Aug. 11, 1992); 138 CONG. REC. S12,275, S12,276 (daily ed. Aug. 11, 1992).

The pertinent House and Senate Committee Reports are as follows: H.R. REP. NO. 617, 102d Cong., 2d Sess. at 48 (1992); S. REP. NO. 334, 102d Cong., 2d Sess. at 49 (1992); H.R. CONF. REP. NO. 815, 102d Cong., 2d Sess. at 20-21 (1992). Although the House Committee Report states that "relying on digital palpation of a horse's pastern as the exclusive means of diagnosing horses is ineffective," the comments were apparently not based upon any hearings on the issue, and USDA has not testified, or otherwise commented, upon the issues underlying the views in the House Committee Report, or the views in the Senate Report recommending "bill language directing APHIS to discontinue its practice of relying on digital palpation as the only diagnostic test . . . to determine whether or not a horse is sore under the act." The proviso only applies to the 1993 Fiscal Year (October 1, 1992-September 30, 1993). There is nothing in the legislative history to suggest that Congress intended any of this to be retroactive.

An examination of APHIS' Fiscal Year 1994 appropriation for the Horse Protection Act does not reveal any restrictive language, like that in the 1993 appropriation (PUB. L. NO. 103-111, 107 Stat. 1046 (1993)).

The pertinent House and Senate Committee Reports are as follows: H.R. REP. NO. 153, 103d Cong., 1st Sess. at 44-45 (1993); S. REP. NO. 102, 103d Cong., 1st Sess. at 46, 48 (1993); H.R. CONF. REP. NO. 212, 103d Cong., 1st Sess. at 22-23 (1993).

The House Report contained no limiting language concerning HPA enforcement, but provided increased

funding from FY 1993--(\$358,000) to FY 1994--(\$481,000). The Senate Report recommended identical statutory language in FY 1994 as in the FY 1993 appropriation for HPA enforcement, and increased funding by only \$3,000, as follows:

Horse protection.—The Committee recommends bill language identical to that in the 1993 act requiring APHIS not to rely solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under the Horse Protection Act.

However, the Conference Report adopted the House Report position--no limiting language in the statute, and increased funding to \$481,000--but, the conferees explained the compromise in this way:

Amendment No. 48: Deletes Senate language providing that APHIS veterinarians may not use digital palpation as the only diagnostic test used to determine horse soring. The House bill contained no similar provision. Funding provided in the bill to carry out activities of the Horse Protection Act includes an increase of \$120,000. The conferees agree that these additional funds should be used to purchase thermograph machines and to provide additional training and evaluation. Neither these machines nor digital palpation should be used as the sole means to determine whether soring has occurred, but they should be used as additional diagnostic tools.

Here, as before, there is nothing in the 1994 legislative history to suggest that Congress intended any of this to be retroactive.³¹

³¹The language just quoted originally related solely to Fiscal Year 1993, and was later expanded to include Fiscal Year 1994.

With respect to the Fiscal Year 1993 language in the Appropriations Act, i.e., that no funds shall be used to pay the salary of a USDA veterinarian who "relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act," that would probably not result in any change in USDA practice. USDA veterinarians never conduct an examination based solely on digital palpation, without also looking at the general appearance of the horse, and its way of going, etc. (Findings 14, 30). However, after considering various diagnostic tests, including the general appearance and way of going of the horse, it will frequently be the case that palpation will be the only diagnostic test actually used to prove a case under the Act. That is, even though the horse's general appearance, etc., and way of going was normal, if digital palpation demonstrated that the horse could reasonably be expected to suffer pain when moving, that would be enough under the express terms of the Act to bring a case for soring. I do not interpret the 1993 Appropriations enactment as precluding such an examination or bringing such a case. If the language in the 1993 Appropriations legislation or the 1993 and 1994 Committee reports caused the Department to fail to bring actions for soring where the only evidence of soring was based on digital palpation, after the USDA veterinarians had looked at, but found nothing abnormal in the horse's way of going, etc., that would completely destroy effective enforcement under the Horse Protection Act, and would totally defeat the congressional purpose in passing the Act. Furthermore, if more than pain revealed by digital palpation was required, that would be contrary to the express definition of "sore" in the Act, as explained above. In any event, as stated in the boilerplate language quoted above with respect to this matter, there is no indication in either the 1993 or 1994 legislative history to suggest that Congress intended any retroactive effect to its language.

If the 1993 and 1994 appropriations language were part of the legislative history of the Horse Protection Act, which was enacted after full hearings, I would agree that the Congress of the United States questioned the effectiveness of using palpation as the sole means to determine whether soring has occurred. However, since the language relied on by the Court was inserted by the appropriation committees, without hearings, and without affording USDA an opportunity to testify or present opposing views, I believe that the appropriations

language is entitled to little weight, particularly in years other than 1993 and 1994, in construing the language of the Horse Protection Act enacted by Congress after full hearings. Even for alleged violations occurring in 1993 and 1994, the appropriations language does not say that, if two or more diagnostic tests have been used, and soring is strongly indicated only by palpation, that evidence is not sufficient to justify a disciplinary proceeding. Moreover, I know from the record in other proceedings that the appropriations language in 1993 and 1994 was based on the views of the same experts who developed the Atlanta Protocol, which, as shown above, was based on outdated studies involving soring practices that are no longer prevalent in the industry. Furthermore, as shown above, the views of those experts was based on a misreading of the definition of soring in the Horse Protection Act, i.e., they thought the Act requires lameness, as well as other indications of inflammation. This, too, shows that the appropriations language should be given little weight. As the Court held in *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1412-13 (6th Cir. 1995):

Furthermore, neither the proviso in APHIS's "salaries and expenses" appropriation for Fiscal Year 1993 nor the statements in the Senate and Conference Reports for Fiscal Year 1994, as relied on by petitioners, renders the Secretary's interpretation of his regulations either "plainly erroneous or inconsistent." *Stinson*, 113 S. Ct. at 1919.

"[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" *United States v. Will*, 449 U.S. 200, 222 (1980) (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940)). However, we do not find that Congress' statements in the 1993 appropriations legislation constitutes an implied amendment to the HPA. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978). The 1993 appropriations legislation applied only to Fiscal Year 1993. Moreover, Congress was clearly aware of USDA's and APHIS's reliance on digital palpation as a means of finding "sorenness" under the HPA. In its appropriations legislation Congress could have but did not direct the Secretary to discontinue the practice of finding "sorenness" based on digital palpation alone. In addition, Congress could have but did not, amend

the HPA to prohibit a finding of "soreness" based on digital palpation alone. (Footnote omitted.)

For the foregoing reasons, the decision by the majority of the Court in *Young v. United States Dep't of Agric.* will not be followed by this Department in any future case, including cases in which an appeal would lie to the Fifth Circuit.

One final point, not relevant here, is, nonetheless, worth mentioning. In an Initial Decision and Order in an HPA case filed recently by Judge Kane (*In re Carl Edwards & Sons Stables*, HPA Docket No. 93-15, November 24, 1995, at 11), he states, after quoting the boilerplate Judicial Officer footnote 1:

The fragility of this Officer's independence from those who evaluate the performance of the office continues as a topic of comment. *See: Roadway Express, Inc. v. Reich*, 1994 U.S. App. Lexis 22924 (6th Cir. 1994) (*per curiam*) citing *Utica Packing Co. v. Block*, 781 F.2d 71, 77-78 (6th Cir. 1986).

The term "fragility" is that of Judge Kane--not the Court in the case cited by Judge Kane. The facts do not support Judge Kane's view that the position is fragile. The Department's first Judicial Officer held the position for 30 years, just short of a third of a century. When I retire (voluntarily) January 3, 1996, I will have held the position for exactly a quarter of a century. Judge Kane is apparently unaware of the fact that the Judicial Officer has not had a performance evaluation in the last two decades. Moreover, Judge Kane's statement that the Judicial Officer lacks "independence" from superior officials is based on ignorance. The following statement as to the independence of the Judicial Officer, from my discussion of the Judicial Officer position in 1 Davidson, *Agricultural Law, The Packers and Stockyards Act Regulatory Program*, § 3.14, at 200 (1981), is just as true today as it was then, *viz.:*

The judicial officer is directly under the secretary and deputy secretary of agriculture, and is completely free from any direction or control from the general counsel, assistant secretaries, or agency heads involved in particular litigation.

Generally the judicial officer is just barely acquainted with the secretary or deputy secretary of agriculture, and none has ever discussed a pending case with the judicial officer.⁸²

⁸²This statement is based on the author's personal experience and what he was told by the first judicial officer, who was his close friend for over 20 years.

The case cited by Judge Kane to support his "lack of independence" broadside, *Roadway Express, Inc.*, merely recites the circumstances of *Utica Packing Co. v. Block*, 781 F.2d 71, 77-78 (6th Cir. 1986). Conversely, however, *Utica Packing Co. v. Block* demonstrates the independence of the Judicial Officer--not the lack thereof. In *Utica Packing Co.*, the Secretary vigorously disagreed with a decision by the Judicial Officer, revoked the Judicial Officer's delegation with respect to further proceedings (in that case only), and appointed his Assistant Secretary for Administration to consider the Department's Petition for Reconsideration. The Court held that the Secretary's actions in *Utica* violated due process. However, if the Judicial Officer had not been totally independent of the Secretary's influence, the Secretary surely would not have removed him from hearing the Petition for Reconsideration; rather, the Secretary would have tried to influence his decision on reconsideration. Hence, *Utica Packing Co. v. Block* demonstrates the complete and total independence of the Judicial Officer from any influence by the Secretary, the General Counsel, or any other administrative officials. Accordingly, there is no basis for Judge Kane's comments suggesting the Judicial Officer's lack of independence.⁷

For the reasons stated on pages 2 and 3 of this decision, the following Order should be issued.

Order

The Complaint is dismissed.

⁷For an in-depth analysis of *Utica Packing Co. v. Block*, 781 F.2d 71 (6th Cir. 1986), see *In re Great American Veal Co.*, 45 Agric. Dec. 1770 (1986), aff'd, No. 86-3998 (D.N.J. Oct. 27, 1987), consent order, No. 86-3998 (D.N.J. Jan. 12, 1990).

In re: KIM BENNETT and MR. & MRS. DAVID BRODERICK.
HPA Docket No. 93-6.
Order Denying Petition for Reconsideration filed February 12, 1996.

Colleen Carroll, for Complainant.

Pamela C. Bratcher, Bowling Green, KY, for Respondents.

Second initial decision issued by Paul Kane, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

A Decision and Order dismissing the Complaint against Respondents was filed in this case on January 3, 1996, and served on the Respondents on January 16, 1996. On January 26, 1996, in accordance with the applicable Rules of Practice, (7 C.F.R. § 1.146(a)(3)), Respondents filed a "Petition to Reconsider the Decision of the Judicial Officer," (hereafter RPR), and on February 1, 1996, in accordance with the applicable Rules of Practice, (7 C.F.R. § 1.146(b)), Complainant filed "Complainant's Response to Respondents' Petition for Reconsideration of the Decision of the Judicial Officer." On February 6, 1996, the case was referred to the Judicial Officer for reconsideration.

Respondents request that the Judicial Officer "review the Decision and Order in regard to certain errors which appear to be purely computer errors, clerical or typographical errors regarding the horse as being 'A Mark For Me' rather than 'Ebb's [sic] Patrick' the horse that is at issue in regard to this case." (RPR, p. 1.)

Further, Respondents request that the Judicial Officer "reconsider reference to testimony which apparently involves a different case and has mistakenly been referenced in [the Decision and Order] rather than the testimony of the experts and witnesses that testified in this case." (RPR, p. 1.) The Respondents request that the Judicial Officer reconsider the Decision and Order "and issue an Order Dismissing The Complaint referencing the horse Ebb's [sic] Patrick." (RPR, p. 2.)

I have carefully reviewed the Decision and Order and find that the references in the Decision and Order to "A Mark For Me" and testimony from other cases were intentional and not in error. These references support the Judicial Officer's discussion in the Decision and Order.

The Complaint filed in this proceeding has already been dismissed and a second Decision and Order dismissing the same Complaint would serve no purpose.

Respondents' January 26, 1996, Petition for Reconsideration is, therefore, denied.

**In re: JOHNNY E. LEWIS and JERRY M. MORRISON.
HPA Docket No. 92-37.**

Decision and Order on Remand as to Jerry M. Morrison filed May 31, 1996.

Decision on Remand — Civil penalty — Disqualification order — Horse soring — Horse owner — *Burton* test — *Burton* test modified by *Lewis*.

The Judicial Officer found that Respondent Morrison allowed, as owner, the entry of a horse for the purpose of showing or exhibiting the horse in a horse show, while the horse was sore, and assessed a civil penalty of \$2,000 and disqualified Respondent Morrison for a period of 1 year from showing exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. The United States Court of Appeals for the Eleventh Circuit remanded the case to the Judicial Officer to determine whether Respondent Morrison "allowed" the entry of a horse using *Burton* test with a slight caveat. *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982), was erroneously decided and will only be followed in proceedings in which appeal would lie to the Eighth Circuit and *Lewis v. Secretary of Agric.*, 73 F.3d 312 (11th Cir. 1996), was erroneously decided and will only be followed in proceedings in which appeal would lie to the Eleventh Circuit. Applying the *Burton* test, as modified by *Lewis*, Respondent Morrison "allowed" the entry of a horse in a horse show for the purpose of showing or exhibiting the horse while the horse was sore in violation of 5(2)(D) of the Horse Protection Act, (15 U.S.C. § 1824(2)(D)).

Tejal Mehta, for Complainant.

James D. Turner, Tuscaloosa, AL, for Respondents.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

Decision and Order on Remand issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding under the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Act). On September 29, 1994, the Judicial Officer issued a Decision and Order in which the Judicial Officer found that:

1. On May 11, 1991, Respondent Jerry Morrison, in violation of section 5(2)(D) of the . . . Act (15 U.S.C. § 1824(2)(D)(1988)), allowed, as owner, the entry for the purpose of showing or exhibiting "Senator's Mr. Big" as Entry No. 153 in Class No. 20, at the Northport Civitan Horse Show at Tuscaloosa, Alabama, while the horse was sore, as defined in the . . . Act.

2. On May 11, 1991, Respondent Johnny Lewis, in violation of section 5(2)(B) of the . . . Act (15 U.S.C. § 1824(2)(B) (1988)), entered for the purpose of showing or exhibiting the horse known as "Senator's Mr. Big" as Entry No. 153 in Class No. 20, at the

Northport Civitan Horse Show at Tuscaloosa, Alabama, while the horse was sore, as defined in the . . . Act.

3. The violations warrant the sanctions authorized by section 6(b) and (c) of the . . . Act (15 U.S.C. § 1825(b), (c) (1988)) and contained in the order below.

In re Johnny E. Lewis, 53 Agric. Dec. 1327, 1334 (1994), *aff'd in part, rev'd and remanded in part*, 73 F.3d 312 (11th Cir. 1996).

Based upon the reasons set forth in the Decision and Order, the Judicial Officer issued an Order that provides:

1. Respondent Jerry M. Morrison is assessed a civil penalty of \$2,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to Tejal Mehta, Esq., Office of the General Counsel, Room 2014, South Building, United States Department of Agriculture, Washington, D.C. 20250-1417, within 30 days from the date of service of this Order on Respondent.

2. Respondent Johnny E. Lewis is assessed a civil penalty of \$2,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to Tejal Mehta, Esq., Office of the General Counsel, Room 2014, South Building, United States Department of Agriculture, Washington, D.C. 20250-1417, within 30 days from the date of service of this Order on Respondent.

3. Respondent Jerry M. Morrison and Respondent Johnny E. Lewis are each disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale or auction.

The provisions of this disqualification order as to each Respondent shall become effective on the 30th day after service of this Order on said Respondent.

In re Johnny E. Lewis, supra, 53 Agric. Dec. at 1356-57.

Both Respondents appealed the Decision and Order to the United States Court of Appeals for the Eleventh Circuit which affirmed the decision that Respondent Johnny E. Lewis violated the Act by entering Senator's Mr. Big as Entry No. 153 in Class No. 20, at the Northport Civitan Horse Show at Tuscaloosa, Alabama, on May 11, 1991, while the horse was sore; reversed the decision that Respondent Jerry M. Morrison violated the Act by allowing, as owner, the entry for the purpose of showing or exhibiting Senator's Mr. Big as Entry No. 153 in Class No. 20, at the Northport Civitan Horse Show at Tuscaloosa, Alabama, while the horse was sore; and remanded the case for further proceedings. *Lewis v. Secretary of Agric.*, 73 F.3d 312 (11th Cir. 1996).

The court held that proof of four elements is necessary to establish a violation of 15 U.S.C. § 1824(2)(D) by an owner:

- (1) the person charged is the owner of the horse in question;
- (2) the horse was shown, exhibited, or entered in a horse show or exhibition;
- (3) the horse was sore at the time it was shown, exhibited, or entered; and
- (4) *the owner allowed such showing, exhibition, or entry.* (Emphasis in the original.)

Lewis v. Secretary of Agric., supra, 73 F.3d at 315.

The court found that Respondent Morrison owned Senator's Mr. Big at all relevant times; that Senator's Mr. Big was entered in a horse show or exhibition, the Northport Civitan Horse Show as Entry No. 153 in Class No. 20, on May 11, 1991; and that Senator's Mr. Big was sore at the time the horse was entered. *Lewis v. Secretary of Agric., supra*, 73 F.3d at 315. With respect to the fourth element, the court adopted the test enunciated in *Burton v. United States Dep't of Agric.*, 683 F.2d 280, 283 (8th Cir. 1982), with a "slight caveat," holding that an owner could escape liability under 15 U.S.C. § 1824(2)(D) if all three of the following factors are shown:

- (1) there is a finding that the owner had no knowledge that the horse was in a "sore" condition,

(2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and

(3) there was uncontradicted testimony that the owner had directed the trainer in a meaningful rather than purely formal or ritualistic manner not to show a "sore" horse.¹

Lewis v. Secretary of Agric., *supra*, 73 F.3d at 315, 317.

The court found that "[t]he record developed by the ALJ is not sufficient to evaluate the first and third factors under the *Burton* test." *Lewis v. Secretary of Agric.*, *supra*, 73 F.3d at 317. Moreover, as to the second factor in the *Burton* test, the court found that Senator's Mr. Big was subjected to three examinations by the Designated Qualified Person (hereinafter DQP) at the Northport Civitan Horse Show on May 11, 1991, and passed the first two examinations, but failed the third. The court found that the Judicial Officer's determination that the first two DQP examinations were irrelevant was in error. The court stated that "it seems to us that all DQP examinations at the same show on the same day are relevant," *Lewis v. Secretary of Agric.*, *supra*, 73 F.3d at 316, and held that "[t]he second factor [of the *Burton* test] must be reconsidered with appropriate weight given to the three findings by the DQPs." [Footnote omitted.] *Lewis v. Secretary of Agric.*, *supra*, 73 F.3d at 317.²

The record establishes that: (1) Respondent Morrison was the owner of Senator's Mr. Big at all relevant times; (2) Senator's Mr. Big was entered in the Northport Civitan Horse Show as Entry No. 153 in Class No. 20 on May 11, 1991; and (3) Senator's Mr. Big was sore at the time the horse was entered. All that remains to be determined on remand is whether, using the test adopted by

¹The first two factors in *Lewis* are identical to the first two factors in *Burton*. In *Burton*, the third factor that must be shown is that there is uncontradicted testimony that the owner had directed the trainer not to show a "sore" horse. The "slight caveat" added by the United States Court of Appeals for the Eleventh Circuit in *Lewis* is that there must be a showing that the owner's direction to the trainer was meaningful rather than purely formal or ritualistic.

²The court also found that "[h]ere, the owner fulfilled th[e] second factor [of the *Burton* test]. *Lewis v. Secretary of Agric.*, *supra*, 73 F.3d at 316. I am unable to reconcile the court's finding that Respondent Morrison fulfilled the second factor in the *Burton* test with the court's instruction that "[t]he second factor [in *Burton*] must be reconsidered with appropriate weight given to the three findings by the DQPs." [Footnote omitted.] *Lewis v. Secretary of Agric.*, *supra*, 73 F. 3d at 718. Nonetheless, the court has explicitly instructed that I reconsider the second factor in *Burton*, which I have done herein.

the United States Court of Appeals for the Eleventh Circuit in *Lewis v. Secretary of Agric.*, *supra*, Respondent Morrison allowed the entry.³

The United States Court of Appeals for the Eleventh Circuit found that the record developed by the ALJ was not sufficient to evaluate the first and third factors under the *Burton* test, as modified by *Lewis*. However, rather than remanding the case to the ALJ to further develop the record at great expense to Respondent Morrison and the Department, I find for Respondent Morrison with respect to the first and third factors under the *Burton* test, as modified by *Lewis*.⁴

Moreover, as instructed by the United States Court of Appeals for the Eleventh Circuit, I have reconsidered the second factor under the *Burton* test. Thus, I find that each examination of Senator's Mr. Big by the DQP on May 11, 1991, is relevant, and I have given appropriate weight to all three findings by the DQP regarding Senator's Mr. Big that were made at the Northport Civitan Horse Show in Tuscaloosa, Alabama, on May 11, 1991. However, the fact that Senator's Mr. Big was examined by the DQP and passed prior to two events, Class No. 6 and Class No. 19, in the Northport Civitan Horse Show on May 11, 1991, (CX 8, 9; Tr. 83, 180-82, 207-09, 216, 278, 292-94), cannot logically overcome the fact that Senator's Mr. Big was presented to the DQP prior to a third event, Class No. 20, at the Northport Civitan Horse Show on May 11, 1991, found by the DQP to be bilaterally sensitive, and disqualified by the DQP from the event, Class No. 20, at issue in this proceeding. (CX 1, 2, 3, 6, 7; Tr. 18, 114-16, 134, 281-82, 306.)

³I adhere to the view expressed in *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), aff'd, 722 F.2d 1483 (9th Cir. 1984), reprinted in 51 Agric. Dec. 302 (1992), that *Burton v. United States Dep't of Agric.*, *supra*, was erroneously decided. I also view *Lewis v. Secretary of Agric.*, *supra*, as erroneously decided for the reasons set forth in *In re Eldon Stamper*, *supra*. *Burton v. United States Dep't of Agric.*, *supra*, will continue to be followed only in proceedings in which an appeal by the owner would lie to the United States Court of Appeals for the Eighth Circuit and *Lewis v. Secretary of Agric.*, *supra*, will be followed only in proceedings in which an appeal by the owner would lie to the United States Court of Appeals for the Eleventh Circuit.

⁴The record: (1) supports a finding that Respondent Morrison did not know Senator's Mr. Big was in a "sore" condition, (Tr. 287, 289-90, 293, 301), and, therefore, met the first factor under the *Burton* test; and (2) contains uncontradicted testimony that Respondent Morrison directed Respondent Lewis, the trainer, in a meaningful rather than purely formal or ritualistic manner, not to show a "sore" horse, (Tr. 217, 287, 289-90, 301, 305), and, therefore, met the third factor under the *Burton* test, as modified by *Lewis*.

An argument could be made that the short time between the penultimate and final DQP examinations did not allow time for soring. I reject this argument for two reasons. First, the final examination by the DQP just prior to the event identified as Class No. 20 was conducted approximately 20 minutes after the second examination by the DQP which was conducted just prior to the event identified as Class No. 19. (Tr. 181-82, 296-97.) Thus, the time between the second and third DQP examinations of Senator's Mr. Big was sufficient to sore Senator's Mr. Big. Second, Senator's Mr. Big could have been sored to compete unfairly in Class No. 19 and anesthetized to evade detection during the DQP pre-Class No. 19 examination. The time that elapsed between the second and third DQP examinations would have resulted in the dissipation of any anesthetic used to numb pain caused by soring Senator's Mr. Big for participation in Class No. 19.⁵

The test enunciated in *Lewis v. Secretary of Agric.*, *supra*, provides that an owner can escape liability under 15 U.S.C. § 1824(2)(D) only if all three of the factors listed in *Lewis* are shown to exist. The second factor listed in *Lewis* is a finding that a DQP examined and approved the horse before entering the ring. Here, the DQP examined Senator's Mr. Big prior to three events at the Northport Civitan Horse Show on May 11, 1991. The DQP approved Senator's Mr. Big before the horse entered the ring on the first two occasions. Nonetheless, the DQP examined Senator's Mr. Big prior to a third event, found

⁵Congress specifically noted the frequent use of anesthetics to mask soring during its consideration of the 1976 amendments to the Horse Protection Act. "Thermovision machines detect the abnormal presence of heat in the limbs of a horse, thereby providing the opportunity to substantiate in court the existence of inflammation of the limbs. They are of particular importance if the practice of soring is to be stopped, since sensitivity in the limbs of a horse is frequently masked by application or injection of anesthetic substances." (H. Rep. No. 1174, 94th Cong., 2d Sess. 5 (1976), reprinted in 1976 U.S.C.C.A.N. 1696, 1700.) The Department has consistently considered this tactic. "[A] quick-acting, short-lasting anesthetic can be applied to a horse's legs a few minutes prior to the pre-show examination, which would dissipate in about 15 to 20 minutes, thereby masking pain symptoms during the pre-show examination but enabling the horse to perform as intended during the show . . ." *In re Richard L. Thornton*, 41 Agric. Dec. 870, 889 (1982), aff'd, 715 F.2d 1508 (11th Cir. 1983), reprinted in 51 Agric. Dec. 295 (1992), quoting from *In re Rowland*, 40 Agric. Dec. 1934, 1944 (1981), aff'd, 713 F.2d 179 (6th Cir. 1983). (See also *Fleming v. United States Dep't of Agric.*, 713 F.2d 179, 187 n.11 (6th Cir. 1983) (Use of a quick-acting anesthetic prior to the pre-show exam may mask otherwise existing soreness until the horse is ready for actual showing); *In re C.M. Oppenheimer*, 54 Agric. Dec. 221, 316 (1995) (Results of examinations conducted after the USDA veterinarians have determined a horse is sore are discounted to some extent because of the possibility that a quick-acting anesthetic can be applied to the horse's legs to mask the pain symptoms).)

Senator's Mr. Big bilaterally sensitive, and disqualified Senator's Mr. Big from the event. This DQP examination was followed by an examination by two United States Department of Agriculture veterinarians who each found that Senator's Mr. Big was sore. The circumstances are such that, even giving some weight to the fact that the DQP examined and passed Senator's Mr. Big on two occasions in the same show on the same day, Respondent Morrison does not fulfill the second factor in the test enunciated in *Lewis v. Secretary of Agric.*, *supra*; and, thus, applying the *Burton* test, as modified by *Lewis*, Respondent Morrison allowed, as owner, the entry for the purpose of showing or exhibiting Senator's Mr. Big as Entry No. 153 in Class No. 20, at the Northport Civitan Horse Show at Tuscaloosa, Alabama, while Senator's Mr. Big was sore, on May 11, 1991.

Findings of Fact on Remand

1. On May 11, 1991, Johnny Lewis and Jerry Morrison entered Senator's Mr. Big as Entry No. 153 in Class No. 20, at the Northport Civitan Horse Show at Tuscaloosa, Alabama. (Answer; CX 1-9; Tr. 205-07, 211, 213, 291-92, 298, 309).

2. On May 11, 1991, the Respondents, Johnny Lewis and Jerry Morrison, entered Senator's Mr. Big in three separate events. In the first event, Senator's Mr. Big was examined by the DQP and passed. In the second event, Senator's Mr. Big was again examined by the DQP and passed. Senator's Mr. Big was presented on a third occasion to the DQP for pre-show examination, examined by the DQP, found by the DQP to be bilaterally sensitive, and disqualified by the DQP from Class No. 20. (CX 6-7.)

3. Respondent Morrison, the owner of Senator's Mr. Big at all times relevant to this proceeding, had no knowledge that Senator's Mr. Big was in a "sore" condition.

4. The record contains uncontradicted testimony that Respondent Morrison directed Respondent Lewis in a meaningful rather than purely formal or ritualistic manner not to show a "sore" horse.

5. Each DQP examination of Senator's Mr. Big at the Northport Civitan Horse Show on May 11, 1991, is relevant to a determination of soring. However, the fact that the DQP examined Senator's Mr. Big before an event at the Northport Civitan Horse Show identified as Class No. 20, found Senator's Mr. Big bilaterally sensitive, and disqualified Senator's Mr. Big from Class No. 20 is not overcome by the two DQP examinations conducted during the same horse show on the same day which Senator's Mr. Big passed.

Conclusions of Law on Remand

1. On May 11, 1991, Respondent Jerry Morrison, in violation of section 5(2)(D) of the Act, (15 U.S.C. § 1824(2)(D) (1988)), allowed, as owner, the entry for the purpose of showing or exhibiting Senator's Mr. Big as Entry No. 153 in Class No. 20, at the Northport Civitan Horse Show at Tuscaloosa, Alabama, while the horse was sore, as defined in the Act.

2. This violation warrants the sanctions authorized by section 6(b) and (c) of the Act, (15 U.S.C. § 1825(b), (c) (1988)), and contained in the order below.

For the foregoing reasons and the reasons set forth in the Decision and Order issued herein on September 29, 1994, the following Order should be issued.

Order

I

Respondent Jerry M. Morrison is assessed a civil penalty of \$2,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to Tejal Mehta, Esq., Office of the General Counsel, Room 2014, South Building, United States Department of Agriculture, Washington, D.C. 20250-1417, within 30 days after the date of service of this Order on Respondent Jerry M. Morrison.

II

Respondent Jerry M. Morrison is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale or auction. This disqualification order shall become effective on the 30th day after service of this Order on Respondent Jerry M. Morrison.

NONPROCUREMENT DEBARMENT AND SUSPENSION

DEPARTMENTAL DECISIONS

In re: LEWIS EUGENE McCRAVY, JR.

DNS Docket No. 95-15.

Decision and Order filed February 8, 1996.

Nonprocurement debarment and suspension - Decision of debarring official vacated - Time limitations - Arbitrary, capricious, abuse of discretion - Mitigating factors and length of time since Respondent's conviction not considered.

Chief Judge Palmer vacated the decision of the debarring official as not in accordance with law because the debarring official failed to issue his decision within the time limits imposed by the Regulations. The debarring official is required to issue his decision within 45 days from the time arguments and submissions are received from Respondent, unless he extends the time for good cause. Although the debarring official extended the time for his decision, such extension was not made in a timely manner. Chief Judge Palmer also found the debarring official's decision to be arbitrary, capricious, and an abuse of discretion because there was nothing in the Notice of Debarment which indicated that the debarring official considered the length of time that had passed since Respondent's conviction or the mitigating factors presented by the Respondent.

William E. Ludwig, Debarring Official.

John B. Koch, for FCS.

Jacob B. Pompan, for Respondent.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515 (1993), the regulations that implement a governmentwide system for nonprocurement debarment and suspension (Regulations).¹ The objective of the regulations is stated at 7 C.F.R. §§ 3017.115(a) and (b):

¹The Regulations implement Exec. Order No. 12,549, 51 Fed. Reg. 6370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a governmentwide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment [is a] discretionary action[] that, taken in accordance with Executive Order 12549 and [the] regulations, [is an] appropriate means to implement this policy.

(b) Debarment . . . shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

On December 7, 1995, Respondent, Lewis Eugene McCravy, Jr., filed an appeal of the November 8, 1995, decision of the debarring official, William E. Ludwig, Administrator, Food and Consumer Service (FCS), United States Department of Agriculture (USDA or Department), which debarred Respondent from participation in government programs for a three-year period beginning November 8, 1995. The basis for the debarment is Respondent's conviction on July 6, 1990, in the Atlanta Division of the United States District Court for the Northern District of Georgia, of conspiring to rig bids for contracts to supply dairy products to public schools in various school districts in Georgia, beginning at least as early as 1985 and continuing at least through June 1988, in violation of section 1 of the Sherman Act (15 U.S.C. § 1). In connection with his conviction, Respondent was ordered to pay a special assessment of \$50 and was sentenced to six months imprisonment and one year of probation. (AR 3). In addition, Respondent was debarred from procurement and sales contracting with the Federal Government by the Defense Logistics Agency (DLA) from November 23, 1990 through June 14, 1993.

FCS instituted these debarment proceedings pursuant to 7 C.F.R. §§ 3017.100-.515. On January 5, 1995, William E. Ludwig, Administrator of FCS, issued by certified mail a Notice of Proposed Debarment that advised Respondent that his debarment was proposed pursuant to 7 C.F.R. § 3017.305(a)(2), which authorizes debarment for "[v]iolation of Federal or State anti-trust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging." (AR 6). Having received no return receipt for the first notice, the debarring official mailed a second Notice of Proposed Debarment to Respondent on April 20, 1995. (AR 7). Respondent received the January 5, 1995, Notice of Proposed Debarment on April 26, 1995. (AR 8).

Pursuant to 7 C.F.R. § 3017.313(a), on May 6, 1995, Respondent submitted a timely response in opposition to the Notice of Proposed Debarment.

(AR 9). On July 6, 1995, August 22, 1995, and October 4, 1995, William E. Ludwig, Administrator of FCS, advised Respondent that he had extended for 45 days the time for filing his decision on the basis of his "need to consider each of the many factors in this case." (AR 10, 11, 12). On November 8, 1995, Respondent was issued a Notice of Debarment, debarring him from participation in Federal nonprocurement programs for a period of three (3) years. (AR 13).

Debarment decisions may be appealed to the Office of Administrative Law Judges pursuant to 7 C.F.R. § 3017.515. The decision by the administrative law judge is based solely upon the administrative record that must demonstrate the evidentiary basis for the decision. The administrative law judge may vacate the debarment if the implementing decision is found not in accordance with law; not based on the applicable standard of evidence; or is arbitrary, capricious and an abuse of discretion. Respondent appealed the decision of the debarring official on December 7, 1995. (Appeal).

On December 8, 1995, I entered a ruling respecting procedural requirements governing this proceeding. Pursuant to that ruling, FCS filed a copy of the administrative record and a Response in Opposition to the Appeal Petition (Response) on December 15, 1995. Respondent filed a timely reply to the administrative record on December 28, 1995.

References to the record in the administrative proceeding below are cited as "AR" followed by the number of the document.

Conclusion

The decision of the debarring official, which imposed a three-year period of debarment upon Respondent, Lewis Eugene McCravy, Jr., is: 1) not in accordance with law because it was not issued within the time limits imposed by the regulations; and 2) arbitrary, capricious and an abuse of discretion. Accordingly, the decision of the debarring official is vacated.

Discussion

A. Decision not Filed Within Prescribed Time Limits

The procedures with respect to debarment decisions are set forth in 7 C.F.R. § 3017.314(a), which specifies:

In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall

make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. *The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.*

(emphasis added).

Pursuant to 7 C.F.R. § 3017.515, debarment decisions may be appealed to the Office of Administrative Law Judges if filed within 30 days after receipt. Appeals filed late are dismissed as untimely filed. *In re Leon Howard*, 53 Agric. Dec. 1400 (1994).

The enforcement of stringent time constraints must be applied in an evenhanded manner. Accordingly, a debarment that is issued later than the time specified by applicable regulation is vacated as not in accordance with law. *In re Young's Food Stores, Inc.*, 53 Agric. Dec. 1403 (1994); *In re Prairie Farms Dairy, Inc.*, 53 Agric. Dec. 1407 (1994); *In re Robert M. Miller*, 53 Agric. Dec. 1411 (1994).

An examination of the administrative record in this proceeding fails to show that the decision of the debarring official was issued within the time requirements specified by the applicable regulation; thus, such decision is not in accordance with the law. See, e.g., *In re Newell Vance Williams*, 54 Agric. Dec. ___, DNS Docket No. 95-12 (Oct. 4, 1995).

A reading of the various procedural requirements relating to debarment actions reveals that time is of the essence in these proceedings. A respondent who has received a notice of proposed debarment has 30 days within which to submit information and argument in opposition to the proposed debarment. 7 C.F.R. § 3017.313(a). If a respondent in a debarment proceeding fails to provide a timely submission in opposition, the action is considered decided. 7 C.F.R. § 3017.314(a)(1). Section 3017.314(a) of the regulations makes clear that the debarring official is required to issue his decision within 45 days from the time arguments and submissions are received from Respondent, unless he extends the time for good cause. Moreover, the appeal of a debarment must be filed within 30 days of its receipt or the appeal will be dismissed. *In re Howard*, 53 Agric. Dec. 1400 (1994). Furthermore, when reviewing debarment decisions on appeal, administrative law judges are required to issue a decision within 90 days of the date the appeal is filed. 7 C.F.R. § 3017.515(c).

FCS contends that a respondent is given 30 days within which to submit information and argument in opposition to a Notice of Debarment and is not

limited in the number of times such information may be submitted during that period. (Response, at 4-5). This appears to be a reasonable interpretation of the Regulations. FCS further asserts, however, that the debarring official's 45-day period for issuing his decision begins to run at the conclusion of the Respondent's 30-day period for response. In the instant case, Respondent's submission in opposition was dated May 6, 1995, 10 days after the Respondent received the Notice of Proposed Debarment on April 26, 1995. FCS argues that Respondent had an additional 20 days within which he could submit supplemental information and that the time for the issuance of the debarring official's decision should not have begun to run until the end of the response period had been reached--on May 25, 1995. FCS urges that an alternative interpretation forces the debarring official to make the choice of either deferring a final decision until the 30 days have run, thus cutting into the 45 day decision making period or risk receiving additional timely submissions after already rendering a decision upon receipt of the initial submission.

(Response, at 6).

In his Reply, Respondent articulates a compelling answer to the FCS position: "If the debarring official decides to wait until a respondent's 30 day period expires before beginning a review of the case and finds that he requires additional time for a decision, all he need do is timely extend the period for his decision." (Reply, at 9). I agree with Respondent's argument. Respondent submitted his information and arguments to the debarring official by letter dated May 6, 1995. Depending upon the exact date that the debarring official received this submission in opposition, he would have had more than three weeks within which to decide the case or issue an extension. Even if a respondent makes his only submission on the first day of the 30-day response period, should the debarring official wait until the end of such response period to assure that no further submissions are made, he still has 15 days from the end of such period within which to issue his decision or extend his time by means of a one-paragraph form letter and comply with the Regulations.

In the instant case, although the debarring official did extend the time for filing his decision, such action was not taken until July 6, 1995, more than two weeks after his debarment decision should have been issued. (AR 10). As stated above, there is no indication as to what date Respondent's submission in opposition was received by the debarring official. In order for his extension to have been timely, however, the debarring official would have had to receive Respondent's response in opposition on or after May 22, 1995, 16 days after the

date on the letter. Nothing in the record suggests that this was the case. The Notice of Debarment was ultimately issued on November 8, 1995.

The time limitations that apply to debarring officials must be enforced with equal consistency. Finding nothing in the administrative record to indicate that the debarring official extended in a timely manner the 45-day decision-making time limit imposed upon him by the regulations, the debarment should be vacated. Treating a failure to comply with the time limitations imposed by the Regulations as harmless error unless the respondent proves how he has been prejudiced, as counsel for FCS has argued (Response to Appeal Petition, at 7-11), unfairly tilts the procedural scales in the government's favor. For that reason, the argument is rejected.

B. Decision is an Arbitrary and Capricious Abuse of Discretion

In the alternative, Respondent contends that the debarring official's decision was "arbitrary, capricious and an abuse of discretion." (Appeal). In his Response in Opposition to the Proposed Debarment, Respondent stated (AR 9):

I would like to know what I will need to do to prevent any future debarment against me or my present employer. My concern is that this notice is coming almost five years after my conviction. I am enclosing information that I received about the time of my conviction, of a debarment notice against me. I believe the information at that time covered all executive branches of the federal government. This would have been for a period of no more than three years and would have commenced in 1990.

When the investigation began in 1989, I made the decision to be honest and take personal responsibility for my actions. I notified my then current employer of my intentions, and made arrangements through my attorney to meet with government officials and discuss the areas of my responsibilities and my past work history. I did not try to evade my responsibility, I did not give testimony based on convenience of memory, nor did I try to pass responsibility on to others. I met with the Justice Department and told the truth to the best of my ability, which lead to my conviction. I pled guilty to one count violation of the laws, resigned my job and served 6 months at Maxwell Air Force, Montgomery, Alabama. I am not proud of some of my poor business decisions, but I am proud that I told the truth.

I joined my present employer, Yarnell Ice Cream Company in June of 1992. I shared with them my past experiences, and was hired by them with knowledge of what had occurred. I have been a good employee to them and they have been a great employer to me.

My present responsibilities do not require me to be involved in the bid process. I know the anti-trust laws and their consequences better than the majority of individuals in business today. And, I know I can be trusted. But, as far as bid responsibility, I want no part of this area of business whatsoever.

I want you to know that I have learned valuable lessons over the past several years. I made mistakes in judgement that will not be repeated. I encourage you to speak with my employer as to my job performance, my job ethics and my job integrity. I request that my present company not suffer any action due to my previous mistakes. I can only give to you my total assurance that I will never place myself in any situation that would be of question, and I promise to uphold the laws of our government.

In the Notice of Debarment issued on November 8, 1995, the debarring official concluded that Respondent's submission consisted of three points and dealt with them as follows (AR 13):

1. You believed that your earlier debarment covered all executive branches of the federal government.

You argue that this notice of proposed debarment came almost five years after your conviction and that you believed "the information at that time covered all executive branches of the Federal government. This would have been for a period of no more than three years and would have commenced in 1990." Admin. Rec. 9, p. 1.

The debarment by DLA was made under separate authority applying to Federal procurement programs. The debarment action FCS is taking against you applies to Federal nonprocurement programs and is independent of the action taken against you with regard to Federal procurement programs. As set in 7 C.F.R. § 3017.305(a)(2),

FCS has the authority to debar you from Federal nonprocurement programs based on your conviction.

2. When the investigation began in 1989, you made the decision to be honest and take personal responsibility for your actions. You cooperated willingly with government officials.

Your letter indicates that you notified your employer of your intentions and made arrangements through your attorney to meet with government officials and discuss the areas of your responsibilities and your past work history. You stated, "I did not try to evade my responsibility, I did not give testimony based on convenience of memory, nor did I try to pass responsibility on to others....I am not proud of some of my poor business decisions, but I am proud that I told the truth." Admin. Rec. Ex. 9, p. 1.

Your cooperation with the investigation and your acceptance of responsibility for the bidrigging activity are definite factors in your favor. They illustrate a desire to recognize misconduct in the past. However, FCS has a responsibility to protect the interests of the public and the Federal Government by conducting business only with responsible parties. No information has been included in the administrative record to indicate that you have undertaken any active measures (i.e., training in business ethics and integrity, compliance training, or information evidencing training programs and a code of ethics at your current place of employment) to assure me that you would not become involved in any unethical activities relating to Federal nonprocurement programs in the future. Present responsibility depends upon a determination that an individual is capable of conducting business within the law.

Your letter asserts that you know the anti-trust laws and their consequences better than the majority of individuals in the business today. Admin. Rec. Ex. 9, p. 1. Your knowledge of antitrust laws is a factor in your favor. However, mere knowledge of antitrust laws does not demonstrate present responsibility.

In light of your past conduct, I cannot consider you to be presently responsible simply based on remorse, statements of

commitment, and your cooperation with government investigations. The public interest and that of the Federal Government will be best served by ensuring that you are prohibited from participating in Federal nonprocurement programs for the period of your debarment.

3. Your responsibilities with your current employer do not require you to be involved in the bid process.

Your letter states that your present responsibilities do not require you to be involved in the bid process. Admin. Rec. Ex. 9, p. 1.

Your current position outside of the area of Federal nonprocurement transactions means that the Federal Government is not currently at risk. However, there is no guarantee that you will remain in this position or that your employer will not in the future participate in Federal nonprocurement transactions. Allowing you to potentially participate in such transactions, in view of the gravity of your past misconduct would not serve to adequately protect the public and the Federal Government.

In making a debarment decision, the debarring official is required to consider the seriousness of Respondent's offense and any mitigating factors. 7 C.F.R. § 3017.300. The ultimate inquiry in a debarment decision must be directed to the "present responsibility" of the Respondent. *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989). The seriousness of the offense, the length of time that has passed since the offense, and the Respondent's conduct in the interim must all be considered when determining "present responsibility." *Silverman v. United States Dep't of Defense*, 817 F. Supp. 846, 849 (S.D. Cal. 1993).

Respondent's primary argument is that the debarring official failed to take into consideration the mitigating factors in his case and whether he "poses a threat to the Government's business interests." (Appeal). Respondent further contends that the debarring official "failed to give due consideration to the length of time and intervening events between the time the conduct that gave rise to the debarment proceedings against McCravy occurred and the initiation of those proceedings." (Appeal).

As stated in *Baltimore Gas & Electric Co. v. National Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983), in assessing agency action under the "arbitrary and capricious" standard, it is necessary to determine whether the

agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." The debarring official's decision lacks this needed articulation.

When discussing the present responsibility and remorse of Respondent, the debarring official stated in the Notice of Debarment (AR 13):

No information has been included in the administrative record to indicate that you have undertaken any active measures (i.e., training in business ethics and integrity, compliance training, or information evidencing training programs and a code of ethics at your current place of employment) to assure me that you would not become involved in any unethical activities relating to Federal nonprocurement programs in the future. Present responsibility depends upon a determination that an individual is capable of conducting business within the law.

Such language is unsupported by the Act and Regulations and constitutes an arbitrary and capricious abuse of discretion. There is nothing in the record to show that Respondent was ever asked to take such measures. Nor was Respondent ever given the opportunity to demonstrate that he would take such measures. See *In re Robert Spring*, 55 Agric. Dec. ___, DNS Docket No, 95-13 (Jan. 24, 1996); *In re George R. Reynolds*, 54 Agric. Dec. ___, DNS Docket No. 95-8 (Aug. 9, 1995).

Moreover, the debarring official did not consider the length of time that had passed since the conduct that gave rise to Respondent's debarment. The debarring official did not institute any action in this case until January 1995, almost five years after the conviction upon which Respondent's debarment is based², at which time Respondent's debarment with another agency had already ended. Common sense and equity suggest that such action should have been initiated in a more timely fashion. Respondent was debarred by the Defense Logistics Agency on November 23, 1990; his period of debarment lasted until June 14, 1993. In his submission in opposition, Respondent asserted that he believed that his DLA debarment covered all executive branches. In responding

²In contrast, two recently decided cases involved a conviction which was entered less than six months before the debarment proceedings were instituted. See *In re Robert Spring*, 55 Agric. Dec. ___, DNS Docket No, 95-13 (Jan. 24, 1996); *In re Mohawk Farms, Inc.*, 55 Agric. Dec. ___, DNS Docket No. 95-14 (Jan. 24, 1996).

to this argument in the Notice of Debarment, the debarring official stated (AR 13):

The debarment by DLA was made under separate authority applying to Federal procurement programs. The debarment action FCS is taking against you applies to Federal nonprocurement programs and is independent of the action taken against you with regard to Federal procurement programs. As set in 7 C.F.R. § 3017.305(a)(2), FCS has the authority to debar you from Federal nonprocurement programs based on your conviction.

It is unclear from the Administrative Record why FCS waited one and one-half years after Respondent's debarment with DLA had concluded to commence its investigation.

FCS contends correctly that there is no precedent to support the contention that the mere passage of time, without more, is sufficient to transform an individual who was convicted of bidrigging into one who is presently responsible. (Response to Appeal Petition, at 13). However, the length of time that has passed since a respondent's conviction clearly is relevant to a consideration of present responsibility. *Silverman*, 817 F. Supp. at 849-50. There is nothing in the debarring official's decision that indicates that he considered the time that had passed since the Respondent was convicted of bidrigging. Therefore, the debarring official's determination of Respondent's present responsibility was not based on the relevant factors as outlined in *Silverman*.

The Notice of Debarment clearly indicates that the debarring official did not fully consider the length of time that has passed since Respondent's conviction or the mitigating factors presented by the Respondent in this case. (AR 13). Consequently, the decision of the debarring official is vacated as arbitrary, capricious, and an abuse of discretion.

Order

The decision of the debarring official is hereby vacated.

This order shall take effect immediately. This decision is final and not appealable within the Department. 7 C.F.R. § 3017.515(d).

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final February 8, 1996.--Editor]

In re: DARYL L. ROBERTSON.
DNS Docket No. 96-2.
Decision and Order filed June 18, 1996.

Nonprocurement debarment and suspension - Decision of debarring official affirmed - Period of debarment reduced - Selling property mortgaged or pledged to Farm Credit Agencies - Suspension period not considered in Notice of Debarment - Laches not applicable.

Chief Judge Palmer affirmed the debarring official's decision to debar Respondent but reduced the period of debarment by 339 days. The Regulations provide that if a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period. There is no indication in the Notice of Debarment that the debarring official actually considered the period of suspension in making his decision. However, the Notice of Debarment clearly indicates that the debarring official's decision to debar Respondent was reasonably related to a valid administrative purpose and is not arbitrary and capricious. The doctrine of laches is not applicable to the government acting in its sovereign capacity.

Grant Buntrock, Debarring Official.

Donald McAmis, for FSA.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515 (1995), the regulations which implement a governmentwide system for nonprocurement debarment and suspension (Regulations).¹ The objective of the Regulations is stated at 7 C.F.R. §§ 3017.115(a) and (b):

- (a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment [is a] discretionary action[] that, taken in accordance with Executive Order 12549 and these regulations, [is an] appropriate means to implement this policy.

¹The Regulations implement Exec. Order No. 12549, 51 Fed. Reg. 6,370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a governmentwide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

- (b) Debarment . . . shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

The Regulations further provide that "[d]ebarment shall be for a period commensurate with the seriousness of the cause(s)." 7 C.F.R. § 3017.320.

On April 1, 1996, Respondent, Daryl L. Robertson, filed an appeal of the March 1, 1996, decision of the debarring official, Grant Buntrock, Administrator, Farm Service Agency (FSA), United States Department of Agriculture, which debarred Respondent from participation in government programs for a three-year period beginning March 1, 1996. The basis for the debarment is Respondent's conviction on June 17, 1992, of the felony of selling property mortgaged or pledged to Farm Credit Agencies.

These debarment proceedings were instituted initially by the Farmers Home Administration (FmHA) pursuant to 7 C.F.R. § 3017.100-.515. On October 25, 1994, Michael Dunn, Administrator of FmHA, issued a Notice of Suspension and Proposed Debarment received by Respondent on October 31, 1994 (AR 6). Respondent was informed that suspension was being imposed in accordance with 7 C.F.R. § 3017.405(a)(2) based upon adequate evidence that a cause for debarment may exist. The debarring official indicated that such action resulted from Respondent's criminal conviction for knowingly and willingly disposing of, or converting, property mortgaged or pledged to FmHA with intent to defraud FmHA. Pursuant to 7 C.F.R. § 3017.313(a), on November 27, 1994, Respondent submitted a timely response in opposition to the Notice of Suspension and Proposed Debarment (AR 5). In actions based upon a conviction, the debarring official must make a decision "within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause." 7 C.F.R. § 3017.314(a). However, no action was taken by the debarring official until September 29, 1995, at which time the suspension and proposed debarment action was withdrawn. On October 14, 1995, Respondent received the withdrawal letter which stated, in pertinent part:

In October 1994, the Farmers Home Administration (FmHA) initiated suspension and proposed debarment action against you. Since that time, the FmHA farm programs have been assigned to the Consolidated Farm Service Agency (CFS) as part of the Department of Agriculture reorganization.

After due consideration of the rules and regulations governing suspension and debarment, we have made the determination to withdraw this suspension and debarment action at this time. This letter is your notification to that effect. This decision shall be without prejudice to any subsequent debarment actions.

(AR 4).

Approximately two months later the current debarment proceeding was instituted by the newly-reorganized FSA. On December 7, 1995, Grant Buntrock, Administrator of FSA, issued a Notice of Proposed Debarment received by Respondent on December 15, 1995 (AR 3). Respondent was informed that his debarment was proposed pursuant to 7 C.F.R. § 3017.305(a)(1), which authorizes debarment for "[c]onviction of or civil judgment for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a private agreement or transaction," 7 C.F.R. § 3017.305(a)(3), which authorizes debarment for "[c]onviction of or civil judgment for commission of falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice," and 7 C.F.R. § 3017.305(d), which authorizes debarment for "[a]ny other cause of so serious and compelling a nature that it affects the present responsibility of a person."²

On January 11, 1996, Respondent again submitted a timely response in opposition to the Notice of Proposed Debarment, received by the debarring official on January 16, 1996 (AR 2). On March 1, 1996, Respondent was issued a Notice of Debarment, debarring him from participation in Federal nonprocurement programs for a period of three (3) years. Respondent received the Notice of Debarment on March 7, 1996 (AR 1).

Pursuant to 7 C.F.R. § 3017.515, debarment decisions may be appealed to the Office of Administrative Law Judges. The decision by the administrative law judge is based solely upon the administrative record which must demonstrate the evidentiary basis for the decision. The administrative law judge may vacate the debarment if the implementing decision is found not in accordance with law;

²As pointed out by Respondent in his Submission in Opposition, the Notice of Proposed Debarment contained a typographical error in the citation to the Code of Federal Regulations. The letter stated that debarment was based on grounds as found in 7 C.F.R. § 3027.305. The correct citation, as pointed out in the Notice of Debarment, should have been to 7 C.F.R. § 3017.305. Since Respondent clearly was aware of the correct citation, no prejudice is demonstrated.

not based on the applicable standard of evidence; or is arbitrary, capricious, and an abuse of discretion. The standard of proof by which the cause for debarment must be established is a preponderance of the evidence. Where the proposed debarment is based upon a conviction, the standard is deemed to have been met. 7 C.F.R. § 3017.314(c). Respondent appealed the decision of the debarring official on April 1, 1996 (Appeal). On April 5, 1996, I entered a ruling respecting procedural requirements governing this proceeding. Pursuant to that ruling, FSA filed a copy of the administrative record on April 15, 1995 (Response). Although the rules of practice provide that Respondent was entitled to reply within ten days of the filing of the administrative record, no reply has been filed.

References to the record in the administrative proceeding below are cited as "AR" followed by the number of the document.

The administrative record supports the debarment of Respondent, Daryl L. Robertson. However, Respondent was suspended previously for 339 days. There is no indication that the debarring official considered this previous period of suspension in making his decision. Accordingly, the decision of the debarring official to debar Respondent is affirmed. However, the period of debarment is reduced by 339 days.

Findings

The debarring official must reach a decision "on the basis of all of the information in the Administrative Record, including any submission made by the respondent." 7 C.F.R. § 3017.314(a). The record before the debarring official consisted of the criminal indictment filed against Respondent; his plea agreement; and the Judgment on June 17, 1992, of the United States District Court, Western District of Louisiana, convicting Respondent of the felony of selling property pledged or mortgaged to Farm Credit Agencies, for which he was sentenced to ten months in a federal penitentiary, fined \$2,000.00, ordered to pay restitution to the United States in the amount of \$447.11 and a special assessment fee of \$50.00, and placed on supervised release for 12 months.

Respondent also submitted to the debarring official a letter dated January 11, 1996, contesting the proposed debarment (AR 2). Respondent raised five basic arguments in this letter. First, Respondent contended that the September 29, 1995, letter withdrawing the previous suspension and proposed debarment action "clearly indicates that you have determined there is no legal cause for debarment." To the same effect, Respondent stated that the second Notice of Proposed Debarment violated 7 C.F.R. § 3017.325(d)(2), which states that "a

decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by ANY OTHER agency." Respondent contended that "[t]his regulation clearly informs . . . [the debarring official] that subsequent debarment action by the SAME agency is prejudiced and withdrawal of the initial proposed debarment action (for the same offense) is final."

Second, Respondent argued that the debarring official violated the doctrine of laches because "[t]he Notice of Suspension and Proposed Debarment . . . and the Notice of Proposed Debarment . . . are the same action(s) for the same offense made by the same agency.

Third, Respondent contended that the debarring official violated the *ex post facto* doctrine because the offense upon which the debarment is based occurred before the date that the current debarment regulations became effective.

Fourth, Respondent argued that debarment was imposed for purposes of punishment for "the Borrower's bad faith activities and unwillingness to cooperate with the Agency." Respondent further alleged that "[w]aiting over 9 years to initiate a proposed debarment only substantiates that this action is for punishment and not in the public interest and for the Federal Government's protection."

Fifth, Respondent contended that a five-year period of debarment, as proposed in the Notice of Proposed Debarment, was excessive.

In the Notice of Debarment issued on March 1, 1996, the debarring official stated the following in response to Respondent's arguments:

Your letter contesting the proposed Debarment Notice was received in the Department of Agriculture January 16, 1996. We have reviewed it carefully. You claim that our letter of September 29, 1995, was a determination that there was no legal cause for debarment. That letter was quite clear that the determination was not on the merits but was because of a procedural matter. The withdrawal was clearly "without prejudice" and is no bar to the present action.

The doctrine of "laches" which you have raised is an affirmative defense to litigation and has no application to administrative proceedings. Even if the doctrine were applicable, not only would the delay have to be extensive, but you would have to prove that you had been detrimentally affected by the delay. Debarment is not for the purpose of punishment but solely for the protection of the Government. You pled guilty to the conversion of Government security. There is no question that occurred. A judgment of guilty

in a criminal action is conclusive and you have no defense to that action. Laches can have no effect.

The letter of proposed debarment did contain a typographical error in the citation to the Code of Federal Regulations. The correct citation should have been to 7 CFR, section 3017.305. However, since you have a copy of that regulation, you were not prejudiced by that incorrect citation and it provides no defense to this action.

Since the action of suspension and debarment is solely for the protection of the Government, the doctrine of *ex post facto* laws does not affect this action.

(AR 1).

In addition, although the debarring official did not address this argument specifically in the Notice of Debarment, the period of debarment was reduced from five years, as proposed in the Notice of Proposed Debarment, to three years.

Conclusions

Respondent raises three arguments in his appeal. Respondent does not contend that the debarring official failed to consider the seriousness of his offense or any mitigating factors presented. Instead, as noted by Counsel for FSA, Respondent "has tried to attack the agency's decision procedurally." (Response). First, Respondent argues that the debarring official failed to consider his period of suspension in determining the period of debarment. Section 3017.320(a) provides that "[d]ebarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period. 7 C.F.R. § 3017.320(a). Counsel for FSA argues that Respondent's period of suspension was considered implicitly by the debarring official in making his decision:

Debarment, according to 7 C.F.R. § 3017.320(a)(1), may be imposed for longer than three years for causes other than Drug Free Workplace Requirements violations where circumstances warrant. Respondent has committed a serious felony, was uncooperative in government

investigations concerning his actions, and was found to have acted in bad faith regarding FmHA loans. FSA has sufficient basis to fix his debarment period beyond three years, but has set the extent of debarment at three years when considering the amount of time he was suspended.

However, there is no indication in the Notice of Debarment that the debarring official actually considered the period of suspension in making his decision. *Cf. In re William E. Johnston*, 51 Agric. Dec. 1103, 1114 (1992) (consideration of Respondent's previous three month suspension reflected in decision to make debarment effective from date of suspension). Respondent was suspended from October 25, 1994 until September 29, 1995. Accordingly, the period of debarment is reduced by 339 days, the amount of time that Respondent was previously suspended.

Second, Respondent contends that the debarring official exceeded the amount of time permitted by the Regulations for making a debarment decision. Section 3017.314(a) provides that "[t]he decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause." 7 C.F.R. § 3017.314(a). Moreover, "[i]f the debarring official decides not to impose debarment the respondent shall be given prompt notice of that decision." 7 C.F.R. § 3017.314(d)(2).

The initial Notice of Suspension and Proposed Debarment was received by Respondent on October 31, 1994. Respondent submitted a timely response in opposition to the Notice of Suspension and Proposed Debarment on November 27, 1994, and received by the debarring official on December 1, 1994. No action was taken by the debarring official until September 29, 1995, at which time the suspension and proposed debarment was withdrawn.

The withdrawal letter was received by Respondent on October 14, 1995, 317 days after Respondent's submission in opposition to the Notice of Suspension and Proposed Debarment was received by the debarring official. Respondent was forced to await a response from the debarring official for over ten months. At no point during this time did the debarring official extend the time for his decision for good cause. Regardless of the agency reorganization within the Department, this is clearly inexcusable and excessive delay, not the prompt decision provided for in the Regulations. As noted above, however, since the debarring official did not consider the length of Respondent's suspension in making his decision, the period of debarment has been reduced by 339 days, the amount of time that Respondent was previously suspended.

Accordingly, although the debarring official did not issue a prompt decision, no harm has been shown, and no further discussion of the initial debarment action is necessary.

The second Notice of Proposed Debarment was issued by FSA on December 7, 1995, and received by Respondent on December 15, 1995. On January 16, 1996, Respondent submitted a timely response in opposition to the Notice of Proposed Debarment. On March 1, 1996, 45 days after receiving the submission in opposition, the Notice of Debarment was issued in timely fashion.

Finally, Respondent argues that by withdrawing the initial debarment action, FSA is precluded from instituting a second debarment action:

7 CFR 3017(d)(2) implies that a decision not to impose debarment for whatever reason, (procedural or on the merits of the case) imposes a bar to further action by the SAME agency. FSA is not "ANY OTHER AGENCY" and is not allowed multiple attempts at debarment.

(Appeal). The September 29, 1995, letter withdrawing the suspension and proposed debarment action indicated that "[t]his decision shall be without prejudice to any subsequent debarment actions." (AR 4). Moreover, in the Notice of Debarment, the debarring official stated the following:

You claim that our letter of September 29, 1995, was a determination that there was no legal cause for debarment. That letter was clear that the determination was not on the merits but was because of a procedural matter. The withdrawal was clearly "without prejudice" and is no bar to the present action.

(AR 1). As stated by Counsel for FSA in his Reply, "[n]either debarment regulations, the Executive Order, nor the statute prohibit an action on the merits for debarment when a previous proposed debarment was withdrawn for procedural reasons."

As noted by Counsel for FSA, Respondent is making an argument that the doctrine of laches should be applied to prohibit the debarring official from initiating a second debarment action against Respondent. However, laches is not applicable to the government acting in its sovereign capacity. *Thompson v. United States*, 312 F.2d 516, 519 (10th Cir. 1962); *In re Keith Becknell*, 54 Agric. Dec. 337, 345-46 (1995).

As stated in *Baltimore Gas & Electric Co. v. National Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983), in assessing agency action under the "arbitrary and capricious" standard, it is necessary to determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made."

The Notice of Debarment clearly indicates that the debarring official's decision to debar Respondent is reasonably related to a valid administrative purpose and is, therefore, clearly not arbitrary or capricious. As evidenced in the Notice of Debarment, the debarring official examined the administrative record, took into account all of the relevant factors in reaching a conclusion, and articulated a rational basis for these conclusions:

You have shown by your actions that you hold your legal obligations to the Government in contempt. There is no basis for the Government to continue to allow you to participate in its programs or to contract with the Government when you have demonstrated your utter disregard for the terms of the programs and your legal contractual obligations.

Debarment is based upon the following grounds as found in 7 CFR, section 3017.305:

(a) Conviction of or civil judgment for any of the following:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

Your noncompliance is evidenced by your conviction in the criminal action styled as United States of America vs. Daryl L. Robertson, Criminal Action No.

91-10040-01, U.S. District Court for the Western District of Louisiana. More specifically, this action is a result of your failure to follow Agency regulations and to conduct your affairs with the Agency in good faith. Specific reasons for the debarment are as follows:

On June 17, 1992, you were sentenced as a result of your plea of guilty to one count of an indictment in the Western District of Louisiana where you admitted to knowingly and willfully disposing of, or converting to your own use, the property described in the count (bovine); that the property disposed of was mortgaged or pledged to FHA; and that you did so with intent to defraud FHA. You were given a prison sentence and ordered to pay restitution to FHA.

However, the period of Respondent's debarment, which pursuant to the Regulations, 7 C.F.R. § 3017.320(a), must consider the length of time that Respondent has been suspended, will be reduced by 339 days.

Order

It is hereby ordered that the debarment of Respondent Daryl L. Robertson, shall be effective March 1, 1996 through March 26, 1998.

This order shall take effect immediately. This decision is final and not appealable within the Department. 7 C.F.R. § 3017.515(d).

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final June 18, 1996.--Editor]

PLANT QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: BARRY GLICK, d/b/a SUNSHINE NURSERY.
P.Q. Docket No. 95-10.
Decision and Order filed February 22, 1996.

Civil penalty — Bringing prohibited and restricted articles into the United States from England
Inability to pay as a mitigating circumstance — Sanction policy — Failure to appear at hearing.

The Judicial Officer affirmed the decision by Administrative Law Judge James W. Hunt (ALJ) assessing a civil penalty of \$5,500 against Respondent Barry Glick for importing prohibited and restricted articles into the United States in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 9 C.F.R. § 319.37 *et seq.* The sanction imposed is appropriate, and Respondent failed to timely raise or prove inability to pay in mitigation of the civil penalty assessed. Default decision properly issued because Respondent failed to appear at the hearing.

James D. Holt, for Complainant.

Respondent, Pro se.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

This case is an administrative proceeding for the assessment of civil penalties for violations of the Federal Plant Pest Act, as amended, (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended, (7 U.S.C. §§ 151-154, 156-165, 167) (Acts), and the regulations promulgated under the Acts, (7 C.F.R. § 319.37 *et seq.*). Administrative Law Judge James W. Hunt (ALJ) filed an Initial Decision and Order on December 15, 1995, assessing a civil penalty of \$5,500 (\$500 for each of 11 violations) against Respondent for the importation into the United States of *Solanum*, *Rosa*, *Hydrangea*, *Salix*, and a restricted article that was not free of soil, in violation of the Acts and 7 C.F.R. § 319.37 *et seq.*

On January 16, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R.

§ 2.35.)¹ On February 1, 1996, Complainant filed a Response to Appeal, and on February 5, 1996, the case was referred to the Judicial Officer for decision.

In his Appeal Petition, Respondent states "[i]f I lose the hearing, I will have no alternative but to close the business and declare bankruptcy." (Respondent's Appeal Petition, p. 1.) Although Respondent has not specifically requested oral argument before the Judicial Officer, I infer that Respondent's reference to a "hearing" is such a request. The Judicial Officer may, under the applicable Rules of Practice, (7 C.F.R. § 1.145(d)), grant, refuse, or limit oral argument. The issues in this case are not complex and are controlled by established precedents, and, thus, oral argument would appear to serve no useful purpose and is refused.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

This is an administrative proceeding for the assessment of a civil penalty for violations of the [Federal Plant Pest Act, as amended, (7 U.S.C. §§ 150aa-150jj), the] Plant Quarantine Act, as amended, (7 U.S.C. §§ 151-[154, 156-165], 167), and the regulations promulgated thereunder, (7 C.F.R. § 319.37 *et seq.*).

This proceeding was instituted by a Complaint filed on November 3, 1994, by the [Acting] Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA). Respondent Barry Glick, d.b.a. Sunshine Nursery, was served with the Complaint on November 10, 1994, and filed an Answer on November 28, 1994. Complainant then filed a Motion for a Hearing. Respondent Barry Glick responded with a request that the hearing be conducted in Greenbrier County, West Virginia[*,* and stated that he would be ready for the hearing sometime after January 1, 1995]. I issued an

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

Order scheduling a hearing for May 17, 1995, commencing at 9 a.m., in Lewisburg, (Greenbrier County), West Virginia, at the City Hall's conference room.

On March 6, 1995, I conducted a telephone conference with James D. Holt, Complainant's counsel, and Respondent, Barry Glick, who represented himself. At Mr. Glick's request, I postponed the hearing until November 1, 1995. This verbal postponement was confirmed with a written notice sent to Mr. Holt and Mr. Glick on March 6[, 1995,] specifically stating that the hearing was rescheduled to commence at 9 a.m. on November 1, 1995, in Lewisburg[, West Virginia]. Another Notice of Hearing was sent to the parties on August 3, 1995, again setting the time and location of the hearing as [November 1, 1995,] 9 a.m., local time, in Lewisburg, [West Virginia,] at the City Hall's conference room. . . . [T]his notice . . . was not sent by certified or registered mail.

On November 1[, 1995,] the hearing commenced at 9 a.m. in the City Hall's 2nd floor conference room, Lewisburg, West Virginia. Mr. Holt appeared on behalf of the Complainant. Respondent was neither present nor represented. I then [delayed the start of the hearing until 9:30 a.m., November 1, 1995, to give Respondent additional time in which to appear.] At 9:[30] a.m., [November 1, 1995,] I . . . convened the hearing and Mr. Glick was still not present [and not represented]. Mr. Holt then moved that the Complainant's exhibits be [admitted] into evidence. There being no objection, Complainant's exhibits were admitted into evidence. Complainant moved that the material allegations of the Complaint be adopted as the Findings of Fact, that a decision be issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding, (7 C.F.R. § 1.139), and that an Order be issued assessing a civil penalty of five thousand, five hundred dollars (\$5,500.00), as requested in the Complaint. [Before granting Complainant's motion to proceed in accordance with 7 C.F.R. § 1.139, the hearing was recessed again to give Respondent additional time to appear. The hearing was reconvened at 10 a.m., November 1, 1995. Respondent failed to appear, and I granted Complainant's motion to proceed in accordance with 7 C.F.R. § 1.139. I further provided that Respondent would have 30 days in which to file a response or objections to Complainant's motion.

On November 6, 1995, Complainant filed a motion for a proposed decision and order and a proposed decision and order in accordance with the applicable Rules of Practice, (7 C.F.R. §§ 1.139, 1.141(e).)

On November 9, 1995, Mr. Glick was served with a copy of Complainant's proposed decision and order. Mr. Glick filed objections to the adoption of the

proposed decision and order, requesting that a new hearing date be set. On November 13, 1995, I conducted a telephone conference with Mr. Holt and Mr. Glick and directed them to file, [by November 22, 1995,] their respective positions concerning Complainant's proposed decision and order [and Respondent's motion that a new hearing date be scheduled]. Mr. Glick filed a response in which he stated, *inter alia*, that he had never received notice of a "firm" hearing date, that no one had called him from the hearing, that he should have been notified of the hearing by certified mail, and that a new hearing should be scheduled. [On November 20, 1995, Complainant filed a Response to Objections to Adoption of Proposed Decision and Order.]

Statement of the Law

Section 1[0] of the Plant Quarantine Act[, as amended,] provides that any person who violates any provision, rule, or regulation promulgated by the Secretary to implement the Act may be assessed a civil penalty by the Secretary after notice and an opportunity for a hearing. (7 [U.S.C.] § 163.)

Section 1.141(e) of the Rules of Practice, (7 C.F.R. § 1.141(e)), provides that a Respondent who, after being notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the Respondent shall also constitute an admission of all the material allegations of fact contained in the Complaint. Complainant shall have an election whether to follow the procedure set forth in section 1.139 of the Rules [of Practice, (7 C.F.R. § 1.130 *et seq.*),] or whether to present evidence, in whole or in part, in the form of affidavits or by oral testimony at the hearing.

Section 1.147(c)([1]) of the Rules of Practice, (7 C.F.R. § 1.147(c)([1])), provides for service by certified or registered mail only for Complaints or other documents initially served on a person [to make that person a party Respondent in a proceeding,] proposed decisions and [motions for adoption of proposed decisions upon failure to file an Answer or other admission of all material allegations of fact contained in the Complaint,] initial and final decisions[, Appeal Petitions filed by the Department, or other documents specifically ordered by the Judge to be served by certified or registered mail].

[Section 1.147(c)(2) of the applicable Rules of Practice, (7 C.F.R. § 1.147(c)(2)), provides that:

Any document or paper, other than one specified in [7 C.F.R. § 1.147](c)(1) . . . or written questions for a deposition as provided in [7 C.F.R.] § 1.148(d)(2) . . . , shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of mailing by ordinary 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.]

Discussion

Mr. Glick gives as his reason for not attending the hearing that he did not receive "firm" notice of the November 1, 1995, hearing.

The hearing was originally scheduled for May 17, 1995, in Lewisburg, Greenbrier County, [West Virginia,] as requested by Mr. Glick. On March 6, 1995, I conducted a telephone conference with Mr. Holt and Mr. Glick. During that telephone conference and at the specific request of Mr. Glick, the hearing was rescheduled for November 1, 1995, in Lewisburg. Mr. Glick was sent a written confirmation of this hearing date. He does not deny receiving this notice. Therefore, on March 6, 1995, Mr. Glick had actual notice that a hearing was scheduled for November 1, 1995, in Lewisburg, West Virginia.

A notice of hearing was also later sent to Mr. Glick. It did not change the November 1[, 1995,] hearing date in Lewisburg. The Rules of Practice did not require that this notice be sent by [registered or] certified mail. Whether he received this notice or not, Mr. Glick nevertheless already knew that the hearing was scheduled for November 1[, 1995,] in Lewisburg, based on the telephone conference and the written summary of the conference that was sent to him. I, therefore, find that Mr. Glick did have adequate notice that the hearing was scheduled for November 1, 1995, in Lewisburg. Since Mr. Glick has not presented any credible reasons for his failure to appear at the hearing, Complainant is entitled to a default judgment [in accordance with the applicable Rules of Practice, (7 C.F.R. §§ 1.139, .141(e).)]

Section 1[0] of the Plant Quarantine Act[, as amended,] provides that any person who violates any provision, rule, or regulation promulgated by the Secretary to implement the Act may be assessed a civil penalty by the Secretary not exceeding \$1,000, after notice and an opportunity for a hearing. (7 [U.S.C.] § 163.) Mr. Glick had an opportunity for a hearing and had notice thereof. Mr. Glick was neither present nor represented at the hearing. He has not presented good cause for his failure to appear. Section 1.141(e) of the Rules

of Practice provides that a Respondent who, after being notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to hearing in the proceeding and to have admitted any facts which may be presented at the hearing and alleged in the Complaint. Thirty-five exhibits, including 1[0] sworn affidavits, including Mr. Glick's affidavit, were admitted into evidence.

Therefore, the following material allegations of fact in the Complaint are deemed admitted and constitute Findings of Fact:

1. The mailing address of Respondent Barry Glick, d/b/a Sunshine Nursery, is Route 5, Renick, West Virginia 24966.
2. Between February 28 and April 1, 1991, Respondent imported *Solanum* into the United States from England without a permit; imported *Rosa* and *Hydrangea* into the United States from England without a permit; imported *Rosa* and *Hydrangea* into the United States from England without a postentry agreement; imported *Rosa* and *Hydrangea* into the United States by mail from England without having the *Rosa* and *Hydrangea* mailed to the Plant Protection and Quarantine Program at a port of entry listed in 7 C.F.R. § 319.37-14; and imported a prohibited article (*Solanum*) and restricted articles (*Rosa* and *Hydrangea*) into the United States from England in the same container.
3. On [or about] December 13, 1993, Respondent imported *Salix* into the United States from England without a permit; imported *Rosa* into the United States from England without a permit; [imported *Rosa* into the United States from England without a postentry agreement;] imported *Rosa* into the United States by mail from England without having the *Rosa* mailed to the Plant Protection and Quarantine Program at a port of entry listed in 7 C.F.R. § 319.37-14; imported a prohibited article (*Salix*) and a restricted article (*Rosa*) into the United States from England [in the same container; and imported a restricted article into the United States from England] which was not free of soil.

Conclusions of Law

Respondent Barry Glick, d/b/a Sunshine Nursery, violated the Federal Plant Pest Act, as amended, (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended, (7 U.S.C. §§ 151-[154, 156-165], 167), and the regulations promulgated thereunder, (7 C.F.R. § 319.37 *et seq.*).

Sanction

It is a well established policy that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose." *S.S. Farms Linn County, Inc.*, [(Decision as to James Joseph Hickey and Shannon Hansen)], 50 Agric. Dec. 476[, 497] (1991)[, *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3)].

The success of the programs designed to protect America's agriculture by preventing the introduction of plant pests and disease is dependent upon the compliance of individuals such as Respondent. The lack of respect shown by Respondent to federal regulations designed to prevent the introduction of plant pests and disease greatly increases the risk of the introduction of plant pests and disease into the United States. The Administrator believes that compliance and deterrence can be achieved only with the imposition of the \$5,500 civil penalty requested. The Administrator's recommendation "as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Administrator] during [his] day-to-day supervision of the regulated industry." *In re S.S. Farms Linn County, Inc.*, *supra*, 50 Agric. Dec. [at 497]. The Administrator also seeks as a primary goal the deterrence of other persons similarly situated to the respondent. *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1831 (1976)[, *aff'd sub nom. Indiana Slaughtering Co. v. Bergland*, No. 76-3949 (E.D. Pa. Aug. 1, 1977)]. "The civil penalties imposed by the Secretary for violations of his quarantine regulations should be sufficiently large to serve as an effective deterrent not only to the respondent but also to other potential violators." *In re Shulamis Kaplinsky*[, 47 Agric. Dec. 613], 629 [(1988)].

The civil penalty of five thousand, five hundred dollars (\$5,500.00), five hundred dollars per violation, requested in the Complaint is consistent with civil penalties requested and assessed in similar circumstances. See [*In re Don Tollefson*, 54 Agric. Dec. 426 (1995) (\$1,500 civil penalty assessed; \$750 for each of two violations)]; *In re Francisco Escobar, Jr.*, 54 Agric. Dec. 392 (1995), [*aff'd per curiam*, No. 95-60081 (5th Cir. Aug. 23, 1995) (unpublished) (\$2,000 civil penalty assessed; \$500 per violation)]; *In re Robert N. Watts, Jr.*, 53 Agric. Dec. 1419 (1994) (\$2,000 civil penalty assessed; \$1,000 per violation); *In re Unique Nursery and Garden Center* (Decision as to Valkering

U.S.A., Inc.), 53 Agric. Dec. 377 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995) (\$14,500 civil penalty assessed; \$1,000 for each of 10 violations, \$500 for each of 9 violations); *In re Christian King*, 52 Agric. Dec. 1333 (1993) (\$750 civil penalty assessed for a single violation); *In re Vanessa Hopkins*, 51 Agric. Dec. 1212 (1992) (\$375 civil penalty assessed for a single violation)].

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's appeal concerns his ability to pay the civil penalty. Respondent states in his Appeal Petition:

I own no property, have no personal assets except a 1980 1nd [sic] a 1984 Subaru with over 200,000 miles on it. My kids qualify for free lunches at school. . . .

. . . .

If I lose the hearing, I will have no alternative but to close the business and declare bankruptcy. (Respondent's Appeal Petition, p. 1.)

The facts concerning Respondent's assets and financial condition and his ability to pay a civil penalty, which are set forth for the first time on appeal, come too late. The Respondent had an opportunity to raise the facts set forth in his Appeal Petition earlier in this proceeding.² It is well settled that Respondent cannot raise new issues on appeal or present new facts for the first time on appeal to the Judicial Officer.³

²Respondent's only reference to his financial condition prior to Respondent's Appeal Petition came in response to Complainant's December 1, 1994, Motion for Hearing and it did not relate to ability to pay a civil penalty, but, instead, related to Respondent's ability to bear the financial burden of travel to Washington, D.C., for a hearing. (Respondent's December 20, 1994, Response to Complainant's Motion for Hearing.)

³*In re Jeremy Byrd*, 55 Agric. Dec. ____ (Feb. 21, 1996); *In re Bama Tomato Co.*, 54 Agric. Dec. ____ (Aug. 17, 1995), *appeal docketed*, No. 95-6778 (11th Cir. Sept. 26, 1995); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 (continued...)

Even if I were to consider the factual assertions in Respondent's Appeal Petition regarding his assets and financial condition, it would not change the outcome of this case. The Department's policy in Plant Quarantine cases involving inability to pay civil penalties is set forth in *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1320-22 (1993). As stated therein, the ability to pay a civil penalty is a mitigating circumstance to be pleaded and proven by Respondent; thus, the burden is on Respondent to produce documentation regarding ability to pay. The undocumented assertion by Respondent in his Appeal Petition that he lacks assets to pay the civil penalty falls far short of the proof necessary to prove an inability to pay. See *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (full civil penalty assessed despite Respondent's submission of some documentation of financial problems); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (full civil penalty assessed because Respondent did not produce documentation of inability to pay civil penalty). Nonetheless, in view of the facts asserted by Respondent regarding his assets and financial condition, both in his December 20, 1994, Response to Complainant's Motion for Hearing and in his appeal, I am providing for payment of the civil penalty in three installments, one year apart.

Respondent's violations of the laws and regulations designed to prevent the introduction of plant pests and diseases into the United States could have cost the United States, the States, and growers hundreds of times the \$5,500 civil penalty assessed, for control and eradication of plant pests and diseases and for lost crops and plants. In these circumstances, the \$5,500 civil penalty is modest.

Therefore, the following Order should be issued.

³(...continued)

Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Petition for Reconsideration), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

Order

Respondent Barry Glick, d.b.a. Sunshine Nursery, is assessed a civil penalty of \$5,500. The Respondent shall send certified checks or money orders, payable to the "Treasurer of the United States," to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, MN 55403

Respondent shall make three payments. Respondent's initial payment of \$1,500 will be due within 90 days after service of this Order on Respondent; Respondent's second payment of \$2,000 will be due within 1 year following such 90-day period; and Respondent's final payment of \$2,000 will be due within 2 years following such 90-day period. If Respondent is late in making or misses any payment, then the entire amount will become immediately due and payable in full.

The certified checks or money orders should include the docket number of this proceeding: P.Q. 95-10.

In re: BARRY GLICK, d/b/a SUNSHINE NURSERY.

P.Q. Docket No. 95-10.

Order Denying Petition for Reconsideration filed March 26, 1996.

Petition for reconsideration — Notice and opportunity for a hearing — Record shows no evidence of government conspiracy or abuse.

The Judicial Officer denied Respondent's Petition for Reconsideration. The record establishes that Respondent had requisite notice of and an opportunity to participate fully in the proceeding. The record contains nothing to indicate that Respondent was the subject of a government conspiracy or abused by government employees. No further review of this matter is available under the applicable Rules of Practice.

James D. Holt, for Complainant.

Respondent, Pro se.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

On March 4, 1996, Respondent filed a Petition for Reconsideration, (hereafter RPR), of the Decision and Order filed in this case on February 22, 1996, and served on Respondent on February 28, 1996. Complainant was served with Respondent's Petition for Reconsideration on March 11, 1996, and Complainant filed Complainant's Opposition to Respondent's Petition for Reconsideration on March 20, 1996. The case was referred to the Judicial Officer for reconsideration on March 20, 1996.

Respondent states that "[he] was not given a proper opportunity to prove [his] innocence."¹ (RPR, p. 1.)

This proceeding was instituted by a Complaint filed on November 3, 1994. Respondent was served with the Complaint on November 10, 1994, and filed an Answer on November 28, 1994. Complainant then filed a Motion for a Hearing, and, in response, Respondent requested that the hearing be conducted in Greenbrier County, West Virginia, after January 1, 1995. Administrative Law Judge James W. Hunt, (hereafter ALJ), issued an Order scheduling a hearing for May 17, 1995, commencing at 9 a.m., in Lewisburg, (Greenbrier County), West Virginia, at the City Hall's conference room.

On March 6, 1995, the ALJ conducted a telephone conference with Complainant's counsel and Respondent, and, at Respondent's request, postponed the hearing until November 1, 1995. This verbal postponement was confirmed with a written notice sent to Complainant and Respondent on March 6, 1995, specifically stating that the hearing was rescheduled to commence at 9 a.m. on November 1, 1995, in Lewisburg, West Virginia. Another Notice of Hearing was sent to the parties on August 3, 1995, again setting the time and location of the hearing as November 1, 1995, 9 a.m., local time, in Lewisburg, West Virginia, at the City Hall's conference room.

On November 1, 1995, the hearing commenced at 9 a.m. in the City Hall's 2nd floor conference room, Lewisburg, West Virginia. Complainant's counsel appeared, but Respondent was neither present nor represented. The ALJ then delayed the start of the hearing until 9:30 a.m., November 1, 1995, to give Respondent additional time in which to appear. At 9:30 a.m., November 1,

¹Respondent's statement that "[he] was not given a proper opportunity to prove [his] innocence," (RPR, p. 1), indicates that Respondent is under the mistaken belief that he has the burden of proof in the instant proceeding. This case is conducted under the Administrative Procedure Act which provides that the proponent of an Order, Complainant in the instant case, has the burden of proof. (5 U.S.C. § 556(d).)

1995, the ALJ convened the hearing, and Respondent was still not present and not represented. Complainant then moved that the Complainant's exhibits be admitted into evidence. There being no objection, Complainant's exhibits were admitted into evidence. Section 1.141(e) of the applicable Rules of Practice, (7 C.F.R. § 1.141(e)), provides that a Respondent who, after being notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to hearing in the proceeding and to have admitted any facts which may be presented at the hearing and alleged in the Complaint, and provides that Complainant shall have an election whether to follow the procedure set forth in 7 C.F.R. § 1.139 or whether to present evidence before the Administrative Law Judge. Complainant moved that the material allegations of the Complaint be adopted as the Findings of Fact, that a decision be issued pursuant to 7 C.F.R. § 1.139, and that an Order be issued assessing a civil penalty of five thousand, five hundred dollars (\$5,500), as requested in the Complaint. Before granting Complainant's motion to proceed in accordance with 7 C.F.R. § 1.139, the hearing was recessed again to give Respondent additional time to appear. The hearing was reconvened at 10 a.m., November 1, 1995. Respondent failed to appear, and the ALJ granted Complainant's motion to proceed in accordance with 7 C.F.R. § 1.139. The ALJ further provided that Respondent would have 30 days in which to file a response or objections to Complainant's motion.

On November 6, 1995, Complainant filed a proposed decision and order in accordance with the applicable Rules of Practice, (7 C.F.R. §§ 1.139, 1.141(e)).

On November 9, 1995, Respondent was served with a copy of Complainant's proposed decision and order. Respondent filed objections to the adoption of the proposed decision and order, requesting that a new hearing date be set. On November 13, 1995, the ALJ conducted a telephone conference with Complainant's counsel and Respondent and directed them to file, by November 22, 1995, their respective positions concerning Complainant's proposed decision and order and Respondent's motion that a new hearing date be scheduled. Respondent filed a response in which he stated, *inter alia*, that he had never received notice of a "firm" hearing date, that no one had called him from the hearing, that he should have been notified of the hearing by certified mail, and that a new hearing should be scheduled. On November 20, 1995, Complainant filed a Response to Objections to Adoption of Proposed Decision and Order. An initial Decision and Order was issued by the ALJ on December 15, 1995. On January 16, 1996, Respondent appealed to the Judicial Officer, and on February 1, 1996, Complainant filed a Response to Appeal. Respondent's Appeal only concerned his ability to pay the civil penalty and the

Judicial Officer issued a final Decision and Order assessing a civil penalty against Respondent on February 22, 1996.

I find nothing in the record which supports Respondent's contention that "[he] was not given a proper opportunity to prove [his] innocence,"² (RPR, p. 1), and, in fact, the record establishes that Respondent had the requisite notice of the proceeding and the hearing and an opportunity to participate fully in all aspects of the proceeding, including the hearing.

Second, Respondent states that "[he has] been the subject of a government conspiracy and . . . abused by government employees." (RPR, p. 1.) Respondent does not allege but I infer that the supposed conspiracy and abuse are connected with the instant proceeding. Respondent does not reveal any of the facts concerning the nature of the alleged conspiracy and abuse or the manner in which Respondent was harmed by the alleged conspiracy and abuse. Based upon a review of the record in this case, I find nothing to indicate that Respondent was the subject of a government conspiracy or abused by government employees in connection with the instant proceeding.

Finally, Respondent states that he is "also appealing." (RPR, p. 1.) No further review of this matter within the Department of Agriculture is available to Respondent under the applicable Rules of Practice. Respondent may, of course, seek judicial review of the final Decision and Order issued in this case.

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

Order

Respondent's Petition for Reconsideration is denied.

²See footnote 1.

MISCELLANEOUS ORDERS

In re: CAL-ALMOND, INC., GOLD HILLS NUT COMPANY, INC., and FRAZIER NUT FARMS, INC.

94 AMA Docket No. F&V 981-1 and

In re: DEL RIO NUT COMPANY and MONTE VISTA FARMING COMPANY.

94 AMA Docket No. F&V 981-3 and

In re: BAL NUT, INC., CARLSON FARMS, CENTRAL VALLEY GROWER PACKING, HOCKER NUT FARM, JARDINE ORGANIC RANCH, and ROTTEVEEL ORCHARDS.

94 AMA Docket No. F&V 981-4 and

In re: TREEHOUSE FARMS, INC.

94 AMA Docket No. F&V 981-5 and

In re: THERON SHAMGOCHIAN, INC., d/b/a MONTE CRISTO PACKING COMPANY, FORMERLY KNOWN AS MONTE CRISTO PACKING COMPANY and THERON SHAMGOCHIAN RANCHES, INC., d/b/a MONTE CRISTO PACKING COMPANY, BUT KNOWN ALWAYS TO THE ALMOND BOARD FOR THE SUBJECT CROP YEARS AS MONTE CRISTO PACKING COMPANY; BEARD'S QUALITY COMPANY, A SOLE PROPRIETORSHIP; and AMARETTO ORCHARDS, A CALIFORNIA GENERAL PARTNERSHIP.

94 AMA Docket No. F&V 981-7.

Order to Show Cause filed May 15, 1996.

Gregory Cooper, for Respondent.

Julian B. Heron, Washington, D.C.; Jeffrey A. LeVee, Los Angeles, California; Brian C. Leighton, Clovis, California; Ronald W. Hillberg, Turlock, California, for Petitioners.

Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

An examination of the Chief ALJ's Decision and Order and the appellate pleadings filed in the consolidated proceeding, *sub judice*, reveals that any decision by the Judicial Officer herein would have to be based upon the same

First Amendment/commercial free speech issues that are still being litigated in the consolidated *Wileman*¹ and the consolidated *Cal-Almond*² proceedings.

On January 24, 1996, the Solicitor General of the United States, on behalf of the Secretary of Agriculture, filed the attached Petition for a Writ of Certiorari in the Supreme Court of the United States seeking review of the United States Court of Appeals for the Ninth Circuit's judgment in *Wileman*. Moreover, I have been informed that the Department will likely request that the Solicitor General file a petition for a writ of certiorari regarding *Cal-Almond*. Consequently, I am issuing this Order for the parties in the proceeding, *sub judice*, to show cause why I should not forestall my Decision and Order herein, and await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond*.

Therefore, the parties herein shall, within 30 days from the service of this Order to Show Cause, file with the Hearing Clerk any cause showing why I should not await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond* before issuing a Decision and Order in the instant case.

¹In re *Wileman Bros. & Elliott, Inc. (Wileman I)*, 49 Agric. Dec. 705 (1990), and *In re Wileman Bros. & Elliott, Inc. (Wileman II)*, 50 Agric. Dec. 1165 (1991), aff'd, No. CV-F-90-473-OWW (E.D. Cal. Jan. 27, 1993) (*In re Asakawa Farms*, 50 Agric. Dec. 1144 (1991), appeal docketed sub nom. *Asakawa Farms, et al. v. Madigan*, CV-F-91-686-OWW (E.D. Cal. 1991); and *In re Gerawan Co. (Gerawan I)*, 50 Agric. Dec. 1338 (1991), and *In re Gerawan Co. (Gerawan II)*, 50 Agric. Dec. 1363 (1991), consolidated with CV-F-90-473-OWW (E.D. Cal. Sept. 14, 1993)), aff'd in part, rev'd in part & remanded, 58 F.3d 1367 (9th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3519 (U.S. Jan. 24, 1996) (No. 95-1184), petition for cert. filed, 64 U.S.L.W. 3605 (U.S. Feb. 26, 1996) (No. 95-1393).

²*In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23 (1991), aff'd sub nom. *Cal-Almond, Inc. v. USDA*, No. CV-F-91-064-REC (E.D. Cal. June 3, 1992), printed in 51 Agric. Dec. 44 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 171 (1991), aff'd, No. CV-F-91-122-REC (E.D. Cal. June 3, 1992), printed in 51 Agric. Dec. 79 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 183 (1991), aff'd, No. CV-F-91-123-REC (E.D. Cal. June 3, 1992), printed in 51 Agric. Dec. 85 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 1445 (1991), aff'd, No. CV-F-91-685-REC (E.D. Cal. July 8, 1992), aff'd in part, rev'd in part & remanded, 14 F.3d 429 (9th Cir. 1993), final order and judgment on remand, No. CV-F-91-064-REC (E.D. Cal. Sept. 6, 1994), aff'd in part & rev'd in part, 67 F.3d 874 (9th Cir. 1995), reh'g denied, Nos. 94-17160, 94-17163, 94-17164, 94-17166, 94-17167, 94-17182 (9th Cir. Feb. 20, 1996).

In re: MIDWAY FARMS, INC., A CALIFORNIA CORPORATION.**94 AMA Docket No. F&V 989-1.****Dismissal of Petition filed May 10, 1996.**

Sharlene A. Deskins, for Respondent.

Brian C. Leighton, Clovis, Ca., for Petitioner.

Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The issue in this case is whether Petitioner is a first handler subject to assessments under the Raisin Marketing Order for "junk raisins" it has handled.

The dispositive evidence on this issue consists of the records of Petitioner's purchases and sales of raisins.

If as the Petitioner alleges, Petitioner's records show it not to be a first handler because it sold its raisins to outlets to which assessments are not intended to attach, Petitioner would be exempt from monetary obligations under the Raisin Marketing Order. But for that determination to be made, Petitioner's records need be produced for inspection. Petitioner is fearful that proprietary information respecting the comparative prices it pays and receives, and the identities of those who buy "junk raisins," will become a matter of public knowledge if it is compelled to produce these documents in an unredacted form. If that were to happen Petitioner states its now profitable "niche" business would probably be lost.

For that reason, Petitioner has requested that only redacted copies of its records be made part of the public record and that the unredacted originals be examined *in camera*. Unfortunately, the records are voluminous and require some expertise to properly understand them. Therefore, I have been seeking an agreement between the parties as to a suitable trustworthy person who would act as my agent to undertake the *in camera* inspection. Respondent wants one of its inspectors to perform this review. Petitioner does not believe the suggested inspector would keep the information completely confidential and has instead suggested Terry Stark, the manager of the Raisin Committee. I believe he would be a reasonable choice and made that part of my Summary of Teleconference of April 30, 1996.

However, Respondent has since advised that Mr. Stark is neither available nor inclined to perform this task. Respondent also challenges my authority to require an *in camera* inspection and has asked that the question be certified instead to the Judicial Officer for his ruling.

The present posture of this case and the predicaments confronting both Petitioner and Respondent are unique. Respondent cannot determine whether

or not Petitioner is violating the Raisin Marketing Order and hence the Act, without reviewing its records. Petitioner is fearful its business will evaporate if the proprietary information contained within the records becomes public.

By filing this administrative petition under 7 U.S.C. § 608C(15)(A), Petitioner has tolled the civil penalties which might be assessed if an administrative action is filed against it pursuant to 7 U.S.C. § 608c(14)(B). Secondly, Petitioner anticipates that should an injunctive action be initiated against it in a federal district court under 7 U.S.C. § 608a(6), to compel the turnover of its records, it might not be permitted to defend on the ground that its activities are not covered by the Act and the Raisin Marketing Order because it did not first exhaust an available administrative remedy for determining the issue.

For these reasons, I have allowed this case to go forward. But upon reflection, a United States District Court Judge has the requisite powers that I lack to properly supervise an appropriate *in camera* inspection. Therefore, I am dismissing the petition without prejudice on the technical grounds that Petitioner has not and, without producing its records, cannot show itself to be a handler subject to the Act as 7 U.S.C. § 608c(15)(A) requires. Inasmuch as no action is presently pending against Petitioner for violation of the Act or the Raisin Marketing Order, this ruling causes it no harm. Should Respondent initiate a proceeding in a United States District Court to obtain Petitioner's records, Petitioner will be able to demonstrate by this ruling why an appropriate *in camera* inspection need be conducted under the District Court's auspices in exercise of its extensive powers which I do not possess. The power, for example, to dismiss the government action or otherwise sanction it, if the government refuses to accept the conditions prescribed for an *in camera* inspection. Moreover, inasmuch as the petition was filed as required by 7 U.S.C. § 608c(14)(B) and was dismissed on the technical grounds advanced by Respondent's two Motions to Dismiss, civil penalties against Petitioner are tolled until and unless a (14)(B) action is initiated in the future, at which time a (15)(A) petition may again be filed to continue tolling them.

In re: M. ROBINSON-DIAZ.
A.Q. Docket No. 93-50.
Order To Dismiss filed February 29, 1996.

Susan Golabek, for Complainant.

Respondent, Pro se.

Order issued by Victor W. Palmer, Chief Administrative Law Judge.

It is hereby ordered that the complaint in the above-captioned case be dismissed without prejudice. Complainant may reissue the complaint at any time.

In re: HUGH TIPTON (Tip) HENNESSEY and BERNARD JAMES VANDE BERG.

A.Q. Docket No. 95-7.

Order Granting Motion To Dismiss filed April 2, 1996.

Darlene M. Bolinger, for Complainant.

William F. Gigray, Jr., Caldwell, ID, for Respondent.

Order issued by Dorothea A. Baker, Administrative Law Judge.

Complainant's Motion to Dismiss as to Bernard James Vande Berg is hereby granted, this the 2nd day of April 1996.

In re: FOUNDATION for BEHAVIORAL RESEARCH, INC.

AWA Docket No. 96-05.

Order of Dismissal filed March 28, 1996.

Darlene M. Bolinger, for Complainant.

Respondent, Pro se.

Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's Motion to Dismiss is hereby granted.

In re: BRADLEY BACHMAN and WANDA BACHMAN.

AWA Docket No. 95-62.

Supplemental Order filed May 17, 1996.

Donald Tracy, for Complainant.

Al Arendt, Pierre, South Dakota, for Respondent.

Order issued by Dorothea A. Baker, Administrative Law Judge.

Upon the motion of complainant, the Animal and Plant Health Inspection Service, the suspension of respondents' license as dealers under the Animal Welfare Act, as amended, contained in the Order issued in this case on April 15, 1996, is hereby terminated.

This order shall be effective upon issuance.

**In re: BRUCE TRAMMELL and NANCY TRAMMELL d/b/a
TRAMMELL TRAIL TREASURE.**

AWA Docket No. 95-68.

Supplemental Order filed June 7, 1996.

Colleen A. Carroll, for Complainant.

C. David Mecklin, Jr., Carrollton, GA, for Respondent.

Order issued by James W. Hunt, Administrative Law Judge.

Upon the motion of complainant, the Animal and Plant Health Inspection Service, the suspension of respondents' license as a dealer under the Animal Welfare Act, as amended, contained in the Order issued in this case on March 1, 1996, is hereby terminated. Further, the civil penalty assessed against the respondents and held in abeyance by that Order is hereby abrogated.

This order shall be effective upon issuance.

In re: MAC'S MEAT, INC. and ALFREDO R. GUERRERO, JR.

FMIA Docket No. 95-7.

PPIA Docket No. 95-6.

Order of Dismissal filed April 19, 1996.

James D. Holt, for Complainant.

Lawrence M. Pickett, Las Cruces, NM, for Respondent.

Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on September 25, 1995, be dismissed.

In re: VELASAM VEAL CONNECTION, SIMON SAMSON, GORDON DURLER, and DOUGLAS ACHTERBERG.

FMIA Docket No. 96-6.

PPIA Docket No. 96-5.

Ruling on Complainant's Motion to Stay Ruling filed June 24, 1996.

Sheila Novak, James D. Holt, and Howard Levine, for Complainant.

Dennis R. Johnson and David L. Durkin, Washington, D.C., for Respondents.

Ruling issued by William G. Jenson, Judicial Officer.

On June 24, 1996, Complainant filed a Motion to Stay Ruling Concerning Respondents' Emergency Appeal Petition to the Judicial Officer and Request for Immediate Hearing on Suspension of Inspection Services (hereinafter Complainant's Motion for Stay) requesting that the Judicial Officer stay the issuance of any ruling on Respondents' Emergency Appeal Petition to the Judicial Officer and Request for Immediate Hearing on Suspension of Inspection Services (hereinafter Emergency Appeal Petition) until 4:30 p.m., Monday June 24, 1996, and that Complainant be allowed until 4:30 p.m., Monday, June 24, 1996, to file a response to Respondents' Emergency Appeal Petition. Complainant's Motion for Stay is granted.

In re: VELASAM VEAL CONNECTION, SIMON SAMSON, GORDON DURLER, and DOUGLAS ACHTERBERG.

FMIA Docket No. 96-6.

PPIA Docket No. 96-5.

Order Dismissing Appeal filed June 25, 1996.

Consent decision - Late appeal.

The Judicial Officer dismissed a late-filed appeal. Administrative Law Judge Edwin S. Bernstein (ALJ) issued a Consent Decision and Order on March 26, 1996, which became final upon issuance in accordance with 7 C.F.R. § 1.138. The Judicial Officer has no jurisdiction to consider Respondents' appeal after an ALJ's Consent Decision and Order becomes final.

Sheila Novak, James D. Holt, and Howard Levine, for Complainant.

Dennis R. Johnson and David L. Durkin, Washington, D.C., for Respondents.

Order issued by William G. Jenson, Judicial Officer.

This case is an administrative proceeding regarding the assignment of inspectors to Respondent Velasam Veal Connection under the Federal Meat Inspection Act, as amended, (21 U.S.C. §§ 601-695) (hereinafter FMIA), and the Poultry Products Inspection Act, as amended, (21 U.S.C. §§ 451-470) (hereinafter PPIA). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by a Complaint filed by the Administrator of the Food Safety and Inspection Service on March 25, 1996. On March 26, 1996, a Consent Decision and Order, agreed to by Respondents and Complainant, was issued by Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ). The Consent Decision and Order became effective upon issuance by the ALJ. (Consent Decision and Order, p. 8.)

On June 19, 1996, Respondents filed an Emergency Motion to Reinstate Inspection and Request for Immediate Hearing on Suspension of Inspection Services (hereinafter Emergency Motion) in which Respondents requested an immediate hearing on the Emergency Motion in connection with the instant proceeding and *In re Velasam Veal Connection*, FMIA Docket No. 96-8 and PPIA Docket No. 96-7 (Complaint filed June 13, 1996), and the entry of an order reinstating inspection services at Velasam Veal Connection.

On June 21, 1996, the ALJ conducted a telephone conference regarding Respondents' Emergency Motion. Messrs. Dennis R. Johnson and David L. Durkin represented Respondents. Ms. Sheila Novak and Messrs. James D. Holt

and Howard Levine represented Complainant. (Summary of Telephone Conference, p. 1.) The ALJ states in the Summary of Telephone Conference:

Complainant's counsel stated that they could file a written reply to Respondents' [Emergency M]otion by June 25, 1996, and I agreed that such written reply may be filed by that date. I told counsel that I will be away between June 26 and 30, 1996, however, perhaps another judge can rule upon the motion in my absence.

Mr. Durkin stated that Respondents may wish to file an appeal with the Judicial Officer in order to obtain an earlier ruling in this matter. . . .

Summary of Telephone Conference, p. 2.

On June 21, 1996, Respondents filed an Emergency Appeal Petition to the Judicial Officer and Request for Immediate Hearing on Suspension of Inspection Services (hereinafter Emergency Appeal Petition) stating, in relevant part, as follows:

[P]ursuant to 7 C.F.R. § 1.145(a), [Respondents] . . . appeal to the Judicial Officer for an Order reinstating inspection services at Respondents' facility and an immediate hearing on the instant appeal petition. . . .

. . . .

Because this case involves the present cessation of operations at Respondents' facility, time is of the essence to receiving a final agency adjudication regarding the suspension of inspection services. In absence of relief, Respondents' company will cease to exist and its employees will be dismissed. Respondents therefore respectfully request an Order reinstating inspection services at Respondents' facility and an immediate hearing on the instant appeal petition.

. . . Respondents further request an order awarding Respondents costs and attorney fees associated with defending against these wholly unsupported and unsupportable actions of the agency, and other further relief as is deemed appropriate.

Emergency Appeal Petition, pp. 1-3.

At 4:00 p.m., June 21, 1996, the case was referred to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).¹ At the request of Respondents, I conducted a telephone conference with Messrs. Dennis R. Johnson and David L. Durkin, counsel for Respondents, and Mr. James D. Holt, counsel for Complainant, at 5:00 p.m., June 21, 1996. During the telephone conference, the parties discussed the Judicial Officer's jurisdiction to rule on the Respondents' Emergency Appeal Petition and the basis for suspension of inspection services at Velasam Veal Connection. Respondents and Complainant agreed that the ALJ had not submitted or certified any motion, request, objection, or other question to the Judicial Officer in accordance with section 1.143(e) of the Rules of Practice, (7 C.F.R. § 1.143(e)). However, Respondents contended that the Judicial Officer has jurisdiction to rule on Respondents' Emergency Appeal Petition pursuant to section 1.145 of the Rules of Practice, (7 C.F.R. § 1.145). Complainant took the position that the Judicial Officer does not have jurisdiction to rule on Respondents' Emergency Appeal Petition.

On June 24, 1996, Complainant filed a Motion to Stay Ruling Concerning Respondents' Emergency Appeal Petition to the Judicial Officer and Request for Immediate Hearing on Suspension of Inspection Services (hereinafter Complainant's Motion for Stay) requesting that the Judicial Officer stay the issuance of any ruling on Respondents' Emergency Appeal Petition until 4:30 p.m., Monday, June 24, 1996, and that Complainant be allowed until 4:30 p.m., Monday, June 24, 1996, to file a response to Respondents' Emergency Appeal Petition. The Judicial Officer granted Complainant's Motion for Stay.

At approximately 3:45 p.m., June 24, 1996, Complainant filed Complainant's Response to Respondents' Emergency Appeal Petition to the Judicial Officer and Request for Immediate Hearing on Suspension of Inspection Services (hereinafter Complainant's Response to Emergency Appeal Petition).

Under the Rules of Practice, a consent decision becomes "final" upon issuance; and, therefore, there is no right of appeal. Specifically, the Rules of Practice provide:

¹The position of the Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

§ 1.138 Consent decision.

At any time before the Judge files the decision, the parties may agree to the entry of a consent decision. Such agreement shall be filed with the Hearing Clerk in the form of a decision signed by the parties with appropriate space for signature by the Judge, and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The Judge shall enter such decision without further procedure, unless an error is apparent on the face of the document. *Such decision* shall have the same force and effect as a decision issued after a full hearing, and *shall become final upon issuance* to become effective in accordance with the terms of the decision.

7 C.F.R. § 1.138. (Emphasis added.)

The Rules of Practice provide as to non-consent decisions:

§ 1.142 Post-hearing procedure.

....

(c) *Judge's decision.* . . .

....

(4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however,* that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4).

Where an appeal from an Administrative Law Judge's decision is filed after it has become final (i.e., on the 35th day after service), it has continuously and consistently been held under the Rules of Practice that the Judicial Officer has

no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final.² The same holding is required where an Administrative Law Judge's decision has become "final" because it is a consent decision. *In re Moore Marketing International, Inc.*, 47 Agric. Dec. 1472, 1476 (1988).

Accordingly, Respondents' Emergency Appeal Petition filed in the instant proceeding must be dismissed, since the Consent Decision and Order issued by the ALJ in the instant proceeding became final on March 26, 1996, and the Judicial Officer has no jurisdiction to hear an appeal that is filed after a Consent Decision and Order becomes final.

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

²*In re Ow Duk Kwon*, 55 Agric. Dec. ____ slip op. at 7 (June 6, 1996); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (Respondents' appeal, filed 2 days after the Initial Decision and Order became final, dismissed); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (Respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective, dismissed); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (Respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective, dismissed); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (Respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective, dismissed); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final and effective, dismissed); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final, dismissed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (Respondent's appeal, filed with the Hearing Clerk on the day the Initial Decision and Order had become final and effective, dismissed); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (Respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective, dismissed); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (Respondent's appeal, filed 1 day after Default Decision and Order became final, denied); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (Judicial Officer has no jurisdiction to consider Respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial 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) (since 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 ALJ nor the Judicial Officer has jurisdiction to consider Respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

The Judicial Officer dismissed an interlocutory appeal from a ruling by Administrative Law Judge Edwin S. Bernstein (ALJ) on the ground that interlocutory appeals are not permitted under the Rules of Practice.

Sheila Novak, James D. Holt, and Howard Levine, for Complainant.

Dennis R. Johnson and David L. Durkin, Washington, D.C., for Respondents.

Order issued by William G. Jenson, Judicial Officer.

This case is an administrative proceeding regarding the continuation of the suspension of inspection services previously provided to Respondent Velasam Veal Connection under the Federal Meat Inspection Act, as amended, (21 U.S.C. §§ 601-695) (hereinafter FMIA), and the Poultry Products Inspection Act, as amended, (21 U.S.C. §§ 451-470) (hereinafter PPIA). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by a Complaint filed by the Administrator of the Food Safety and Inspection Service on June 13, 1996. On June 17, 1996, the Complaint, a copy of the Rules of Practice, and a service letter from the Office of the Hearing Clerk were personally served at Respondent Velasam Veal Connection's principal place of business on Mr. Bernstein, Chief Financial Officer, Velasam Veal Connection. This method of service was approved by the attorney for Velasam Veal Connection and Simon Samson.

On June 19, 1996, Respondents filed an Emergency Motion to Reinstate Inspection and Request for Immediate Hearing on Suspension of Inspection Services (hereinafter Emergency Motion) in which Respondents requested an immediate hearing on the Emergency Motion in connection with the instant proceeding and *In re Velasam Veal Connection* (Consent Decision and Order), FMIA Docket No. 96-6 and PPIA Docket No. 96-5 (Mar. 26, 1996), and the entry of an order reinstating inspection services at Velasam Veal Connection.

On June 21, 1996, Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) conducted a telephone conference regarding Respondents' Emergency Motion. Messrs. Dennis R. Johnson and David L. Durkin represented Respondents. Ms. Sheila Novak and Messrs. James D. Holt and Howard Levine represented Complainant. (Summary of Telephone Conference, p. 1.) The ALJ states in the Summary of Telephone Conference:

Complainant's counsel stated that they could file a written reply to Respondents' [Emergency M]otion by June 25, 1996, and I agreed that such written reply may be filed by that date. I told counsel that

I will be away between June 26 and 30, 1996, however, perhaps another judge can rule upon the motion in my absence.

Mr. Durkin stated that Respondents may wish to file an appeal with the Judicial Officer in order to obtain an earlier ruling in this matter. . . .

Summary of Telephone Conference, p. 2.

On June 21, 1996, Respondents filed an Emergency Appeal Petition to the Judicial Officer and Request for Immediate Hearing on Suspension of Inspection Services (hereinafter Emergency Appeal Petition) stating, in relevant part, as follows:

[P]ursuant to 7 C.F.R. § 1.145(a), [Respondents] . . . appeal to the Judicial Officer for an Order reinstating inspection services at Respondents' facility and an immediate hearing on the instant appeal petition. . . .

. . . .

Because this case involves the present cessation of operations at Respondents' facility, time is of the essence to receiving a final agency adjudication regarding the suspension of inspection services. In absence of relief, Respondents' company will cease to exist and its employees will be dismissed. Respondents therefore respectfully request an Order reinstating inspection services at Respondents' facility and an immediate hearing on the instant appeal petition.

. . . Respondents further request an order awarding Respondents costs and attorney fees associated with defending against these wholly unsupported and unsupportable actions of the agency, and other further relief as is deemed appropriate.

Emergency Appeal Petition, pp. 1-3.

At 4:00 p.m., June 21, 1996, the case was referred to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been

delegated, (7 C.F.R. § 2.35).¹ At the request of Respondents, I conducted a telephone conference with Messrs. Dennis R. Johnson and David L. Durkin, counsel for Respondents, and Mr. James D. Holt, counsel for Complainant, at 5:00 p.m., June 21, 1996.

During the telephone conference, the parties discussed the Judicial Officer's jurisdiction to rule on the Respondents' Emergency Appeal Petition and the basis for suspension of inspection services at Velasam Veal Connection. Respondents and Complainant agreed that the ALJ had not submitted or certified any motion, request, objection, or other question to the Judicial Officer in accordance with section 1.143(e) of the Rules of Practice, (7 C.F.R. § 1.143(e)). However, Respondents contended that the Judicial Officer has jurisdiction to rule on Respondents' Emergency Appeal Petition pursuant to section 1.145 of the Rules of Practice, (7 C.F.R. § 1.145). Complainant took the position that the Judicial Officer does not have jurisdiction to rule on Respondents' Emergency Appeal Petition.

On June 24, 1996, Complainant filed a Motion to Stay Ruling Concerning Respondents' Emergency Appeal Petition to the Judicial Officer and Request for Immediate Hearing on Suspension of Inspection Services (hereinafter Complainant's Motion for Stay) requesting that the Judicial Officer stay the issuance of any ruling on Respondents' Emergency Appeal Petition until 4:30 p.m., Monday, June 24, 1996, and that Complainant be allowed until 4:30 p.m., Monday, June 24, 1996, to file a response to Respondents' Emergency Appeal Petition. The Judicial Officer granted Complainant's Motion for Stay.

At approximately, 3:45 p.m., June 24, 1996, Complainant filed Complainant's Response to Respondents' Emergency Appeal Petition to the Judicial Officer and Request for Immediate Hearing on Suspension of Inspection Services (hereinafter Complainant's Response to Emergency Appeal Petition), in which Complainant contends that interlocutory appeals are not authorized under the Rules of Practice. (Complainant's Response to Emergency Appeal Petition, pp. 1-2.)

The Rules of Practice provide that:

§ 1.145 Appeal to Judicial Officer.

¹The position of the Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

(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).

Section 1.145(a) of the Rules of Practice, (7 C.F.R. § 1.145(a)), clearly limits the time during which a party may file an appeal to a 30-day period *after* receiving service of the *Judge's decision*. The Rules of Practice define the word "decision" as follows:

1.132 Definitions.

As used in this subpart [7 C.F.R., pt. 1, subpart H, (7 C.F.R. §§ 1.130-.151)], the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

....
Decision means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

The ALJ has not issued an initial decision in the instant proceeding in accordance with the provisions of 5 U.S.C. §§ 556 and 557, and the Rules of Practice do not permit interlocutory appeals. *In re L.P. Feuerstein*, 48 Agric. Dec. 896 (1989); *In re Landmark Beef Processors, Inc.*, 43 Agric. Dec. 1541 (1984); *In re Orie S. Leavell*, 40 Agric. Dec. 783 (1980).

Therefore, Respondents' Emergency Appeal Petition must be rejected as premature.

The Department'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) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

Fed. R. App. P. 4(a)(1).

The notes of the Advisory Committee on Appellate Rules regarding a 1979 amendment to Rule 4(a)(1) make clear that Rule 4(a)(1) is specifically designed to prevent premature as well as late appeals, as follows:

The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "o[f]." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. . . .

Notes of Advisory Committee on Appellate Rules—1979 Amendment.

Accord Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) (per curiam) (notice of appeal filed while timely motion to alter or amend judgment was pending in district court was absolute nullity and could not confer jurisdiction on court of appeals); *Willhauck v. Halpin*, 919 F.2d 788 (1st Cir. 1990) (premature notice of appeal is a complete nullity); *Mondrow v. Fountain House*, 867 F.2d 798 (3d Cir. 1989) (appellate court had no jurisdiction to hear appeal during pendency of motion for new trial timely filed in trial court).

Accordingly, Respondents' Emergency Appeal Petition must be dismissed, since the Rules of Practice do not permit interlocutory appeals. Upon appealing the Judge's initial decision, the party may raise issues with respect to "any ruling by the Judge or any alleged deprivation of rights." (7 C.F.R. § 1.145(a).)

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

Order

Respondents' Emergency Appeal Petition filed June 21, 1996, with respect to the instant proceeding, is dismissed.

In re: DON R. CRUM and CLARK A. SPENCER.

HPA Docket No. 94-46.

Corrected Order as to Respondent Clark A. Spencer filed January 17, 1996.

Sharlene Deskins, for Complainant.

Carthel Smith, Lexington, TN, for Respondent.

Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to Respondent Spencer's Motion to Correct Order filed December 11, 1995, and the Complainant having no objection to said correction, it is hereby:

Ordered:

That paragraph 2 of the Consent Order filed July 14, 1995, as to Clark A. Spencer shall read:

Respondent Clark A. Spencer is disqualified for eight (8) months, beginning July 16, 1995 from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction.

Copies hereof shall be served upon the parties.

In re: JACKIE McCONNELL and FLOYD SHERMAN.

HPA Docket No. 91-162.

Order Lifting Stay Order filed February 14, 1995.

Sharlene A. Deskins, for Complainant.

Carthel L. Smith, Lexington, TN, for Respondent.

Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Order issued by Donald A. Campbell, Judicial Officer.

The Stay Order filed in this proceeding pending the outcome of proceedings for judicial review is hereby removed. The disqualification provisions of the Order previously filed herein shall become effective on the 30th day after service of this Order on Respondent Jackie McConnell, and Respondent Jackie McConnell shall pay the civil penalty within 30 days from the date of service of this Order on Respondent.

In re: CHARLES ALEXANDER BOBO and ANGIE BOBO.

HPA Docket No. 94-17.

Order Dismissing Complaint Against Charles Alexander Bobo Without Prejudice filed February 16, 1995.

Sharlene A. Deskins, for Complainant.

Jack G. Huffington, Murfreesboro, TN, for Respondent.

Order issued by James W. Hunt, Administrative Law Judge.

Wherefore, for good cause shown the complaint against Charles Alexander Bobo is dismissed without prejudice. A hearing as to Respondent Angie Bobo has already been scheduled for July 12, 1995.

In re: EDDIE C. TUCK, EDMUND B. FLYNT, JR., and DONALD B. LONGEST.

HPA Docket No. 91-115.

Order Lifting Stay filed March 1, 1995.

Donald A. Tracy, for Complainant.

Philip L. Whitson, Charlotte, NC, for Respondent.

Initial decision issued by Paul Kane, Administrative Law Judge.

Order issued by Donald A. Campbell, Judicial Officer.

By agreement of the parties, the Order staying the original Order in this case pending the outcome of proceedings for judicial review is hereby lifted. The 2-year disqualification order previously entered shall be effective November 1, 1994. The \$4,000 civil penalty shall be paid in equal payments over 4 years, with the first payment due within 30 days from the date of service of this Order on Respondent, and each remaining payment due on the anniversary date of the first payment. If any payment is missed, the entire remaining amount shall become due and payable immediately.

In re: BILLY GRAY.

HPA Docket No. 90-28.

Order Lifting Stay filed March 6, 1995.

M. Bradley Flynn & Lance T. Mason, for Complainant.

G. Thomas Blankenship, Indianapolis, IN, for Respondent.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

Order issued by Donald A. Campbell, Judicial Officer.

The Stay Order filed in this proceeding pending the outcome of proceedings for judicial review is hereby removed. The disqualification provisions of the Order previously filed herein shall become effective on the 30th day after service of this Order on Respondent, and Respondent shall pay the civil penalty within 30 days from the date of service of this Order on Respondent.

In re: GARY R. EDWARDS, LARRY E. EDWARDS, CARL EDWARDS & SONS STABLES, WILLIAM V. BARKLEY, JR., and KAY BARKLEY. HPA Docket No. 91-113.

Second Remand Order filed June 9, 1995.

Remand order — Past recollection recorded — Adverse inference from failure to testify — Palpation evidence.

The Judicial Officer vacated the Second Initial Decision and Order filed by Judge Kane (ALJ) dismissing the Complaint, and remanded the proceeding to the ALJ. The ALJ erred in assigning slight credibility to one USDA veterinarian and no credibility to the other solely because of their lack of memory as to their examinations. Both veterinarians had recorded the results of their examinations while the events were fresh in their minds. The ALJ erred in drawing an adverse inference that the testimony of additional USDA experts, if called, would have been adverse to USDA, since the two USDA veterinarians who examined the horse testified at the hearing. The statutory presumption of soreness is frequently relied on, in addition to a conclusion of soreness reached in the absence of the statutory presumption. In this Department, there is no debate as to the sufficiency of palpation evidence alone as serving as a highly reliable method of determining whether a horse is sore, within the meaning of the HPA. The ALJ erred in stating that evidence obtained by palpation is prohibited to the Department's veterinarians by an Appropriations Act.

Colleen Carroll, for Complainant.

Paul D. Priamos, Torrance, CA, for Respondents.

Initial decision issued by Paul Kane, Administrative Law Judge.

Remand Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. § 1821 *et seq.*). After a Remand Order filed August 24, 1993 (*In re Gary R. Edwards*, 52 Agric. Dec. 1365 (Remand Order)), on June 30, 1994, Administrative Law Judge Paul Kane (ALJ) filed a Second Initial Decision and Order stating, "Proof of the essential allegation having failed, the complaint as to Gary R. Edwards, Larry E. Edwards and Carl Edwards & Sons Stables is, in all aspects, dismissed with prejudice" (Second Initial Decision and Order at 15).¹

The first Remand Order followed the ALJ's first Initial Decision and Order filed June 26, 1992, in which he denied Complainant's motion to amend the Complaint to conform to the proof, and dismissed the Complaint, with prejudice, for failure of proof of the allegations therein. In remanding, I stated (52 Agric. Dec. 1366-67, 1368-71):

¹Respondents William V. Barkley, Jr., and Kay Barkley entered into a Consent Decision filed January 10, 1991, and are, therefore, no longer parties to this proceeding.

Complainant inadvertently cited and referred to the prohibition on "entering" a horse for the purpose of exhibiting while sore (15 U.S.C. § 1824(2)(B)) instead of the correct citation and language against *exhibiting* a sore horse (15 U.S.C. § 1824(2)(A)). . . .

. . . .

Likewise in this case *sub judice*, it cannot be realistically asserted that the allegations of the Complaint did not reasonably apprise the Respondents of the issues in controversy. Respondent was on notice that the government would seek to prove that the Respondents' horse, "Rare Coin," was sore at an exhibition at a certain date, time, and place. Respondents had full opportunity to justify their conduct.

Moreover, there was a pre-hearing exchange of exhibits, and the Respondents are certainly held to prior knowledge of the contents of Complainant's exhibits. These exhibits all specifically and exclusively address the issue of "Rare Coin" being sore *after showing* on the date and in the exhibition charged in the Complaint. With these exhibits in hand, I find unconvincing Respondents' claim of prejudice because of the amendment to the Complaint. . . .

. . . .

From the foregoing, it is obvious that there really is no rational basis for any misunderstanding as to the government's case. . . .

However, in order to avoid any possibility of an appearance of prejudice to Respondents, other than the expense of a new hearing,³ I am remanding this proceeding to the ALJ, with an opportunity afforded to Respondents to offer further evidence and/or re-question witnesses. . . .

³I find it difficult to believe that Respondents actually want a new hearing. They knew exactly what Complainant intended to prove (because of the pre-trial exchange of exhibits), i.e., that the post-show examination of the horse showed that it was sore. Complainant is only changing the legal inference to be drawn from that proof.

Respondents had every opportunity to show that the horse was not sore during the post-show examination, or that, if it was, it was sore, e.g., because it stumbled in the ring. Accordingly, if they now have to incur the additional expense of a new hearing, it is much more their fault than the fault of Complainant's counsel.

The ALJ shall provide Respondents the opportunity to reopen the hearing. If Respondents request a new hearing, they may call additional witnesses, or recall former witnesses based upon the amended allegations. Rebuttal and surrebuttal testimony, etc., will be allowed. The ALJ shall decide the case based upon the original record, plus any additional evidence adduced at the new hearing.

Four days before the scheduled date of the reopened hearing, Respondents' counsel advised the ALJ that he had determined to not offer any evidence in further defense of this matter, and requested that the hearing be canceled. On the same date, March 14, 1994, the ALJ denied Respondents' request to cancel the hearing, and amended his prior orders so as to permit Complainant's counsel "to fully develop facts which would have been brought forth as if respondent's [sic] counsel had proceeded with the presentation of a defense" (Order filed March 14, 1994). However, on March 16, 1994, the ALJ canceled the hearing, stating that Complainant's counsel concurs with Respondents' "request that the hearing scheduled for March 18, 1994, be canceled as she has no further evidence to offer, thereby declining the opportunities afforded by the order filed March 14, 1994" (Order filed March 16, 1994).

In his Second Initial Decision and Order, the ALJ assigned "slight credibility" to one USDA veterinarian and "no credibility" to the other USDA veterinarian, solely because of their lack of memory as to their examinations, stating (Second Initial Decision at 7):

14. Based upon the appearance, demeanor and qualifications, the testimony of Drs. Baker and Humburg[, Respondents' experts,] concerning their observations is assigned great credibility. The testimony of Dr. Riggins is assigned slight credibility as he had but slight and unconvincing memory of "Rare Coin" (Tr. 103, 108) and the testimony of Drs. Knowles has no credibility as he had no recollection of his observations on the examination of "Rare Coin." (Tr. 189-190)

Although neither USDA veterinarian had present recollection at the time of the hearing of his examination, both signed a **SUMMARY OF ALLEGED VIOLATIONS, VS FORM 19-7** (CX 4), within a few minutes after their examinations, and both signed an affidavit relating to their examinations within one (Dr. Riggins) or two (Dr. Knowles) days after their examinations, while the events were still fresh in their minds. It was reversible error for the ALJ to assign slight or no credibility to their testimony solely because of their lack of present recollection at the time of the hearing. Virtually the same issue was involved in *In re Cecil Jordan*, 51 Agric. Dec. 1229, 1229-30 (1992) (Remand Order), *final decision*, 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir. 1995), in which I remanded a Horse Protection Act case to the same ALJ, involving the same USDA veterinarians (Dr. Riggins and Dr. Knowles), stating:

The ALJ did not regard Complainant's documentary evidence (the USDA veterinarians' examination report (VS Form 19-7) and the two veterinarians' affidavits) as probative because the ALJ concluded that the two "Government veterinarians had no present recollection of their examination of the horse at the time of their testimony at hearing, and so, CX 1, CX 2, CX 3, constitute hearsay." (Initial Decision at 9). He further concluded that the recorded recollections fail to provide the needed indicia of trustworthiness (Initial Decision at 10-15).

But, past recollection recorded is considered reliable, probative and substantial evidence, and fulfills requirements of the Administrative Procedure Act (5 U.S.C. § 556(d)), if the affidavits were made while the events recorded were fresh in the witnesses' minds, as stated in *In re Rowland*, 40 Agric. Dec. 1934, 1942 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983)):

Respondents complain that complainant's evidence should be disregarded because it is "based upon past recollection recorded and not independent memory" (Appeal 1). However, respondents did not object to the admission of such evidence and, therefore, they are not in a position to complain now. Moreover, complainant's witnesses made their affidavits while the events recorded were fresh in their minds, and such evidence is "reliable, probative, and substantial," as required by the Administrative Procedure Act (5 U.S.C. § 556(d)).

In the present case, Respondents did not object to the admission of CX 1, the form filled out by the two veterinarians stating their conclusion that the horse was sore. Moreover, the record shows conclusively that CX 1 and CX 2 were filled out while the events were fresh in the minds of the veterinarians, and CX 3 was filled out only 2 weeks after the examination, based on notes made while the events were fresh in the mind of the veterinarian. Hence the ALJ erred in failing to regard CX 1, CX 2, and CX 3 as reliable and probative.

In *Cecil Jordan*, the ALJ found on remand (and the reviewing court agreed) that Complainant had proven the violation, stating (52 Agric. Dec. at 1226):

After careful consideration of the conflicting evidence in this case, it is necessary to find that when complainant's documentary evidence is viewed as reliable and probative, the clinical findings attributed to the two qualified and experienced Government veterinarians merit greater credibility and weight than the testimony of respondent and her husband. CX 1, CX 2 and CX 3 are sufficiently detailed to provide substantial evidence on which to base a decision.

In *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer, d/b/a Oppenheimer Stables), 54 Agric. Dec. ____ (Mar. 6, 1995), in reversing this same ALJ in another Horse Protection Act case, in part, because he discounted the weight of the evidence by the USDA veterinarians because at the time of the hearing they had no present recollection of their examinations, I stated (slip op. at 24-30):

I. Complainant's Past-Recollection-Recorded Evidence Is Reliable, Probative, and Substantial.

At the outset, it must be acknowledged that here, as in every (or almost every) Horse Protection Act case, the USDA veterinarians had, at the time of the hearing, no independent recollection of their examination of "Black Power's Jezebel" (Finding 7). Their routine examination occurred on August 23, 1990, almost 3 years prior to the hearing. However, both USDA veterinarians had present recollection that they examined horses at the Shelbyville National Celebration on that date (Tr. 20, 116-17).

In accordance with their customary procedure, the SUMMARY OF ALLEGED VIOLATIONS, APHIS FORM 7077, was filled out immediately after the two USDA veterinarians determined that the horse was sore, with an investigator filling out the top portion relating to the name of the event, horse trainer and owner, etc., and Dr. Knowles filling out the lower part, beginning with Item 22 (Finding 11). In accordance with his customary procedure, Dr. Riggins signed the SUMMARY OF ALLEGED VIOLATIONS form, indicating his agreement, immediately after it was completed by Dr. Knowles (Finding 11).

Dr. Knowles personally typed and executed his affidavit the morning after the examination, while the events were fresh in his mind, and he also had in front of him the SUMMARY OF ALLEGED VIOLATIONS form, which he had prepared the night before (Findings 11, 13). Dr. Riggins wrote a handwritten account of his examination on the night of the examination, or the next morning, based on his fresh recollection and the SUMMARY OF ALLEGED VIOLATIONS form, and his notes were copied verbatim into an affidavit, which he executed 4 days after the examination (Finding 14).

The SUMMARY OF ALLEGED VIOLATIONS, APHIS FORM 7077 (CX 3), and the USDA veterinarians' affidavits (CX 4, 5) are evidence which is "'reliable, probative, and substantial,' as required by the Administrative Procedure Act (5 U.S.C. § 556(d))." *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1942 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983). This same type of evidence, consisting of past recollection recorded, has been received in all, or almost all, of the more than 60 Horse Protection Act cases I have reviewed, and is almost always the principal part of Complainant's proof as to a horse soring violation.

The ALJ's decision in this case shows that he gave little weight to affidavits and the SUMMARY OF ALLEGED VIOLATIONS form prepared by the Department's veterinarians, in part, because the Department's veterinarians had no present recollection of their examinations. (His erroneous views as to inconsistencies are discussed below and in sections II and III.) He states (Initial Decision at 14, 20-21, 31-32):

The Federal Circuit Court of Appeals to which Mr. Oppenheimer could, as a resident of Kentucky, voice an appeal to any disciplinary order resulting from this litigation is well aware of the statute prohibiting soring of Tennessee Walking Horses. However, this present matter involves the weight to be assigned by the trial judge to the uncorroborated hearsay documents which form the only foundation for the Government's proof, an issue not reached in *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179 (6th Cir. 1983). In the *Fleming* case, it was not significant that the veterinarians who provided evidence did or did not have recall of the facts of their examinations, for direct testimony, based on recall, of such was offered at trial, thereby providing opportunities for the testing of their abilities to accurately observe and record facts. In *Fleming*, *id.* at 185, the evidence of soring as offered by the Department's veterinarians was noted as being subject to cross-examination, and was corroborated by the presence of scars, lesions, and thermograph tests. Here these features are absent. And, here, another issue is present: the recordings of the veterinarians are shown to be inconsistent, a flaw in accuracy.

. . . .

I find that the veterinarians' recorded observations do not concur and do not contain sufficient information to support their conclusions; therefore, the documents relied upon by the Department as representing the findings of the veterinarians lack the requisite indicia of trustworthiness and accuracy for their recorded recollections to be considered reliable, probative and substantial evidence. . . . Counsel to Mr. Oppenheimer further established that the abilities of the Government's veterinarians to see, hear and record relevant facts were displayed to be insufficient, thereby weakening the presumption of soreness. Indeed, Dr. Riggins testified, "if I had gone into a real complete description I might have written more" in the affidavit. (Tr. 57)

. . . .

I find that the evidence offered by respondent's witnesses enjoys greater credibility than the hearsay of complaint counsel's [sic] affidavits and form, which lacked the indicia of trustworthiness and reliability. Dr. Carver had a clear memory of the events surrounding her examination of "Black Power's Jezebel" and the results thereof. Her testimony was subject to cross-examination by complaint counsel [sic]. Dr. Knowles and Dr. Riggins had no recall of their examinations and hence avoided cross-examination.

The ALJ is incorrect in his belief that in the administrative hearings involved in the Sixth Circuit's *Fleming* case, "direct testimony, based on recall, . . . was offered at trial, thereby providing opportunities for the testing of their [i.e., the veterinarians'] abilities to accurately observe and record facts" (Initial Decision at 14). The veterinarians in *Fleming*, as in the present case, had no independent recollection of their examinations. The first sentence of the court's decision in *Fleming* states that four appellants, "Preach Fleming, Albert Lee Rowland, C.[H]. Meadows and Joe Fleming were found in three separate administrative hearings to have shown 'sored' Tennessee Walking Horses in violation of the Horse Protection Act, 15 U.S.C. § 1821 *et seq.* (1976)." My three decisions affirmed in *Fleming* were *In re Joe Fleming*, 41 Agric. Dec. 38 (1982); *In re Albert Lee Rowland and C.H. Meadows*, 40 Agric. Dec. 1934 (1981); and *In re Preach Fleming*, 40 Agric. Dec. 1521 (1981). In my decision in *Preach Fleming*, affirmed by the Sixth Circuit in *Fleming*, it is expressly stated that the veterinarians had no present recollection of their examinations, as follows (40 Agric. Dec. at 1524 n.1):

1. Each of the USDA veterinarians who observed or examined Ebony's Bad Loser on August 24, 1978, testified and were cross-examined at the hearing. However, because they observe and examine many horses in the course of their official duties and had no present recollection of examining Ebony's Bad Loser, their affidavits, given when their observations were fresh, were received in evidence.

Similarly, in my decision in *Rowland and Meadows*, affirmed by the Sixth Circuit in *Fleming*, it is stated (40 Agric. Dec. at 1942):

Respondents complain that complainant's evidence should be disregarded because it is "based upon past recollection recorded and not independent memory" (Appeal 1). However, respondents did not object to the admission of such evidence and, therefore, they are not in a position to complain now. Moreover, complainant's witnesses made their affidavits while the events recorded were fresh in their minds, and such evidence is "reliable, probative, and substantial," as required by the Administrative Procedure Act (5 U.S.C. § 556(d)).

Hence, as to three of the four appellants (respondents) in the Sixth Circuit's *Fleming* case, it is absolutely certain that the Department's veterinarians had no recall of their examinations at the administrative trial. As to the fourth appellant (respondent), in my decision in *Joe Fleming*, affirmed by the Sixth Circuit in *Fleming*, there is no mention of any present recollection by the USDA veterinarians, and the testimony of one of the veterinarians is quoted that, "[n]ormally, I approach a horse from the left side . . ." (41 Agric. Dec. at 40 n.2), which is consistent with the view that he had no present recollection, or he would not have been testifying as to his normal practice.

In addition to *Fleming*, the Sixth Circuit has affirmed findings of soreness based on past recollection recorded in *In re A.P. Holt* (Decision as to Richard Polch & Merrie Polch), 52 Agric. Dec. 233, 239-40 (1993), *aff'd per curiam*, 32 F.3d 569 (6th Cir. 1994) (Table) (citation limited under 6th Circuit Rule 24) (WL 390510) (Text in WESTLAW), and *In re Billy Gray*, 52 Agric. Dec. 1044, 1058, 1069, 1075-76 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994). See also *In re Charles Roach* (Decision as to Calvin L. Baird, Sr.), 52 Agric. Dec. 1092, 1101 (1993), *rev'd*, 39 F.3d 131 (6th Cir. 1994) (court reversed the JO's finding that Baird "allowed" the entry of the sore horse, but the court was "not persuaded that, based upon the evidence, the JO reached the wrong conclusion" in concluding that the horses were sore, when entered (39 F.3d at 135)--which conclusion was based on

past recollection recorded (by Knowles and Riggins) as to one of the two horses). In *Gray v. USDA*, 39 F.3d 670, 675-76 (6th Cir. 1994), the court held:

In challenging the Secretary's decision, Gray disputes the reliability, probativeness, and substantiality of the evidence against him. For instance, he makes much of the fact that the government's key witnesses at his June 1991 hearing -- Hester, Rushing, and Sutton -- could not independently recall the facts and circumstances surrounding his alleged violation. As such, Gray insists, the primary evidence the ALJ and the Secretary relied upon to find a § 1824(2)(B) violation -- comprised of the doctors' affidavits, the Summary of Alleged Violation form, and the interview summary prepared by Sutton -- is suspect and cannot support the Secretary's ultimate decision.⁵

⁵This same argument was considered and rejected by the Third Circuit in *Wagner v. Department of Agric.*, 28 F.3d 279, 280 (3d Cir. 1994). In *Wagner*, the court observed:

In spite of petitioners' protestations to the contrary, it is well settled that affidavits are a form of probative evidence. Though live testimony may generally be favored over affidavits because the former permits cross-examination and credibility assessment, these interests are adequately safeguarded when, as in this case, the affiant appears in court. Though the doctors' inability to recall their respective examinations of Sir Shaker impaired petitioners' ability to cross-examine as to examination itself, this does not upset our determination that the finding of soreness is supported by substantial evidence.

Id. at 282-83 (citations omitted).

The Administrative Procedure Act (APA) provides that an agency conducting a hearing may receive "[a]ny oral or documentary evidence." 5 U.S.C. § 556(d). The APA adds, however, that "the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." *Id.* On this point, the USDA's implementing regulations state: "Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable." 7 C.F.R. § 1.141(g)(iv) (1994).

The documentary evidence of which Gray complains is clearly the sort of evidence "upon which responsible persons are accustomed to rely." That this evidence is technically hearsay does not alter our conclusion. *See Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980) ("Not only is there no administrative rule of automatic exclusion for hearsay evidence, but the only limit to the admissibility of hearsay evidence is that it bear satisfactorily indicia of reliability."), *cert. denied*, 452 U.S. 906 (1981). The *Calhoun* court commented: "We have stated the test of admissibility as requiring that the hearsay be probative and its use be fundamentally fair." *Id.* The documents at issue here satisfy these criteria. They were signed and/or prepared by individuals who were experienced in their tasks and who had no reason to record their findings in other than an impartial fashion. Moreover, the documents were created almost contemporaneously with the observations they relay.⁶

⁶At Gray's hearing, Hester and Rushing both testified that their affidavits reflected what they had found during their examination of Night Prowler.

To determine that this evidence was probative and reliable, of course, is not to say that it also is substantial.

Again, as our decision in *Murphy* makes clear, "[s]ubstantiality of the evidence must be based upon the record taken as a whole." 801 F.2d at 184.

In addition, in *Oppenheimer, supra*, I noted that the testimony and past recollection recorded of Dr. Riggins and Dr. Knowles (the same two USDA veterinarians involved in the present proceeding) were accepted as credible by all five of the USDA ALJs in numerous cases, stating (slip op. at 84-86):

It is worth noting that Dr. Riggins and Dr. Knowles were the two USDA veterinarians whose testimony and past recollection recorded (very similar to that in the present case) were accepted as credible enough in numerous other cases to sustain a finding of soring by Judge Kane,¹⁴ Judge Bernstein,¹⁵ Judge Hunt,¹⁶ Chief Judge Palmer,¹⁷ and Judge Baker.¹⁸

¹⁴*In re Ernest Upton*, 53 Agric. Dec. 239 (1994); *In re Cecil Jordan* (Decision after remand as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), [aff'd, 50 F.3d 46 (D.C. Cir. 1995)]; *In re Harvey L. King*, 50 Agric. Dec. 1592 (1991); *In re A.P. "Sonny" Holt*, 49 Agric. Dec. 853 (1990).

¹⁵*In re Paul A. Watlington*, 52 Agric. Dec. 1172 (1993).

¹⁶*In re Charles Roach* (Decision as to Calvin L. Baird, Sr.), 52 Agric. Dec. 1092 (1993), *rev'd*, 39 F.3d 131 (6th Cir. 1994) (court reversed the JO's finding that Baird "allowed" the entry of the sore horse, but the court was "not persuaded that, based upon the evidence, the JO reached the wrong conclusion" in concluding that the horses were sore, when entered (39 F.3d at 135)).

¹⁷*In re A.P. Holt* (Decision as to Richard Polch & Merrie Polch), 52 Agric. Dec. 233 (1993), *aff'd per curiam*, 32 F.3d 569 (6th Cir. 1994) (Table) (citation limited under 6th Circuit Rule 24) (WL 390510) (Text in WESTLAW).

¹⁸*In re Gilbert McCarley*, 51 Agric. Dec. 378 (1992).

Further, Dr. Riggins was one of the two USDA veterinarians whose testimony and past recollection recorded were accepted in other cases by Judge Kane,¹⁹ Judge Bernstein,²⁰ Chief Judge Palmer,²¹ and Judge Baker.²² Similarly, Dr. Knowles was one of the two USDA veterinarians whose testimony and past recollection recorded were accepted in other cases by Judge Kane,²³ by Judge Bernstein,²⁴ and by Judge Hunt.²⁵

¹⁹*In re Charles Massey*, 52 Agric. Dec. 543 (1993).

²⁰*In re William Earl Bobo*, 53 Agric. Dec. 176 (1994), [aff'd, 23 F.3d ___, No. 94-3311 (6th Cir. May. 5, 1995)]; *In re Gerald Grizzell*, 49 Agric. Dec. 875 (1990).

²¹*In re Jackie McConnell*, 52 Agric. Dec. 1156 (1993), aff'd, 23 F.3d 407 (Table) (6th Cir. 1994) (text in WESTLAW), printed in 53 Agric. Dec. 174 (1994).

²²*In re Larry E. Edwards*, 49 Agric. Dec. 188 (1990), aff'd per curiam, 943 F.2d 1318 (11th Cir. 1991) (unpublished), cert. denied, 112 S.Ct. 1475 (1992).

²³*In re Charles Massey*, 51 Agric. Dec. 1151, 1155-56 (1992).

²⁴*In re Ronald Green*, 51 Agric. Dec. 363, 367-68 (1992).

²⁵*In re Steve Brinkley*, 52 Agric. Dec. 252, 254, 257, 261 (1993); but not in *In re Bryant Fly*, 51 Agric. Dec. 1128 (1992).

Based upon my examination of the record in this case, in addition to my examination of the records in over 60 other Horse Protection Act cases, I am convinced that palpation alone, as practiced by the USDA veterinarians to differentiate between a horse that is nervous, excited, silly about its feet, etc., from a horse in pain from man-made causes, is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act. The more than 60 other cases upon which I rely include expert testimony, similar to

that of Dr. Knowles and Dr. Riggins in the present case, of numerous other USDA veterinarians who had examined thousands of horses for compliance with the Horse Protection Act, including the testimony of Dr. Crichfield (several thousand horses since 1973),²⁶ Dr. Clawson (8,000 to 10,000 horses),²⁷ Dr. Hester (thousands of horses),²⁸ Dr. Kelley (1,000 to 2,000 horses),²⁹ Dr. Wood (2,000 horses),³⁰ Dr. Hendricks (4,000 to 6,000 horses),³¹ Dr. Clifford (1,000 horses),³² Dr. Rushing (thousands of horses),³³ Dr. Jordon (thousands of horses),³⁴ Dr. Burkholder (10 years' experience),³⁵ and Dr James (8 years' experience, over 2,000 horses).³⁶

²⁶*In re Bill Young*, 53 Agric. Dec. [1232, 1256 (1994)], *appeal docketed*, No. 94-40818 (5th Cir. Aug. 25, 1994).

²⁷*In re William Earl Bobo*, 53 Agric. Dec. 176, 200 (1994), [*aff'd*, __ F.3d __, No. 94-3311 (6th Cir. May. 5, 1995)].

²⁸*In re Danny Burks*, 53 Agric. Dec. 322, 328 (1994).

²⁹*In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994) (sanction not changed).

³⁰*In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), [*aff'd*, __ F.3d __, No. 94-3311 (6th Cir. May. 5, 1995)].

³¹*In re Jackie McConnell*, 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407 (Table) (6th Cir. 1994) (text in WESTLAW).

³²*In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259 (1993).

³³*In re Billy Gray*, 52 Agric. Dec. 1044, 1072 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994).

³⁴*In re Larry E. Edwards*, 49 Agric. Dec. 188, 196 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 112 S.Ct. 1475 (1992).

³⁵*In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259 (1993).

³⁶*In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1190 (1993); *In re Jackie McConnell*, 44 Agric. Dec. 712, 727 n.4 (1985), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992).

Since once again the ALJ has inappropriately discounted the testimony of USDA veterinarians because at the time of the hearing they had no independent recollection of their examinations, I am remanding the proceeding to the ALJ to reconsider the evidence without such improper discounting of their credibility.

In addition to the error just discussed, the ALJ erred in drawing an adverse inference that the testimony of additional USDA experts, if called, would have been adverse to USDA. The ALJ states (Second Initial Decision at 13-14):

Complaint counsel [sic] did not introduce evidence of equal weight contrary to that expressed by respondent's witness and it must therefore be inferred that such evidence would not contradict the opinions of Drs. Baker and Humburg. *See, Saylor v. U.S. Dep't. of Agric.*, 723 F.2d 581 (7th Cir. 1983), *Edward Whaley, et al.*, 35 Agric. Dec. 1519, 1522 (H.P.A. Dkt. No. 2[8]) (September 22, 1976).¹⁶

¹⁶Complaint counsel [sic], by supporting the motion to cancel the post-remand hearing, did not take advantage of the orders of November 10, 1993 and March 14, 1994, the previous in part noting:

"It is expected that expert opinion will be offered by both counsel to interpret this tape[, i.e., RX 3, a video recording of the exhibition,] and the consequences of the stumble therein depicted, recognizing the stipulation of counsel filed February 7, 1992."

In *Saylor v. United States Dep't of Agric.*, *supra*, cited by the ALJ, the court held (723 F.2d at 583):

In any event, the USDA did not call Kostelecky to testify at the hearing. We recently approved the USDA's practice of drawing an adverse inference from a party's failure to call a potentially important witness. See *Mattes v. United States*, 721 F.2d 1125 at 1130 (7th Cir. 1983). What is sauce for the goose is sauce for the gander, and we believe a like inference may be drawn here against the USDA.²

Similarly, in *Edward Whaley*, *supra*, cited by the ALJ, I held (35 Agric. Dec. 1522):

Respondents rely on the fact that a third Department veterinarian who physically examined "Delight's Grand Slam" after its performance on August 30, 1972, was not called as a witness. Complainant contends that the witness was not available since he was on vacation, but that if he had been available, his testimony would have supported the testimony of the other two Department veterinarians[, who observed the horse in the ring, but did not examine it]. Under the Department's settled policy, which has been applied frequently in the past, [footnote omitted] I infer that the Department's veterinarian who physically examined "Delight's Grand Slam" on August 30, 1972, did not detect evidence of soring.

However, in the present case, both USDA veterinarians who examined the horse testified at the hearing. Hence there is no basis for drawing an adverse inference against USDA. Although only one of the two USDA veterinarians (Dr. Knowles) viewed the video, "and he was of the opinion that the stumble did not occasion a sprain (Tr. 315, 323-324), and that the pain response recorded

²Although irrelevant here, I note that the court in *Saylor* remanded the proceeding to me because I failed to explain adequately why I did not believe Saylor's testimony that livestock weight gains occurred when he bought cattle, took them to his farm, substituted some heavier cattle for lighter ones, and then sold them. After I explained my reasons in a 527-typed-page decision involving 14 separate transactions (*In re George W. Saylor, Jr.*, 44 Agric. Dec. 2238, 2238-2676 (1985)), in which I demonstrated that the "proof here is beyond the shadow of a reasonable doubt" (44 Agric. Dec. at 2255), Saylor accepted the \$10,000 civil penalty and 8-month registration suspension without further appeal.

at CX 4 [SUMMARY OF ALLEGED VIOLATIONS, VS FORM 19-7] would not be the result of a sprain or injury to a shoulder or tendon" (Second Initial Decision at 12), all of the palpation testimony by both USDA veterinarians is relevant in determining whether the consistent and repeatable pain responses detected by the veterinarians was caused by chemical and/or action devices, or whether the results were caused by some other circumstance, such as the horse's stumble during the exhibition. The courts have recognized that the palpation technique used by USDA's veterinarians is designed to distinguish between consistent and localized pain responses and responses because the horse did not want to be touched. For example, in *Bobo v. United States Dep't of Agric.*, ___ F.3d ___, No. 94-3311, slip op. at 5, 11, 18 (6th Cir. May. 5, 1995), the court stated:

In addition, both Drs. Clawson and Riggins [(Dr. Riggins is one of the two USDA veterinarians in the present case)] testified that in palpating a horse's pastern, they employ examination methods that would distinguish consistent and localized pain response to palpation from the reaction of a nervous or skittish horse, which generally would react to touching anywhere on its foot.

....

It is the Secretary's interpretation of his own regulations that evidence based on palpation alone may serve as the basis for a finding of "soreness" under the HPA. Brief of Respondent at 37. See also *In re Tuck*, 53 Agric. Dec. 261, 1994 WL 271821 at *21, *23 (1994) ("Frequently, in [HPA] cases, the evidence relates solely to observations based on palpation. [P]alpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the [HPA].").

....

Finally, although petitioners Bobo and Mitchell both testified that Ultimate Beam's responses which were observed by Drs. Clawson and Riggins at the Shelbyville show were the result of Ultimate Beam's nervousness or high strung nature, both Drs. Clawson and Riggins testified that they use methods, such as coming back and repalpating a spot at which they obtained a response to palpation to see if the horse responds consistently, in order to distinguish a pain reaction

from a reaction due to a horse that is nervous, high strung, or silly about its feet.

In addition, the ALJ expressed a number of erroneous or incomplete views as to palpation. For example, the ALJ states (Second Initial Decision at 8-9):

The process they [Drs. Riggins and Knowles] use to detect soring is simple: they palpate forelimbs, they observe reactions. . . .

. . . .

. . . It has been concluded that evidence of soring obtained only through palpation¹⁰ is of such a quality that consideration of the enforcement-enhancing provision of the presumption at 15 U.S.C.A. § 1825(d)(5) is but extravagant.

¹⁰The status of the reliability of the palpation technique is discussed in *A.P. Holt (Decision as to Richard Polch & Merrie Polch)* 52 Agric. Dec. 233, 243-246 (1993), [*aff'd per curiam*, 32 F.3d 569 (6th Cir. 1994), 1994 WL 390510 (citation limited under 6th Circuit Rule 24)]. Evidence obtained by palpation, is hotly debated as being insufficient (Tr. 446) and prohibited to the Department's veterinarians by an Appropriations Act, Pub. L. No. 102-341, 106 Stat. 873, 881-882 (1992).

First, the observation that they "palpate forelimbs, they observe reactions," is so incomplete and simplistic as to be misleading. As the court recognized in *Bobo, supra* (slip op. at 18), USDA veterinarians "use methods, such as coming back and repalpating a spot at which they obtained a response to palpation to see if the horse responds consistently, in order to distinguish a pain reaction from a reaction due to a horse that is nervous, high strung, or silly about its feet." Also, their uniform practice is to rule out, in their professional opinions, responses from injury or natural causes.

Second, the statutory presumption is not regarded as "but extravagant," but is frequently relied on, in addition to the conclusion reached in the absence of the statutory presumption. For example, in my decision in *Bobo*, discussed

above, I held that, "I rely on the *prima facie* case as well as the presumption that the horse was sore on both occasions" (53 Agric. Dec. at 206).

Third, in this Department, there is no debate as to the sufficiency of palpation evidence alone as serving as a highly reliable method of determining whether a horse is sore, within the meaning of the Act. *See Bobo, supra*, slip op. at 11 (quoted above). *See also In re C.M. Oppenheimer*, 54 Agric. Dec. ___, slip op. at 40-89 (Mar. 6, 1995); *In re Bill Young*, 53 Agric. Dec. 1232, 1253-67 (1994), *appeal docketed*, No. 94-40818 (5th Cir. Aug. 25, 1994). As stated in *Bill Young* (53 Agric. Dec. at 1282):

Considering all of the Horse Protection Act cases decided by the Judicial Officer from June 29, 1990, to the present²⁸ (not involving the irrebuttable presumption created by the Scar Rule), the evidence as to 19 of the 25 horses, or 76%, consisted entirely of the reaction of the horses to palpation.²⁹ Even as to the other six horses in which there was some evidence of a slight gait deficit (usually failing to lead freely with a loose rein, and sometimes tucked under),³⁰ the primary evidence in each case was the palpation evidence.

²⁸No Horse Protection Act cases were decided by the Judicial Officer from September 12, 1985, through June 28, 1990.

²⁹*In re Burks*, 53 Agric. Dec. [322, 328-29, 339-42 (1994)]; *In re Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. [261, 269-78, 283, 286-95 (1994)] (two horses), [*appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994)]; *In re Martin*, 53 Agric. Dec. [212, 223-24 (1994), *rev'd per curiam*, No. 94-3394 (6th Cir. May 31, 1995) (unpublished) (citation limited under 6th Circuit Rule 24)]; *In re Bobo*, 53 Agric. Dec. [176, 197-201 (1994)] (same horse, two shows), *aff'd*, No. 94-3311 (6th Cir. May. 5, 1995)]; *In re Kelly*, 52 Agric. Dec. 1278, 1288-95 (1993), [*appeal dismissed*, 38 F.3d 999 (8th Cir. 1994)]; *In re Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-62 (1993); *In re Watlington*, 52 Agric. Dec. 1172, 1187-92 (1993) (one of two horses); *In re Roach* (Decision as to Calvin L. Baird, Sr.), 52 Agric. Dec. 1092, 1101-02 (1993), [*rev'd*, 39 F.3d 131 (6th Cir. 1994)]; *In re Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 308-13 (1993), *aff'd*, [28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169

(1994)]; *In re Callaway*, 52 Agric. Dec. 272, 284-89 (1993); *In re Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 262-66 (1993); *In re Holt* (Decision as to Richard Polch & Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, [32 F.3d 569 (6th Cir. 1994), 1994 WL 390510 (citation limited under 6th Circuit Rule 24)]; *In re Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *In re Smith*, 51 Agric. Dec. 327, 328-31 (1992); *In re Sparkman*, 50 Agric. Dec. 602, 612-14 (1991); *In re Holt*, 49 Agric. Dec. 853, 856-57 (1991); *In re Edwards*, 49 Agric. Dec. 188, 195-97, 204-06 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 112 S.Ct. 1475 (1992).

³⁰*In re Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1229, 1235 (1993), [*aff'd*, 50 F.3d 46 (D.C. Cir. 1995)]; *In re Watlington*, 52 Agric. Dec. 1172, 1192 (1993) (one of two horses); *In re McConnell*, 52 Agric. Dec. 1156, 1160 (1993), *aff'd*, 23 F.3d 407 (Table) (6th Cir. 1994) (text in WESTLAW); *In re Crowe*, 52 Agric. Dec. 1132, 1152 (1993); *In re Roach* (Decision as to Calvin L. Baird, Sr.), 52 Agric. Dec. 1092, 1101-02 (1993) (one of two horses), [*rev'd*, 39 F.3d 131 (6th Cir. 1994)]; *In re Gray*, 52 Agric. Dec. 1044, 1073-74 (1993), [*aff'd*, 39 F.3d 670 (6th Cir. 1994)].

Since the cases just cited in *Bill Young* were decided, there have been six additional decisions (including *Bill Young*), all of which relied solely on palpation evidence to prove sorring.³ Hence at this time, considering all of the relevant Horse Protection Act cases decided since June 29, 1990, to the present, the evidence as to 25 of the 31 horses, or 80.6%, consisted entirely of the reaction of the horses to palpation.

³*In re Becknell*, 54 Agric. Dec. ___, slip op. at 4, 7, 12-13 (June 1, 1995); *In re C.M. Oppenheimer*, 54 Agric. Dec. ___, slip op. at 65 (Mar. 6, 1995); *In re Tracy Renee Hampton*, 53 Agric. Dec. 1357, 1363-65, 1367-70 (1994); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1337-43, 1345-46 (1994), *appeal docketed*, No. 94-7044 (11th Cir. Oct. 28, 1994); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1305-07 (1994), *appeal docketed*, No. 94-9202 (11th Cir. Oct. 26, 1994); *In re Bill Young*, 53 Agric. Dec. 1232, 1253-67 (1994), *appeal docketed*, No. 94-40818 (5th Cir. Aug. 25, 1994).

Fourth, evidence obtained by palpation is not "prohibited to the Department's veterinarians by an Appropriations Act" (Second Initial Decision at 9 n.10). As the Sixth Circuit held in *Bobo, supra* (slip op. at 12-13):

Furthermore, neither the proviso in APHIS's "salaries and expenses" appropriation for Fiscal Year 1993 nor the statements in the Senate and Conference Reports for Fiscal Year 1994, as relied on by petitioners, renders the Secretary's interpretation of his regulations either "plainly erroneous or inconsistent." *Stinson*, 113 S. Ct. at 1919.

"[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" *United States v. Will*, 449 U.S. 200, 222 (1980) (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940)). However, we do not find that Congress' statements in the 1993 appropriations legislation constitutes as implied amendment to the HPA. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978). The 1993 appropriations legislation applied only to Fiscal Year 1993. Moreover, Congress was clearly aware of USDA's and APHIS's reliance on digital palpation as a means of finding "soreness" under the HPA. In its appropriations legislation Congress could have but did not direct the Secretary to discontinue the practice of finding "soreness" based on digital palpation alone. In addition, Congress could have but did not, amend the HPA to prohibit a finding of "soreness" based on digital palpation alone. (Footnote omitted.)

Turning to Respondents' expert witnesses, the ALJ stated (Second Initial Decision at 7):

14. Based upon the appearance, demeanor and qualifications, the testimony of Drs. Baker and Humburg concerning their observations is assigned great credibility.

Several months earlier, the same ALJ stated with respect to the same two witnesses (*In re Ernest Upton*, 53 Agric. Dec. 239, 251 (1994)):

The testimony of Dr. Randall Baker reveals that he made no record of his examination of Mr. Upton's horse. Neither he nor

Mr. Upton established how much time had elapsed following the examinations of "Flipping Gold" by Drs. Riggins and Knowles before Dr. Baker examined the horse. Under Departmental precedent, examinations conducted after the horse has left the inspection area do not generally warrant the same probative value as the Government examinations because of the opportunity for tampering. *Pat Sparkman, et al.*, 50 Agric. Dec. 602, 610 (H.P.A. Dkt. No. 88-58) (January 24, 1991). *Richard L. Thornton et al.*, 41 Agric. Dec. 870, 878 (H.P.A. Dkt. No. 125) (May 19, 1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983). Further, Dr. Baker testified that when conducting a palpation examination he applies just enough pressure to slightly pit the skin. Dr. Crichfield's testimony revealed that lightly touching the skin in this manner is not a meaningful examination. (Tr. 215) While Dr. Baker based his conclusion that "Flipping Gold" was not sore on his physical examination, Dr. Baker would describe the presence of "soreness," a legal conclusion, to exist only if it resulted in a display of gait deficiency in both forelegs. While respondent's other expert witness, Dr. Humburg, expressed caution about relying on evidence derived from palpation under some circumstances, he agreed that evidence of repeatable, localized, responses to palpation, such as those displayed by "Flipping Gold," were an indication of noxious stimuli, rather than incidental reaction to pressure, being handled, or reacting to distraction.

In *In re William Earl Bobo*, 53 Agric. Dec. 176, 185 (1994), *aff'd*, No. 94-3311 (6th Cir. May 5, 1995), I adopted the decision of another ALJ who stated:

Dr. Baker's testimony impressed me as highly professional and forthright. However, he has only limited experience in examining horses for compliance with the Act. (Tr. 399) However, both he and Dr. O'Brien revealed their misunderstanding of the examination criteria by expressing the erroneous view that a horse must exhibit an abnormal gait to be sore as defined by the Act. (Tr. 399, 404, 414-415, 443)

In *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 272 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994), I found:

16. Dr. Randall Baker, a veterinarian, and a recognized expert [in the "field of veterinary medicine in equine practice (Tr. 375)," has specialized in equine practice of fifteen years, including the diagnoses of diseases and afflictions of Tennessee Walking Horses. (Tr. 373-375) [However, unlike the APHIS VMOs, Dr. Baker is not qualified as an expert in detecting artificially-induced soreness in these horses. Dr. Baker admits that a significant portion of his income is derived from employment by owners and trainers of Tennessee Walking Horses. (Tr. 392) Complainant made an offer of proof at the hearing, which I accept as evidence (7 C.F.R. § 1.141(g)(7)), that Dr. Baker has "repeatedly been called upon by members of the industry to examine their horses after those horses have been found sore by the United States Department of Agriculture, and that he has, in every case, testified that he has not found the horse to be sore." (Tr. 389)]⁴

The foregoing is not to suggest any opinion by me as to the ultimate outcome of this case. In fact, in view of the errors by the ALJ discussed above, I have not read the record in this case, except for a limited review of some of the references cited by the parties. Before reading the record and reaching a final decision in this case, I would like to have the benefit of a revised Initial Decision by the ALJ, free from the errors discussed above.

The ALJ and the parties are advised that the unpublished decision by the Sixth Circuit in *Martin v. United States Dep't of Agric.*, No. 94-3394 (6th Cir. May 31, 1995), attached as an Appendix, may or may not be relevant to the facts here. I am not sufficiently familiar with the present record to have any view as to this matter.

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

⁴For examples of Dr. Baker's testimony, see *In re Bill Young*, 53 Agric. Dec. 1232, 1287 n.32 (1994), *appeal docketed*, No. 94-40818 (5th Cir. Aug. 25, 1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 272-73, 303-04 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Judy Martin*, 53 Agric. Dec. 212, 220, 225-28, 231 (1994), *rev'd per curiam*, No. 94-3394 (6th Cir. May 31, 1995) (unpublished) (citation limited under 6th Circuit Rule 24); *In re Ernest Upton*, 53 Agric. Dec. 239, 245, 251 (1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 180, 184-86 (1994), *aff'd*, No. 94-3311 (6th Cir. May. 5, 1995); *In re Elizabeth Marie Hestle*, 52 Agric. Dec. 1270, 1274, 1276 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 277, 282 (1993); *In re A.P. "Sonny" Holt*, 49 Agric. Dec. 853, 857 (1990).

Order

The Second Initial Decision and Order filed in this proceeding is vacated and the case is remanded to the Administrative Law Judge for the purpose of filing a further Initial Decision and Order.

APPENDIX

Martin v. United States Dep't of Agric., No. 94-3394 (6th Cir. May 31, 1995) (unpublished) (citation limited under 6th Circuit Rule 24).

In re: MARVIN PASTER.
HPA Docket No. 94-2.
Dismissal of Complaint filed June 14, 1995.

Colleen Carroll, for Complainant.

Respondent, Pro se.

Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

The Complaint filed herein, on March 30, 1994, is dismissed without prejudice.

Copies hereof shall be served upon the parties.

In re: CECIL JORDAN, SHERYL CRAWFORD, and RONALD R. SMITH.
HPA Docket No. 91-23.
Order Lifting Stay filed February 23, 1996.

Donald A. Tracy, for Complainant.

John M. Harmon, Austin, TX, for Respondent.

Order issued by William G. Jenson, Judicial Officer.

On November 19, 1993, the Judicial Officer issued the final agency Decision and Order holding that Ms. Crawford had violated the Horse

Protection Act and assessing a \$2,000 civil penalty and a one-year disqualification from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993). Ms. Crawford appealed the Decision and the Judicial Officer issued a stay pending the completion of proceedings for judicial review, 54 Agric. Dec. 449 (1995); 53 Agric. Dec. 536 (1994).

The agency decision was affirmed, *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), and the United States Supreme Court denied Ms. Crawford's petition for writ of certiorari, 116 S. Ct. 88 (1995). The United States Supreme Court's denial of Ms. Crawford's petition for writ of certiorari concluded the proceedings for judicial review.

Therefore, the Stay Order is lifted. Ms. Crawford is to pay the \$2,000 civil penalty by certified check or money order, made payable to the Treasurer of the United States, and forwarded to Donald A. Tracy, Esq., Office of the General Counsel, United States Department of Agriculture, Room 2014, South Building, Washington, D.C. 20250-1400, within 30 days of the service of this Order. The provisions of the one-year disqualification shall become effective on the 30th day after service of this Order on Respondent.

In re: CECIL JORDAN, SHERYL CRAWFORD, and RONALD R. SMITH.
HPA Docket No. 91-23.
Temporary Stay Order filed March 28, 1996.

Donald A. Tracy, for Complainant.
David N. Patterson, Willoughby, OH, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On November 19, 1993, the Judicial Officer issued the final agency Decision and Order holding that Sheryl Crawford (hereafter Respondent) had violated the Horse Protection Act and assessing a \$2,000 civil penalty and a one-year disqualification from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or

horse sale or auction, *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993). Respondent appealed the Decision and the Judicial Officer issued a stay pending the completion of proceedings for judicial review, 54 Agric. Dec. 449 (1995); 53 Agric. Dec. 536 (1994).

The agency decision was affirmed, *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), and the United States Supreme Court denied Respondent's petition for writ of certiorari, 116 S. Ct. 88 (1995). Based upon the denial of Respondent's petition for writ of certiorari, Complainant filed a Motion to Lift Stay as to Sheryl Crawford which was granted by the Judicial Officer on February 16, 1996. Pursuant to the Order Lifting Stay, Respondent was to pay the assessed civil penalty no later than April 1, 1996, and begin a one-year disqualification period on April 1, 1996.

Respondent filed a Motion to Stay Order of Judicial Officer on March 25, 1996, pending the disposition of Respondent's Motion for Leave to File a Petition for Rehearing with the United States Supreme Court. Complainant informed the Judicial Officer that Complainant intends to oppose Respondent's Motion to Stay Order of Judicial Officer. Under the applicable Rules of Practice, an opposing party may file a response to any written motion within 20 days after service of such written motion, or within such shorter or longer period as may be fixed by the Judicial Officer. (7 C.F.R. § 1.143(d).)

Therefore, the Order previously issued in this case, which would have required Respondent to pay the assessed civil penalty no later than April 1, 1996, and begin a one-year disqualification period on April 1, 1996, is stayed pending the Judicial Officer's disposition of Respondent's Motion to Stay Order of Judicial Officer. Any opposition to Respondent's Motion to Stay Order of Judicial Officer shall be filed by Complainant no later than April 19, 1996.

In re: CECIL JORDAN, SHERYL CRAWFORD, and RONALD R. SMITH.

HPA Docket No. 91-23.

Stay Order filed May 8, 1996.

Donald A. Tracy, for Complainant.

David N. Patterson, Willoughby, OH, for Respondent.

Order issued by William G. Jenson, Judicial Officer.

On November 19, 1993, the Judicial Officer issued the final agency Decision and Order holding that Sheryl Crawford (hereinafter Respondent) had violated the Horse Protection Act and assessing a \$2,000 civil penalty and a 1-year disqualification from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction. *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993). Respondent appealed the Decision and the Judicial Officer issued a Stay Order pending the completion of proceedings for judicial review. *In re Cecil Jordan* (Stay Order), 53 Agric. Dec. 536 (1994).

The agency decision was affirmed, *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), and the Judicial Officer granted Respondent's motion for another stay pending the outcome of Respondent's then contemplated petition for a writ of certiorari. *In re Cecil Jordan* (Stay of Execution), 54 Agric. Dec. 449 (1995). On October 2, 1995, the Supreme Court of the United States denied Respondent's petition for a writ of certiorari, 116 S. Ct. 88 (1995). Based upon the denial of Respondent's petition for a writ of certiorari, Complainant filed a Motion to Lift Stay as to Sheryl Crawford which was granted by the Judicial Officer on February 16, 1996. Pursuant to the Order Lifting Stay, Respondent was to pay the assessed civil penalty no later than April 1, 1996, and begin a 1-year disqualification period on April 1, 1996.

Respondent filed a Motion to Stay Order of Judicial Officer on March 25, 1996, pending the disposition of Respondent's Motion for Leave to File Petition for Rehearing with the Supreme Court of the United States which, at that time, Respondent only planned to file. I issued a Temporary Stay Order on March 28, 1996, to provide the Complainant with an opportunity to respond to Respondent's Motion to Stay Order of Judicial Officer.

Complainant filed Complainant's Opposition to Respondent's Motion to Stay the Judicial Officer's Order on April 11, 1996, and the matter was referred to the Judicial Officer on April 16, 1996. Complainant opposes Respondent's Motion to Stay Order of Judicial Officer on the ground that a petition for rehearing of an order denying a petition for a writ of certiorari must be filed within 25 days after the date of the order of denial. (Rule 44 of the Rules of the Supreme Court of the United States.)

On May 7, 1996, Respondent filed a Motion for Leave to File Petition for Rehearing with the Supreme Court of the United States. Respondent has not filed a petition for rehearing to which Rule 44 of the Rules of the Supreme Court of the United States is applicable, but rather filed a motion for leave to file a petition for rehearing.

Therefore, the Order previously issued in this case, which would have required Respondent to pay the assessed civil penalty no later than April 1, 1996, and begin a 1-year disqualification period on April 1, 1996, which was temporarily stayed on March 28, 1996, is stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: JACKIE McCONNELL.

HPA Docket No. 91-162.

Order Modifying Order Lifting Stay Order filed May 8, 1996.

Sharlene A. Deskins, for Complainant.

Carthel L. Smith, Lexington, TN, for Respondent.

Order issued by William G. Jenson, Judicial Officer.

This proceeding was instituted under the Horse Protection Act, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Act) by a Complaint filed on April 30, 1991, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that Jackie McConnell (hereinafter Respondent) entered for the purpose of showing or exhibiting a horse known as Executive Order at the Tennessee Walking Horse National Celebration at Shelbyville, Tennessee, while the horse was sore. On March 4, 1993, Chief Administrative Law Judge Victor W. Palmer (hereinafter Chief ALJ) issued an Initial Decision and Order finding that Respondent violated the Act. The Chief ALJ assessed a \$2,000 civil penalty against Respondent and disqualified Respondent from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or otherwise, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction for 2 years. Both parties appealed to the Judicial Officer who issued a Decision and Order on September 16, 1993, affirming the Chief ALJ's Initial Decision. *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156 (1993).

Respondent appealed to the United States Court of Appeals for the Sixth Circuit and filed a Motion for Stay Pending Review with the Judicial Officer who granted Respondent's motion. *In re Jackie McConnell*, 52 Agric. Dec. 1172 (1993). The United States Court of Appeals for the Sixth Circuit affirmed

the Decision and Order of the Judicial Officer on April 29, 1994. *McConnell v. United States Dep't of Agric.*, 23 F.3d 407 (6th Cir. 1994) (Table), and subsequently denied Respondent's petition for rehearing. *McConnell v. United States Dep't of Agric.* (Order of June 15, 1994).

Complainant filed a Report to the Judicial Officer and Motion to Lift Stay on February 9, 1995, which was not opposed by Respondent. The Judicial Officer lifted the Stay Order on February 14, 1995, *In re Jackie McConnell*, 54 Agric Dec. 448 (1995), and, in so doing, ordered that Respondent pay the \$2,000 civil penalty within 30 days from the date of service on Respondent of the Order Lifting Stay Order and begin the 2-year disqualification period on the 30th day after service on Respondent of the Order Lifting Stay Order. Respondent was served on February 17, 1995, and Respondent's 2-year disqualification period began on March 19, 1995.

On February 15, 1996, Respondent filed a Motion to Correct Order (hereinafter RM); on February 29, 1996, Complainant filed an Opposition to Respondent's Motion to Correct Order; and on March 1, 1996, the matter was referred to the Judicial Officer.

Respondent requested that the Order Lifting Stay Order be amended so that Respondent's 2-year disqualification period begins September 13, 1994, rather than March 19, 1995.

Respondent asserted in his Motion to Correct Order that after the United States Court of Appeals for the Sixth Circuit's June 15, 1994, denial of his petition for rehearing, he had 90 days, ending September 13, 1994, in which to file a petition for a writ of certiorari with the Supreme Court of the United States, and that his failure to file such a petition within that 90-day period ended all possibility of further proceedings for judicial review. (RM, pp. 1-2.) Respondent stated that he "assumed that the Stay Order would be automatically lifted on September 13, 1994," and that he "refrained from all activity prohibited by the disqualification since said time." (RM, p. 2.)

Respondent's Motion to Correct Order did not indicate the basis for Respondent's assumption that the Stay Order was automatically lifted on September 13, 1994; did not reference any evidence that Respondent actually began his 2-year disqualification period on September 13, 1994; did not explain the apparent inconsistency between Respondent's belief that the Stay Order was automatically lifted on September 13, 1994, and Respondent's failure to pay the civil penalty assessed within the required 30 days after Respondent purportedly believed the Stay Order had been automatically lifted; did not explain Respondent's failure to oppose Complainant's Report to the Judicial Officer and Motion to Lift Stay; and did not explain the 363-day period between service on

Respondent of the Order Lifting Stay Order and Respondent's Motion to Correct Order.¹ On March 11, 1996, I issued a Ruling on Respondent's Motion to Correct Order Lifting Stay Order in which I denied Respondent's motion based upon my finding that Respondent's assertions that he assumed the Stay Order was automatically removed on September 13, 1994, and that he "refrained from all activity prohibited by the disqualification since [September 13, 1994,]" were not credible.

On March 20, 1996, Respondent filed a Petition to Rehear or Reconsider Ruling of Judicial Officer (hereinafter RP) requesting reconsideration of the Judicial Officer's March 11, 1996, ruling. Complainant filed no response to Respondent's petition, and on May 6, 1996, the matter was referred to the Judicial Officer.

Respondent asserts in his petition that after the United States Court of Appeals for the Sixth Circuit denied his petition for rehearing, *McConnell v. United States Dep't of Agric.* (Order of June 15, 1994), Respondent's counsel advised Stephen M. Reilly, the United States Department of Agriculture attorney defending against Respondent's appeal, that Respondent would not file a petition for a writ of certiorari and that "it was further agreed that Respondent could continue [to show, exhibit, and enter horses and judge, manage, and otherwise participate in horse shows, exhibitions, sales, and auctions until the 90-day period for filing a petition for a writ of certiorari had expired.]" (RP, p. 2.) Further, Respondent asserts that he did not wait 363 days after service of the Order Lifting Stay Order to ask for a correction of the Order Lifting Stay Order.

Attached to Respondent's petition are two letters, dated February 20, 1995, and May 4, 1995, Respondent sent to Mr. Reilly. The February 20, 1995, letter, states:

Mr. Stephen M. Reilly
U.S. Department of Agriculture
Office of the General Counsel
14th and Independence Avenue, S.W.
Suite 2036-S
Washington, D.C. 20250-1400

¹Respondent stated in his Motion to Correct Order that he "made repeated requests to correct and/or amend the Order to no avail." (RM, p. 3.) However, a thorough review of the record revealed no request by Respondent asking for a correction or amendment of the Order Lifting Stay Order prior to Respondent's Motion to Correct Order filed February 15, 1996.

In re: Jackie McConnell and Floyd Sherman
HPA Docket No. 91-162.

Dear Mr. Reilly:

Enclosed herewith is a copy of the Order Lifting Stay Order that has been forwarded to my office by the Judicial Officer.

As you recall, Mr. McConnell's suspension was to start around the first of September, 1994 and the government then notified the National Horse Show Regulatory Committee of the suspension date. Therefore, Mr. McConnell has now been on suspension for approximately six (6) months.

Please let me hear from you at your earliest convenience.

Sincerely,

Carthel L. Smith, Jr.

Based on Respondent's petition, I find that Respondent incorrectly assumed that the Stay Order was automatically lifted in September 1994; that Respondent refrained from all activities prohibited by the disqualification beginning in September 1994; and that employees of the United States Department of Agriculture responsible for enforcement of the Act were aware of Respondent's assumption that he was disqualified as of September 1994, and that Respondent had been acting on this assumption since September 1994.

Stay Orders issued by the Judicial Officer pending the outcome of judicial review are not automatically lifted upon conclusion of judicial review. Instead, action must be taken to lift Stay Orders, and there are numerous instances in which the Judicial Officer has lifted Stay Orders in administrative proceedings instituted for violations of the Act. See, e.g., *In re Jackie McConnell*, 54 Agric. Dec. 448 (1995); *In re William Dwaine Elliott*, 52 Agric. Dec. 1372 (1993); *In re Larry E. Edwards*, 51 Agric. Dec. 436 (1992); *In re Eldon Stamper*, 43 Agric. Dec. 829 (1984); *In re Preach Fleming*, 43 Agric. Dec. 829 (1984); *In re Joe Fleming*, 43 Agric. Dec. 829 (1984); *In re Albert Lee Rowland*, 43 Agric. Dec. 799 (1984). Nonetheless, given the unique circumstances in this case, the disqualification provision in the Order Lifting Stay Order previously

entered in this case² is modified to read as follows: The disqualification provisions of the Order previously filed herein, (*In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156 (1993)), are effective on September 13, 1994, *nunc pro tunc*, and end September 13, 1996.

This Order shall take effect immediately.

In re: GALLO CATTLE COMPANY, a CALIFORNIA LIMITED PARTNERSHIP.

NDPRB Docket No. 96-1.

Order Denying Interim Relief filed May 29, 1996.

Gregory Cooper, for Respondent.

Brian C. Leighton, Clovis, California, and James A. Moody, Washington, D.C., for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On April 16, 1996, Petitioner filed a petition pursuant to section 118(a) of the Dairy Production Stabilization Act of 1983, (7 U.S.C. § 4509(a)), requesting an exemption from or modification of the Dairy Promotion and Research Order, (7 C.F.R. §§ 1150.101-.187). Paragraph 27 of the petition states that:

27. Petitioner is also entitled to interim relief, injunctive relief allowing Petitioner to escrow [assessments] in an interest-bearing account pending a decision of the case on the merits so that Petitioner's [assessments] are not used by the [National Dairy Promotion and Research] Board to convey the messages complained of herein, and so that there is an available source of money to refund when Petitioner prevails.

Petition, p. 12.

On May 14, 1996, Respondent filed Answer of Respondent which addressed Petitioner's request for interim relief by stating that it constitutes a "prayer for relief and, therefore, does not require an answer." (Answer of Respondent, p. 3.) The case was referred to the Judicial Officer on May 15, 1996, for a decision regarding Petitioner's request for interim relief.

Petitioner's request for interim relief is denied for the following reasons.

²*In re Jackie McConnell*, 54 Agric. Dec. 448 (1995).

First, interim relief is not available to Petitioner. The Rules of Practice governing this proceeding, (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), provide that "[a] person who has filed a petition pursuant to [7 C.F.R.] § 900.52 may by separate application filed with the hearing clerk apply to the Secretary [f]or an order postponing the effective date of, or suspending the application of, the marketing order or any provision thereof, or any obligation imposed in connection therewith, pending final determination of the proceeding." (7 C.F.R. § 900.70(a).) However, the petition-filing provisions in 7 C.F.R. § 900.52 are not applicable to this proceeding. Rather, the petition-filing provisions applicable to this proceeding are set forth in 7 C.F.R. § 1200.52. The petition herein was properly filed pursuant to 7 C.F.R. § 1200.52, not 7 C.F.R. § 900.52; therefore, interim relief, which is only available to persons who have filed a petition pursuant to 7 C.F.R. § 900.52, is not available to Petitioner.

Second, even if interim relief had been available to Petitioner in this proceeding, Petitioner has not complied with the requirements for filing an application for interim relief. (7 C.F.R. § 900.70(a), (b).) Petitioner's request for interim relief is included in its petition for exemption from or modification of the Dairy Promotion and Research Order, (7 C.F.R. §§ 1150.101-.187). The applicable Rules of Practice require that Petitioner file a separate application for interim relief. (7 C.F.R. § 900.70(a).)

Third, even if interim relief had been available to Petitioner in this proceeding and Petitioner had filed a separate application for interim relief in accordance with the applicable Rules of Practice, Petitioner's request for interim relief would be denied based upon established precedent. The Judicial Officer has consistently denied applications for interim relief from marketing orders because interim relief would work directly in opposition to the purposes of the marketing order from which interim relief is sought and the act under which the marketing order is issued, and could harm the public interest if provisions of the marketing order were, in effect, suddenly terminated by granting interim relief to the applicant and others who plan to file similar applications for interim relief. *In re Dole DF&N, Inc.*, 53 Agric. Dec. 527 (1994); *In re Cal-Almond, Inc.*, 53 Agric. Dec. 527 (1994); *In re Gerawan Farming, Inc.*, 52 Agric. Dec. 925 (1993); *In re Independent Handlers*, 51 Agric. Dec. 122 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 670 (1991); *In re Saulsbury Orchards & Almond Processing, Inc.*, 49 Agric. Dec. 836 (1990); *In re Lansing Dairy, Inc.*, 48 Agric. Dec. 867 (1989); *In re Gerawan Co., Inc.*, 48 Agric. Dec. 79 (1989); *In re Cal-Almond, Inc.*, 48 Agric. Dec. 15 (1989); *In re Wileman Bros. & Elliott, Inc.*, 47 Agric. Dec. 1109 (1988), *reconsideration denied*, 47 Agric. Dec. 1263 (1988); *In re Wileman Bros. & Elliott, Inc.*, 46 Agric. Dec. 765

(1987), *reconsideration denied*, 46 Agric. Dec. 765 (1987); *In re Saulsbury Orchards & Almond Processing, Inc.*, 46 Agric. Dec. 561 (1987); *In re Borden, Inc.*, 44 Agric. Dec. 661 (1985); *In re Sequoia Orange Co.*, 43 Agric. Dec. 1719 (1984); *In re Dean Foods Co.*, 42 Agric. Dec. 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 Agric. Dec. 1246, 1246-50 (1981). The reasons for denial of applications for interim relief from marketing orders are applicable to Petitioner's application for interim relief from the Dairy Promotion and Research Order, (7 C.F.R. §§ 1150.101-.187), issued pursuant to the Dairy Production Stabilization Act of 1983, (7 U.S.C. §§ 4501-4513).

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

Order

Petitioner's application for interim relief is denied.

In re: HAI HOANG.

P.Q. Docket No. 96-14.

Dismissal of Complaint filed April 25, 1996.

Scott Safian, for Complainant.

Respondent, Pro se.

Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Upon consideration of complainant's Motion To Dismiss and for Good Cause Shown, the complaint in the above-captioned case is hereby dismissed.

In re: MENELAS OSIT.

P.Q. Docket No. 96-24.

Dismissal of Complaint filed May 10, 1996.

Jane H. Settle, for Complainant.

Respondent, Pro se.

Order issued by Victor W. Palmer, Chief Administrative Law Judge.

At Complainant's request and For Good Cause Shown, the complaint is hereby dismissed.

DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

In re: BY WAY BROKERAGE.

AMAA Docket No. 96-1.

Decision and Order filed January 16, 1996.

**Failure to file an answer - Handler - Failure to remit assessments owed in 1994-1995 crop year
-Civil penalty - Cease and desist order - Payment of assessments.**

Denise Hansberry, for Complainant.

Respondents, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Marketing Order for Florida Tomatoes (7 C.F.R. §§ 966.1--966.92) ("Order"), issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. § 601 *et seq.*) ("Act"), and the Rules and Regulations issued pursuant to the Act and Order (7 C.F.R. §§ 966.100--966.323) ("Regulations"), by a complaint filed by the Administrator, Agricultural Marketing Service, United States Department of Agriculture, alleging that the Respondent By Way Brokerage violated the Act, Order and Regulations.

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130- 1.151, were served on said Respondent by the Hearing Clerk by certified mail on or about October 27, 1995. The Respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

The Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. §1.139.

Findings of Fact

1. By Way Brokerage, hereafter referred to as the Respondent, is a Florida corporation whose principal place of business is 5541 Clara Drive, Fort Myers, Florida 33919.

2. The Respondent, at all material times herein, was a handler of Florida tomatoes, as defined in the Act, 7 U.S.C. § 608c(1), and the Order, 7 C.F.R. § 966.6.

3. The Respondent willfully violated section 966.42(a) of the Order, 7 C.F.R. § 966.42(a), by failing to remit \$505.92 in assessments owed in the 1994-1995 crop year.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, said Respondent violated the Act, Order and Regulations thereunder.
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent By Way Brokerage is assessed a civil penalty of \$1,000.00 which shall be paid by a certified check or money order made payable to the Treasurer of United States and shall be sent to Denise Y. Hansberry, Office of the General Counsel, Marketing Division, United States Department of Agriculture, Room 2014, South Building, Washington, D.C. 20250-1400.

2. The Respondent his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Order and regulations and in particular, shall cease and desist from:
(a) failing to remit all assessments when due; and

3. The Respondent shall pay his past-due assessments to the Florida Tomato Committee in the amount of \$505.92. The payment shall be made by certified check or money order and shall be sent to Denise Y. Hansberry, Office of the General Counsel, U.S. Department of Agriculture, Room 2014S, 14th & Independence Ave., Washington, D.C. 20250. The provisions of this order shall become effective on the first day after this decision becomes final. Pursuant to the Rules of Practice, this decision becomes final without further

proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 28, 1996.-Editor]

ANIMAL QUARANTINE AND RELATED LAWS

In re: L. WASHINGTON.

A.Q. Docket No. 95-20.

Decision and Order filed November 15, 1995.

Failure to file an answer - Importation of pork meat product from Germany into United States without required certificate - Civil penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of pork from Germany into the United States (9 C.F.R. § 94.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. §§ 70.1 *et seq.* and 7 C.F.R. §§ 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act) and regulations promulgated thereunder, by a complaint filed on January 19, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about May 21, 1994, respondent imported five packages, approximately 1 kilo, of pork meat product (wurst) from Germany into the United States at the Dallas/Ft. Worth, Texas, airport postal facilities in violation of 9 C.F.R.

§ 94.9(b)(3) because the pork meat product was not accompanied by a certificate, as required.

The respondent failed to file an answer within the time prescribed in 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, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. L. Washington is an individual whose mailing address is (b) (6).
2. On or about May 21, 1994, respondent imported five packages, approximately 1 kilo, of pork meat product (wurst) from Germany into the United States at the Dallas/Ft. Worth, Texas, airport postal facilities in violation of 9 C.F.R. § 94.9(b)(3) because the pork meat product was not accompanied by a certificate, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. §§ 94.1 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, L. Washington, is hereby assessed a civil penalty of three hundred and seventy-five dollars (\$375.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 95-20.

¹The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Bobo*, 49 Agric. Dec. 849 (1990).

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final January 2, 1996.-Editor]

In re: MOISES MORILLO.

A.Q. Docket No. 95-40.

Decision and Order filed November 16, 1995.

Failure to file an answer - Importation of live bird from Dominican Republic into United States at other than designated port of entry and without import certificate, inspection, or quarantine -Civil penalty.

Scott Safian, for Complainant..

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for violations of Section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), and the regulations issued thereunder (9 C.F.R. §§ 92.100 et seq.)(Regulations). The proceeding was instituted by a Complaint filed on July 24, 1995, by the Administrator of the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA), alleging that Moises Morillo (Respondent) violated the Act and the Regulations.

The Complaint was served upon the Respondent in accordance with Section 1.147 of the Rules of Practice (7 C.F.R. § 1.147). The Respondent failed to file an Answer with the Hearing Clerk within 20 days of service of the Complaint as required by 7 C.F.R. § 1.136(a). Consequently, pursuant to sections 1.136(c) and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136(c) and 1.139), the Respondent has admitted the allegations in the Complaint and waived the opportunity for a hearing.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

purposes of this proceeding, an admission of said allegations. Therefore, by his failure to answer, Respondent James is deemed to have admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Thomas James, Respondent, is an individual with a mailing address of (b) (6).

2. On or about September 17, 1993, the respondent moved 30 test-eligible cows from Trent, Texas, to American Falls, Idaho, without a certificate, as required.

3. On or about September 17, 1993, the respondent moved 30 test-eligible cows from Trent, Texas, to American Falls, Idaho, without a permit for entry, as required.

4. On or about September 17, 1993, the respondent moved 30 test-eligible cows from Trent, Texas, to American Falls, Idaho, without a negative official test within 30 days prior to interstate movement, as required.

5. On or about September 23, 1993, the respondent moved 29 test-eligible cows from Trent, Texas, to American Falls, Idaho, without a certificate, as required.

6. On or about September 23, 1993, the respondent moved 29 test-eligible cows from Trent, Texas, to American Falls, Idaho, without a permit for entry, as required.

7. On or about September 23, 1993, the respondent moved 29 test-eligible cows from Trent, Texas, to American Falls, Idaho, without a negative official test within 30 days prior to interstate movement, as required.

8. On or about September 27, 1993, the respondent moved 62 test-eligible cows from Trent, Texas, to American Falls, Idaho, without a certificate, as required.

9. On or about September 27, 1993, the respondent moved 62 test-eligible cows from Trent, Texas, to American Falls, Idaho, without a permit for entry, as required.

10. On or about September 27, 1993, the respondent moved 62 test-eligible cows from Trent, Texas, to American Falls, Idaho, without a negative official test within 30 days prior to interstate movement, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, respondent James has violated 9 C.F.R. §§ 71.18, 78.9.

Therefore, the following Order is issued.

Order

1. Respondent Thomas James is hereby assessed a civil penalty of two thousand, two hundred and fifty dollars (\$2,250.00).

2. The penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334,
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final February 9, 1996.-Editor]

In re: ALEX THOMAS, JR.
A.Q. Docket No. 95-46.
Decision and Order filed January 16, 1996.

Failure to file an answer - Permitting untreated garbage to be fed to swine - Allowing untreated garbage in a swine feeding area - Allowing drainage from untreated garbage to be accessible to swine - Failure to store untreated garbage in covered containers - Civil penalty.

James D. Holt, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Swine Health Protection Act, as amended (7 U.S.C. § 3801 *et seq.*) and regulations promulgated thereunder (9 C.F.R. § 166.1 *et seq.*).

This proceeding was instituted by a complaint filed on September 26, 1995, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. On October 10, 1995, the complaint was served upon the respondent. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the material allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. The mailing address of Alex Thomas, Jr., is (b) (6)
(b) (6)
2. On May 9, 1995, respondent permitted untreated garbage to be fed to swine.
3. On May 9, 1995, respondent allowed untreated garbage in a swine feeding area.
4. On May 9, 1995, respondent allowed drainage from untreated garbage to be accessible to swine.
5. On May 9, 1995, respondent did not store untreated garbage was in covered containers.
6. On July 10, 1995, respondent permitted untreated garbage to be fed to swine.
7. On July 10, 1995, respondent allowed untreated garbage in a swine feeding area.

8. On July 10, 1995, respondent did not store untreated garbage in covered containers.

9. On July 14, 1995, respondent by permitted untreated garbage to be fed to swine.

10. On July 14, 1995, respondent allowed untreated garbage in a swine feeding area.

11. On July 14, 1995, respondent allowed drainage from untreated garbage to be accessible to swine.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 9 C.F.R. §§ 166.2, 166.3, 166.4. and 166.6.

Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two thousand, five hundred dollars (\$2,500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, P.O. Box 3334, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final February 26, 1996.-Editor]

In re: PETER MAYES.

A.Q. Docket No. 95-36.

Decision and Order filed December 26, 1995.

Failure to file an answer - Interstate movement of swine and goats without certificate - Shipment of swine without swine being individually identified - Civil penalty.

Darlene M. Bolinger, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of swine (9 C.F.R. §§ 85.7(c), 71.19(a), 76.6 and Schedule B), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111), and the regulations promulgated thereunder, by a complaint filed on July 14, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleges that on or about October 13, 1993, respondent violated 9 C.F.R. § 85.7(c)(1) by moving interstate approximately 65 swine from New Jersey to Virginia, without the swine being accompanied by a certificate, as required. Also, on or about October 13, 1993, respondent violated 9 C.F.R. § 71.19(a) by the shipment of approximately 65 swine from New Jersey to Virginia, without the swine being individually identified, as required. Furthermore, on or about June 15, 1994, respondent violated 9 C.F.R. § 71.3(d) by moving interstate approximately 28 goats from New Jersey to Pennsylvania, without the goats being accompanied by a certificate, as required.

The respondent failed to file an answer within the time prescribed in 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, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Peter Mayes, is an individual with a mailing address of (b) (6)
(b) (6)
2. On or about October 13, 1993, respondent violated 9 C.F.R. § 85.7(c)(1) by moving interstate approximately 65 swine from New Jersey to Virginia, without the swine being accompanied by a certificate, as required.
3. On or about October 13, 1993, respondent violated 9 C.F.R. § 71.19(a) by the shipment of approximately 65 swine from New Jersey to Virginia, without the swine being individually identified, as required.
4. On or about June 15, 1994, respondent violated 9 C.F.R. § 71.3(d) by moving interstate approximately 28 goats from New Jersey to Pennsylvania, without the goats being accompanied by a certificate, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated 9 C.F.R. §§ 85.7(c), 71.19(a), and 76.6. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand five hundred dollars (\$1,500.00)(\$500.00 per violation).¹ This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

¹The respondent has failed to file and answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Bobo*, 49 Agric. Dec. 849 (1990).

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to A.Q. Docket No. 95-36.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final February 27, 1996.-Editor]

In re: MARIA GRACIELA ROY.

A.Q. Docket No. 95-35.

Decision and Order filed January 19, 1996.

Admission of material allegations - Importation of amazon parrots from Mexico into the United States without import permit, inspection or quarantine at other than designated port of entry - Civil penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of birds from Mexico into the United States (9 C.F.R. § 92.100 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), and regulations promulgated thereunder the Act, by a complaint filed on July 14, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about July 3, 1994, respondent imported two amazon parrots from Mexico into the United States at Otay Mesa, California, in violation of 9 C.F.R. §§ 92.101(c)(3) and 92.102(a) because the parrots were imported at other than a designated port of entry, as required. Also, on or about July 3, 1994, respondent imported two amazon parrots from Mexico into the United States at Otay Mesa, California, in violation of 9 C.F.R. §§ 92.103(a)(1) because the parrots were imported without an import permit, as

required. Furthermore, on or about July 3, 1994, respondent imported two amazon parrots from Mexico into the United States at Otay Mesa, California, in violation of 9 C.F.R. §§ 92.105(b) because the parrots were not subjected to inspection at the port of entry, as required. Moreover, on or about July 3, 1994, respondent imported two amazon parrots from Mexico into the United States at Otay Mesa, California, in violation of 9 C.F.R. §§ 92.106(a) because the parrots were not quarantined at the port of entry, as required.

The respondent filed an answer that admitted all the material allegations of fact in the complaint. Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that the admission of all the material allegations of fact in the complaint shall constitute a waiver of hearing. Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Maria Graciela Roy is an individual whose mailing address is (b) (6) (b) (6)
2. On or about July 3, 1994, respondent imported two amazon parrots from Mexico into the United States at Otay Mesa, California, in violation of 9 C.F.R. §§ 92.101(c)(3) and 92.102(a) because the parrots were imported at other than a designated port of entry, as required.
3. On or about July 3, 1994, respondent imported two amazon parrots from Mexico into the United States at Otay Mesa, California, in violation of 9 C.F.R. §§ 92.103(a)(1) because the parrots were imported without an import permit, as required.
4. On or about July 3, 1994, respondent imported two amazon parrots from Mexico into the United States at Otay Mesa, California, in violation of 9 C.F.R. §§ 92.105(b) because the parrots were not subjected to inspection at the port of entry, as required.
5. On or about July 3, 1994, respondent imported two amazon parrots from Mexico into the United States at Otay Mesa, California, in violation of 9 C.F.R. §§ 92.106(a) because the parrots were not quarantined at the port of entry, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 92.100 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Maria Graciela Roy, is hereby assessed a civil penalty of one thousand dollars (1,000.00)(\$250.00 per count)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty(30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 95-35.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final March 6, 1996.-Editor]

¹The respondent filed an answer which failed to deny any of the material allegations of the complaint. Under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decision in *In re Bobo*, 49 Agric. Dec. 849 (1990).

In re: OW DUK KWON, d/b/a KWANG DONG CHINESE HERBS ENTERPRISE, INC., and KENNEY TRANSPORT, INC.

A.Q. Docket No. 95-41.

Decision and Order as to Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc. filed December 27, 1995.

Failure to file an answer - Importation of "deer antlers in velvet" not consigned to an approved establishment as required - Civil penalty.

Darlene M. Bolinger, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of foreign animal byproducts into the United States (9 C.F.R. §§ 95.12), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111), and the regulations promulgated thereunder, by a complaint filed on July 28, 1995, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleges that on or about February 6, 1992, respondents imported from Russia into the United States "deer antlers in velvet" in violation of Section 95.12 of the regulations (9 C.F.R. § 95.12) because the imported antlers, were not consigned to an approved establishment, as required; and that on or about May 22, 1992, respondents imported from Russia into the United States "deer antlers in velvet" in violation of Section 95.12 of the regulations (9 C.F.R. § 95.12) because the imported antlers, were not consigned to an approved establishment, as required.

The respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) which 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, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., respondent herein, is an entity with a mailing address of 29 West 36th Street, New York, New York 10018.

2. On or about February 6, 1992, respondents imported from Russia into the United States "deer antlers in velvet" in violation of Section 95.12 of the regulations (9 C.F.R. § 95.12) because the imported antlers, were not consigned to an approved establishment, as required.

3. On or about May 22, 1992, respondents imported from Russia into the United States "deer antlers in velvet" in violation of Section 95.12 of the regulations (9 C.F.R. § 95.12) because the imported antlers, were not consigned to an approved establishment, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., has violated 9 C.F.R. §§ 95.12. Therefore, the following Order is issued.

Order

The respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., is hereby assessed a civil penalty of two thousand dollars (\$2,000.00).¹ This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office

¹The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested would have been reduced by one-half in accordance with the Judicial Officer's Decision in *In re Bobo*, 49 Agric. Dec. 849 (1990). Complainant, however, included in its complaint a request that the civil penalty not be reduced if the respondent Ow Duk Kwon d/b/a Kwang Dong Chinese Herbs Enterprise, Inc. failed to file an answer. Therefore, in accordance with the Judicial Officer's Decision in *In re Heywood*, 52 Agric. Dec. 1315 (1993), the civil penalty is not being reduced.

Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., shall indicate that payment is in reference to A.Q. Docket No. 95-36.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final March 12, 1996.-Editor]

**In re: JOHN Q. MASTERS.
A.Q. Docket No. 95-37.
Decision and Order filed April 5, 1996.**

Failure to file an answer - Export movement of horse to United States border without required origin health certificate - Civil penalty.

Susan Golabek, for Complainant.
Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the inspection and handling of livestock for exportation (9 C.F.R. § 91.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 7 C.F.R. § 380.1 *et seq.*

This proceeding was instituted by a complaint filed on July 14, 1995, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about March 5, 1994, respondent moved approximately one horse from Great Falls, Montana, into High River, Alberta, Canada, in violation of section 91.3(a) of the regulations (9 C.F.R. § 91.3(a)), because the horse was not accompanied

from the State of origin of the export movement to the border of the United States by an origin health certificate, as required.

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

Findings of Fact

1. John Q. Masters, respondent herein, is an individual with a mailing address of (b) (6)¹.
2. On or about March 5, 1994, respondent moved approximately one horse from Great Falls, Montana, into High River, Alberta, Canada, in violation of section 91.3(a) of the regulations (9 C.F.R. § 91.3(a)), because the horse was not accompanied from the State of origin of the export movement to the border of the United States by an origin health certificate, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 9 C.F.R. § 91.3. Therefore, the following Order is issued.

¹This was respondent's address at the time of the violation. Respondent's current mailing address is (b) (6).

Order

The respondent is hereby assessed a civil penalty of five hundred dollars (\$ 500.00).² This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to A.Q. Docket No. 95-37.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final June 7, 1996.-Editor]

**In re: SANDERS JONES.
A.Q. Docket No. 96-02.
Decision and Order filed May 2, 1996.**

Failure to file an answer - Shipment of pork bockwurst and pork bacon by mail from Germany to United States without required certificate - Civil penalty.

Susan Golabek, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

²Inasmuch as the respondent has failed to file an answer, and, therefore, the Department is not required to hold a hearing, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988).

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of meat and other animal products from specified countries (9 C.F.R. § 94.0 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 7 C.F.R. § 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on November 17, 1995, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about February 12, 1995, respondent shipped one kilogram of pork bockwurst and one kilogram of pork bacon by mail from Germany to the United States, in violation of Section 94.11 of the regulations (9 C.F.R. § 94.11), because the pork products were not accompanied by a certificate, as required.

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

Findings of Fact

1. Sanders Jones, respondent herein, is an individual with a mailing address of (b) (6).
2. On or about February 12, 1995, respondent shipped one kilogram of pork bockwurst and one kilogram of pork bacon by mail from Germany to the United States, in violation of Section 94.11 of the regulations (9 C.F.R. § 94.11), because the pork products were not accompanied by a certificate, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 9 C.F.R. § 94.11. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred seventy-five dollars (\$ 375.00).¹ This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to A.Q. Docket No. 96-02.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final June 28, 1996.-Editor]

**In re: R. VICKERS.
A.Q. Docket No. 96-04.
Decision and Order filed May 2, 1996.**

Failure to file an answer - Shipment of meat derived from swine and ruminant without required certificate - Civil penalty.

Susan Golabek, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

¹Inasmuch as the respondent has failed to file an answer, and, therefore, the Department is not required to hold a hearing, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988).

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of meat and other animal products from specified countries (9 C.F.R. § 94.0 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 7 C.F.R. § 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on December 8, 1995, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about March 22, 1995, respondent shipped a meat product, derived from swine and ruminant, by mail from Germany to the United States, in violation of Section 94.11 of the regulations (9 C.F.R. § 94.11), because the meat product was not accompanied by a certificate, as required.

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

Findings of Fact

1. R. Vickers, respondent herein, is an individual with a mailing address of (b) (6)

2. On or about March 22, 1995, respondent shipped a meat product, derived from swine and ruminant, by mail from Germany to the United States, in violation of Section 94.11 of the regulations (9 C.F.R. § 94.11), because the meat product was not accompanied by a certificate, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 9 C.F.R. § 94.11. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred seventy-five dollars (\$ 375.00).¹ This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to A.Q. Docket No. 96-04.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final June 28, 1996.-Editor]

¹Inasmuch as the respondent has failed to file an answer, and, therefore, the Department is not required to hold a hearing, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988).

ANIMAL WELFARE ACT

In re: MIKE PERSCHBACHER.

AWA Docket No. 95-53.

Decision and Order filed December 19, 1995.

Failure to file an answer - Operating as a dealer without being licensed - Cease and desist order - Civil penalty - License disqualification.

Scott Safian, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 et seq.), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act.

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the respondent as required. The respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Also, the respondent was informed that failure to deny the material allegations of the complaint constitutes an admission of the allegations and waiver of a hearing.

The respondent failed to file a timely answer as required by the Rules of Practice. Accordingly, the respondent has admitted the allegations in the complaint and waived the opportunity for a hearing. Therefore, the material allegations in the complaint are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. Mike Perschbacher, respondent herein, is an individual whose address is (b) (6).

2. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.

3. From May 10, 1992, and continuing to the present, the respondent has operated as a dealer as defined in the Act and regulations without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). The respondent's actions as a dealer include, but are not limited to, the sale of a bear on May 10, 1992, the sale of a zebra on September 4, 1992, the sale of a nilgai on December 11, 1993, the sale of a nilgai and a wallaby on September 4, 1994, the offer for sale of six hedge hogs on December 11, 1993, and the purchase of six hedgehogs on December 9, 1993. The sale, offer for sale, or purchase of each animal constitutes a separate violation.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of \$6,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified for a period of one year from becoming licensed under the Act and regulations.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 11, 1996.--Editor]

EGG RESEARCH & CONSUMER INFORMATION ACT

In re: EGGS WEST, INC.
ERCIA Docket No. 95-1.
Decision and Order filed November 17, 1995.

Failure to file an answer - Handler - Failure to pay assessment to American Egg Board - Failure to submit complete and accurate reports of the number of cases of eggs handled and other required information - Cease and desist order - Civil penalty - Payment order.

Tejal Mehta, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding instituted under the Egg Research and Promotion Act, as amended 7 U.S.C. §§ 2701-18 ("Act"), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act, the Egg Research and Promotion Order, 7 C.F.R. Part 1250 ("Order"), and the Rules and Regulations issued pursuant to the Act, 7 C.F.R. §§ 1250.500 - 1250.552.

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130 - 1.151, were served by certified mail upon respondent Eggs West on September 20, 1995. Respondent was also served with a letter of service informing him that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Eggs West failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent Eggs West, Inc. is a corporation whose business address is 1723 W. Bernardino Road, Box 2340, West Covina, California 91793-2340.

2. At all times mentioned herein, the Respondent was operating as a "handler" as defined in section 1250.309 of the order (7 C.F.R. § 1250.309) and section 1250.500(i) of the administrative rules and regulations promulgated pursuant thereto (7 C.F.R. § 1250.500(i)).

3. The Respondent, during the months of August 1992 through July 1993 and September 1993 through August 1995, failed to pay to the American Egg Board an assessment based on the rate of 5 cents per 30-dozen case of eggs in the manner and in the time specified by the American Egg Board, thereby willfully violating sections 1250.347, 1250.349 and 1250.517 of the order and the regulations promulgated thereunder (7 C.F.R. §§ 1250.347, 1250.349, 1250.517) in each of the 36 months.

4. The Respondent, during the months of September 1993 through August 1995, failed to submit complete and accurate reports of the number of cases of eggs handled and other required information, thereby willfully violating section 1250.352 of the order and sections 1250.529 of the regulations promulgated thereunder (7 C.F.R. §§ 1250.352, 1250.529) in each of the 36 months.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 2706(c) and 2707(e) of the Act, (7 U.S.C. §§ 2706(d) and 2707(e)), sections 1250.347 and 1250.352 of the Order (7 C.F.R. §§ 1250.347 and 1250.352), and sections 1250.517 and 1250.529 of the rules and regulations (7 C.F.R. §§ 1250.517 and 1250.529).
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent Eggs West, its agents and employees, directly or through any corporate or other device, shall comply with each and every provision of the Egg Research and Promotion Act and the Order and Regulations issued thereunder, shall cease and desist from any violation thereof.

2. Respondent Eggs West is specifically ordered to file all handler reports as required by 7 U.S.C. 2706(c), section 1250.352 of the Order, and section 1250.529 of the Regulations, and to pay the Board \$186,134.20 in assessments due under 7 U.S.C. § 2707(e), section 1250.347 of the Order, and section

1250.517 of the Rules and Regulations and shall file all future reports and pay all future assessments as required by those sections.

3. Respondent Eggs West is further ordered to pay to the Board late payment fees on the unpaid assessments in the amount of \$27,682.66, as authorized by section 1250.523 (7 C.F.R. § 1250.523) of the Rules and Regulations.

4. Respondent Eggs West is assessed a civil penalty of \$36,000 which shall be paid by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final December 28, 1995 and effective January 2, 1996.-Editor]

FEDERAL CROP INSURANCE ACT

In re: JAMES HARVEY FRAZIER.

FCIA Docket No. 95-24.

Decision filed February 27, 1996.

Failure to file an answer - Providing false and inaccurate information to FCIC or to an insurer with respect to an insurance plan or policy - Disqualification.

Kimberly Arrigo, for Complainant.

Respondent, Pro se.

Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of the respondent, James Harvey Frazier, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision became final April 16, 1996.-Editor]

HORSE PROTECTION ACT

**In re: BILLY WATSON, JAMES RITTER & SHEREE CUNNINGHAM.
HPA Docket No. 94-37.**

Decision and Order as to Billy Watson filed January 11, 1996.

Failure to file an answer - Entering for the purpose of exhibiting or showing a sore horse - Civil penalty - Disqualification.

Denise Hansberry, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Horse Protection Act ("Act"), as amended (15 U.S.C. § 1821 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the Act.

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were sent to Respondent Billy Watson by the Hearing Clerk by certified mail on or about June 17, 1995. The letter was returned to the hearing clerk marked "unclaimed" on or about June 26, 1995. Subsequently, on June 28, 1995, the hearing clerk remailed copies of the Complaint and the Rules of Practice to the respondent by regular mail. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent Billy Watson is an individual whose mailing address is (b) (6).
2. At all times material herein, respondent Billy Watson was the trainer of the horse known as "Fashion's Passion" and entered this horse in Class No. 4, on May 3, 1991, at the Kentucky Walking and Racking Horse Trainers Association Derby Classic Horse Show at Harrodsburg, Kentucky.
3. At all times material herein, respondent Billy Watson was the trainer of the horse known as "Sunrise Surprise" and entered this horse in Class No. 13, on May 3, 1991, at the Kentucky Walking and Racking Horse Trainers Association Derby Classic Horse Show at Harrodsburg, Kentucky.
4. On May 3, 1991, respondent Billy Watson, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)), entered for the purpose of showing or exhibiting the horse known as "Fashion's Passion" in Class No. 4 at the Kentucky Walking and Racking Horse Trainers Association Derby Classic Horse Show at Harrodsburg, Kentucky, while the horse was sore.
5. On May 3, 1991, respondent Billy Watson, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)), entered for the purpose of showing or exhibiting the horse known as "Sunrise Surprise" in Class No. 13 at the Kentucky Walking and Racking Horse Trainers Association Derby Classic Horse Show at Harrodsburg, Kentucky, while the horse was sore.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated section 5(2) (B) of the Act, 15 U.S.C. § 1824 (2) (B).
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent is assessed a civil penalty of \$4,000 which shall be paid by a certified check or money order made payable to the Treasurer of the United States.
2. Respondent is disqualified for two years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or

otherwise, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 7, 1996.-Editor]

**PORK PROMOTION, RESEARCH &
CONSUMER INFORMATION ACT**

**In re: LEE GASHEL and SON, INC.
PPRCIA Docket No. 95-1.
Decision and Order filed March 7, 1996.**

Failure to file an answer - Engaging in the business of purchasing porcine animals - Failure to submit reports as required - Failure to pay assessments in a timely manner - Civil penalty - Cease and desist order.

Sharlene A. Deskins, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Pork Promotion, Research and Consumer Information Act, as amended, 7 U.S.C. §§ 4801-4819 ("Act"), by a complaint filed by the Administrator, Agricultural Marketing Service, United States Department of Agriculture, alleging that the respondent willfully violated the Pork Research and Promotion Order, 7 C.F.R. §§ 1230.1-1230.91 ("Order"), issued pursuant to the Act, and the Rules and Regulations issued pursuant to the Act, 7 C.F.R. §§ 1230.100-1230.402 ("Regulations").

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§1.130-1.151, were served on said Respondent by the Hearing Clerk by certified mail on or about July 24, 1995. The letter of service accompanying the complaint stated that an answer should be filed and that the failure to answer any allegation in the complaint would constitute an admission of the allegation.

The Respondent failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by the Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Lee Gashel and Sons, Inc., hereinafter referred to as the respondent, is a corporation whose address is Post Office Box G, Claysville, Pennsylvania 15323.
2. The respondent, at all material times herein, was engaged in the business of purchasing porcine animals.
3. The Respondent willfully violated the Act, Order and Regulations by failing to submit reports as required by section 1230.80 of the Order (7 C.F.R. § 1230.80) from May 31, 1994, to December 1994 and February 1995 to the filing date of the complaint.
4. The Respondent willfully violated the Act, Order and Regulations by failing to pay assessments in a timely manner as required by section 1230.71 of the Order (7 C.F.R. § 1230.71) from May 31, 1994, to December 1994 and February 1995 to the filing date of the complaint.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the Respondent violated the Act, Order and Regulations thereunder.
3. The following order is authorized by the Act and warranted under the circumstances.

Order

1. The Respondent is assessed a civil penalty of \$1,500. The payment shall be made by certified check or money order made payable to the Treasurer of the United States, and shall be sent to Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1400.
2. The Respondent shall pay his past-due assessments and accrued late-payment charges to the National Pork Board. The payment shall be made by certified check or money order and shall be sent to the National Pork Board, 122 C Street, N.W., Suite 875, Washington, D.C. 20001.
3. The respondent shall submit all past due reports.

4. The Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Order and 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 thereon; and
- (c) failing to file reports in a timely manner.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 15, 1996.-Editor]

PLANT QUARANTINE ACT

In re: SOSAIA PULU.

P.Q. Docket No. 95-52.

Decision and Order filed November 29, 1995.

Failure to file an answer - Offering fresh noni fruit and leaves to a common carrier for shipment from Hawaii to the continental United States - Civil penalty.

Jane H. Settle, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the shipment of fruits from Hawaii to the continental United States (7 C.F.R. § 318.13 *et seq.*) [hereinafter referred to as the regulations], in accordance with the Rules of Practice in 7 C.F.R. § 380.1 *et seq* and 7 C.F.R. § 1.130 *et seq*.

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), and the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165, and 167) (Acts), and the regulations promulgated thereunder, by a complaint filed on July 14, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about April 4, 1994, respondent offered to a common carrier, specifically the United States Postal Service, 1.6 pounds of fresh noni fruit and 3 pounds of fresh noni leaves for shipment from Hawaii to the continental United States, in violation of sections 318.13(b) and 318.13-2(a) of the regulations (7 C.F.R. § 318.13(b) and 318.13-2(a)), because such fruits and leaves are prohibited movement.

The respondent failed to file an answer within the time prescribed in 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, the failure to file a timely answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Sosaia Pulu is an individual with a mailing address of (b) (6)
(b) (6)

2. On or about April 4, 1994, respondent offered to a common carrier, specifically the United States Postal Service, 1.6 pounds of fresh noni fruit and 3 pounds of fresh noni leaves for shipment from Hawaii to the continental United States, in violation of sections 318.13(b) and 318.13-2(a) of the regulations (7 C.F.R. § 318.13(b) and 318.13-2(a)), because such fruits and leaves are prohibited movement.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 318.13 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred and seventy-five dollars (\$375.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 95-52.

¹The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final January 16, 1996.-Editor]

In re: REYNALDA ONATE.

P.Q. Docket No. 95-35.

Decision and Order filed December 6, 1996.

Failure to file an answer - Importation of rose plant from Mexico into United States without required permit - Civil penalty.

Glenn Nadaner, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding concerning the assessment of a civil penalty for a violation of the regulations governing the importation of a rose plant from Mexico into the United States (7 C.F.R. § 319.37 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165, and 167), ("Acts"), and the regulations promulgated thereunder, by a complaint filed on April 12, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture.

The respondent failed to file an answer within the time prescribed in 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, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the

Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Reynalda Onate is an individual with a mailing address of (b) (6)
(b) (6)
2. On or about July 28, 1992, the respondent imported a rose plant from Mexico into the United States, at San Diego, California, in violation of section 319.37-3 of the regulations (7 C.F.R. § 319.37-3), because the rose plant was not imported under a permit, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.37 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two hundred dollars (\$200.00).¹ This penalty shall be payable to the "Treasurer of the United States" by certified check or money order. The respondent shall make payments of fifty dollars (\$50.00) each month for four (4) consecutive months. The respondent's initial payment will be due within thirty (30) days from the effective date of the Decision and Order. The subsequent payments will be due within thirty (30) days from the date the previous payment was sent to the address in Minneapolis listed below. If the respondent is late in making or misses any payment, then all remaining payments become immediately due and payable in full. All payments shall be forwarded to:

¹The respondent has failed to file an answer, and under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985). In addition, since the respondent has provided Complainant with evidence indicating an inability to pay the requested civil penalty, Complainant believes that the assessed civil penalty should be further reduced to two hundred dollars (\$200.00), in accordance with the Judicial Officer's Decision in *In re Robert L. Heywood*, 52 Agric. Dec. 1315 (1993).

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 95-35.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final January 19, 1996.-Editor]

In re: JUAN RAYA-MARTINEZ.

P.Q. Docket No. 95-60.

Decision and Order filed December 6, 1995.

Failure to file an answer - Importation of cherimoya from Mexico into the United States without permit - Civil penalty.

James D. Holt, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), and regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*). This proceeding was instituted by a complaint filed against Juan Raya-Martinez, respondent, on August 21, 1995, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding,

an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Juan Raya-Martinez, respondent, is an individual whose mailing address is (b) (6)

2. On November 15, 1994, at San Jose, California, respondent imported twenty cherimoya from Mexico into the United States without a permit.

Conclusion

By reason of the facts contained in the Findings of Fact above, respondent Juan Raya-Martinez has violated 7 C.F.R. § 319.56 *et seq.*

Therefore, the following Order is issued.

Order

Juan Raya-Martinez, respondent, is hereby assessed a civil penalty of two hundred and fifty dollars (\$250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial

Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final January 31, 1996.-Editor]

In re: CLINTON SMITH.

P.Q. Docket No. 95-58.

Decision and Order filed November 30, 1995.

Failure to file an answer - Importation of meat derived from swine into the United States from Germany - Civil penalty.

James D. Holt, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. § 111), and regulations promulgated thereunder (9 C.F.R. § 94.11).

This proceeding was instituted by a complaint filed on August 21, 1995, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent Smith was served with the complaint on September 6, 1995, and has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. Therefore, by his failure to answer, Respondent is deemed to have admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Clinton L. Smith, Respondent, is an individual with a mailing address of (b) (6).

2. On or about March 15, 1995, at Atlanta, Georgia, respondent imported a meat derived from swine into the United States from Germany.

Conclusion

By reason of the facts contained in the Findings of Fact above, Respondent Smith has violated 9 C.F.R. § 94.11.

Therefore, the following Order is issued.

Order

1. Respondent Clinton L. Smith is hereby assessed a civil penalty of three hundred and seventy-five dollars. (\$375).

2. The penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334,
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final February 12, 1996.-Editor]

**In re: BILL TALLEY.
P.Q. Docket No. 94-36.
Decision and Order filed August 31, 1995.**

Admission of material allegations - Importation of kalbsleberwurst from Germany to United States without required inspection - Civil penalty.

Scott Safian, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for violations of the Act of February 2, 1903, as amended (21 U.S.C. § 111), and the regulations issued thereunder (9 C.F.R. §§ 94.0 to 94.18)(Regulations). The proceeding was instituted by a Complaint filed on July 1, 1994, by the Administrator of the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA), alleging that Bill Talley (Respondent) violated the Act and the Regulations.

The Complaint was served upon the Respondent in accordance with Section 1.147 of the Rules of Practice (7 C.F.R. § 1.147). The Respondent responded by letter filed with the Hearing Clerk on August 15, 1994. Respondent's letter failed to deny the material allegations of the complaint. Consequently, pursuant to sections 1.136(c) and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136(c) and 1.139), the Respondent has admitted the allegations in the Complaint and waived the opportunity for a hearing.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Bill Talley, herein referred to as Respondent, is an individual with a mailing address of (b) (6)
2. On or about October 27, 1993, the Respondent imported approximately 900 grams of kalbsleberwurst, a cooked meat, from Germany, a country designated as infected with rinderpest or foot-and-mouth disease, to the United States, by shipment through the mail, which was not inspected by a Food Safety and Inspection Service inspector as required.

Conclusion

By reason of the Findings of Fact set forth above, Respondent has violated 9 C.F.R. § 94.4(b)(3). The violation warrants imposition of a civil penalty under section 3 of the Act of February 2, 1903, as amended (21 U.S.C. § 122).

Therefore, the following Order is issued:

Order

The Respondent is hereby assessed a civil penalty of three hundred seventy five dollars (\$375.00).¹ This penalty shall be payable to the "Treasurer of the United States" by certified check or money order and shall be forwarded to:

U.S. Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 94-36.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondent, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final March 25, 1996.-Editor]

**In re: MARIA HIGGS.
P.Q. Docket No. 95-54.
Decision and Order filed November 16, 1995.**

Failure to file an answer - Importation of cured meat derived from swine into United States from Germany - Importation of fresh radishes with leaves into United States from Germany - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.

¹The amount of the civil penalty has been reduced by half that sought in the Complaint filed in this proceeding in accordance with *In re Bobo*, 49 Agric. Dec. 940 (1990) and *In re Kaplinsky*, 47 Agric. Dec. 613 (1988).

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. § 111), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), and regulations promulgated thereunder (7 C.F.R. § 319.56, 9 C.F.R. § 94.4).

This proceeding was instituted by a complaint filed on July 14, 1995, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent Higgs was served with the complaint on July 25, 1995, and has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. Therefore, by her failure to answer, Respondent is deemed to have admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Maria Higgs, Respondent, is an individual with a mailing address of
(b) (6)
2. On or about May 5, 1995, at the Dallas/Fort Worth International Airport, Texas, respondent imported a cured meat derived from swine into the United States from Germany.
3. On or about May 5, 1995, at the Dallas/Fort Worth International Airport, Texas, respondent imported two (2) fresh radishes into the United States from Germany without a permit.
4. On or about May 5, 1995, at the Dallas/Fort Worth International Airport, Texas, respondent imported two (2) fresh radishes with leaves into the United States from Germany.

Conclusion

By reason of the facts contained in the Findings of Fact above, Respondent Higgs has violated 9 C.F.R. § 94.4, 7 C.F.R. § 319.56-2(e) and 7 C.F.R. § 319.56-2(a)

Therefore, the following Order is issued.

Order

1. Respondent Maria Higgs is hereby assessed a civil penalty of one thousand, five hundred dollars (\$1,500).

2. The penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334,
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final March 25, 1996.-Editor.]

In re: LIONICA NGIRATKAKI.
P.Q. Docket No. 95-45.
Decision and Order filed February 5, 1996.

Failure to file an answer - Offering fresh Betel nuts to common carrier for shipment from Hawaii to the continental United States - Civil penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the offering of fruit from Hawaii to

a common carrier to be brought into the continental United States (7 C.F.R. § 318.13 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on June 29, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about August 9, 1994, respondent offered or caused to be offered to a common carrier, specifically the United Parcel Service, approximately 3 pounds of fresh Betel nuts to be shipped from Hawaii to the continental United States, in violation of 7 C.F.R. § 318.13(b) which prohibits entry of such fruit into the continental United States.

The respondent failed to file an answer within the time prescribed in 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, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Lionica Ngiratkaki is an individual whose mailing address (b) (6)
(b) (6)
2. On or about August 9, 1994, respondent offered or caused to be offered to a common carrier, specifically the United Parcel Service, approximately 3 pounds of fresh Betel nuts to be shipped from Hawaii to the continental United States, in violation of 7 C.F.R. § 318.13(b) which prohibits entry of such fruit into the continental United States.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 318.13 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Lionica Ngiratkaki, is hereby assessed a civil penalty of three hundred seventy-five dollars (\$375.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-45.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final March 27, 1996.-Editor]

**In re: EDUARDO ZAVALA GARCIA.
P.Q. Docket No. 95-42.
Decision and Order filed January 11, 1996.**

Failure to file a timely answer - Failure to deny material allegations - Importation of sweet limes and fresh apples from Mexico into the United States - Civil Penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

¹The respondent has failed to file a timely answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits from Mexico into the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on June 29, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about October 25, 1994, respondent imported approximately two pounds of fresh sweet limes and two fresh apples from Mexico into the United States at Chicago International Airport, in violation of 7 C.F.R. § 319.56(c), which prohibits entry of such fruit into the United States.

The respondent filed an untimely answer that failed to deny the material allegations. 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, the failure to file an answer in the time prescribed constitutes a waiver of hearing. The failure to deny the material allegations of fact contained in the complaint also constitutes an waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

- (b) (6)¹ Eduardo Zavala Garcia is an individual whose mailing address is [REDACTED]
2. On or about October 25, 1994, respondent imported approximately two pounds of fresh sweet limes and two fresh apples from Mexico into the United States at Chicago International Airport, in violation of 7 C.F.R. § 319.56(c), which prohibits entry of such fruit into the United States.

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. §§ 319.56 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Eduardo Zavala-Garcia, is hereby assessed a civil penalty of two hundred and fifty dollars (\$250.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-42.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final April 11, 1996.-Editor]

¹The respondent filed a late answer which failed to deny any of the material allegations of the complaint. Under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

In re: JORGE G. MEDINA.

P.Q. Docket No. 95-65.

Decision and Order filed February 15, 1996.

Failure to file an answer - Importation of fresh avocados and tomatoes from Ecuador into the United States - Civil penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of vegetables and/or fruits from Ecuador to the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on June 29, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about December 11, 1994, respondent imported approximately 12 fresh avocados and one-half pound of tomatoes from Ecuador into the United States at JFK International Airport, in violation of 7 C.F.R. § 319.56(c) which prohibits entry of such vegetables and/or fruit into the United States.

The respondent failed to file an answer within the time prescribed in 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, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Jorge G. Medina is an individual whose mailing address is [REDACTED]
(b) (6) [REDACTED]

2. On or about December 11, 1994, respondent imported approximately 12 fresh avocados and one-half pound of tomatoes from Ecuador into the United States at JFK International Airport, in violation of 7 C.F.R. § 319.56(c) which prohibits entry of such vegetables and/or fruit into the United States.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Jorge G. Medina, is hereby assessed a civil penalty of three hundred seventy-five dollars (\$375.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-65.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final April 11, 1996.-Editor]

¹The respondent has failed to file a timely answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

In re: SEVERIANA FERNANDA LOZANO ARELLANO.
P.Q. Docket No. 95-46.
Decision and Order filed January 19, 1996.

Failure to file an answer - Importation of fresh mangoes from Mexico into United States - Civil penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruit from Mexico to the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on June 29, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about August 17, 1994, respondent imported two fresh mangoes from Mexico into the United States at Los Angeles International Airport, in violation of 7 C.F.R. § 319.56(c) which prohibits entry of such fruit into the United States.

The respondent failed to file an answer within the time prescribed in 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, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Severiana Fernanda Lozano Arellano is an individual whose mailing address (b) (6)

2. On or about August 17, 1994, respondent imported two fresh mangoes from Mexico into the United States at Los Angeles International Airport, in violation of 7 C.F.R. § 319.56(c) which prohibits entry of such fruit into the United States.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Severiana Fernanda Lozano Arellano, is hereby assessed a civil penalty of two hundred fifty dollars (\$250.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-46.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final April 29, 1996.-Editor]

¹The respondent has failed to file a timely answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

In re: CARLOS ALBERTO RIVERA-CERON.**P.Q. Docket No. 95-57.****Decision and Order filed March 20, 1996.**

Failure to file an answer - Importation of jicama from El Salvador into United States - Civil penalty.

Susan Golabek, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 7 C.F.R. § 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on August 21, 1995, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about December 8, 1994, the respondent imported at least ten pounds of jicama from El Salvador into the United States at Los Angeles, California, in violation of 7 C.F.R. § 319.56, because the importation of jicama from El Salvador into the United States is prohibited.

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

Findings of Fact

1. Carlos Alberto Rivera-Ceron, respondent herein, is an individual whose mailing address is (b) (6).
2. On or about December 8, 1994, the respondent imported at least ten pounds of jicama from El Salvador into the United States at Los Angeles,

California, in violation of 7 C.F.R. § 319.56, because the importation of jicama from El Salvador into the United States is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two hundred fifty dollars (\$ 250.00).¹ This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to P.Q. Docket No. 95-57.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final April 29, 1996-Editor]

¹Inasmuch as the respondent has failed to file an answer, and, therefore, the Department is not required to hold a hearing, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988).

In re: MARIA PENA.

P.Q. Docket No. 95-30.

Decision and Order filed February 5, 1996.

Failure to file an answer - Importation of mangoes and passion fruits from the Dominican Republic into the United States - Civil penalty.

Jane H. Settle, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits from the Dominican Republic into the United States (7 C.F.R. § 319.56 *et seq.*) [hereinafter referred to as the regulations], in accordance with the Rules of Practice in 7 C.F.R. § 380.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), and the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165, and 167) (Acts), and the regulations promulgated thereunder, by a complaint filed on April 5, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about May 19, 1994, respondent imported 18 mangoes and 7 passion fruits from the Dominican Republic into the United States in violation of 7 C.F.R. § 319.56 *et seq.* because importing mangoes and passion fruits from the Dominican Republic is prohibited.

The respondent failed to file an answer within the time prescribed in 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, the failure to file a timely answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Maria Pena is an individual with a mailing address of [REDACTED]

(b) (6) [REDACTED]

2. On or about May 19, 1994, respondent imported 18 mangoes and 7 passion fruits from the Dominican Republic into the United States in violation of 7 C.F.R. § 319.56 *et seq.* because importing mangoes and passion fruits from the Dominican Republic is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two hundred and fifty dollars (\$250.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 95-30.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final April 29, 1996.-Editor]

¹The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

In re: PEDRO OTERO FERNANDEZ.

P.Q. Docket No. 96-03.

Decision and Order filed March 20, 1996.

Failure to file an answer - Importation of fresh guavas from the Dominican Republic into the United States without required permit - Civil penalty.

Glenn Nadaner, for Complainant,

Respondent, Pro se.

Decision and Order issued by Dorothy A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-163 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on October 19, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 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, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Pedro Otero Fernandez is an individual whose mailing address is [REDACTED] (b) (6)
2. On or about February 27, 1995, respondent imported six (6) fresh guavas from the Dominican Republic into San Juan, Puerto Rico, in violation of Section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)), because respondent did not import fruit under a permit, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two hundred and fifty dollars (\$250.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-03.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final April 30, 1996-Editor]

¹The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

In re: CHAUMETTE JOSEPH.

P.Q. Docket No. 95-63.

Decision and Order filed February 14, 1996.

Failure to file an answer - Importation of fresh mangoes and sugar cane from Haiti into the United States - Civil penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruit from Haiti to the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on June 29, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about February 7, 1995, respondent imported approximately 25 fresh mangoes and 5 pounds of sugar cane from Haiti into the United States at JFK International Airport, in violation of 7 C.F.R. § 319.56(c) which prohibits entry of such fruit into the United States.

The respondent failed to file an answer within the time prescribed in 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, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Chaumette Joseph is an individual whose mailing address is [REDACTED]

(b) (6) [REDACTED]

2. On or about February 7, 1995, respondent imported approximately 25 fresh mangoes and 5 pounds of sugar cane from Haiti into the United States at JFK International Airport, in violation of 7 C.F.R. § 319.56(c) which prohibits entry of such fruit into the United States.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Chaumette Joseph, is hereby assessed a civil penalty of two hundred fifty dollars (\$250.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-63.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order issued by May 7, 1996-Editor]

¹The respondent has failed to file a timely answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

**In re: CHRISTINE HINDS.
P.Q. Docket No. 95-11.
Decision and Order filed March 19, 1996.**

Failure to file an answer - Importation of mangoes from Jamaica into the United States without required permit - Civil penalty.

Dariene M. Bolinger, for Complainant.
Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits from Jamaica into the United States (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et. seq.* and 380.1 *et. seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa *et seq.*), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on November 29, 1994, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleges that on or about April 1, 1994, respondent imported mangoes from Jamaica into the United States in violation of 7 C.F.R. § 319.56-2(e), because the importation was without a permit, as required.

The respondent failed to file an answer within the time prescribed in 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, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Christine A. Hinds is an individual whose mailing address [REDACTED]
(b) (6) [REDACTED]

2. On or about April 1, 1994, respondent imported mangoes from Jamaica into the United States, in violation, 7 C.F.R. § 319.56(c), because the importation was without a permit, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two hundred and fifty dollars (\$250.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 95-11.

This order shall have the same effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final June 7, 1996.-Editor]

¹The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested by one-half in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2210 (1985).

In re: ANA M. PONCE.
P.Q. Docket No. 96-11.
Decision and Order filed April 5, 1996.

Failure to file an answer - Offering unprocessed mango fruit to common carrier for shipment from Hawaii into continental United States - Civil penalty.

Scott Safian, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Federal Plant Pest Act, as amended (21 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165, and 167) ("Acts"), and the regulations issued thereunder (7 C.F.R. §§ 318.13 *et seq.*) ("Regulations").

The proceeding was instituted by a Complaint filed on December 21, 1995, by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), alleging that Ana M. Ponce ("Respondent") violated the Acts and the Regulations.

The Complaint was served upon the Respondent in accordance with 7 C.F.R. § 1.147. The Respondent has not filed an Answer with the Hearing Clerk within 20 days of service of the Complaint as required by 7 C.F.R. § 1.136. Consequently, pursuant to 7 C.F.R. §§ 1.136(c) and 1.139, the Respondent has admitted the allegations in the complaint and waived the opportunity for a hearing.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Ana M. Ponce, Respondent herein, is an individual with a mailing address of (b) (6).
2. On or about June 5, 1995, the Respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 32.4 pounds of raw or unprocessed mango fruit from Hawaii into the continental United States.

Conclusion

By reason of the Findings of Fact set forth above, the Respondent has violated sections 318.13(b) and 318.13-2(a)(1) of the Regulations (7 C.F.R. § 318.13(b) and 318.13-2(a)(1)) issued under the Acts. The violation warrants imposition of a civil penalty under the Federal Plant Pest Act and the Plant Quarantine Act, 7 U.S.C. §§ 150gg and 163, respectively.

Therefore, the following Order is issued:

Order

The Respondent is hereby assessed a civil penalty of three hundred seventy five dollars (\$375.00).¹ This penalty shall be payable to the "Treasurer of the United States" by certified check or money order and shall be forwarded to:

U.S. Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-11.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

[This Decision and Order became final June 18, 1996.-Editor]

¹This civil penalty is one-half that requested in the Complaint filed in this proceeding because no hearing is required. See *In re Kaplinsky*, 47 Agric. Dec. 613 (1988).

In re: MIGUEL ANGEL MEDRANO ALATORRE,
P.Q. Docket No. 95-30,
Decision and Order filed March 6, 1996.

Failure to file an answer - Importation of fresh nanches and mango from Mexico into United States - Civil penalty.

James A. Booth, for Complainant.

Respondent, P.M. ss.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruit from Mexico to the United States (7 C.F.R. § 319.96 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on June 29, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about August 25, 1994, respondent imported two pounds of fresh nanches and one fresh mango from Mexico into the United States at San Diego, California, in violation of 7 C.F.R. § 319.96(c) which prohibits entry of such fruit into the United States.

The respondent failed to file an answer within the time prescribed in 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, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Miguel Angel Medrano Alatorre is an individual whose mailing address is (b) (6)

2. On or about August 25, 1994, respondent imported two pounds of fresh nanches and one fresh mango from Mexico into the United States at San Diego, California, in violation of 7 C.F.R. § 319.56(c) which prohibits entry of such fruit into the United States.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Miguel Angel Medrano Alatorre, is hereby assessed a civil penalty of three hundred seventy-five dollars (\$375.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-50.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final June 18, 1996.-Editor]

¹The respondent has failed to file a timely answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1989).

In re: L. SOU.

P.Q. Docket No. 96-16.

Decision and Order filed May 2, 1996.

Failure to file an answer - Offering unprocessed cherries and mangoes to common carrier for shipment from Hawaii into continental United States - Civil penalty.

Dariene M. Bolinger, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-167) and the regulations promulgated thereunder (7 C.F.R. § 318.13 *et seq.*)

This proceeding was instituted by a complaint filed against respondent, on January 23, 1996, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rule of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. L. Sou, hereinafter referred to as respondent, is an individual with a mailing address of (b) (6).

2. On or about June 21, 1995, respondent offered to a common carrier prohibited fruit (raw or unprocessed cherries and mangoes) for shipment from Hawaii to the continental United States.

Conclusion

By reasons of the facts contained in the Findings of Fact above, respondent has violated 7 C.F.R. 318.13 *et seq.*

Therefore, the following order is issued.

Order

Respondent, L. Sou, is hereby assessed a civil penalty of three hundred seventy five dollars (\$375.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final June 18, 1996.-Editor]

In re: MARIE YVROSE LAURENT.
P.Q. Docket No. 95-59.
Decision and Order filed December 28, 1995.

Failure to file an answer - Importation of ten mangoes from Haiti into United States without permit as required - Civil penalty.

¹The respondent has failed to answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Kaplinsky*, 47 Agric. Dec. 613 (1988).

James D. Holt, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), and the regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*).

This proceeding was instituted by a complaint filed against Marie Yvrose Laurent, respondent, on August 21, 1995, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. On October 5, 1995, the complaint was then served upon the respondent by regular mail in conformity with section 1.147 of the rules of practice (7 C.F.R. § 1.147). Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Marie Yvrose Laurent is an individual whose mailing address is [REDACTED]

(b) (6)

2. On January 31, 1995, at John F. Kennedy International Airport, Jamaica, New York, respondent imported ten mangoes from Haiti into the United States without a permit.

Conclusion

By reason of the facts contained in the Findings of Fact above, Marie Yvrose Laurent, respondent, has violated 7 C.F.R. § 319.56 *et seq.*.

Therefore, the following Order is issued.

Order

Marie Yvrose Laurent, respondent, is hereby assessed a civil penalty of two hundred and fifty dollars (\$250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final June 24, 1996.-Editor]

In re: YANET LOPEZ.
P.Q. Docket No. 96-04.
Decision and Order filed April 17, 1996.

Failure to file an answer - Importation of 3 jaguars and sugarcane from Dominican Republic into United States - Civil penalty.

Jane Bettle, for Complainant.
Respondent. Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and/or vegetables from the Dominican Republic into the United States (7 C.F.R. §§ 319.15 & 319.56 *et seq.*) (hereinafter referred to as the regulations), in

accordance with the Rules of Practice in 7 C.F.R. § 380.1 *et seq.*, and 7 C.F.R. §§ 1.130 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165, and 167)(Acts), and the regulations promulgated thereunder, by a complaint filed on October 24, 1995, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about November 21, 1994, at Jamaica, New York, respondent imported 3 jaguas from the Dominican Republic into the United States in violation of 7 C.F.R. § 319.56 *et seq.* because the importation of jaguas from all foreign countries is prohibited. Also, on or about November 21, 1994, at Jamaica, New York, respondent imported two (2) pounds of sugarcane from the Dominican Republic into the United States in violation of 7 C.F.R. § 319.15 because the importation of sugarcane from all foreign countries is prohibited.

The respondent failed to file an answer within the time prescribed in 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, the failure to file a timely answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Yanet Lopez, is a person with a mailing address of [REDACTED]

(b) (6)

2. On or about November 21, 1994, at Jamaica, New York, respondent imported 3 jaguas from the Dominican Republic into the United States in violation of 7 C.F.R. § 319.56 *et seq.* because the importation of jaguas from all foreign countries is prohibited.

3. On or about November 21, 1994, at Jamaica, New York, respondent imported two (2) pounds of sugarcane from the Dominican Republic into the United States in violation of 7 C.F.R. § 319.15 because the importation of sugarcane from all foreign countries is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. §§ 319.15 & 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars (\$500.00)(\$250.00 per count)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-04.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final June 28, 1996-Editor.]

¹The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decisions in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

POTATO RESEARCH & PROMOTION ACT

**In re: LOREN SANTISTEVAN d/b/a SANTISTEVAN FARMS.
PRPA Docket No. 94-1.**

Decision and Order filed August 18, 1995.

Failure to file an answer - Failure to submit monthly reports to the National Potato Promotion Board - Failure to remit assessments for potatoes first handled in 4 reporting periods during 1990 - Cease and desist order - Civil penalty.

Tejal Mehta, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding instituted under the Potato Research and Promotion Act, as amended 7 U.S.C. §§ 2611-2627 ("Act"), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act, the Potato Research and Promotion Order, 7 C.F.R. §§ 1207.301 - 1207.366 ("Order"), and the Rules and Regulations issued pursuant to the Act, 7 C.F.R. §§ 1207.500 - 1207.546.

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130 - 1.151, were served by certified mail upon respondent Loren Santistevan on June 15, 1995. Respondent was also served with a letter of service informing him that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Loren Santistevan failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent Loren Santistevan is an individual doing business as Santistevan Farms. His current mailing address is [REDACTED]
(b) (6) [REDACTED].

2. At all times mentioned herein, respondent Loren Santistevan was a handler of potatoes, as that term is defined in the Act, 7 U.S.C. § 2612(d), and in the Plan, 7 C.F.R. § 1207.308.

3. During the period March 1, 1990, through June 30, 1990, respondent Loren Santistevan willfully violated section 310(b) of the Act [7 U.S.C. § 2619(b)], section 1207.350 of the Plan, and section 1207.513(c)(1) of the Rules and Regulations by failing to submit to the National Potato Promotion Board (the "Board") 4 monthly reports due in 1990.

4. During the period March 1, 1990, through June 30, 1990, respondent Loren Santistevan willfully violated section 310(a) of the Act [7 U.S.C. § 2619(a)], section 1207.342 of the Plan, and section 1207.513(c)(1) of the Rules and Regulations by failing to remit assessments for potatoes first handled in 4 reporting periods during 1990 as required.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated section 310 (a) and (b) of the Act, (7 U.S.C. § 2619 (a) and (b)), sections 1207.350 and 1207.342 of the Plan (7 C.F.R. §§ 1207.350 and 1207.342), and section 1207.512(c)(1) of the rules and regulations (7 C.F.R. § 1207.512(c)(1)).
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent Loren Santistevan, his agents and employees, directly or through any corporate or other device, shall comply with each and every provision of the Potato Research and Promotion Act and the Order and Regulations issued thereunder, shall cease and desist from any violation thereof; and, specifically, shall file handler reports as required by 7 U.S.C. § 2619(b)], section 1207.350 of the Plan, and section 1207.513(c)(1) of the Regulations, pay all assessments due under 7 U.S.C. § 2619(a)], section 1207.342 of the Plan,

and section 1207.513(c)(1) of the Rules and Regulations and shall file all future reports and pay all future assessments as required by those sections.

2. The respondents are assessed a civil penalty of five thousand dollars (\$ 3,000.00) which shall be paid by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 4, 1996.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Panoche Creek Packing Corporation. AMAA Docket No. 96-2. 5/3/96.

Panoche Creek Packing Corporation. 94 AMA Docket No. F&V 981-6. 5/3/96.

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Don E. Bridges. A.Q. Docket No. 95-2. 2/20/96.

Richard Smyer. A.Q. Docket No. 94-39. 2/22/96.

Murphy Farms, Inc. A.Q. Docket No. 95-45. 2/29/96.

T.R. Green. A.Q. Docket No. 96-05. 2/29/96.

Lawrence Bishop. A.Q. Docket No. 96-08. 3/20/96.

Avco Meat Company. A.Q. Docket No. 95-45. 4/5/96.

Robert Robben. A.Q. Docket No. 95-27. 4/24/96.

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Santa's Pet Farm, Inc., and Francis R. Mercier. AWA Docket No. 95-82. 2/21/96.

Deer Acres, Inc. and Rodger L. Cederberg. AWA Docket No. 95-51. 2/27/96.

Arda E. Lee, d/b/a Hidden Hollow Park. AWA Docket No. 96-08. 2/27/96.

George A. Rilling and Stone Mountain Game Ranch, Inc. d/b/a Yellow River Game Ranch. AWA Docket No. 95-66. 2/28/96.

Arashiyama West Primate Center/South Texas Primate Observatory, Lou Griffin, and Tracy Wyman. AWA Docket No. 95-64. 2/29/96.

Bruce Trammell and Nancy Trammell d/b/a Trammell Trail Treasures. AWA Docket No. 95-68. 3/1/96.

John D. Davenport d/b/a King Royal Circus. AWA Docket No. 96-18. 3/4/96.

State University of New York at Buffalo. AWA Docket No. 96-10. 3/11/96.

Gregory W. Fedechko, Anne Fedechko, and South Jersey Biological Farm, Inc.. AWA Docket No. 95-39. 3/12/96.

Bradley Bachman and Wanda Bachman. AWA Docket No. 95-62. 4/15/96.

John F. Cuneo and The Hawthorn Corp. AWA Docket No. 96-11. 5/7/96.

Northwest Airlines, Inc. AWA Docket No. 95-05. 5/8/96.

Jim Hughes and Sue Hughes, d/b/a Do-Bo-Tri Kennels. AWA Docket No. 95-58. 5/8/96.

City of Crossett d/b/a Crossland Zoo. AWA Docket No. 96-39. 5/21/96.

Dave Knight. AWA Docket No. 95-43. 6/12/96.

Robert Vader and Linda Vader, d/b/a Vader's Bunny and Pets. AWA Docket No. 96-23. 6/13/96.

The Coulston Foundation. AWA Docket No. 95-65. 6/14/96.

Bela Tabak. AWA Docket No. 96-17. 6/14/96.

Nancy Kutz d/b/a Kutz's Kountry Kennel. AWA Docket No. 95-46. 6/19/96.

Lorin Womack, d/b/a Land O'Lorin Exotics. AWA Docket No. 95-32. 6/19/96.

Norman Trosper, d/b/a Dawg Gone Kennel. AWA Docket No. 96-32. 6/25/96.

New York University Medical Center. AWA Docket Nos. 95-36 and 96-42. 6/28/96.

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C.D. Moyer Company, Freda Corporation, Kohler Delicatessen Meats, Inc., and Matthew JA. Guiffrida. FMIA Docket No. 93-2/PPIA Docket No. 93-1. 3/20/96.

Velasam Veal Connection, Simon Samson, Gordon Durier, and Douglas Achterberg. FMIA Docket No. 96-6/PPIA Docket No. 96-5. 3/26/96.

Norfolk Packing Company, Inc., also d/b/a J.S. Bell, Jr. & Company, Div., and Jack Cohen. FMIA Docket No. 95-6/PPIA Docket No. 95-5. 3/28/96.

HORSE PROTECTION ACT

Brian Reece. HPA Docket No. 92-34. 3/14/96.

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Farmington Foods, Inc. I & G Docket No. 96-0001. 6/27/96.

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American Airlines, Inc. P.Q. Docket No. 96-02. 2/5/96.

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American Airlines, Inc. P.Q. Docket No. 96-17. 4/2/96.

Tonya Anstett. P.Q. Docket No. 96-19. 4/2/96.

Farias & Farias, Inc. P.Q. Docket No. 95-51. 4/3/96.

American Airlines. P.Q. Docket No. 96-20. 5/15/96.

Bihari Lall and Ramela Trading Inc. P.Q. Docket No. 95-26. 5/17/96.

Valentin Garcia. P.Q. Docket No. 96-12. 5/17/96.

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AGRICULTURE DECISIONS

Volume 55

**January - June 1996
Part Two (P&S)
Pages 429 - 505**



**THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE**

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Direct all inquiries regarding this publication to: Editors, Agriculture Decisions, Hearing Clerk Unit, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443.

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PACKERS AND STOCKYARDS ACT

COURT DECISION

SAMUEL J. DALESSIO, JR., DOUGLAS S. DALESSIO, d/b/a INDIANA FARMERS LIVESTOCK MARKET, INC. v. SECRETARY OF AGRICULTURE.

No. 95-3266.

Filed February 6, 1996.

**UNITED STATES COURT OF APPEALS
THIRD CIRCUIT**

The United States Court of Appeals for the Third Circuit affirmed the Secretary's decision.

The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Third Circuit provides by rule for the reporting of opinions having "precedential or institutional value. An opinion which appears to have value only to the trial court or the parties is ordinarily not published." The Federal Reporter tables are prepared from lists of cases terminated by judgment orders, unpublished per curiam opinions and unpublished signed opinions, indicating the disposition of each case, transmitted by the Court. Third Circuit Rules, App. 1, Internal Operating Procedures, Ch. 5, sec. 5.1, 28 U.S.C.A.

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

In re: SMITHFIELD LIVESTOCK AUCTION, INC., LEROY DEL HOLMGREN, WAYNE NORMAN and KAREN JACKSON.

P&S Docket No. D-95-43.

Decision and Order filed November 29, 1995.

Stipulated facts - Failure to maintain and use properly a custodial account - Alter ego - Existence of line of credit no defense to custodial account violation - Sufficient funds necessary without regard to collection of receivables - Cease and desist order - Civil penalty.

Judge Bernstein issued a cease and desist order and imposed a \$7,000 civil penalty. Complainant and Respondents stipulated that the corporate Respondent, under the direction, management and control of individual Respondents, failed to maintain and use properly its custodial account and that individual Respondents were the alter ego of corporate Respondent. Respondents' delays in securing funds from a bond and from receivables and a bank's failure to honor a line of credit to cover Respondents' overdrafts are no defenses to Respondents' custodial account violations.

Andrew Y. Stanton, for Complainant.

N. George Daines, Logan, UT, for Respondents.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), (the "Act"), and the regulations promulgated pursuant to the Act (9 C.F.R. § 201.1 *et seq.*). A Complaint was filed on June 7, 1995, by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the corporate Respondent, under the direction, management and control of the individual Respondents, wilfully violated the Act and the regulations by failing to maintain and use properly its Custodial Account for Shippers' Proceeds, thereby endangering the faithful and prompt accounting and payments of the portions due the owners or consignors of livestock.

Respondents did not file timely Answers and on August 9, 1995, Complainant filed a motion for a decision without hearing by reason of default. On August 9, 1995, Respondents filed a proposed Answer in which they admitted that they technically violated the Act and regulations. On August 14, 1995, Complainant filed an objection to Respondents' proposed Answer. In a September 14, 1995, telephone conference, I stated that I would

reserve ruling on Complainant's motion for a decision and if the parties could file stipulations of fact and proposed findings of fact, conclusions and orders, I would decide the sole issue of sanction based upon such submissions. The parties filed their agreed upon stipulations of fact and they filed proposed findings of fact, proposed conclusions of law, and briefs on November 15 and 16, 1995. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence. In addition, Respondents filed a document of alleged mitigating facts.

As agreed by the parties, the sole issue is one of sanction which will be determined upon consideration of the findings of fact and the applicable law.

Pertinent Statutory and Regulatory Provisions

Section 312 of the Act (7 U.S.C. § 213):

- (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.
- (b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty.

by an action in the appropriate district court of the United States.

Section 201.42 of the regulations (9 C.F.R. § 201.42):

- (a) *Payments for livestock are trust funds.* Each payment that a livestock buyer makes to a market agency selling on commission is a trust fund. Funds deposited in custodial accounts are also trust funds.
- (b) *Custodial accounts for shippers' proceeds.* Every market agency engaged in selling livestock on a commission or agency basis shall establish and maintain a separate bank account designated as "Custodial Account for Shippers' Proceeds," or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.
- (c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business banking day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.
- (d) *Withdrawals from custodial accounts.* The custodial account for shipper's proceeds shall be drawn on only for payment of (1) net proceeds to the consignor or shipper, or to any person that the market agency knows is entitled to payment, (2) to pay lawful charges against the consignment of livestock which the market agency shall, in its capacity as agent, be required to pay, and (3) to obtain any sums due the market agency as compensation for its services.
- (e) *Accounts and records.* Each market agency shall keep such accounts and records as will disclose at all times the handling of

funds in such custodial accounts for shippers' proceeds. Accounts and records must at all times disclose the name of consignors and the amount due and payable to each from funds in the custodial account for shippers' proceeds.

(f) *Insured banks.* Such custodial accounts for shippers' proceeds must be established and maintained in banks whose deposits are insured by the Federal Deposit Insurance Corporation.

(g) *Certificates of deposit and/or savings accounts.* Funds in a custodial account for shippers' proceeds may be maintained in an interest-bearing savings account and/or invested in one or more certificates of deposit, to the extent that such deposit or investment does not impair the ability of the market agency to meet its obligations to its consignors. The savings account must be properly designated as a part of the custodial account of the market agency in its fiduciary capacity as trustee of the custodial funds and maintained in the same bank as the custodial account. The certificates of deposit, as property of the custodial account, must be issued by the bank in which the custodial account is kept and must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

Findings of Fact

The parties stipulated and I find:

1. Respondent, Smithfield Livestock Auction, Inc. (the "corporate Respondent"), is a Utah corporation whose business mailing address is 711 South 100 West, Smithfield, Utah 84335.
2. The corporate Respondent was at all times material:
 - a. Engaged in the business of operating the Smithfield Livestock Auction, Inc., a posted stockyard subject to the provisions of the Act,
 - b. Engaged in the business of a market agency selling livestock on a commission basis; and
 - c. Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis and furnish stockyard services.
3. Respondent, LeRoy Del Holmgren, is an individual whose business mailing address is 711 South 100 West, Smithfield, Utah 84335.
4. Respondent Holmgren was at all times material:

PACKERS AND STOCKYARDS ACT

a. President and owner of 25 percent of the stock of the corporate Respondent; and

b. Responsible for the direction, management and control of the corporate Respondent.

5. Respondent, Wayne Norman, is an individual whose business mailing address is 711 South 100 West, Smithfield, Utah 84335.

6. Respondent Norman was at all times material:

a. Vice-president and owner of 25 percent of the stock of the corporate Respondent; and

b. Responsible for the direction, management and control of the corporate Respondent.

7. Respondent, Karen Jackson, is an individual whose business mailing address is 711 South 100 West, Smithfield, Utah 84335.

8. Respondent Jackson was at all times material:

a. Secretary/treasurer and owner of 25 percent of the stock of the corporate Respondent; and

b. Responsible for the direction, management and control of the corporate Respondent.

9. The corporate Respondent, under the direction, management and control of the individual Respondents, during the period April 30, 1994, through June 15, 1994, failed to maintain and use properly its Custodial Account for Shippers' Proceeds (the "custodial account"), in that:

a. As of April 30, 1994, the corporate Respondent had outstanding checks drawn on the custodial account in the amount of \$307,764.61, and had, to offset those checks, a balance in the account in the amount of \$94,408.89, no deposits in transit and current proceeds receivable in the amount of \$121,125.70, resulting in a deficiency of \$92,230.02 in funds available to pay shippers' proceeds.

b. As of May 31, 1994, the corporate Respondent had outstanding checks drawn on the custodial account in the amount of \$157,068.71 and a negative balance in the account in the amount of \$38,073.35, and had, to offset such amounts, deposits in transit in the amount of \$89,854.86, and current proceeds receivable in the amount of \$37,480.13, resulting in a deficiency of \$67,807.07 in funds available to pay shippers' proceeds.

c. As of June 13, 1994, the corporate Respondent had outstanding checks drawn on the custodial account in the amount of \$144,845.40, and had, to offset those checks, a balance in the account in the amount of \$12,575.62, no deposits in transit and current proceeds receivable in the amount of

\$65,196.85, resulting in a deficiency of \$67,062.93 in funds available to pay shippers' proceeds.

d. As of June 15, 1994, the corporate Respondent had outstanding checks drawn on the custodial account in the amount of \$144,845.40, and had, to offset those checks, a balance in the account in the amount of \$93,411.02, no deposits in transit and current proceeds receivable in the amount of \$11,183.50, resulting in a deficiency of \$40,250.88 in funds available to pay shippers' proceeds.

e. Such deficiencies were caused, in part, by the failure of the corporate Respondent, under the direction, management and control of the individual Respondents, to deposit in the custodial account, within the time prescribed in section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), amounts equal to the proceeds receivable from the sale of consigned livestock.

f. Further, the corporate Respondent, under the direction, management and control of the individual Respondents, failed to properly designate the custodial account and failed to reimburse the custodial account in amounts equal to the proceeds receivable from the sale of livestock due from the corporate Respondent, Respondent Holmgren and buyers to whom the corporate Respondent had extended credit.

10. The actions of Respondents were in violation of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)), and section 201.42 of the regulations issued pursuant to the Act (9 C.F.R. § 201.42).

11. In a certified letter dated March 5, 1991, and received by Respondent Holmgren and the corporate Respondent, Complainant advised that a review of the corporate Respondent's custodial account revealed that the account was short \$4,909.68 due to the failure of the corporate Respondent to fully reimburse the custodial account for accounts receivable. The shortage was also due to withdrawals from the custodial account which exceeded the amount of funds due to the corporate Respondent for services. Respondent Holmgren and the corporate Respondent were also advised that full and complete records of funds due the corporate Respondent as compensation for its services and accounts receivable due the corporate Respondent were not being maintained.

12. The corporate Respondent has submitted an annual report to Complainant, dated May 15, 1995, covering the year ending December 31, 1994. The May 15, 1995, annual report shall be considered part of the evidence (Exhibit 1).

Respondents have alleged additional mitigating facts. Complainant disputes these assertions on the basis that Complainant has no knowledge

about those facts. Since it was agreed that my findings would be based upon only stipulated facts, I am unable to accept Respondents' alleged mitigating facts as a basis for findings of fact.

Conclusions

1. **The corporate Respondent, under the direction, management and control of the individual Respondents, during the period April 30, 1994, through June 15, 1994, failed to maintain and use properly its custodial account, in violation of the Act and Regulations.**

Respondents have failed to maintain and use properly the custodial account of the corporate Respondent. Respondents admit that their actions violated section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42) (Finding 10).

Every market agency subject to the Packers and Stockyards Act is required to establish and properly maintain a custodial account (9 C.F.R. § 201.42(b)). The custodial account is a fiduciary account which is designed to hold trust proceeds that a market agency collects from the sale of livestock consigned to it for sale on a commission basis. Section 201.42(c) prescribes the manner in which a market agency is to make deposits into the custodial account and otherwise maintain the custodial account.

Respondents failed to properly maintain the corporate Respondent's custodial account on four different occasions, April 30, 1994, May 31, 1994, June 13, 1994, and June 15, 1994. The custodial account was out of balance, reflecting deficiencies of \$92,230.02, \$67,807.07, \$67,062.93, and \$40,250.88, respectively, in funds available to pay shippers' proceeds (Findings 9a, b, c and d). These deficiencies were caused, in part, by the failure of Respondents to deposit in the custodial account, within the time prescribed in section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), amounts equal to the proceeds receivable from the sale of consigned livestock (Finding 9e).

Further, Respondents misused the custodial account, as they failed to properly designate the custodial account and failed to reimburse the custodial account in amounts equal to the proceeds receivable from the sale of livestock due from the corporate Respondent, Respondent Holmgren and buyers to whom the corporate Respondent had extended credit (Finding 9f).

It has been consistently held by the Department, and upheld by the Courts, that the improper handling and use of the custodial account, in contravention of the requirements of section 201.42 of the regulations, is a

violation of section 312(a) of the Act (7 U.S.C. § 213(a)). It has also been held that shortages found to exist in the custodial account and the failure to properly use and maintain the custodial account are unfair and deceptive practices in violation of Section 312(a) of the Act. *In re Farmers and Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Thumb Auction Markets, Inc.*, 37 Agric. Dec. 164 (1977); *In re Smithfield Livestock Market, Inc.*, 36 Agric. Dec. 1546 (1977); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522 (1977); *In re James J. Miller*, 33 Agric. Dec. 53, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *In re Bowman*, 23 Agric. Dec. 1074 (1964), *aff'd*, *Bowman v. United States Dep't of Agric.*, 363 F.2d 81 (5th Cir. 1966).

A significant aggravating factor in this case is that Respondents were aware of the importance of the proper use and maintenance of the custodial account. In a certified letter dated March 5, 1991, and received by Respondent Holmgren and the corporate Respondent, Complainant advised that a review of the corporate Respondent's custodial account revealed that the account was short \$4,909.68 due to the failure of the corporate Respondent to fully reimburse the custodial account for accounts receivable. The shortage was also due to withdrawals from the custodial account which exceeded the amount of funds due to the corporate Respondent for services. Respondent Holmgren and the corporate Respondent were also advised that full and complete records of funds due the corporate Respondent as compensation for its services and accounts receivable due the corporate Respondent were not being maintained (Finding 11).

Despite receiving prior notice of problems with the corporate Respondent's custodial account, Respondents have again failed to maintain and use properly the corporate Respondent's custodial account, in violation of the Act and regulations.

2. The individual Respondents were the alter egos of the corporate Respondent.

The parties have stipulated that, at all times material herein, Respondent Holmgren was the president and 25 percent owner of the corporate Respondent (Finding 4a), Respondent Norman was vice-president and 25 percent owner of the corporate Respondent (Finding 6a), and Respondent Jackson was secretary/treasurer and 25 percent owner of the corporate Respondent (Finding 8a). The parties have also stipulated that, at all times

PACKERS AND STOCKYARDS ACT

material, the individual Respondents were responsible for the direction, management and control of the corporate Respondent (Findings 4b, 6b and 8b). Therefore, the individual Respondents were the alter egos of the corporate Respondent.

The law is clear that in cases under the Packers and Stockyards Act, "[t]he corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute." *Bruhn's Freezer Meats v. United States Dep't of Agric.*, 438 F.2d 1332, 1343 (3d Cir. 1971). See also *Van Wyck v. Bergland*, 570 F.2d 701, 705 (1978); *In re Fowler Livestock Auction, Inc.*, 52 Agric. Dec. 558, 571 (1993); *In re Sebastopol Meat Company, Inc.*, 28 Agric. Dec. 435, 441 (1969). In this case, the individual Respondents admittedly directed, managed and controlled the corporate Respondent and are thus responsible for the violations.

3. The proper sanction in this case is a cease and desist order and a \$7,000.00 civil penalty.

Complainant argues that the appropriate sanction in this case is a cease and desist order and a \$7,000.00 civil penalty. Complainant's sanction recommendation is based on the nature of the violations committed by Respondents, the remedial purposes of the Act and relevant circumstances, including the aggravating factor that Respondents were previously notified of problems with the maintenance and use of the corporate Respondent's custodial account in a certified letter dated March 5, 1991. Respondents, therefore, knew the importance of properly maintaining and using the corporate Respondent's custodial account but chose not to do so. Further, there is no stipulated finding or even allegation that Respondents are not able to pay a \$7,000 civil penalty, pursuant to section 312(b) of the Act (7 U.S.C. § 213(b)).

The sanction sought by Complainant complies with the Judicial Officer's sanction policy set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991):

The sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondents' failure to maintain and use properly its custodial account exposes its consignors to great risk. As stated in *In re Danny Cobb and Crockett Livestock Sales Co., Inc.*, 48 Agric. Dec. 234, 256 (1989), "the custodial account is a trust account which is a conduit for funds received from the sale of consignors' livestock. When properly designated, as required, such funds are protected from attachment by creditors and each consignor is further protected by the insurance coverage of the Federal Deposit Insurance Corporation." The consignors were not adequately protected in this case due to Respondents' violations.

Respondents' alleged mitigating facts fall into six basic categories: (1) the corporate Respondent and its bank, the First Bank of Commerce, North Logan, Utah, had an informal agreement that the bank would pay overdrafts, and there is now a formal agreement to this effect; (2) when the corporate Respondent received a bad check from Todd Davis, Complainant requested that the corporate Respondent proceed against the bond, but there was a five and one-half month delay in obtaining the bond money which Respondents allege was caused by Complainant; (3) the deficiencies in the custodial account occurred because receivables owed to the corporate Respondent were delayed beyond seven days; (4) that the corporate Respondent has never had a check returned to any seller for insufficient funds; (5) the violations were corrected during the examination and (6) no one was harmed by the violations. Since these were not stipulated to, I am unable to base my decision upon these allegations. However, even if I found these to be the case, my decision would not be changed.

Assuming, *arguendo*, that the corporate Respondent did have an informal agreement to pay overdrafts with the First Bank of Commerce and currently has a formal line of credit, this is not a legally adequate defense to Respondents' violations. It has been held in many decisions under the Act that the existence of a line of credit, informal or formal, is no defense to payment or custodial account violations because it provides no security to the unpaid livestock sellers. If the bank, lawfully or unlawfully, terminates the line of credit or fails, the sellers will have no recourse. *In re Jeff Palmer d/b/a Palmer Cattle Company*, 50 Agric. Dec. 1762 (1991); *In re Ozark County Cattle Company, Inc.*, 49 Agric. Dec. 336 (1990); *In re Richard N. Garver*, 45 Agric. Dec. 1090 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988). As stated in *Garver*, *id.* at 1094-1095 (1986):

Respondent . . . argues that his relationship with his bank and the over-draft protection the bank extended to him demonstrate that he

did not wilfully engage in the practices in violation of the Act. However, the unilateral termination by the bank of the respondent's over-draft protection demonstrates precisely why such arrangement cannot insulate a livestock buyer from accountability under the Act. It gives no protection to the sellers of livestock. Respondent's awareness or state of mind at the time the bad checks were issued is of no consequence.

A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. Despite Mr. Garver's longstanding and friendly relationship with his bank, his bank lawfully and unilaterally terminated his over-draft protection without notice. Similarly, over-draft protection would be of no value if respondent's bank were to fail. As stated in *In re Thumb Auction Markets, Inc.*, 37 A.D. 164, 167-168 (1977). "Such protection fails to fulfill respondent's obligation under statutory and regulatory requirements"

Decisions under the Act and regulations have established that a line of credit or over-draft protection extended by a bank is of no defense to a charge of insolvency or custodial account violations. *In re Thumb Auction Markets, Inc., supra*; *In re Hugh B. Powell*, 41 A.D. 1354, 1360 (1982); *In re Sechrist Sales Co.*, 36 A.D. 665, 668, 670-75 (1977); *In re Harry Hardy*, 33 A.D. 1383, 1401 (1974). Similarly, over-draft protection cannot be a defense to a charge of issuing insufficient funds checks.

The lack of protection afforded livestock sellers by the existence of a line of credit was discussed in *In re Harry C. Hardy*, 33 Agric. Dec. 1383, 1401 (1974):

The existence of a line of credit under which the bank agrees to honor a check notwithstanding the absence of funds in the account is not as much protection to consignors as cash in the account. The line of credit could be immediately withdrawn in the event of a sudden business failure by the respondents. In these times, sudden and unexpected business failures have occurred, not only in the livestock industry, but in many other industries. In addition, a line

of credit would be of no value if the bank extending the line of credit failed.

Similarly, in the case at hand, Respondents' consignors should not have been placed in a position where they were compelled to rely on Respondents' informal credit line with the First Bank of Commerce, which the bank apparently elected not to honor. This is not a mitigating circumstance to Respondents' custodial account violations.

Respondents' argument that Complainant is responsible for a five and one-half month delay in recovering funds from the bond of Todd Davis, a customer of the corporate Respondent, is based on a misunderstanding of the Act and regulations. Section 201.29 of the regulations (9 C.F.R. § 201.29) requires that an appropriate bond be maintained by every market agency, packer and dealer, except packers whose annual purchases do not exceed \$500,000.00 and packer buyers registered as dealers to purchase livestock for slaughter only. Section 201.33 of the regulations (9 C.F.R. § 201.33) requires that the bonds contain provisions regarding claims for recovery made on such bonds. However, neither the Act nor the regulations state anywhere that it is the responsibility of Complainant, Packers and Stockyards Programs, to make the claim for recovery on behalf of the aggrieved party. Respondents' contention that Complainant is somehow responsible for the alleged delay in recovery on the bond is, therefore, baseless.

Respondents' claim that the deficiencies in the custodial account occurred because receivables owed to the corporate Respondent were delayed beyond seven days is not a mitigating circumstance. Section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)) states that the market agency shall

deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

Therefore, it was Respondents' duty to ensure that, within seven days from the sale of the livestock, the custodial account contained sufficient funds to pay the consignor, whether or not Respondent had collected all proceeds receivable by that time. By conducting business as a market agency subject to the Act, Respondents elected to comply with the requirement set forth in section 201.42(c) to provide sufficient funds in the custodial account, without

regard to the collection of receivables. The alleged untimely collection of receivables is no excuse for Respondents' violations.

Further, Respondents' claim that it could not maintain its custodial account because of the failure to collect its receivables in a timely fashion demonstrates the domino effect created by the failure to comply with the Act's custodial obligations. Respondents should not have been buying on commission if they could not conform to the custodial account requirements of the Act.

Finally, although I am unable to find, as Respondents allege, that the corporate Respondent has never had a check returned for insufficient funds, Respondents have admitted that, prior to these custodial violations, the corporate Respondent and Respondent Holmgren were notified by Complainant in a certified letter dated March 5, 1991, that they were not properly maintaining the custodial account (Finding 11). This is an aggravating factor.

Upon consideration of the foregoing, I conclude that the issuance of a cease and desist order and a \$7,000.00 civil penalty constitute an appropriate sanction.

Order

Respondent Smithfield Livestock Auction, Inc., its officers, directors, agents, employees, successors and assigns, Respondent LeRoy Del Holmgren, Respondent Wayne Norman and Respondent Karen Jackson, individually or through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from:

1. Failing to deposit in the corporate Respondent's "Custodial Account for Shippers' Proceeds" within the time prescribed by section 201.42 of the regulations (9 C.F.R. § 201.42) an amount equal to the proceeds receivable from the sale of consigned livestock; and

2. Failing to maintain its "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42).

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondents are jointly and severally assessed a civil penalty of \$7,000.00.

This Decision and Order will become final and effective without further proceedings 35 days after service upon Respondents, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final January 10, 1996.-Editor].

In re: JEREMY BYRD, d/b/a T BYRD CATTLE CO.

P&S Docket No. D-95-55.

Decision and Order filed February 21, 1996.

Cease and desist order — Registration order — NSF checks — Failing to pay — Failing to pay when due — Engaging in business without being registered or bonded — Failure to file timely answer — P&S sanctions permitted notwithstanding bankruptcy — Sanction.

The Judicial Officer affirmed the decision by Chief Judge Palmer (Chief ALJ) ordering Respondent to cease and desist from engaging in business in any capacity without the required registration and bonding under the Act; failing to pay for livestock; failing to pay, when due, for livestock; and issuing NSF checks in payment for livestock. The Order prohibits Respondent from engaging in business subject to the Act without being registered, and provides that Respondent shall not be registered to engage in business for 5 years and thereafter until properly registered and bonded; provided, however, that upon application, a supplemental order may be issued allowing Respondent registration and bonding after 150 days upon demonstration that all unpaid livestock sellers have been paid in full, and provided further, that the Order may be modified to permit Respondent's salaried employment by another registrant or packer after 150 days. Respondent failed to file a timely Answer, and, therefore, a default order was properly issued. The Bankruptcy Code permits disciplinary proceedings and the imposition of sanctions under the Packers and Stockyards Act notwithstanding bankruptcy. The sanction imposed is appropriate, based upon similar sanctions in similar disciplinary proceedings under the Packers and Stockyards Act, considering the serious nature of the violations.

Kimberly D. Hart, for Complainant.

Hal B. Cameron, Jr., Tyler, Texas, for Respondent.

Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, (7 U.S.C. § 181 *et seq.*) (Act). An Initial Decision Without Hearing By Reason of Default was filed on December 4, 1995, by Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) ordering that Respondent cease and desist from: (1) Engaging in any business for which registration and bonding are required under the Act and regulations issued under the Act, (9 C.F.R. § 201.1 *et seq.*), without so registering and filing adequate bond or its equivalent; (2) Failing to pay for livestock; (3) Failing to pay, when due, for livestock; and (4) Issuing NSF checks in payment for livestock; and that Respondent not be registered to engage in business subject to the Act for 5 years and thereafter until Respondent is properly registered and bonded. The Chief ALJ's Order provides, however, that, upon application, a supplemental order may be issued allowing Respondent to register and obtain a bond or its equivalent after 150

days if Respondent has paid all livestock sellers in full, and provides further, that, upon application, Respondent may be permitted salaried employment by another registrant or packer after the initial 150 days.

On December 18, 1995, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)¹ The Respondent filed a First Amended Notice of Appeal and a Second Amended Notice of Appeal on December 18, 1995, and December 28, 1995, respectively. On January 25, 1996, Complainant filed a Response to Respondent's Appeal, and on January 26, 1996, the case was referred to the Judicial Officer for decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit, (7 C.F.R. § 1.145(d)), is refused because the issues are not complex and are controlled by established precedents, and, thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusions.

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint filed by the Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, charging that the Respondent willfully violated the Act and the regulations promulgated under the Act.

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

Copies of the Complaint and the Rules of Practice, (7 C.F.R. § 1.130 *et seq.*), governing proceedings under the Act were [sent to] Respondent by certified mail[, but the letter containing these documents was returned marked by the United States Postal Service as "Unclaimed." The Complaint was then remailed to the Respondent by ordinary mail on October 2, 1995, and under the applicable Rules of Practice, (7 C.F.R. § 1.147(c)(1)), was deemed received by the Respondent on the date of remailing.] Respondent was informed in [the Complaint] that an Answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint.

Respondent failed to file an Answer within the time prescribed in the Rules of Practice which ended on October 2[3], 1995. [On November 2, 1995, in accordance with the applicable Rules of Practice, (7 C.F.R. § 1.139), Complainant filed a motion for adoption of a proposed decision and a proposed decision based upon Respondent's failure to file an Answer within the time prescribed by the applicable Rules of Practice. (7 C.F.R. § 1.136(a).)] Instead [of filing an Answer or responding to Complainant's motion for adoption of a proposed decision, Respondent filed] a Suggestion of Bankruptcy on November 6, 1995, followed by a Corrected Suggestion of Bankruptcy filed on November 14, 1995. On November 2[2], 1995, an Answer was finally filed by Respondent. Although the late-filed Answer does generally deny the allegations of the Complaint, it . . . asserts bankruptcy as a bar to the Complaint. On November 30, 1995, Complainant filed a response to Respondent's Notice of Bankruptcy Filing. [In that response, Complainant identified] the statutory authorities and the case law which preclude bankruptcy being a bar to this proceeding . . . [and] requested that the Answer tendered by Respondent should not be accepted as timely filed. 7 C.F.R. § 1.136(c) states that failure to file an Answer within the time provided shall be considered a default and deemed an admission of the allegations in the Complaint. Extension of time for filing may be ordered by a Judge if there is good reason for it and after a notice of the request for the extension has been given to the other party. (7 C.F.R. § 1.147([f])). Respondent has not given any reason why the time for the filing of the Answer should have been extended, and, therefore, the tendered Answer will not be treated as timely filed. Therefore, the material facts alleged in the Complaint, which are admitted by Respondent's default, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice. (7 C.F.R. § 1.139.)

Findings of Fact

1. (a) Jeremy Byrd, hereinafter referred to as Respondent . . . , is an individual doing business as T Byrd Cattle Co., whose mailing address is P█.
(b) (6) ██████████, ██████████, ██████████.

(b) The Respondent, at all times material herein, was engaged in the business of a dealer buying and selling livestock in commerce for his own account.

(c) The Respondent, at all times material herein, was not registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent . . . was placed on notice by certified mail dated June 7, 1994, and July 6, 1994, that he was operating as a dealer subject to the Act and that, if he continued such operations, he would need to register and obtain adequate bond coverage. Notwithstanding such notice, Respondent has continued to engage in the business of a dealer subject to the Act without registering with the Secretary of Agriculture and obtaining an adequate bond or its equivalent.

3. (a) The Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III(a) of the Complaint, purchased livestock and in purported payment issued checks which were returned unpaid by the bank upon which they were drawn because Respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions listed in paragraph III(a) of the Complaint, and in the transaction set forth in paragraph III(b) of the Complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of August 1, 1995, there remained unpaid a total of \$141,444.69 for such livestock purchases.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the Respondent has willfully violated sections 201.29 and 201.30 of the regulations. (9 C.F.R. §§ 201.29-30.)

By reason of the facts found in Finding of Fact 3 herein, the Respondent has willfully violated sections 312(a) and 409 of the Act. (7 U.S.C. §§ 213(a), 228b.)

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues on appeal. First, Respondent denies that he was told that an Answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all material facts contained in the Complaint. (Respondent's Second Amended Notice of Appeal, p. 1, ¶ I; hereafter RA.) Second, Respondent contends that "he was out of the state working and although the Notice was received by someone at his residence, he did not learn of the contents of this letter until he returned to Grapeland, Texas on November 1, 1995." (RA, p. 1, ¶ II.) These facts, which are set forth for the first time on appeal, come too late. Complainant's proposed decision and motion for adoption of a proposed decision was filed on November 2, 1995, and served on Respondent on November 6, 1995. In accordance with the applicable Rules of Practice, (7 C.F.R. § 1.139), Respondent had 20 days after service of Complainant's motion for a proposed decision in which to file objections to the motion. The letter transmitting Complainant's motion to Respondent informed Respondent of this 20-day time limit. Respondent had an opportunity to raise the facts set forth in RA, p. 1, ¶ I and ¶ II, in response to Complainant's motion for adoption of a proposed decision, but Respondent chose not to file a response to Complainant's motion. Instead, Respondent filed a Suggestion of Bankruptcy on November 6, 1995, a Corrected Suggestion of Bankruptcy on November 14, 1995, and an untimely Answer on November 22, 1995, none of which assert the facts set forth in RA, p. 1, ¶ I and ¶ II. On appeal, Respondent, for the first time, asserts the facts in RA, p. 1, ¶ I and ¶ II.² It is well settled that

²The facts asserted in RA, p. 1, ¶ I, are also asserted in Respondent's Notice of Appeal and First Amended Notice of Appeal. The facts asserted in RA, p. 1, ¶ II, are also asserted in Respondent's First Amended Notice of Appeal.

Respondent cannot raise new issues on appeal or present new facts for the first time on appeal to the Judicial Officer.³

Nonetheless, I will address the newly raised issues in RA, p. 1, ¶ I and ¶ II, and show that those arguments would not have changed the outcome of this case. Copies of the Complaint and applicable Rules of Practice, (7 C.F.R. § 1.130 *et seq.*), were sent to Respondent by certified mail, but the letter containing these documents was returned marked by the United States Postal Service as "Unclaimed." The Complaint was then remailed to the Respondent by ordinary mail on October 2, 1995, and under the applicable Rules of Practice, (7 C.F.R. § 1.147(c)(1)), was deemed received by the Respondent on the date of remailing, October 2, 1995. Respondent admits that the "Notice was received by someone at his residence," but states that it was not until November 1, 1995, that he learned of its contents. (RA, p. 1, ¶ II.)

Under the Department's Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, a Respondent's failure to file a timely Answer constitutes an admission of the allegations in the Complaint and a waiver of hearing. The Rules of Practice provide:

³*In re Bama Tomato Co.*, 54 Agric. Dec. ____ (Aug. 17, 1995), appeal docketed, No. 95-6778 (11th Cir. Sept. 26, 1995); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), aff'd in part, rev'd & remanded in part, 73 F.3d 312 (11th Cir. 1996); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), aff'd, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Petition for Reconsideration), aff'd, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), printed in 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), aff'd, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), printed in 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), aff'd, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), appeal dismissed, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), aff'd sub nom. *Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), printed in 36 Agric. Dec. 1642, aff'd, 607 F.2d 1007 (7th Cir. 1979), cert. denied, 444 U.S. 1077 (1980).

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall:

(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(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. (7 C.F.R. § 1.136(a)-(c).)

....

§ 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 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. § 1.139.)

. . . .

§ 1.141 Procedure for Hearing.

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing. (7 C.F.R. § 1.141(a).)

The Complaint served on Respondent on October 2, 1995, states: The respondent shall have twenty (20) days after receipt of this complaint in which to file with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, an answer in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. Section 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint. (Complaint, pp. 3-4.)

The Complaint clearly informs Respondent of the consequences of a failure to answer and clearly identifies the Rules of Practice applicable to the administrative proceeding instituted by the Complaint.

Respondent's Answer was due October 23, 1995, and a failure to file a timely Answer constitutes an admission of the material allegations in the Complaint. (7 C.F.R. § 1.136(a), (c).) Respondent did not file a timely

Answer.⁴ Accordingly, the default order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,⁵ Respondent has shown no basis for setting aside the default decision here.⁶

⁴Respondent filed an Answer November 22, 1995: 51 days after service of the Complaint under the applicable Rules of Practice, (7 C.F.R. § 1.147(c)(1)); between 51 and 21 days after the Complaint arrived at Respondent's residence, (RA, p. 1, ¶ II); and 21 days after Respondent contends he had actual knowledge of the contents of the Complaint, (RA, p. 1, ¶ II).

⁵*In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ, L.A.W.A.* Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and see *In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

⁶See *In re Moreno Bros.*, 54 Agric. Dec. ___ (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. ___ (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Halifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely (continued...)

The requirement in the Department's Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely Answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJ's frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year.

⁶(...continued)

Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Guiman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttome*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; respondent Carl D. Cuttome properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttome), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; respondent cannot present evidence that it is unable to pay \$54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (default order proper where timely Answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"⁷ If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

Third, Respondent contends that he filed a Suggestion of Bankruptcy on November 1, 1995, which, through a clerical error, was assigned a number of another case, which Respondent's attorney handled in 1992. This error was brought to the attention of Respondent, and, on November 8, 1995, Respondent filed a Corrected Suggestion of Bankruptcy. (RA, pp. 1-2, ¶ III.)

The facts asserted by Respondent in paragraph III of his Second Amended Notice of Appeal do not change the outcome of this case. First, neither Respondent's Suggestion of Bankruptcy nor Respondent's Corrected Suggestion of Bankruptcy deny or respond to any of the allegations in the Complaint; and, under the applicable Rules of Practice, Respondent is deemed, for the purposes of the proceeding, to have admitted the allegations in the Complaint. (7 C.F.R. § 1.136(c).) Further, even if Respondent's Suggestion of Bankruptcy or Corrected Suggestion of Bankruptcy were determined to be an Answer to the Complaint, they were untimely filed,⁸ and, under the applicable Rules of Practice, Respondent is deemed, for the purposes of the proceeding, to have admitted the allegations in the Complaint. (7 C.F.R. § 1.136(a), (c).)

Although not stated in the Suggestion of Bankruptcy, the Corrected Suggestion of Bankruptcy, Respondent's Notice of Appeal, Respondent's First Amended Notice of Appeal, or Respondent's Second Amended Notice of Appeal, Respondent's late Answer reveals that Respondent takes the position

⁷*Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); accord *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

⁸The record shows that Respondent's Suggestion of Bankruptcy was filed November 6, 1995, 35 days after service of the Complaint on Respondent; and the Corrected Suggestion of Bankruptcy was filed November 14, 1995, 43 days after service of the Complaint on Respondent.

that "any efforts to subject Respondent or his assets to this proceeding while he was in bankruptcy are void." (Answer, ¶ III.)

Respondent is incorrect. Section 362(a) of the Bankruptcy Code provides, in relevant part, that:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. . . . (11 U.S.C. § 362(a).)

Section 362(b) of the Bankruptcy Code provides, in relevant part, that:

(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay—

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. . . .
(11 U.S.C. § 362(b)(4).)

Further, section 525 of the Bankruptcy Code provides, in relevant part, that:

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for

other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. (11 U.S.C. § 525(a).)

The Secretary of Agriculture is seeking to enforce regulatory power under the Packers and Stockyards Act in this disciplinary proceeding. This proceeding clearly falls within the class of actions or proceedings described in section 362(b)(4) of the Bankruptcy Code, (11 U.S.C. § 362(b)(4)), and, therefore, is exempt from the stay provisions in section 362(a) of the Bankruptcy Code, (11 U.S.C. § 362(a)). Further, section 525(a) of the Bankruptcy Code, (11 U.S.C. § 525(a)), does not limit the Secretary of Agriculture's authority to issue a cease and desist order or refuse to register the Respondent under the Packers and Stockyards Act. *See Farmers & Ranchers Livestock Auction, Inc. v. United States (In re Farmers & Ranchers Livestock Auction, Inc.)*, 46 B.R. 781 (Bankr. E.D. Ark. 1984).

Fourth, Respondent contends that " [a]fter Respondent's Suggestion of Bankruptcy was mailed to this Court on November 1, 1995, and before Respondent learned that his Bankruptcy Petition had been dismissed on November 2, 1995, Respondent filed his Original Answer and generally denied the allegations contained in the Complaint filed by the Administrator, Texas Stockyard Administration and requested a hearing on Complainant's allegations." (RA, p. 2, ¶ IV.)

I assume that the Respondent's reference to his general denial of the allegations contained in the Complaint filed by the "Administrator, Texas Stockyard Administration," is in error and that he meant to refer to his

general denial in response to the Complaint filed in the instant case by the Deputy Administrator, Packers and Stockyards Programs, on September 1, 1995. (Complaint.)

Respondent's Answer was due October 23, 1995. Under the applicable Rules of Practice, (7 C.F.R. § 1.136(a), (c)), a failure to file a timely Answer (in the instant case within 20 days after service of the Complaint on Respondent) constitutes an admission of the allegations of the Complaint. Respondent's Answer was filed on November 22, 1995, 51 days after proper service of the Complaint in accordance with the applicable Rules of Practice, (7 C.F.R. § 1.147(c)(1)), and Respondent is deemed, for the purposes of the proceeding, to have admitted the allegations in the Complaint. Accordingly, the default order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,⁹ the facts set forth in paragraph IV of Respondent's Second Amended Notice of Appeal, (RA, p. 2, ¶ IV), do not constitute a basis for setting aside this default decision.¹⁰

An examination of other cases instituted by Packers and Stockyards Programs for similar violations reveals that similar sanctions have been imposed. See, e.g., *In re Samuel J. Dalessio, Jr.*, 54 Agric. Dec. 590, 611 (1995), *aff'd*, No. 95-3266 (3d Cir. Feb. 6, 1996) (unpublished); *In re Bruce Thomas*, 53 Agric. Dec. 1569, 1576 (1994); *In re Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511, 1530 (1993), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); *In re Jimmy Ray Hendren*, 51 Agric. Dec. 672, 675-76 (1992); *In re David H. Harris*, 51 Agric. Dec. 649, 651-52 (1992); *In re Jeff Palmer*, 50 Agric. Dec. 1762, 1773, 1790-96 (1991); *In Sam Odom*, 48 Agric. Dec. 519, 536-45 (1989); *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1097-1104 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988). The sanction imposed in this case is entirely appropriate, considering the serious nature of Respondent's violations.

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

⁹See note 5.

¹⁰See note 6.

Order

Paragraph I.

Respondent Jeremy Byrd, his agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Act, shall cease and desist from:

1. Engaging in business in any capacity for which registration and bonding is required under the Act and the regulations, without registering with the Secretary of Agriculture and filing an adequate bond or its equivalent, as required by the Act and the regulations;
2. Failing to pay the full purchase price of livestock;
3. Failing to pay, when due, the full purchase price of livestock; and
4. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

Paragraph II.

Respondent Jeremy Byrd shall not be registered to engage in business subject to the Act for a period of 5 years and thereafter until the Respondent is properly registered and bonded; *Provided, however,* That upon application to the Packers and Stockyards Programs a supplemental order may be issued allowing Respondent to register with the Secretary of Agriculture and obtain an adequate bond or its equivalent at any time after 150 days from the effective date of paragraph II of this Order upon demonstration by the Respondent that all unpaid livestock sellers have been paid in full; *And provided further,* That this Order may be modified upon application to the Packers and Stockyards Programs to permit the salaried employment of Respondent by another registrant or packer at any time after 150 days from the effective date of paragraph II this Order.

Paragraph III.

Pursuant to section 303 of the Act, (7 U.S.C. § 203), Respondent is prohibited from engaging in business subject to the Act without being registered with the Secretary of Agriculture.

Paragraph IV.

Paragraph I of this Order shall become effective on the day after service of this Order on Respondent. Paragraphs II and III of this Order shall become effective on the 30th day after service of this Order on Respondent.

In re: GREENCASTLE LIVESTOCK MARKET, INC. and JEFFREY S. CRAIG.

P&S Docket No. D-94-58.

Decision and Order filed March 22, 1996.

Civil penalty - Cease and desist order - Failure to maintain and use properly custodial account - Line of credit not acceptable alternative to custodial account or defense to account violation.

Judge Hunt issued a cease and desist order and jointly and severally assessed respondents a civil penalty of \$4,000.00. Corporate respondent Greencastle Livestock, under the direction, management, and control of respondent Jeffrey S. Craig, failed to maintain or use properly its custodial account for shippers' proceeds. Respondents did not timely deposit in custodial account an amount equal to the proceeds receivable for the sale of consigned livestock. The failure of a market agency to maintain its custodial account is an unfair and deceptive practice. A line of credit is not an acceptable alternative to a certificate of deposit and/or a savings account and is not a defense to a custodial account violation.

Julie Cook Schuster, for Complainant.

James H. Thomas, Lancaster, PA, for Respondents.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This disciplinary proceeding was instituted by a complaint filed on September 28, 1994, by the Acting Administrator, Packers and Stockyards Administration, United States Department of Agriculture, ("Department"). The complaint was brought pursuant to the Packers and Stockyards Act, 1921, as amended and supplemented, ("Act"), 7 U.S.C. § 181 *et seq.*, and the Department's Rules of Practice, 7 C.F.R. § 1.130 *et seq.*

The complaint alleges that the corporate respondent, Greencastle Livestock Market, Inc., under the direction, management and control of respondent Jeffrey S. Craig, wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42) by failing to maintain and use properly its Custodial Account for Shippers' Proceeds ("custodial account"). Respondents' answer denied that they violated the Act or regulations.

A hearing was held on November 15, 1995, in Lancaster, Pennsylvania. Complainant was represented by Julie Cook Schuster, Esq. Respondents were represented by James H. Thomas, Esq.

Facts

Respondent Greencastle Livestock Market, Inc., ("Greencastle"), a Pennsylvania corporation, operates a stockyard in Greencastle, Pennsylvania, as a registered market agency under the Act selling livestock in commerce on a commission basis. Respondent Jeffrey S. Craig, ("Craig"), is president and manager of Greencastle and its 100% stockholder.

On December 4, 1990, Greencastle and Craig entered into a consent decision with complainant (P&S Docket No. D-90-69), whereby Greencastle and Craig were, among other things, ordered to cease and desist from failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed, an amount equal to the outstanding proceeds receivable due from the sale of consigned livestock and from otherwise failing to maintain their Custodial Account for Shippers' Proceeds in conformity with section 201.42 of the regulations. (CX-3.)

During the week of June 6, 1994, two of complainant's auditors, Branard England and Lyle Nordstrand, conducted an audit of Greencastle's custodial account. England testified that it was a routine audit. Nordstrand, who is no longer employed by complainant, testified that it was his "feeling" that the audit resulted from his supervisor, Durwood Helms, wanting to take "formal action" against Greencastle. However, when asked the basis for this "feeling," he responded only with "I don't know why. Ask him [Helms]." (Tr. 114.) Helms said the audit was conducted routinely according to his work plan and that there was no intention to take formal action against Greencastle. (Tr. 20, 142.) Routine audits of market agencies are conducted every three or four years and the 1994 audit of Greencastle was apparently the first since 1990. (Tr. 114-116.)

The auditors' analysis of Greencastle's custodial account revealed that on May 2, 1994, Greencastle had outstanding custodial checks in the amount of \$520,934.69 and that it had offset the checks against a balance in the custodial account of \$67,579.97, with money market savings accounts designated as custodial funds of \$3,069.12, proceeds on hand of \$227,600.12, and proceeds receivable of \$133,615.66. This left a deficiency of \$89,069.82 in Greencastle's custodial account on May 2, 1994. The auditors' analysis further indicated that Greencastle had not deposited in its custodial account an

amount equal to the proceeds received from the sale of consigned livestock within the time required by the regulations. (CX-4.) The auditors' report, however, also showed that by the time they prepared the report in June, 1994, \$90,002.95 in accounts receivable had been paid to Greencastle. (RX-2; Tr. 65.) Nordstrand testified that the receivables had been paid by May 5 to cover the shortage on May 2. (Tr. 113.) Helms, England and Nordstrand all testified that, despite the shortage on May 2, Greencastle was not insolvent. (Tr. 43, 67, 109.) There is no evidence that any livestock seller was not paid.

Craig, who acquired Greencastle in 1985, testified that he has always paid livestock sellers, and has never issued an insufficient funds check. He said that in 1994 he had a formal line of credit for \$100,000 from the bank where Greencastle's custodial account is maintained to insure Greencastle's ability to meet its obligations, that the line of credit was in effect on May 2, 1994, and that since that time he has increased it to \$200,000. The line of credit, secured by a mortgage on Greencastle's property and Craig's personal guarantee, provides that "[d]raws on the line of credit will be available for use in conjunction with the Greencastle Livestock Market custodial account for shippers' proceeds." (Tr. 124-127.) However, it also states that the line of credit is "contingent upon the right of the bank to review the loan from time to time and adjust terms and conditions or to discontinue the line of credit upon written notice by the Bank should it appear necessary to do so." (RX-1.) Craig said he believed that the line of credit was "as good as cash" and complied with the requirements for custodial accounts, but admitted that he had not asked anyone from the Packers and Stockyards Administration at the time he obtained the line of credit whether it was a permissible means of securing the custodial account. (Tr. 124-129.) Craig, however, did tell England about the line of credit at the time of the audit. England said he did not know at the time whether a line of credit met the requirements for custodial accounts, but that others at the agency later told him that a line of credit could not be included in a custodial account analysis. He relayed this information to Craig in a phone call. (Tr. 77-78, 126.)

Craig testified that he has at times drawn on the line of credit to cover shortfalls in the custodial account, but that he did not make any draws on May 2, 1994, because he believed he had sufficient money in the account and he had not checked the account at that time to determine whether there was a shortage. (Tr. 129.)

Law and Regulations

1. Statute

Section 312 of the Act (7 U.S.C. § 213) provides:

- (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.
- (b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

2. Regulations

9 C.F.R. § 201.42

§ 201.42. Custodial accounts for trust funds.

(a) *Payments for livestock are trust funds.* Each payment that a livestock buyer makes to a market agency selling on commission is a trust fund. Funds deposited in custodial accounts are also trust funds.

(b) *Custodial accounts for shippers' proceeds.* Every market agency engaged in selling livestock on a commission or agency basis shall establish and maintain a separate bank account designated as "Custodial Account for Shippers' Proceeds," or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.

(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (ii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

....

(g) *Certificates of deposit and/or savings accounts.* Funds in a custodial account for shippers proceeds may be maintained in an interest-bearing savings account and/or invested in one or more certificates of deposit, to the extent that such deposit or investment does not impair the ability of the market agency to meet its obligations to consignors. The savings account must be properly designated as a party of the custodial account of the market agency in its fiduciary capacity as trustee of the custodial funds and maintained in the same bank as the custodial account. The

certificates of deposit, as property of the custodial account, must be issued by the bank in which the custodial account is kept and must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

Discussion

The failure of a market agency to maintain its custodial account in accordance with the regulatory requirements is an unfair and deceptive practice in violation of the Act, irrespective of whether livestock sellers were paid or not. *Finger Lakes Livestock Exchange, Inc.*, 48 Agric. Dec. 390, 398 (1989). The Act is intended to prevent potential as well as actual injuries to livestock sellers from occurring. *Thumb Auction Market*, 37 Agric. Dec. 164, 167 (1977).

Respondents contend that they did not violate the statute or regulations because their line of credit, which was intended to cover any shortages in the custodial account, should be considered compliance with the regulations.¹ They argue that a line of credit is an alternative to, and as safe as, a certificate of deposit and/or savings account which are permissible under the regulations (9 C.F.R. § 201.42(g)) to reconcile custodial accounts. The Department, however, has held that a line of credit is not an acceptable alternative and is not a defense to a custodial account violation. "A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. . . Such protection fails to fulfill respondent's obligation under statutory and regulatory requirements." *Jeff Palmer*, 50 Agric. Dec. 1762, 1775 (1991). In the instant case, for instance, the bank issuing the line of credit specifically reserved to itself the unilateral right to discontinue the line of credit it had extended to Greencastle. Accordingly, I find that respondents' May 2, 1994, shortage in Greencastle's custodial account and their failure to make timely deposits to the custodial account from the sale of consignor livestock was a violation of section 312(a) of the Act and that respondents' line of credit was not a defense to their failure to maintain the custodial account as required by the regulations.

¹ Respondents do not argue in their brief that complainant conducted its audit for purposes of instituting formal action against respondents, as Nordstrand testified. Whether this is an issue or not, I find the evidence insufficient in any event to support Nordstrand's contention.

In determining the sanction, the seriousness of the offense is one of the factors to consider. Complainant's sanction witness, Daniel Van Ackeren, Director of the Department's Livestock Marketing Division, testified: "We consider it a pretty serious violation if the shortage in the custodial account puts the livestock sellers at risk of not getting paid." (Tr. 157.)

The circumstances of this case, however, do not show that respondents' violation put the sellers at great risk. The line of credit, while not providing the degree of security required by the regulations for custodial accounts, did nevertheless provide some protection for livestock sellers. It was a resource that was available to respondents to pay these creditors. As it turned out, the brief shortfall in the custodial account did not result in any creditor being unpaid and it was corrected within three days. Respondents were also not insolvent.

Craig testified that his reliance on a line of credit was based on his mistaken belief that it was a permissible means of complying with the requirements for custodial accounts. While ignorance of the law's requirements is not a defense, it is noteworthy for purposes of determining whether the violation was wilful that even one of complainant's officials, Branard England, was unsure whether a line of credit was an asset that could be included in a custodial account analysis. I find that respondents' violation was not wilful.

Nevertheless, despite these circumstances, a line of credit, while providing some protection to livestock sellers, is not, contrary to Craig's belief, "as good as cash." It can in fact be a risky means of securing funds. Craig's bank, as noted, reserved the right to unilaterally revoke the line of credit, a power that banks have, indeed, exercised with the result that, on some occasions, market agencies who have relied on a line of credit to pay livestock sellers have been unable to do so. See, e.g., *Richard N. Garver*, 45 Agric. Dec. 1090, 1094-95 (1986).

Greencastle's custodial account was a trust fund for its livestock sellers. Craig and Greencastle, as the fund's fiduciaries, were under a duty to maintain the account according to strict statutory and regulatory requirements. They had, moreover, expressly agreed to an order to that effect. Considering all the circumstances, including the extent to which livestock sellers were actually at risk, I find that \$4,000 is an appropriate sanction for respondents' failure to comply with these requirements.

Findings of Fact

1. Respondent Greencastle Livestock Market, Inc., is a corporation organized and existing in the State of Pennsylvania.
2. Greencastle is, and at all times material herein, was:
 - a. Engaged in the business of conducting and operating the Greencastle Livestock Market, Inc.;
 - b. Engaged in the business of a market agency selling livestock in commerce on a commission basis; and
 - c. Registered with the Secretary of Agriculture as a market agency.
3. Respondent Jeffrey S. Craig, an individual, is and at all times material herein, was:
 - a. President and manager of Greencastle;
 - b. Owner of 100% of the stock of Greencastle; and
 - c. Responsible for the direction, management and control of Greencastle.
4. On May 2, 1994, Greencastle had a shortage in its Custodial Account for Shippers' Proceeds in the amount of \$89,069.82. Greencastle issued custodial checks in the amount of \$520,934.69, which remained outstanding as of May 2, 1994. Greencastle offset such checks against a balance in the custodial account of \$67,579.97, with money market savings accounts designated as custodial funds of \$3,069.12, proceeds on hand of \$227,600.12, and proceeds receivable of \$133,615.66.
5. Greencastle did not deposit in its custodial account an amount equal to the proceeds receivable from the sale of consigned livestock within the time set forth in the regulations.
6. On May 5, 1994, Greencastle was paid \$90,002.95 in accounts receivable.
7. Greencastle was not insolvent at any time relevant to this proceeding.
8. Greencastle paid all sums due to livestock consignors at all times relevant to this proceeding.
9. On December 4, 1990, Greencastle and Craig entered into a consent decision with complainant which ordered Greencastle and Craig from, among other things, failing to deposit in the Custodial Account for Shippers' Proceeds, within the time prescribed in Section 201.42 of the regulations, amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock and from failing to otherwise maintain their Custodial

Account for Shippers' Proceeds in conformity with section 201.42 of the regulations.

Conclusion of Law

Greencastle Livestock Market, Inc., under the direction management and control of Jeffrey Craig, violated section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42) by failing to properly maintain its Custodial Account for Shippers' Proceeds.

Order

Respondent Greencastle Livestock Market, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondent Jeffrey S. Craig, directly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed in Section 201.42 of the regulations (9 C.F.R. § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock; and
2. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of Section 201.42 of the regulations (9 C.F.R. § 201.42). In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents Greencastle Livestock Market, Inc., and Jeffrey S. Craig are jointly and severally assessed a civil penalty in the amount of Four Thousand Dollars (\$4,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service pursuant to Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

[This Decision and Order became final May 2, 1996.--Editor]

PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDER

In re: RIVERBEND CATTLE COMPANY and JOHN WHEELER.
P&S Docket No. D-95-10.

**Order on Motion Requesting Imposition of Sanction Against Respondents
for Failure to Comply with Terms of Consent Decision filed June 17, 1996.**

Kimberly D. Hart, for Complainant.

Dwight D. Sutherland, Jr., Kansas City, MO, for Respondent.

Order issued by Dorothea A. Baker, Administrative Law Judge.

On May 6, 1996, Complainant filed a Motion Requesting Imposition of Sanction Against Respondents for Failure to Comply with Terms of Consent Decision. Respondents filed a Response on June 4, 1996, seeking an extension until July 1, 1996, within which to comply. On June 14, 1996, Complainant filed a document indicating it would not agree to the requested extension. Therefore, the following Order is issued:

Order

Respondents John Wheeler and Riverbend Cattle Company are suspended as registrants under the Act for a period of five years. Provided, however, that upon application to the Grain Inspection, Packers and Stockyards Administration, Packers and Stockyards Programs, a Supplemental Order may be issued terminating the suspension of the Respondents at any time after ninety (90) days upon demonstration by the Respondents that all livestock sellers identified by the Complaint in this proceeding have been paid in full, and provided, further, that this order may be modified upon application to the Packers and Stockyards Programs, GIPSA, to permit the salaried employment of Respondent John Wheeler by another registrant or packer after the expiration of the initial ninety (90) days of this suspension terms and upon circumstances warranting modification of the Order.

Copies hereof shall be served upon all parties.

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: BENSON W. THOMPSON.

P&S Docket No. D-95-25.

Decision and Order filed October 27, 1995.

Failure to file an answer - Engaging in the buying and selling of livestock in commerce without adequate bond - Cease and desist order - Suspension of registration - Civil penalty.

Andrew Y. Stanton, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Benson W. Thompson, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 159, Pitkin, Louisiana 70656.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce for his own account.

3. As more fully set forth in paragraph II of the complaint, respondent was notified by certified mail dated November 18, 1994, that the \$10,000.00 bond he maintained to secure the performance of his livestock obligations under the Act was inadequate and that it was necessary to increase his bond to \$40,000.00 before continuing his livestock operations subject to the Act. Notwithstanding such notice, respondent has continued to engage in the business of a dealer without maintaining an adequate bond or its equivalent.

Conclusions

By reason of the facts alleged in paragraph II of the complaint, respondent has wilfully violated sections 312(a) of the Act (7 U.S.C. §§ 213(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

Order

Respondent, Benson W. Thompson, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Five Hundred Dollars (\$1,500.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

[The Decision and Order became final January 11, 1996.-Editor]

In re: LANCE A. TARVER.

P&S Docket No. D-95-48.

Decision and Order filed December 1, 1995.

Failure to file an answer - Engaging in the business of buying and selling livestock while not registered as a dealer and without adequate bond - Issuance of checks returned unpaid for insufficient funds - Failure to pay, when due, full purchase price of livestock - Cease and desist order - Prohibition from registration.

Andrew Y. Stanton, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Lance A. Tarver, hereinafter referred to as respondent Tarver, is an individual whose mailing address is (b) (6) S [REDACTED], [REDACTED], a [REDACTED].

(b) Respondent Tarver, at all times material herein, was:

(1) Engaged in the business of buying and selling livestock for his own account;

(2) Operating as a dealer within the meaning and subject to the provisions of the Act; and

(3) Not registered with the Secretary of Agriculture as a dealer.

2. (a) Respondent Tarver, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II(b) of the complaint, operated without a bond.

(b) Respondent Tarver, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II(b) of the complaint, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondent Tarver did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(c) Respondent Tarver, on or about the dates and in the transactions set forth in paragraph II(b) and paragraph II(c) of the complaint and on numerous other occasions, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(d) As of April 26, 1995, \$49,504.00 remained unpaid for livestock purchases.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) & 228(b)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

Order

Respondent Tarver, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock;
3. Failing to pay the full purchase price of livestock; and
4. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent Tarver is prohibited from registering as a dealer subject to the Packers and Stockyards Act for a period of five years, and pursuant to section 303 of the Act (7 U.S.C. § 203) is prohibited from engaging in business subject to the Act without being registered and bonded, provided, however, that upon application to the Grain Inspection, Packers and Stockyards Administration, a supplemental order may be issued terminating this prohibition at any time after the expiration of 120 days upon demonstration by the respondent that all unpaid livestock sellers have been paid in full and that the respondent is registered and bonded, and provided further that this order may be modified upon application to the Grain Inspection, Packers and Stockyards Administration to permit respondent Tarver's employment by a registrant or packer after the expiration of the 120 day period of prohibition upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final February 28, 1996.-Editor]

In re: ROBERT M. CROUCH.

P&S Docket No. D-95-54.

Decision Without Hearing By Reason of Default filed December 20, 1995.

Failure to file an answer - Issuance of checks in payment for livestock without having sufficient funds on deposit - Failure to make full payment when due for livestock - Cease and desist order - Suspension of registration.

Kimberly Hart, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Robert Crouch, hereinafter referred to as respondent Crouch, is an individual whose mailing address is (b) (6)

(b) Respondent Crouch is and at all times material herein was:
(1) Engaged in the business of buying and selling livestock as a dealer in commerce for its own account and the account of others; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock in commerce on a commission basis.

2. (a) The respondent, in connection with his operations subject to the Act, on or about the date and in the transaction set forth in paragraph II(a) of the complaint, purchased livestock and in purported payment issued a check which was returned unpaid by the bank upon which it was drawn because respondent did not have sufficient funds on deposit and available in the account upon which such check was drawn to pay such check when presented.

(b) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transaction listed in paragraph 2(a) and paragraph II(b) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of August 1, 1995, there remained unpaid a total of \$16,028.95 for such livestock purchases.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b)).

Order

Respondent Robert Crouch, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

Respondent Robert Crouch is suspended as a registrant under the Act for a period of 5 years. Provided, however, that upon application to Packers and Stockyards Programs a supplemental order may be issued terminating the suspension of the respondent at any time after 120 days upon demonstration by respondent that all livestock sellers identified by the complaint in this proceeding have been paid in full and provided further, that this order may be modified upon application to Packers and Stockyards Programs to permit

respondent's salaried employment by another registrant or a packer after the expiration of the 120 day period of suspension and upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 15, 1996.-Editor]

In re: JAMES L. "PAT" HANNA, d/b/a HANNA CATTLE.

P&S Docket No. D-95-45.

Decision Without Hearing By Reason of Admissions filed January 16, 1996.

Admissions of material allegations - Issuance of checks in payment for livestock purchases without sufficient funds available - Failure to pay, when due, the full purchase price of livestock - Cease and desist order - Suspension of registration.

Jane McCavitt, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed on June 13, 1995 by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. It is alleged in the complaint that the respondent issued checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented; failed to pay, when due, the full purchase price of livestock; and failed to pay the full purchase price of livestock totalling \$41,086.25 as of May 3, 1995.

A copy of the complaint was served upon respondent and the complaint was answered on July 31, 1995. In the answer respondent admitted that he issued checks in payment for livestock purchases without having and

maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented; failed to pay, when due, the full purchase price of livestock; and failed to pay the full purchase price of livestock, but denied that his acts constituted wilful violations of the Act. The respondent's answer constitutes an admission of all the material allegations of fact contained in the complaint pursuant to Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). Complainant moved for the issuance of a Decision, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Therefore, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. James L. "Pat" Hanna, doing business as Hanna Cattle, hereinafter referred to as respondent Hanna, is an individual whose business mailing address is P.O. Box 349, Kemp, Texas 75143.
2. Respondent Hanna is and at all times material herein was:
 - (a) Engaged in the business of buying livestock in commerce on a commission basis;
 - (b) Engaged in the business of buying and selling livestock for his own account; and
 - (c) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis and as a dealer to buy and sell livestock on his own account.
3. As more fully set forth in paragraph II of the complaint, respondent issued checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented; failed to pay, when due, the full purchase price of livestock; and failed to pay the full purchase price of livestock totalling \$41,086.25 as of May 3, 1995.

Conclusions

By reason of the facts found in Findings of Fact No. 3 above, respondent has wilfully violated Sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) for which the Order below is issued.

Order

Respondent Hanna, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Act shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

Respondent Hanna is suspended as a registrant under the Act for a period of five (5) years provided, however, that upon application to the Grain Inspection, Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of 120 days upon demonstration by the respondent that all unpaid livestock sellers have been paid in full. It is provided further that this order may be modified upon application to the Grain Inspection, Packers and Stockyards Administration to permit respondent Hanna's employment by a registrant or packer after the expiration of the 120 day period of suspension upon demonstration of circumstances warranting modification of the order.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final March 5, 1996.-Editor]

In re: JAMES L. "PAT" HANNA d/b/a HANNA CATTLE.
P&S Docket No. 95-45.
Modified Order filed April 30, 1996.

Jane McCavitt, for Complainant.
Respondent, Pro se.

Order issued by James W. Hunt, Administrative Law Judge.

On January 16, 1996, a Decision Without Hearing by Reason of Admissions was issued in the above-captioned matter, which, *inter alia*,

suspended respondent as a registrant under the Act for a period of five (5) years and included a proviso permitting respondent Hanna's employment by a registrant or packer after the expiration of a 120 day period of suspension upon demonstration of circumstances warranting modification of the order.

Subsequent to that order, the respondent submitted a plan of restitution for the amounts still owing for livestock. As a result, the complainant submitted a request for a modification of the order issued on January 16, 1996, to permit respondent Hanna's employment by a registrant or packer so long as he continues making payments according to the plan of restitution, with the order remaining in effect in all other respects. Accordingly,

IT IS HEREBY ORDERED that respondent Hanna is permitted to be employed by a registrant or packer so long as he continues making payments according to the plan of restitution. If respondent is in default on this payment plan for more than sixty days he shall be prohibited from salaried employment by a registrant or packer for the remainder of the 120 day period. Proof of payments shall be forwarded to the Fort Worth GIPSA Regional Office. Affidavits from each livestock seller will be required to prove payment in full. Upon demonstration that full restitution has been made, a supplemental order terminating the suspension will be issued after such suspension has been in effect for at least 120 days. The order shall remain in full force and effect in all other respects.

In re: JACKSON LIVESTOCK MARKET, INC., THOMAS G. OLIN and RODNEY L. KOLANDER.

P&S Docket No. D-94-20.

Decision and Order As To Jackson Livestock Market, Inc., filed January 18, 1996.

Failure to file an answer - Failure to deposit in custodial account amounts equal to outstanding proceeds receivable due from the sale of consigned livestock - Failure to maintain custodial account - Reimbursement of custodial account with checks drawn on other accounts without maintaining sufficient funds on deposit in such accounts to cover the checks when presented - Using funds received from sale of livestock for purpose other than payment of marketing charges or payment to consignors - Issuance of checks in payment for livestock without having sufficient funds on deposit - Kiting checks for the purpose of changing the true amounts of funds available - Failure to remit when due the net proceeds received from the sale of consigned livestock - Failure to pay when due the full purchase price of livestock - Consigning livestock under false names - Cease and desist order - Suspension of registration.

Eric Paul, for Complainant.

Respondent Jackson Livestock Market, Inc., Pro se.

Donald H. Molstad, Sioux City, IA, for Respondent Thomas G. Olin.

Steven L. Handevitd, Jackson, MN, for Respondent Rodney L. Kolander.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Acting Administrator, Packers and Stockyards Administration, charging that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201. *et seq.*). The original allegations were realleged and additional new and subsequent allegations were added by an amended complaint filed on May 23, 1995, by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration.

Copies of the complaint and the amended complaint were served upon respondent Jackson Livestock Market, Inc., by certified mail delivery to its officers, respondents Thomas G. Olin and Rodney L. Kolander. Separate answers were duly filed by respondents Thomas G. Olin and Rodney L. Kolander in their individual capacities. Respondent Jackson Livestock Market, Inc., has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the amended complaint, which are admitted by the failure of respondent Jackson Livestock Market, Inc., to file an answer, are adopted and set forth herein as findings of fact.

Findings of Fact

1. Jackson Livestock Market, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the state of Minnesota. The corporate respondent's business mailing address was P.O. Box 362, Jackson, Minnesota 56143.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of conducting and operating the Jackson Livestock Market, a posted stockyard under the Packers and Stockyards Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard;

(c) Engaged in the business of a dealer buying and selling livestock in commerce for its own account and for the account of others; and

(d) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce.

3. The corporate respondent failed to maintain and use properly its "Jackson Livestock Market Custodial Account for Shippers' Proceeds" (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting therefor and the payment of portions thereof due owners and consignors of livestock, in that:

(a) As of February 26, 1993, the corporate respondent had outstanding checks drawn on its custodial account in the amount of \$266,483.67 and expense items chargeable to its custodial account in the amount of \$1,796.70, and had to offset these checks and expense items, a balance in its custodial account of \$152,690.78 and proceeds receivable in the amount of \$35,875.48, resulting in a deficiency of \$79,714.11 in funds available to pay shippers their proceeds.

(b) As of March 24, 1993, the corporate respondent had outstanding checks drawn on its custodial account in the amount of \$145,151.50 and expense items chargeable to its custodial account in the amount of \$2549.36, and had to offset these checks and expense items, a balance in its custodial account of \$34,894.59 and proceeds receivable in the amount of \$80,548.02, resulting in a deficiency of \$31,258.25 in funds available to pay shippers their proceeds.

(c) As of December 31, 1993, the corporate respondent had outstanding checks drawn on its custodial account in the amount of \$163,545.92, and had to offset these checks, a balance in its custodial account of \$1,495.89, resulting in a deficiency of \$162,050.05 in funds available to pay shippers their proceeds.

4. The corporate respondent was misusing its custodial account in that the corporate respondent was not reimbursing the account by the close of the next business day following the sale of livestock for purchases made by the corporate respondent, its owners, officers, employees.

5. The corporate respondent was further mishandling its custodial account in that the corporate respondent was not reimbursing the account by the close of the seventh day following the sale of livestock for all uncollected receivables.

6. The corporate respondent misused, mishandled and failed to maintain properly its custodial account on and about the dates set forth above

despite having been placed on notice by certified mail letter dated September 17, 1992, that practices of the nature set forth above were prohibited by section 201.42 of the regulations.

7. The corporate respondent, in connection with its operations as a market agency selling livestock on a commission basis, on or about the dates and in the transactions set forth in paragraph III of the amended complaint, issued checks in purported payment of the net proceeds resulting from the sale of livestock consigned for sale on a commission basis, which checks were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

8. The corporate respondent on or about the dates and in the transactions set forth in paragraph IV of the amended complaint sold livestock consigned to the corporate respondent for sale on a commission basis and failed to remit to the consignors the net proceeds resulting from the sale of their livestock.

9. As of March 15, 1995, there remained unpaid approximately \$34,625.88 for livestock sold on a commission basis.

10. The shortage in the custodial account for shippers proceeds that precluded full payment being made for the consigned livestock sold in commission in the above transactions was attributable to:

(a) The corporate respondent's failure to pay for purchase of consigned livestock made by corporate respondent and by respondent Tom Olin; and

(b) The corporate respondent's purported reimbursement of the custodial account with checks drawn on other bank accounts maintained by the corporate respondent and respondent Olin which were subsequently dishonored. Payments received from purchasers of consigned livestock were either expended by the corporate respondent for other purposes, or lost when the banks containing the general or dealer bank accounts in which such funds were deposited stopped providing credit for uncollected funds and applied the funds on deposit to reduce overdrafts in the bank accounts.

11. The corporate respondent, on or about the dates and in the transactions set forth in paragraph V of the amended complaint, purchased livestock from Joseph E. Furr Livestock, a livestock dealer located in Staunton, Virginia, and failed to pay, when due, the full purchase price of such livestock.

12. The corporate respondent, in connection with its operations and a dealer buying and selling livestock in commerce for its own account or the account of others, on or about the dates and in the transactions set forth in paragraph V of the amended complaint, issued checks in purported payment of the purchase price of livestock, which checks were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

13. The corporate respondent, on or about the dates and in the transactions set forth in paragraph VII of the amended complaint consigned livestock under false names and prepared accounts and records using the false names.

14. The corporate respondent sold livestock after August 1993 without keeping and maintaining a purchase and sales journal.

15. The corporate respondent engaged in an extensive exchange or "kiting" of checks between Jacksonville Livestock Market, Inc., Account No. (b) (4) in Bank [REDACTED] (the general or "Hay" account) and Tom Olin Livestock Account No. (b) (4) in [REDACTED] Bank [REDACTED] Checks were exchanged as set forth in paragraph VII of the amended complaint.

16. The corporate exchanged or "kited" these 483 checks totalling \$33,945,249.33 during the three month period set forth in paragraph VII of the amended complaint in order to create a false float and inflated bank balances that relied upon credit extended for uncollected funds. The checks issued vastly exceeded the actual purchase and sales volume of the corporate respondent's livestock operations.

17. The corporate respondent knew, or should have known, when it deposited checks drawn on the above bank accounts in the custodial Account For Shippers Proceeds in purported payment for purchases of consigned livestock, or in purported reimbursement of proceeds due for consigned livestock sold to others, that if Bank Midwest of Farmers Saving Bank became aware of this check kiting and stopped providing immediate credit for uncollected funds that custodial account deposits would be reversed and that a substantial deficit condition would result. This occurred beginning on or about December 17, 1993.

Conclusions

By reason of the fact found in Findings of Fact 3 through 6 and herein, the corporate respondent has wilfully violated section 312 (a) of the Act (7 U.S.C. § 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42).

By reason of the facts found in Findings of Fact 7 through 9 and 11 through 12 herein, the corporate respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228(b) and section 201.43 of the regulations (9 C.F.R. § 201.43).

By reason of the facts found in Findings of Fact 13 and 14 herein, the corporate respondent has violated sections 312(a) and 401 of the Act (7 U.S.C. §§ 213(a), 221).

Order

Respondent Jackson Livestock Market, Inc., its agents and employees, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in the Custodial Account for Shippers' Proceeds within the time prescribed in Section 201.42 of the regulations (9 C.F.R. § 201.42) amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;
2. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42);
3. Reimbursing the custodial account for shippers' proceeds with checks drawn on any account without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
4. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of its own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the consignors and shippers of livestock;
5. Issuing checks in payment for livestock purchases without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
6. Issuing checks in payment of the net proceeds from the sale of consigned livestock without having sufficient funds on deposit and available in

the custodial account upon which such checks are drawn to pay such checks when presented;

7. Exchanging or "kiting" checks with any person or between any accounts for the purpose or with the effect of concealing the true amount of funds available in any account;

8. Failing to remit, when due, the net proceeds received from the sale of consigned livestock;

9. Failing of remit the net proceeds received from the sale of consigned livestock;

10. Failing to pay, when due, the full purchase price of livestock, and

11. Consigning livestock under false names and preparing accounts and records using false names.

The corporate respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in its business subject to the Packers and Stockyards Act including the following:

1. Check-in-slips, scale tickets, clerk sheets, accounts of sale showing the true and correct names of livestock consignors; and

2. A purchase and sales journal identifying all livestock purchased and sold.

Respondent Jackson Livestock Market, Inc., is suspended as a registrant under the Act for a period of five (5) years and thereafter until such times as it demonstrates that the shortage in its Custodial Account For Shippers' Proceeds has been eliminated. Provided however, that upon application to Grain Inspection, Packers and Stockyards Administration, a supplemental order may be issued terminated the corporate respondent's suspension at any time after 150 days of this suspension term upon demonstration by the corporate respondent that all unpaid consignors have been paid the full net proceeds due for the sale of consigned livestock and that the shortage in its Custodial Account For Shippers' Proceeds has been eliminated.

The decision shall become final and effective without further proceedings 35 days after the date of service upon respondent Jackson Livestock Market, Inc., unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final May 15, 1996.-Editor]

In re: AUSTIN FARMS, INC. and WESLEY W. AUSTIN.

P&S Docket No. D-95-33.

Decision and Order Upon Admission By Facts By Reason of Default filed March 7, 1996.

Failure to file an answer - Alter ego - Failure to pay, when due, full purchase price for livestock - Issuing checks - Non payment for livestock without sufficient funds on deposit - Cease and desist order - Civil penalty.

Eric Paul, for Complainant.

Respondents, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint and notice of hearing filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and notice of hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

Findings of Fact

1. Respondent Austin Farms, Inc., hereinafter referred to as the corporate respondent, is a South Dakota corporation whose business mailing address until it ceased operating in 1993 was P.O. Box 1018, Elk Point, South Dakota 57025.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of purchasing livestock in commerce for purposes of slaughter, and of manufacturing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

3. Respondent Wesley W. Austin, hereinafter referred to as the individual respondent, is an individual whose business mailing address is [REDACTED]

(b) (6)

4. The individual respondent is, and at all times material herein was:

(a) President and one of the two directors of the corporate respondent;

(b) Owner, in combination with his wife Marva C. Austin, of 100 percent of the corporate respondent's stock;

(c) Responsible for the direction, management and control of the corporate respondent;

(d) The *alter ego* of the corporate respondent; and

(e) A packer within the meaning of that term as defined in the Act.

Conclusions

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

Order

Respondent Austin Farms, Inc., its officers, directors, agents, employees, successors and assigns, and respondent Wesley W. Austin, his agents and employees, directly or through any corporate or other device, in connection with their operations as a packer, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to pay the full purchase price of livestock; and

3. Issuing checks in payment for livestock purchases without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Wesley W. Austin is assessed a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

[The Decision and Order became final on May 2, 1996.-Editor]

In re: POPLARVILLE STOCKYARDS, INC., M&J CATTLE COMPANY, INC., and JOE MACK SMITH.

P&S Docket No. D-95-14.

**Decision Without Hearing By Reason of Default With Respect to Respondent
Poplarville Stockyards, Inc., filed April 2, 1996.**

Failure to file an answer - Engaging in the business of a dealer or market agency while insolvent - Current liabilities in excess of current assets - Usage or disposal of funds endangering or impairing the faithful and prompt accounting therefor and payment due to owners or consignors of livestock - Using funds received from the sale of consigned livestock for purposes other than payment to consignors or payment of sums due the respondent as compensation for services rendered - Failure to maintain custodial account - Issuance of checks in payment for livestock without having sufficient funds on deposit - Failure to remit to consignors when due net proceeds from sales of consigned livestock - Cease and desist order - Suspension of registration.

Julie Cook Schuster, for Complainant.

Respondent Poplarville Stockyards, Inc., Pro se.

James K. Dukes, Hattiesburg, MS, for Respondent M&J Cattle Company, Inc.

Respondent Joe Mack Smith, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, charging that respondent Poplarville Stockyards, Inc., wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were directed to respondent Poplarville Stockyards, Inc., by certified mail on August 24, 1995, but were returned on September 1, 1995. Thereafter, on September 12, 1995, copies of the complaint and the Rules of Practice were sent to respondent Poplarville Stockyards, Inc., by regular mail to its last known address. Respondent Poplarville Stockyards, Inc., was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent Poplarville Stockyards, Inc., has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint relative to respondent Poplarville Stockyards, Inc., which are admitted by respondent Poplarville Stockyards, Inc.'s failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Poplarville Stockyards, Inc., hereinafter "respondent Poplarville," is a corporation whose mailing address is P.O. Box 306, Poplarville, Mississippi 39470.

(b) Respondent Poplarville, at all times material herein, was:

(1) Engaged in the business of conducting and operating the Poplarville Stockyards, Inc., a posted stockyard subject to the provisions of the Act, hereinafter referred to as "the stockyard;"

(2) Engaged in the business of a market agency selling livestock in commerce on a commission basis at the stockyard;

(3) Engaged in the business of a dealer buying and selling livestock in commerce for its own account; and

(4) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

2. (a) As of December 31, 1993, respondent Poplarville's current liabilities exceeded its current assets. As of that date, respondent Poplarville had current liabilities totalling \$242,917.34 and current assets totalling \$121,244.85, resulting in an excess of current liabilities over current assets of \$121,672.49.

(b) Respondent Poplarville's current liabilities presently exceed its current assets.

3. During the period December 31, 1993, through December 31, 1994, respondent Poplarville operated subject to the Act while its current liabilities exceeded its current assets.

4. Respondent Poplarville, during the period November 16, 1993, through December 31, 1994, failed to maintain and use properly its Custodial Account for Shippers' Proceeds (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting therefor and the payment of portions thereof due the owners and consignors of livestock, in that:

(a) As of November 16, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of \$306,494.38, and had to offset such checks a balance in the custodial account of \$64,487.35, deposits in transit of \$12,157.70, and current proceeds receivable of \$67,385.40, resulting in a shortage of \$162,463.93.

(b) As of November 30, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of \$279,249.92, and had to offset such checks a balance in the custodial account of \$93,777.47 and current proceeds receivable of \$60,185.12, resulting in a shortage of \$125,287.33.

(c) As of December 7, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of \$310,003.10, and had to offset such checks a balance in the custodial account of \$60,369.01, deposits in transit of \$23,386.26, and current proceeds receivable of \$110,909.32, resulting in a shortage of \$115,338.51.

(d) As of December 14, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of \$354,598.11, and had to offset such checks a balance in the custodial account of \$104,268.04, deposits in transit of \$18,831.95, and current proceeds receivable of \$161,575.88, resulting in a shortage of \$69,922.24.

(e) As of December 22, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of \$178,143.48, and had to offset such checks a balance in the custodial account of \$34,677.42, resulting in a shortage of \$143,466.06.

(f) As of December 31, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of \$121,140.94, and had to offset such checks a balance in the custodial account of \$36,040.17, resulting in a shortage of \$85,100.77.

(g) As of December 31, 1994, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of \$299,716.19, and had a deficit balance in the custodial account of \$701.04, resulting in a shortage of \$300,418.03.

5. Respondent Poplarville engaged in unfair and deceptive practices in that respondent Poplarville failed to deposit checks received from purchasers of consigned cattle into the custodial account and used funds received from the sale of consigned livestock for purposes other than remittance of net proceeds to the owners and consignors of livestock. Specifically, respondent Poplarville misused custodial funds by issuing checks on the Poplarville custodial account in payment for loans, commissions, and cattle purchased on

a dealer basis. During the period November 16, 1993, to January 3, 1994, \$364,973.44 in custodial funds were misused in this manner.

6. Respondent Poplarville engaged in unfair and deceptive practices in that respondent Poplarville failed to deposit checks in the amount of \$23,302.19 received from the sale of consigned livestock into its custodial account for shippers' proceeds, but instead converted said checks to cash and transferred the cash to individuals to whom respondent Poplarville previously had given insufficient funds checks as payment for consigned livestock.

7. (a) Respondent Poplarville, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in Exhibit A to the complaint, sold livestock on a commission basis and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds available in the account upon which such checks were drawn to pay such checks when presented.

(b) In connection with the transactions set forth in Exhibit A to the complaint, respondent Poplarville failed to remit to consignors, when due, the net proceeds due from the sale of consigned livestock.

(c) In connection with the transactions set forth in Exhibit A to the complaint, respondent Poplarville failed to remit to consignors \$141,417.19 in net proceeds due from the sale of consigned livestock.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the financial condition of respondent Poplarville does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Finding of Fact 3 herein, respondent Poplarville wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)).

By reason of the facts found in Finding of Fact 4 herein, respondent Poplarville wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42).

By reason of the facts found in Finding of Fact 5 herein, respondent Poplarville wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42).

By reason of the facts found in Finding of Fact 6 herein, respondent Poplarville wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42).

By reason of the facts found in Finding of Fact 7 herein, respondent Poplarville wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.43(a) of the regulations (9 C.F.R. § 201.43(a)).

Order

Respondent Poplarville Stockyards, Inc., its officers, directors, agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

(1) Engaging in business as a dealer or market agency while insolvent, that is, while current liabilities exceed current assets;

(2) Making such use or disposition of funds in its possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock;

(3) Using funds received as proceeds from the sale of consigned livestock for purposes of its own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondent as compensation for services rendered or for other lawful marketing charges;

(4) Failing to otherwise maintain its Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42);

(5) Issuing checks to consignors in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

(6) Failing to remit to consignors the net proceeds resulting from the sale of consigned livestock; and

(7) Failing to remit to consignors, when due, the net proceeds resulting from the sale of consigned livestock.

Respondent Poplarville is suspended as a registrant under the Act for a period of five years, and thereafter until respondent Poplarville demonstrates that its current liabilities no longer exceed its current assets and that any shortages in its Custodial Account for Shippers' Proceeds have been eliminated; *Provided that*, if respondent Poplarville demonstrates that its

current liabilities no longer exceed its current assets and that all shortages in its Custodial Account for Shippers' Proceeds have been eliminated, and that all unpaid consignors have been paid in full, a supplemental order may be issued terminating this suspension after the expiration 180 days of the term of the suspension.

This decision shall become final and effective without further proceedings 35 days after the date of service upon respondent Poplarville, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 22, 1996.-Editor]

In re: KARLER PACKING COMPANY, INC., JESSE KARLER and HENRY KARLER.

P&S Docket No. D-95-52.

Decision By Reason of Admissions filed April 22, 1996.

Admission of material allegations - Current liabilities in excess of current assets - Alter ego - Purchasing livestock for slaughter without filing or maintaining a bond or its equivalent - Failing to pay when due for livestock or meat purchases - Issuance of checks in payment for livestock or meat purchases without having sufficient funds on deposit - Impeding prompt disbursement of trust proceeds to unpaid cash sellers of livestock who have preserved their trust interests with timely filed written notices - Violation of Consent Decision - Cease and desist order - Civil penalty.

Barbara S. Good, for Complainant.

Peter H. Johnstone, Albuquerque, NM, for Respondents.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers & Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that the financial condition of the corporate respondent herein does not meet the requirements of the Act and that respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*). This decision is entered pursuant to the provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Karler Packing Company, Inc., hereinafter referred to as the corporate respondent, is a corporation incorporated and doing business in the State of New Mexico and whose mailing address is P.O. Box 1005, Albuquerque, New Mexico 87103.

(b) The corporate respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter, and manufacturing or preparing meat or meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of and subject to the provisions of the Act.

2. (a) Jesse Karler is an individual whose mailing address is [REDACTED]

(b) (6)

(b) Jesse Karler is, and at all times material herein, was:

(1) President of the corporate respondent;

(2) Owner of 68 per cent of the stock of the corporate respondent; and

(c) In combination with respondent Henry Karler, responsible for the direction, management and control of the corporate respondent.

3. (a) Henry Karler is an individual whose address is [REDACTED]

(b) (6)

(b) Henry Karler is, and at all times material herein was:

(1) Vice-President of the corporate respondent;

(2) Owner of 32 per cent of the stock of the corporate respondent; and

(c) In combination with respondent Jesse Karler, responsible for the direction, management and control of the corporate respondent.

4. Each of the respondents Jesse Karler and Henry Karler, hereinafter collectively referred to as the individual respondents, is, and at all times material herein was, the *alter ego* of the corporate respondent, and a packer within the meaning of and subject to the provisions of the Act.

5. Respondents Karler Packing Company, Inc., Jesse Karler, and Henry Karler entered into a consent decision in P&S Docket No. D-92-28, issued on January 14, 1993, a copy of which is attached to the complaint and notice of hearing as Exhibit A. The decision, *inter alia*, ordered respondents to cease and desist from failing to pay, when due, the full purchase price of livestock and from issuing checks in payment for livestock without having and

maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

6. Respondents were notified by certified mail, received May 15, 1995, that the surety bond they maintained to secure the performance of the livestock operations of the corporate respondent under the Act would terminate on June 9, 1995. Notwithstanding such notice, the corporate respondent, under the direction, management, and control of the individual respondents, continued to purchase livestock for purposes of slaughter without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

7. As of October 29, 1994, the corporate respondent's current liabilities exceeded its current assets. As of that date, respondent Karler had current liabilities totalling [REDACTED] and current assets totalling [REDACTED] resulting in an excess of current liabilities over current assets of [REDACTED].

8. The corporate respondent's current liabilities presently exceed its current assets.

9. The corporate respondent, under the direction, management and control of the individual respondents, on or about the dates and in the transactions set forth in Exhibit B to the complaint and notice of hearing, purchased livestock for slaughter and failed to pay, when due, the full purchase price of such livestock.

10. As of July 12, 1995, \$551,351.64 of the amounts referred to in ¶ 9 remained unpaid.

11. The corporate respondent, under the direction, management and control of the individual respondents, on or about the dates and in the transactions set forth in Exhibit C to the complaint, purchased livestock for slaughter, and in purported payment for such livestock issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

12. The corporate respondent, under the direction, management and control of the individual respondents, in connection with its business as a packer, on March 30, 1995, purchased meat from Booker Packing Company, and failed to pay when due the full purchase price of such meat, which was \$31,385.62.

13. As of July 12, 1995, the entire amount of \$31,385.62 referred to in Paragraph 12 remained unpaid.

14. The corporate respondent, under the direction, management and control of the individual respondents, in connection with its business as a packer, on March 1, 1995, purchased meat from Ruebush Packing Company and in purported payment therefor issued its check no. 3037 to Ruebush Packing Company dated March 27, 1995 in the amount of \$6,048.00, which was returned unpaid by the bank on which it was drawn because the corporate respondent did not have sufficient funds on deposit and available in the account on which such check was drawn to pay the check when presented.

15. The corporate respondent, under the direction, management and control of the individual respondents, purchased livestock for slaughter in cash sales and failed properly to carry out its fiduciary obligations as a statutory trustee by not collecting, liquidating and distributing trust assets on a pro rata basis within a reasonable time after receiving timely written trust notices from unpaid cash sellers of livestock, and the trust analysis prepared by the Packers and Stockyards Programs, Grain Inspection, Packers & Stockyards Administration (GIPSA).

16. The trust proceeds collected and not properly distributed as of the date of issuance of the complaint and notice of hearing herein total at least \$34,081.91.

17. The corporate respondent, under the direction, management, and control of the individual respondents, failed to carry out properly its fiduciary obligations as statutory trustee despite the actual knowledge of the individual respondents of such fiduciary obligations based upon their participation in prior trusts involving the corporate respondent.

Conclusions

1. Respondents have admitted all the material allegations of fact contained in the complaint, and have therefore, pursuant to 7 C.F.R. § 1.139, waived hearing in this matter.

2. By reason of the facts alleged in paragraph I(a) through I(f) and I(h) of the complaint, which are admitted in the response, each of the individual respondents, Jesse Karler and Henry Karler, is the *alter ego* of the corporate respondent, Karler Packing Company, Inc. See Findings of Fact 1 through 4.¹

¹We note that in the response, each of the individual respondents denied that he was the *alter ego* of the corporate respondent, insofar as corporate formalities were adhered to in the business. However, the issue for our purposes is whether the individuals were responsible for
(continued...)

3. By continuing to purchase livestock for purposes of slaughter without maintaining an adequate bond or its equivalent as required by the Act and the regulations, which facts are alleged in paragraph II of the complaint and which facts respondents have admitted in their response, respondents have wilfully violated section 202(a) of the Act (7 U.S.C. § 192(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29 and 201.30). See Findings of Fact No. 6 herein.

4. Respondents admit, as alleged in paragraph III of the complaint, that as of October 29, 1994, the corporate respondent had current liabilities totalling \$2,084,940.94 and current assets totalling \$1,229,727.75 as of October 29, 1994, resulting in an excess of current liabilities over current assets of \$855,213.19. See Findings of Facts Nos. 7 and 8 herein. Therefore, the corporate respondent's financial condition does not meet the requirements of 7 U.S.C. § 204.

5. Respondents admit, as alleged in paragraphs IV and V of the complaint, that the corporate respondent, under the direction, management, and control of the individual respondents, purchased livestock for slaughter and failed to pay, when due, the full purchase price of such livestock; that as of July 12, 1995, \$551,351.64 of the amounts alleged remained unpaid; that the corporate respondent, under the direction, management, and control of the individual respondents, purchased livestock for slaughter, and in purported payment for such livestock issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented. See Findings of Fact Nos. 9 and 10 herein. By reason of such facts, the respondents have wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a) and 228b), and the Secretary's Order in P&S Docket No. D-92-28.

6. Respondents admit, as alleged in paragraphs VI and VII of the complaint herein, that in connection with its business as a packer, the

¹(...continued)

the direction, management, and control of the corporation. The respondents admitted that they were responsible for the direction, management, and control of the corporate respondent. Complaint, ¶¶ I(d)(3) and I(f)(3); Response, ¶ 1. Furthermore, respondents admitted the numerous substantive allegations of the complaint which alleged their direction, management, and control of the corporate respondent. As they admittedly owned and controlled the corporation, they are responsible as individuals for the violations admitted. *In re MCM Livestock, Inc.*, 39 Agric. Dec. 893 (1980); *In re Britton Bros., Inc.*, 49 Agric. Dec. 423 (1990).

corporate respondent, under the direction, management, and control of the individual respondents, on March 30, 1995, purchased meat from Booker Packing Company, and failed to pay when due the full purchase price of such meat. *See Findings of Fact No. 12 herein.* Respondents further admitted that as of July 12, 1995, the entire purchase price of \$31,385 remained unpaid. *See Findings of Fact No. 13 herein.* Respondents also admitted that the corporate respondent, under the direction, management, and control of the individual respondents, in connection with its business as a packer, on March 1, 1995, purchased meat from Ruebush Packing Company and in purported payment therefor issued its check no. 3037 to Ruebush Packing Company dated March 27, 1995, in the amount of \$6,048.00, which was returned unpaid by the bank on which it was drawn because the corporate respondent did not have sufficient funds on deposit and available in the account on which such check was drawn to pay the check when presented. *See Findings of Fact No. 14 herein.* By reason of these facts, respondents have wilfully violated section 202(a) of the Act (7 U.S.C. §§ 192(a)).

7. Respondents have admitted, as alleged in paragraph VIII herein, that the corporate respondent, under the direction, management and control of the individual respondents, purchased livestock for slaughter in cash sales and failed properly to carry out its fiduciary obligations as a statutory trustee by not collecting, liquidating and distributing trust assets on a pro rata basis within a reasonable time after receiving timely written trust notices from unpaid cash sellers of livestock, and a trust analysis prepared by the Packers and Stockyards Programs, Grain Inspection, Packers & Stockyards Administration. The trust proceeds collected and not properly distributed as of the date of issuance of the complaint total at least \$34,081.91. *See Findings of Fact Nos. 15 and 16 herein.* I find that the corporate respondent, under the direction, management, and control of the individual respondents, failed to carry out properly its fiduciary obligations as statutory trustee despite the actual knowledge of the individual respondents of their fiduciary obligations. By reason of these facts, respondents have wilfully violated sections 202(a) and 206(b) of the Act (7 U.S.C. §§ 192(a) and 196(b)).

Order

Respondent Karler Packing Company, Inc., its officers, directors, agents, employees, successors, and assigns, and respondents Jesse Karler and Henry Karler, individually or as officers, directors, agents or employees of respondent Karler Packing Company, Inc., or of any other packer, directly or through any

corporate or other device, in connection with their operations as a packer, shall CEASE AND DESIST from:

1. Purchasing livestock for slaughter without filing and maintaining a bond or its equivalent in the amount determined by the Packers and Stockyards Programs, GIPSA, in accordance with the Act and the regulations.
2. Failing to pay, when due, for livestock or meat purchases;
3. Failing to pay for livestock or meat purchases;
4. Issuing checks in payment for livestock or meat without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to permit the payment of such checks upon presentation;
5. Acting in such a manner as to impede or delay the prompt disbursement of trust proceeds to unpaid cash sellers of livestock who have preserved their trust interests with timely filed written notices;
6. Violating the Order of the Secretary in P&S Docket No. D-92-28; and

IT IS HEREBY ORDERED that all purchases of livestock for slaughter by respondents shall be paid for at the time of purchase by cashier's check, wire transfer of funds, or United States currency PROVIDED that a supplemental order may be issued releasing respondents from the obligation to follow such payment procedures after the defendants demonstrate that the current assets of Karler Packing Company, Inc., are no longer exceeded by its current liabilities.

IT IS FURTHER ORDERED that until such time as respondents demonstrate, by properly audited financial statements, that the corporate respondent is solvent; *i.e.*, that the current assets of the Karler Packing Company, Inc., exceed its current liabilities; and a stipulation to such effect is filed in this proceeding, respondents shall prepare weekly statements showing all livestock purchases, and all payments made for such purchases by cashier's check, wire transfer of funds or United States currency; and monthly balance sheets of Karler Packing Company, Inc. The weekly statements shall identify the names of the livestock sellers, the number of head and purchase amount, the purchase and payment date; and the method of payment; *i.e.*, whether the payment is by cashier's check, wire transfer of funds, or United States currency. Copies of these weekly statements and monthly balance sheets shall be mailed to the Regional Supervisor of the GIPSA Regional Office in Denver, Colorado, at the close of each week and month, respectively. Monthly balance sheets may be prepared by compilation by a certified public accountant.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Karler Packing Company, Inc., Jesse Karler, and Henry Karler are jointly and severally assessed a civil penalty of \$46,000.

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Jurisdiction is retained for the purpose of insuring full compliance with the provisions of this Order.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final May 1, 1996.-Editor]

**In re: S. LEVON OWENS.
P&S Docket No. D-95-13.
Decision and Order filed May 3, 1996.**

Failure to deny material allegations - Suspension of registration - Cease and desist order - Failure to pay full purchase price when due - Prior course of dealing not sufficient - Willful violation.

Barbara S. Good, for Complainant.

Michael S. MacInnis, Jackson, MS, for Respondent.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the provisions of the Rules of Practice setting forth the procedure upon failure to file an answer or admissions of facts (7 C.F.R. § 1.139).

The complaint in this matter was filed on December 22, 1994, and served upon the respondent on January 25, 1995. The complaint set forth the details of a number of livestock purchase transactions covering the period January 4, 1993 through September 22, 1993, and alleged that respondent, in these transactions, had failed to pay when due for livestock in the amount of \$63,602.43, and that further, of that amount, \$32,104.01 remained unpaid as of the date of the complaint. The complaint further alleged that respondent's failures to pay when due for livestock and failures to pay for livestock as

alleged constitute violations of §§ 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Respondent filed his answer to the complaint on March 24, 1995. In the answer, respondent admitted the jurisdictional allegations in paragraph I of the complaint, admitted that he purchased livestock on or about the dates set forth in the complaint, admitted that there remains unpaid the \$32,104.01 specified in the complaint; but denied that he failed to pay when due for the livestock purchases and denied that the \$32,104.01 admitted as unpaid is due because there were no terms of "repayment other than those established by prior course of dealing." AN, ¶ II(b).

Findings of Fact

1. S. Levon Owens, hereinafter referred to as "the respondent," is an individual whose business mailing address is [REDACTED]

2. Respondent is, and at all times material herein, was:

(A) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account or the accounts of others; and

(B) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. Respondent purchased livestock as set out in Paragraph II of the complaint and failed to pay, when due, the amount of \$32,104.01.

4. Respondent purchased livestock as set out in Paragraph II of the complaint and failed to pay therefor the amount of \$32,104.01.

Conclusions

The respondent admits making the purchases of livestock set forth in the complaint, and further admits that \$32,014.01 remains unpaid for such purchases. As a defense, he states that the amount is not presently due based upon a prior course of dealing with the livestock seller. As a matter of law, respondent has willfully violated §§ 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). Section 409 of the Act provides, in part, as follows:

(a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full

amount of the purchase price: . . . *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirements for prompt payment.

- (b) Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a). Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.
- (c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered- an "unfair practice" in violation of this Act. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this Act.

Respondent here admits the transactions, admits the amount unpaid, but relies on a theory that he had a prior course of dealing with the livestock seller for the argument that the unpaid amount is not due. Section 409, however, requires either payment or a written credit agreement. Under no set of circumstances can "prior course of dealing" suffice as compliance with the Act. If parties to a transaction wish to extend payment terms beyond those specified in the Act, the plain language of section 409 requires a written credit agreement to be in existence before the transaction in question. Thus, the admissions that the transactions took place as alleged and that \$32,104.01 remains unpaid establishes that a violation of the statute occurred.

The undisputed facts show that the respondent has violated the Act by failing to pay when due and failing to pay for livestock. Section 409 of the Act requires *delivery of the full amount of the purchase price before the close of the next business day following the purchase.* 7 U.S.C. § 228b(a). Subsection (c) provides, further, that "[a]ny delay or attempt to delay by a market agency [or] dealer . . . purchasing livestock, the collection of funds as herein provided . . . resulting in extending the normal period of payment shall be considered an unfair practice" in violation of § 213(a) of the Act. (Emphasis supplied).

Such a violation is willful where the respondent has ". . . 1) intentionally do[ne] an act that is prohibited--irrespective of evil motive or reliance on erroneous advice, or 2) act[ed] with careless disregard of statutory requirements. . . . *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961), citing *Eastern Produce v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), cert. denied, 450 U.S. 997. The Ninth Circuit Court of Appeals has ruled that if a person "acts with careless disregard of statutory requirements, the violation is willful." * * * [quotations omitted]. "To establish willfulness, the . . . [agency] . . . only needed to show that . . . [petitioner's] . . . ongoing failure to act was intentional as opposed to accidental. Proof of an evil motive is unnecessary." *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 773 (9th Cir. 1985). In such cases the notice described in 5 U.S.C. § 558(c) is not required prior to suspension of respondents' registration.

Order

Respondent, S. Levon Owens, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and
2. Failing to pay the full purchase price of livestock; and

Respondent, S. Levon Owens, is suspended as a registrant under the Act for a period of 5 years; **provided, however**, that at any time after the expiration of 90 days after the effective date of this decision, if respondent demonstrates that restitution has been made to all unpaid sellers of livestock, then a supplemental order may be issued terminating this suspension; and **provided further** that this order may be modified upon application to Packers and Stockyards Programs, Grain Inspection, Packers & Stockyards Administration to permit the salaried employment of the respondent, S. Levon Owens, by a

registrant or packer after the initial 90 days of the term of this order and upon demonstration of circumstances warranting modification of the order.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service upon Respondent unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final June 14, 1996.-Editor]

PACKERS AND STOCKYARDS ACT

CONSENT DECISIONS

(Not published herein.-Editor)

Jimmy Hughes. P&S Docket No. D-95-35. 1/17/96.

Gregory W. Shipman. P&S Docket No. D-95-57. 1/23/96.

Riverbend Cattle Company and John Wheeler. P&S Docket No. D-95-10. 2/1/96.

Taylor Packing Co., Inc., Harold A. Roney. P&S Docket No. D-95-21. 2/12/96.

Empire Kosher Poultry, Inc., Lenard Tessler and Matthew Soccio. P&S Docket No. D-96-06. 2/29/96.

Aiken Livestock, Sam Aiken, Jerry Aiken, Jack Aiken and Jeff Aiken. P&S Docket No. D-96-07. 3/8/96.

C.R. (Rick) Nejmanowski. P&S Docket No. D-95-39. 3/20/96.

Milan Brumit. P&S Docket No. D-96-09. 3/28/96.

Barry Kort. P&S Docket No. D-95-19. 4/2/96.

Thomas G. Olin. P&S Docket No. D-94-20. 4/24/96.

Harold L. Marshall. P&S Docket No. D-96-08. 4/29/96.

J.B. Richards. P&S Docket No. D-96-16. 4/30/96.

Joe A. Fritz d/b/a Mid West Cattle Co. P&S Docket No. D-95-05. 5/2/96.

Gaines Hughes. P&S Docket No. D-96-14. 5/9/96.

Fresh Meat Export Co., Inc. and Herve Solandt. P&S Docket No. D-96-01. 5/14/96.

Jack-Rich, Inc. P&S Docket No. D-95-39. 5/31/96.

AGRICULTURE DECISIONS

Volume 55

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Part Three (PACA)
Pages 506 - 726**



**THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE**

PERISHABLE AGRICULTURAL COMMODITIES ACT

ERRATA

NORINSBERG CORPORATION v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 93-1842.

Errata.

In the Court Decision published at 54 Agric. Dec. 634, the correct name of the United States Court of Appeals that decided the case is the "DISTRICT OF COLUMBIA CIRCUIT."

In re: ATLANTIC PRODUCE CO. AND JOSEPH PINTO.

PACA Docket No. D-94-533.

Errata.

In the Decision and Order issued by Donald A. Campbell, Judicial Officer on March 22, 1995, and published at 54 Agric. Dec. 701, several lines were omitted from the final page of the Decision. The last two paragraphs of the Decision on page 715 should read as follows:

Although *Caito* mentions briefly the Department's severe sanction policy, which has not been followed since *S.S. Farms Linn County, supra*, the overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time. That doctrine is not altered by the new sanction policy set forth in *S.S. Farms Linn County*.

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

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in **AGRICULTURE DECISIONS**.

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in **AGRICULTURE DECISIONS**.

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PERISHABLE AGRICULTURAL COMMODITIES ACT**COURT DECISIONS****CARL NORMAN QUINN v. SECRETARY OF AGRICULTURE.****No. 72-1396.****Decided January 6, 1975.**

(Cite as: 510 F.2d 743)

Rebuttable presumption - "Responsibly connected" - Secretary's authority to institute disciplinary proceedings not dependent on continued existence of licensee eligible to do business.

The United States Court of Appeals for the District of Columbia Circuit found that the administrative record did not support the action taken against Petitioner and remanded the case to the Secretary for further proceedings. The District of Columbia Circuit held that the presumption raised by PACA that a person is "responsibly connected" with a licensee if he is affiliated with the licensee as an officer was rebuttable. The court further stated that Petitioner, a former employee and vice-president of a licensee found to have violated the PACA, was entitled to the opportunity to prove that his officership was purely nominal and that he was not "responsibly connected" with the licensee. Petitioner-employee also was entitled to prove that licensee was not a corporation under the PACA. The court held that the Secretary erred in failing to consider Petitioner's evidence. However, the court rejected Petitioner's contention that the Secretary's authority to institute disciplinary proceedings depended upon the continued existence of a licensee eligible to do business under the Act.

Before BAZELON, Chief Judge, and LEVENTHAL and ROBINSON, Circuit Judges.

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

SPOTTSWOOD W. ROBINSON, III, Circuit Judge:

Petitioner, Carl Norman Quinn, seeks review of orders¹ of the Secretary of Agriculture rendering him ineligible for employment by any licensee under the Perishable Agricultural Commodities Act² for a period of one year.

¹See note 35, *infra*.

²Act of June 10, 1990, ch. 436, § 1, as amended, 7 U.S.C. § 499a *et seq.* (1970). Pertinent amendments to the Act since the 1970 codification are noted hereinafter.

These orders rest upon determinations that DeVita Fruit Company, a corporate licensee, had flagrantly and repeatedly violated the Act, and that Quinn had then been "responsibly connected" with the company because he served nominally as its vice-president. Finding that the administrative record, in its present posture, does not support the action taken against Quinn, we remand the case to the Secretary for further proceedings.

I. THE LEGISLATIVE BACKGROUND

To facilitate an understanding of the issues presented for our review, we pause initially to briefly examine the purpose and principal features of the Act. Originally passed in 1930, this legislation was designed to combat a pattern of unfair practices prevalent in the perishable agriculture commodities industry.³ The basic problem was victimization of growers and shoppers by unscrupulous dealers to whom such commodities were sold or consigned for sale.⁴ A conspicuous example was a sale followed by a decline in the market for the commodity and the dealer faced financial loss if he accepted shipment, paid the contract price and then sold on his own account. In such instances, dealers frequently rejected shipments on false grounds, notably that the commodities arrived in a condition other than as promised.⁵ It was to eradicate these and other machinations that Congress settled on a statutory scheme which has been regarded as one of the Nation's most successful regulatory programs.⁶

In broad outline, the Act regulates the shipment of perishable agricultural commodities in interstate and foreign commerce through a system of licensing and administrative supervision of the conduct of licensees. Commission merchants, dealers and brokers in such commodities must obtain from the

³H.R. Rep. No. 1041, 71st Cong., 2d Sess. 1-2 (1930).

⁴*Id.*

⁵*Id.* at 1-2. Sellers of such commodities were also accused of unfair practices. "Many instances have arisen where the shipper, after having previously signed a contract to deliver the commodity on a certain date in the future, fails to do so when delivery would be to his disadvantage and he sells to some one else at a higher price." *Id.* at 2.

⁶H.R. Rep. No. 1546, 87th Cong., 2d Sess. 3, 1962 U.S. Code Cong. & Admin. News, p. 2749 (1962). See also *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966).

Secretary of Agriculture a license as a precondition to doing business.⁷ By Section 2, licensees are forbidden to engage in specified unfair practices,⁸ which include failure to make full payment promptly for commodities dealt in.⁹ An unfair practice subjects the licensee to liability to the injured party for damages, recoverable either in a proceeding before the Secretary or by suit in court.¹⁰ The Secretary is authorized to investigate complaints of unfair practices¹¹ and, finding a violation, to issue a reparation order requiring the offending licensee to pay damages.¹² Failure to obey the order automatically suspends the license during noncompliance.¹³

The Secretary is also empowered to suspend or revoke licenses for unfair practices,¹⁴ and to limit employment within the industry of those who violate

⁷Perishable Agricultural Commodities Act §§ 3, 4, 7 U.S.C. §§ 499c, 499d (1970).

⁸*Id.* § 2, 7 U.S.C. § 499b (1970).

⁹*Id.* § 2(4), 7 U.S.C. § 499b(4) (1970).

¹⁰*Id.* § 5, 7 U.S.C. § 499e (1970).

¹¹*Id.* § 6, 7 U.S.C. § 499f (Supp. III 1973).

¹²*Id.* § 7(a), 7 U.S.C. § 499g(a) (Supp. III 1973).

¹³"Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: *Provided*. That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied." *Id.* § 7(d), 7 U.S.C. § 499g(d) (1970).

¹⁴Whenever (a) the Secretary determines, as provided in [§ 6], that any commission merchant, dealer, or broker has violated any of the provisions of [§ 2], or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated [§ 14(b)],
(continued...)

the Act and those who are "responsibly connected" with violators.¹⁵ Section 8(b) of the Act, in respects highly relevant to this case, provides that except with the Secretary's approval no licensee may employ any person, or anyone "responsibly connected" with a person, whose license has been revoked or is currently suspended, or who has been found to have committed any flagrant or repeated violation of Section 2, or against whom there is an unpaid reparation order issued with two years.¹⁶ Section 1(9), another provision bearing importantly on this case, specifies that a person is "responsibly connected" with an offending licensee if he is affiliated with the licensee as

¹⁴(...continued)

the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender. . . . " *Id.* § 8(a), 7 U.S.C. § 499h(a) (1970).

¹⁵*Id.* § 8(b), 7 U.S.C. § 499h(b) (1970), which in relevant part provides:

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person--

- (1) whose license has been revoked or is currently suspended by order of the Secretary;
- (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or
- (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

¹⁶See note 15, *supra*. The Secretary is authorized to approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation, upon the posting of bond. *Id.* The Secretary may also approve employment without bond after the expiration of two years from the effective date of the disciplinary order. *Id.*

officer, director or holder of more than 10% of its outstanding stock.¹⁷

II. THE FACTUAL BACKGROUND

The material facts of the case at bar emerge without substantial dispute. Quinn commenced employment in the wholesale fruit and vegetable industry in 1944. During the first 12 years he worked as a truck driver and a buyer and seller of produce for different firms. In 1956, he was hired by John A. DeVita, who then conducted as a sole proprietorship a fruit and vegetable business in Lima, Ohio. Quinn supervised other employees in the packing and loading of produce; he also loaded trucks and made deliveries himself. From 1968 to 1970, his primary activity was buying and selling produce by telephone.

In 1964, DeVita incorporated his business. The assets and liabilities of the sole proprietorship were transferred to DeVita Fruit Company, a newly-organized Ohio corporation, in exchange for all of its issued stock. To meet a requirement of Ohio law, DeVita asked Quinn to become vice-president and Quinn assented.¹⁸ Quinn's officership was purely nominal, and in no way did his activities for the business change in consequence of the incorporation. DeVita remained sole stockholder and exercised full and exclusive control over the corporation's operations.

From October, 1964, onward DeVita Fruit Company obtained successive one-year licenses authorizing it to do business as a commission merchant, dealer and broker of perishable agricultural commodities in interstate and foreign commerce.¹⁹ Between November 1969, and July 1970, however, the company failed to make full payment for 47 lots of fruits and vegetables shipped to it from outside Ohio. One of the shippers filed a complaint with the Department of Agriculture and on September 14, 1970, was awarded

¹⁷"The term 'responsibly connected' means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association . . ." *Id.* § 1(9), 7 U.S.C. § 499a(9) (1970).

¹⁸DeVita became president, and two others secretary and treasurer, respectively.

¹⁹See text *supra* at note 7.

reparations.²⁰ When, 30 days later, the award remained unsatisfied, the company's license was automatically suspended by force of the Act.²¹

In the meantime, on September 5, 1970, pursuant to the Bankruptcy Act, DeVita Fruit Company filed a petition in the District Court for the Northern District of Ohio for an arrangement with its creditors.²² A few days previously, the company had terminated Quinn's employment, and on October 1, 1970, he took a job with another wholesale fruit and vegetable company licensed to do business under the Act.²³ On December 8, 1970, DeVita Fruit Company was adjudged a bankrupt, but apparently never received a discharge.²⁴

III. THE ADMINISTRATIVE BACKGROUND

Several months later the Department of Agriculture moved against DeVita Fruit Company. On April 27, 1971, the Department's Consumer and Marketing Service sent a letter to the company calling attention to its outstanding financial obligations to the unpaid shippers. The letter advised that "[s]uch violations are sufficient grounds for instituting disciplinary action which could result in the revocation or suspension of your license," and that the company's explanation should be submitted within 20 days.²⁵ On June 22, no response having been received, the Service filed a complaint charging

²⁰See text *supra* at note 10.

²¹See note 13, *supra*.

²²See Bankruptcy Act, ch. XI, 11 U.S.C. § 701 *et seq.* (1970).

²³It was Quinn's employment by the licensee that gave rise to this litigation.

²⁴In his brief, Quinn states that the company was discharged in bankruptcy. Brief for Petitioner at 5, 12, 16, but no supporting record reference is supplied. Respondents' brief makes the contrary claim and appendicizes a letter outside the record from a referee in bankruptcy for the Northern District of Ohio stating "that the bankrupt has neither petitioned for nor been granted a discharge in Bankruptcy." Brief for Respondent at 17, 2a.

²⁵We have already noted that by the terms of the Act the company's license had already been automatically suspended for nonpayment of the reparation award. See text *supra* at note 21.

the company with violations of the Act by reason of its failure to pay the shippers and seeking revocation of the company's license.²⁶ Copies of the letter and complaint were sent to the company's officers, including Quinn, and no formal answer to the complaint was filed within the 20-day period allowed therefor.²⁷

On July 13, 1971, however, during the period for answering the complaint, Quinn's attorney sent to the Division a letter asking for the opportunity to appear at a hearing "to present factual evidence and legal arguments which will show that [Quinn] was not 'responsibly connected' with the DeVita Fruit Company at the time of the alleged violations of the [Act] which form the basis for the subject complaint." The letter recited the facts disclosing the nature of Quinn's relationship with the company and was accompanied by supporting affidavits.

On August 16, 1971, the Division moved for the issuance of a hearing examiner's report in default proceedings²⁸ and again recommended that DeVita Fruit Company's license be revoked. A copy of this motion was sent to Quinn's attorney on August 19 together with a letter stating the Division's view that the request for a hearing to show that Quinn was not "responsibly connected" with the company was "not responsive to the allegations of the complaint," and so was not considered an answer to the complaint.

On August 25, Quinn's counsel wrote that he wished to dispute the charge that the company's violations were "flagrant or repeated" on the ground that the company's default was occasioned by reasonable expectations of a large business loan which did not materialize.²⁹ In response to the hearing examiner's direction that Service state on the record its position on counsel's request, the Service filed an opposition on the ground that "no useful purpose would be served in holding an oral hearing on the violations alleged in the

²⁶See note 14, *supra*, and accompanying text.

²⁷See 7 C.F.R. §§ 47.30, 47.32(a) (1974).

²⁸See 7 C.F.R. § 47.30(c) (1974).

²⁹The letter stated that "the transactions referred to in the complaint were entered into by Mr. DeVita in anticipation of his receiving a \$350,000 loan from Small Business Administration" which DeVita did not ultimately receive, but that "Mr. DeVita's reliance upon the SBA's intention to make this loan was reasonable under the circumstances."

Complaint because on its face the Request shows there is no issue as to whether the violations were repeated." The opposition added that "[t]here is no assertion that the violations did not occur, but rather an implicit admission that they did, with an expressed intention merely to challenge the character of those violations. . . . Whether these violations constitute flagrant violations of the Act need not be considered since the Act speaks in the disjunctive as regards 'repeated or flagrant' violations, and 47 violations are clearly 'repeated'." In turn, Quinn's counsel replied that his letter of August 25 was not intended to suggest "that we conceded that the violations actually occurred or that if any did occur they were 'repeated' within the meaning of the statute." The reply reiterated facts descriptive of the relationship which Quinn bore to the company.

On October 29 the hearing examiner filed a recommended decision. As to the request to reopen the proceedings, the examiner pointed out that DeVita Fruit Company had not answered the complaint and held that Quinn's attempt to raise a defense based on the unsuccessful loan applications for "the apparent purpose [of] show[ing] that [the alleged violations] were not flagrant" did not negate their character as repeated violations.³⁰ The examiner thus concluded that the request to reopen should be denied. On the merits, the examiner proposed revocation of the company's license, concluding that the company's nonpayment of the reparation award and its failure to account for the remainder of the 47 lots of fruits and vegetables "constituted willful flagrant and repeated violations of" the unfair conduct provisions of the Act.³¹ The examiner dismissed Quinn's lack-of-responsible-connection data with the observation that it indicated a "primary interest to obviate the provisions of

³⁰The examiner based this position on *Joseph Gangi & Sons, Inc.*, 30 Agric. Dec. 815, 816, aff'd sub nom., *Fruit Salad, Inc. v. Secretary of Agric.*, 451 F.2d 162 (1st Cir. 1971).

³¹See note 14, *supra*. Section 2 of the Act, 7 U.S.C. § 499b (1970), provides in relevant part:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce--

(4) For any commission merchant, dealer, or broker to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any [perishable agricultural] commodity to the person with whom such transaction is had. . . .
. . .

the Act which affect officers of an organization found to have violated the Act, or collateral consequences of violations found." Quinn filed exceptions to the recommended decision, restating earlier arguments, and asked that the proceeding be reopened to enable him "to present factual evidence and legal argument as to the merits of the Complaint and his contention that he was not 'responsibly connected' with DeVita Fruit Company within the meaning of" Section 8(b).

The Secretary's final decision and order, by the Department's judicial officer, came on February 16, 1972. It adopted in all respects the recommended decision of the hearing examiner and revoked the license of DeVita Fruit Company. By letters of February 22, 1972, the Consumer and Marketing Service notified Quinn and his new employer of the decision and of Quinn's resulting ineligibility for employment under the Act for a period of one year from the effective date of the decision.³² Quinn presented a petition for reconsideration and for reopening of the proceedings,³³ which the Consumer and Marketing Service resisted on the ground that the only proper issues in the proceedings were whether the alleged violations occurred and whether they were repeated or flagrant, and that uncontroverted facts required answers to both questions in the affirmative. The Service further asserted that "Mr. Quinn's real interest in contesting the allegations of violations in this proceeding is not to defend against the violations, but rather to endeavor to avoid the subsequent effect on his employment status should such violations ultimately be found to have occurred;" and that "[q]uestions as to whether Mr. Quinn was 'responsibly connected' with [DeVita Fruit Company] are not proper for consideration in this proceeding. Therefore, all arguments which have been made with respect to Mr. Quinn's status are irrelevant, and Mr. Quinn must seek any remedy he may have in this regard in the courts."

Quinn's petition for reconsideration was denied on April 4, 1972, and the effective date of revocation of the company's license was reset. On April 16, the Service sent Quinn's employer a letter directing Quinn's discharge for the one-year period, and sent Quinn a letter informing him of his ineligibility for employment during that period by licensees under the Act. Then followed the

³²See notes 15, 17, *supra*.

³³See 7 C.F.R. § 47.42(a), (b) (1974). The revocation order of February 16 was thereupon stayed pending action on the petition for reconsideration.

petition for review by this court,³⁴ attacking the action taken against the company as well as against Quinn.³⁵

IV. THE PROCEDURAL CONTENTIONS

Quinn presents for resolution four contentions, three of which require only relatively brief discussion. One is that the Secretary could not initiate a disciplinary action against DeVita Fruit Company because its license had already been suspended, by operation of the Act, on account of its discharge in bankruptcy.³⁶ We cannot accept Quinn's factual premise, for from aught that appears the company never did receive a discharge in the bankruptcy proceeding.³⁷ The disciplinary action, however, did not commence until after automatic suspension of the license by reason of the company's failure to satisfy the reparation award against it;³⁸ beyond that, the action endured well past the point at which the latest one-year term of the license expired.³⁹ For these latter reasons, Quinn's objection seemingly remains viable.

Nonetheless, we reject the point for in our view the Secretary's authority to institute disciplinary proceedings does not depend upon the continued existence of a once-effective license to do business under the Act: The purposes of such a proceeding extend to a determination as to whether a

³⁴See 28 U.S.C. § 2342(2) (1970). The revocation order against DeVita Fruit Company has been stayed administratively, and the notice of Quinn's ineligibility for employment withdrawn, pending our decision on review.

³⁵The rulings of which review is sought are (a) the decision and order of February 16, 1972, revoking the license of DeVita Fruit Company; (b) the order of April 4, 1972, denying Quinn's motion for reconsideration; (c) the direction incorporated in the letter of April 17, 1972, to Quinn's employer to discharge him for the one-year period; and (d) the declaration in the letter of April 17, 1972, of Quinn's ineligibility for employment for that period.

³⁶See Perishable Agricultural Commodities Act § 4(a), 7 U.S.C. § 499d(a) (1970).

³⁷See note 24, *supra*.

³⁸See note 13, *supra*.

³⁹That point was October 26, 1971.

licensee has flagrantly or repeatedly violated the Act⁴⁰ and, if so, a further determination as to whether the licensee and those responsibly connected with the licensee should in the future be allowed to engage in further activity in the industry.⁴¹ To say that the Secretary cannot decide these matters simply because the license has already been suspended for failure to pay a reparation award is to insulate those responsible for the failure from the statutory consequences of their own delinquency.⁴² And to allow individual wrongdoers to escape such consequences by the fortuity of license expiration during the pendency of the disciplinary action is to promote an obvious inconsistency in the statutory scheme.⁴³ Congress hardly contemplated avoidance of the statutory sanctions in instances where, in the public interest, they are needed most.⁴⁴

Quinn also argues that the Secretary's action in temporarily disapproving his employability is fundamentally faulty because the Department of Agriculture did not notify him beforehand that that could result from his undertaking to serve as vice-president of DeVita Fruit Company. More specifically, the argument is that the Department, in issuing a license to the company, took no steps to inform the company's officers of the sanctions applicable to them personally in the event that the license was subsequently revoked or suspended for conduct infringing the Act.⁴⁵ Appellees respond that the officers were bound, as a matter of law, to know the statutory provisions to which they became subject upon assuming office. Like Quinn, we cannot as a matter of logic subscribe to the oft-repeated proposition that

⁴⁰See note 14, *supra*.

⁴¹See notes 15, 16. *supra*.

⁴²*Fruit Salad, Inc. v. Secretary of Agric.*, *supra* note 30, 451 F.2d at 163.

⁴³See *id.*

⁴⁴See *id.*

⁴⁵We are advised that, although there is no statute requiring it to do so, the Consumer and Marketing Service of the Department of Agriculture, as a matter of administrative practice, transmits a copy of the Act and the implementing regulations to each licensee along with his license.

everyone is presumed to know the law,⁴⁶ but like the Secretary we are satisfied that Quinn's argument cannot prevail. We perceive no statutory or constitutional duty on the Department to take affirmative steps to bring to Quinn's attention provisions that are matters of general law. Absent such a duty, we cannot accept Quinn's contention.

Quinn further resists the statutory penalty on the ground that he was wrongfully deprived of the opportunity to defend the charge that DeVita Fruit Company had committed flagrant and repeated violations of the Act.⁴⁷ We may assume, without deciding, that though the company did not oppose the charge against it, Quinn was entitled to do so if indeed he was in position to present matter constituting a legitimate defense. The insuperable difficulty in Quinn's position, however, is that the only "defense" he proffered was that the company had sought, but ultimately did not obtain, a loan to enable it to accommodate its financial obligations.⁴⁸ While conceivably a showing to that effect might have been relevant on the question whether the violations were flagrant, it had no tendency to meet the charge that they also were repeated. The statutory language is in the disjunctive; disciplinary action is authorized if violations of the Act are either "flagrant or repeated."⁴⁹ With defaults aggregating more than \$100,000 due 19 shippers on 47 transactions over an eight-month period, we cannot overturn the Secretary's finding⁵⁰ that the company's violations were "repeated."⁵¹

⁴⁶See, e.g., *Van Aalten v. Hurley*, 176 F. Supp. 851, 857 (S.D.N.Y. 1959); *Martindale v. Falkner*, 2 C.B. 706, 135 Eng. Reg. 1124, 1129 (1846).

⁴⁷See Part III, *supra*.

⁴⁸See note 29, *supra*, and accompanying text.

⁴⁹See notes 14, 15, *supra*.

⁵⁰See text *supra* at and following note 31.

⁵¹*George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 991, 992, 994 (2d Cir. 1974); *Zwick v. Freeman*, 373 F.2d 110, 114 115 (2d Cir. 1967); *Fruit Salad, Inc. v. Secretary of Agric.*, *supra* note 30, 451 F.2d at 163.

V. THE INTERPRETATION CONTENTION

We now turn to the remaining question Quinn tenders for decision: whether Section 1(9) of the Act⁵² requires inexorably a holding that, as nominal vice-president of DeVita Fruit Company, Quinn was "responsibly connected" with the company, thereby foreclosing all opportunity to prove that he was not. We answer that question in the negative on each of two independent bases. Interpreting Section 1(9) conformably with accepted canons of statutory construction in light of its legislative history, we conclude that the section's formula for ascertaining responsible connection is rebuttable rather than absolute. We further conclude that in the current state of the record it cannot confidently be said that DeVita Fruit Company was a "corporation" within the meaning of Section 1(9), and so an organization to which the rule of that section applies.

A. *The Issue*

The Act limits licenses in the employment of any person then or theretofore "responsibly connected" with another (a) whose license is revoked or currently suspended by the Secretary, or (b) who has been found to have committed any flagrant or repeated violation of the fair-practice provisions, or (c) against whom there is an unsatisfied reparation award issued within two years.⁵³ The Secretary revoked the license of DeVita Fruit Company for flagrant and repeated fair-practice violations after the license had been statutorily suspended for nonpayment of a reparation award.⁵⁴ Section 1(9) of the Act then became relevant by reason of its specification that "[t]he term 'responsibly connected' means affiliated or connected with a commission merchant, dealer, or broker as . . . officer . . . of a corporation. . . ."⁵⁵ The Secretary's ruling that Quinn is ineligible, at least temporarily, for reemployment in the industry is predicated flatly and exclusively on this

⁵²See note 17, *supra*.

⁵³See note 15, *supra* and accompanying text.

⁵⁴See Part III, *supra*.

⁵⁵See note 17, *supra*.

provision.

Quinn contends that Section 1(9) is but a designation of categories of persons who *prima facie* are "responsibly connected" with a licensee, and who have the burden of proving, but also the prerogative of attempting to prove, a claim to the contrary. On the other hand, appellees argue, as had been administratively considered,⁵⁶ that Section 1(9) establishes a conclusive rule, barring anyone within its categories from undertaking to demonstrate that he was not "responsibly connected" with the offending licensee. So it was that the Secretary proclaimed a one-year moratorium on Quinn's employability on the ground that Quinn was responsibly connected with DeVita Fruit Company when it transgressed the Act.⁵⁷ Indulging Section 1(9) an irreversible effect, the Secretary refused Quinn's request, repeated throughout the administrative proceeding,⁵⁸ for an opportunity to prove that actually he bore no such relationship to the company. The sole reason cited for the refusal was the view that Quinn's contention manifested a "primary interest . . . to obviate the provisions of the Act, or collateral consequences of violations found."⁵⁹

If the facts are as Quinn represented them during the proceeding, it could hardly be urged that he ever was "responsibly" affiliated with the company in any true sense of the word. In an uncontested affidavit submitted in support of his application for an evidentiary hearing, Quinn acknowledged that he allowed John DeVita to use his name as vice-president of the company to enable incorporation under Ohio law, but swore that never was he assigned duties or paid additional salary as vice-president; that never did he perform services as vice-president, or even attend meetings of the board of directors; and that indeed, after the corporation was formed, never was his status as vice-president even discussed.

Never, Quinn further avowed, did he have anything to do with policy or business decisions, or have access to the company's records, or have any

⁵⁶See Part III, *supra*.

⁵⁷See Part III, *supra*.

⁵⁸See Part III, *supra*.

⁵⁹See text *supra* following note 31. The language quoted is that of the trial examiner, whose recommended decision, as there pointed out, was adopted by the Department's judicial officer, acting for the Secretary.

knowledge of the company's financial difficulties. Other unopposed affidavits stated that Quinn's occupancy of the vice-presidency of DeVita Fruit Company was purely nominal, and that John DeVita, as sole stockholder, completely controlled the company and effectively exercised the ultimate decision-making power in all aspects of company operations.

These circumstances, if they existed, would demonstrate not only that Quinn did not to any extent participate in the management of the company's affairs, but also that he was totally without power to do so; in other words, that Quinn did not bear any responsible connection with the company. They would also generate at least a doubt as to whether this one-man corporation dominated by its sole stockholder was a "corporation" within the contemplation of Section 1(9) to which the rule prescribed by that section could apply. The Secretary did not consider either of these aspects of the case, and the twin questions are whether he erred in not doing so.

B. Conclusiveness of Section 1(9)

The statutory language leaves open the question whether Section 1(9)'s definition of "responsibl[e] connect[ion]" is rebuttable or irrebuttable, and the Secretary's view that it is irrebuttable ignores well settled canons of statutory construction. The Secretary's interpretation obviously rests upon a literal reading of the language, a technique which well may stifle true legislative intent.⁶⁰ "It is a 'familiar rule,'" the Supreme Court has stated, "'that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.'"⁶¹ Moreover, a construction of a statute leading to unjust or absurd consequences should be avoided.⁶² And "even when the plain meaning [of statutory language] did not produce absurd results but merely an unreasonable one 'plainly at variance

⁶⁰See *Lynch v. Overholser*, 369 U.S. 705, 710 (1962); *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946); *Cleary v. Chalk*, 488 F.2d 1315, 1322 (D.C. Cir. 1973); *Lange v. United States*, 443 F.2d 720, 722-23 (D.C. Cir. 1971).

⁶¹*National Woodwork Mfrs Ass'n v. NLRB*, 386 U.S. 612, 619 (1967); *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

⁶²*United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). *Hagger Co. v. Helvering*, 308 U.S. 389, 394 (1940); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 945 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972).

with the policy of the legislation as a whole' [the Court] has followed that purpose, rather than the literal words."⁶³

Lacking enlightenment from the bare language of Section 1(9), we look to its legislative history, and there we find nothing showing that Congress opted for an incontestable formula for ascertaining "responsibl[e] connect[ion]" through corporate officership. As originally enacted in 1930, Section 8 empowered the Secretary to suspend or revoke the authority of a licensee to do business under the Act, but contained no provision enabling restrictions on future employment of those who were violators in an employee capacity.⁶⁴ Thus, for example, a violator could circumvent the Act by the subterfuge of acting as an "employee" of a dummy corporation newly licensed.⁶⁵ By enactment of what is now Section 8(b) in 1934⁶⁶ and amendment thereof in 1956,⁶⁷ the Secretary was authorized to revoke a license when the licensee, after notice from the Secretary, continued to employ in a "responsible position" one whose own license had been revoked or suspended or one who had been "responsibly connected" with a licensee who incurred revocation or suspension.⁶⁸ These charges, however, left to the Secretary the task of ascertaining what in the way of new employment constituted a "responsible position," and who in the way of old employment had been "responsibly connected" with a violating licensee.

It was to ameliorate the problems incidental to such determination that

⁶³*United States v. American Trucking Ass'n*, *supra* note 62, 310 U.S. at 543, quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922).

⁶⁴Act of June 10, 1930, ch. 436, § 8, 46 Stat. 535.

⁶⁵See S. Rep. No. 2485, 84th Cong., 2d Sess. 4 (1956); H.R. Rep. No. 1196, 84th Cong., 1st Sess. 3 (1955); See also H.R. Rep. No. 489, 73d Cong., 2d Sess. 2 (1934).

⁶⁶Act of Apr. 13, 1934, ch. 120, § 14, 48 Stat. 588.

⁶⁷Act of July 30, 1956, ch. 786, § 5, 70 Stat. 727.

⁶⁸The restriction imposed in 1934 precluded employment only of those whose licenses had been revoked and those "responsibly connected" with them. The 1956 amendment extended the restrictions to employment of suspended licensees and their "responsibly connected" affiliates. See H.R. Rep. No. 1156, 84th Cong., 1st Sess. 3 (1955).

Congress in 1962 again amended Section 8(b).⁶⁹ As Secretary Freeman commented, a major purpose of the bill proposing the amendments was

to improve and clarify the provisions relating to relicensing or employment of persons who had violated the act or had been affiliated with such persons;⁷⁰

as he pointed out,

frequent attempts are made to circumvent the law following revocation or suspension of a license. Effective enforcement of the act, therefore, rests on having comprehensive, *clear and equitable* provisions relating to relicensing and employment which fully cover the situations encountered in this area in the fruit and vegetable industry.⁷¹

Additionally, the hearings on the bill which eventually produced the 1962 amendments disclosed difficulty in securing evidence that an individual had a "responsible-position" with a new employer-licensee,⁷² and the focus on the troubles brewed by "responsible position" with a new employer was much greater than on any germinated by "responsibl[e] connect[ion]" with a former employer. As the House Committee on Agriculture explained,

[a]ny licensee hiring a person without the approval of the Secretary in violation of this provision, after notice and opportunity for hearing, may have his license suspended and revoked. At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship

⁶⁹Act of Oct. 1, 1962, Pub. L. No. 87-725, § 11, 76 Stat. 675.

⁷⁰Hearing on H.R. 5023 Before the Subcommittee on Domestic Marketing of the House Committee on Agriculture, 87th Cong., 1st Sess., ser P, at 4 (1961).

⁷¹*Id.* (emphasis supplied).

⁷²*Id.* at 15, 79.

with the licensee. Under the present provisions of the act the restrictions against employment are directed specifically to persons whose licenses had been revoked or suspended and persons responsibly connected therewith. The bill extends such restrictions to persons whose licenses could have been revoked or suspended if they had active licenses. As amended, section 8(b) would prohibit employment of persons covered by it unless such employment is approved by the Secretary; whereas at present it prohibits such employment only after notice by the Secretary.⁷³

Simultaneously with the 1962 amendment of Section 8(b), Congress added the present Section 1(9) as a new provision of the Act. The explanation for this addition was sparse. When the Committee reported the bill out favorably, it stated merely that Section 1(9) would give the term "responsibly connected" and others "specific meaning, thus avoiding possible confusion as to interpretations."⁷⁴ There is nothing to indicate that the Committee was so gravely concerned about an employee's past relations with a defaulting licensee as to intend the provision of an absolute rule on that score.

We do not find in this history a clear purpose to fashion what in the Secretary's view was an irrebuttable presumption of responsible connection with an organizational licensee merely from officership in the organization. Secretary Freeman did not ask for such a presumption,⁷⁵ and the House Committee on Agriculture stated as the single object of Section 1(9) the provision of a definition to unify interpretations of "responsibly connected," as distinguished from an effort to absolutely bar inquiry as to whether one who satisfied the definition was really "responsibly connected" with an offending licensee.⁷⁶ What seems as likely to have been contemplated was the specification of a standard by which the caliber of licensee-connections could

⁷³H.R. Rep. No. 1546, 87th Cong., 2d Sess. 8 (1962), 1962 U.S. Code Cong. & Admin. News, p. 2755 (1962). See also S. Rep. No. 750, 87th Cong., 1st Sess. 7 (1961).

⁷⁴H.R. Rep. No. 1546, 87th Cong., 3d Sess. 4 (1962), 1962 U.S. Code Cong. & Admin. News, p. 275 (1962). See also S. Rep. No. 750, 87th Cong., 1st. Sess. 2 (1961).

⁷⁵See text *supra* at notes 70-71.

⁷⁶See text *supra* at note 73.

be ascertained, rather than a mechanical and possibly inequitable ascertainment of such a connection for all cases. If either the Secretary or the Committee had in mind the drastic effect which appellees attribute to Section 1(9), we would have expected a good deal more explication in that regard.

Moreover, assuming a passionate congressional concern about proof that an employee was responsibly connected, rather than a definition of when an employee was so affiliated, it does not follow that Congress settled on an irreversible presumption as the solution. Undeniably the proof problem is eased greatly by a rule establishing *prima facie* a responsible connection from officership and casting upon the officer the obviously heavy burden of demonstrating satisfactorily to the Secretary that such a connection did not actually exist. Congress has frequently supplied rebuttable presumptions and inferences to meet similar difficulties of proof,⁷⁷ and there is no significant indication that Congress felt that more was needed here.

The injustice,⁷⁸ indeed the absurdity,⁷⁹ of irrebuttably presuming that one is responsibly connected when actually he is not is readily apparent. If those who profess to know the facts are to be believed, Quinn was an officer of DeVita Fruit Company only on paper. Undeniably, the Perishable Agricultural Commodities Act was designed to strike at persons in authority who acquiesced in wrongdoing as well as the wrongdoers themselves.⁸⁰ But by the Secretary's construction of Section 1(9), it also smites one who was not only unaware of the wrongdoing but also powerless to curb it.⁸¹

⁷⁷See *Turner v. United States*, 396 U.S. 398 (1970); *Adler v. Board of Educ.*, 342 U.S. 485, 494-496 (1952); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 18-19 (1931); *United States v. Los Angeles, S. L. R.R.*, 273 U.S. 299, 311-312 (1927); *Luria v. United States*, 231 U.S. 9, 25-27 (1913).

⁷⁸See text *supra* at note 62.

⁷⁹See text *supra* at notes 62-63.

⁸⁰See text *supra* at notes 64-74.

⁸¹Quinn, now approaching the half-century mark in life with a wife and seven children, suddenly finds himself banned from the industry in which he has worked since a teenager. He has no income other than his present salary, and no vocational experience other than in the wholesale fruit and vegetable industry. He faces this dilemma allegedly because he acceded to
(continued...)

We are not persuaded that Congress, in enacting Section 1(9), intended that consequence. We think that when Congress decides to impose a conclusive presumption, its purpose must be, not merely arguable, but unmistakable. Here there is an almost total lack of indicia of such a purpose in the legislative history of Section 1(9). At the same time, the Act is replete with delegations to the Secretary of duties-some, difficult duties-requiring exertion of his fact-finding and discretionary power.⁸² There is ample basis for believing that in promulgating the formula set forth in Section 1(9), Congress contemplated the same administrative exercise.

To sum up, Congress provided, as the Secretary proposed, that once the Secretary determined that a person's license be suspended or revoked, the ensuing sanction should be prescribed by a "clear and equitable"⁸³ rule that denied him any employment, for the pertinent period, rather than require a new determination of precisely which positions were closed. But for something as consequential as the initial order of suspension or revocation of license, which traditionally rests on determination of personal fault, it would take more than the bare test and skimpy history of the statute before us to establish that this consequence was intended to be visited on a basis of absolute liability, of liability without either personal fault or a realistic capacity to counteract or obviate the fault of others.

We hold, then, that the rule of "responsible[e] connect[ion]" forged by Section 1(9) is rebuttable.⁸⁴ It operates unless and until there is a proffer of

⁸¹(...continued)

the request of his employer that his name be used to enable incorporation of the business for which he continued to work merely as an employee just as before.

⁸²See Perishable Agricultural Commodities Act §§ 3(a), (c), 4(b), (c), (d), (e), 6(a), (c), (e), 7(a), 8(a), (b), (c), 10, 12, 13(a), (c), (d), 14(a), 15, 7 U.S.C. §§ 499c(a), (c), 499d(b), (c), (d), (e), 499f(a), (c), (e), 499g(a), (d), 499h(a), (b), (c), 499j, 499l, 499m(a), (c), (d), 499n(a), 499o (1970).

⁸³See text *supra* at note 71.

⁸⁴We do not consider our construction of § 1(9) inconsistent with either of two decisions upon which appellees endeavor to support the position that a conclusive presumption is provided. In *Fruit Salad, Inc. v. Secretary of Agric.*, *supra* note 30, there was no claim that officers affected by an order suspending a corporate license were not in fact "responsibly connected" with the corporation; the challenge was predicated upon an entirely different ground.

(continued...)

proof of facts and circumstances which might reasonably lead to the conclusion that actually the connection was lacking. When, however, such a proffer is made, the opportunity of proof must be accorded, and the issue must be resolved on the evidence. Quinn made a suitable proffer, and must now be given a chance to submit his proof.⁸⁵

C. Applicability of Section 1(9)

Quite apart from the considerations just discussed, there is another which demonstrates the Secretary's error in refusing to consider Quinn's proffer in connection with the determination that the statutory limitations on reemployment applied to him. The refusal rested on the theory that Quinn could not be permitted to contest the operation of Section 1(9)'s definition of an officer of a corporate violator as one responsibly connected with the corporate licensee,⁸⁶ and as such one whose reemployment was enjoined by Section 8(b).⁸⁷ We are unable to accept the Secretary's view that Section

⁸⁴(...continued)

See notes 42-44, *supra*, and accompanying text. In *Birkenfield v. United States*, *supra* note 6, where one who admittedly had been treasurer, director, and 10%-plus stockholder of an offending corporate licensee asserted that "he never had real responsibility in" the corporation's affairs, *id.* 369 F.2d at 494, the court held merely that "[t]he automatic exclusion of 'responsibly connected' persons is not irrational or arbitrary under the circumstances." *Id.* The court felt that "the relationships of director, officer or substantial shareholder form a sufficient nexus for the arbitrary conclusion of responsible connection," *id.*, and that "[t]he fact that an individual has not exercised 'real' authority in the sanctioned company is not controlling." *Id.* We have no difficulty with the conclusion that one genuinely an officer is not the less "responsibly connected" with his corporation simply because he does not use the powers of his office. We think, however, that the situation is radically different where the affiliation is purely nominal and the so-called officer had no powers at all.

⁸⁵In light of our construction of § 1(9), it is unnecessary to consider whether as a definition of a conclusive presumption the section could have passed constitutional muster. See e.g., *Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632, 644-650 (1974); *Vlandis v. Kline*, 412 U.S. 441, 446-454 (1973). The obviously rational relationship between officership in a corporation and responsible connection with the corporation clearly sustains it as a rebuttable presumption. See *Leary v. United States*, 395 U.S. 6, 32-36 (1969).

⁸⁶See note 17, *supra*.

⁸⁷See Part III, *supra*.

1(9) was to be given automatic operation in the circumstances of this case.

To briefly recapitulate, Section 8(b) imposes restrictions on the employment of those who formerly were "responsibly connected" with revoked or suspended licensees.⁸⁸ The restraint on Quinn did not follow any determination that he was responsibly connected with DeVita Fruit Company as a matter of fact. Indeed, the Secretary declined to consider evidence, proffered by affidavits Quinn submitted, which if believed would have demonstrated that he never had such a relationship with the company. The Secretary relied instead upon the definition of "responsibly connected" set forth in Section 1(9), which he deemed unavoidable and incontrovertible in its effect upon Quinn.

Section 1(9), however, purports to attribute to Quinn a responsible connection with DeVita Fruit Company only if the company was a "corporation" within that section's meaning, and Quinn's tender challenged the Secretary's assumption that it was. The tender included an affidavit by Charles W. Daley, an attorney who had prepared and filed the articles of incorporation converting the DeVita business from individual to corporate form, and who thereafter had served as secretary of the corporation. Daley stated that "all decision making in this corporation was done by [John A.] DeVita who, throughout the entire corporate existence, was the sole stockholder." More importantly, there was also the affidavit of John DeVita, who stated "that in the conduct of his business as a corporation, affiant as shareholder, elected the directors of the corporation from year to year and that said directors as elected by affiant, elected the officers of the corporation;" and "that all policy decisions of the corporation with reference to the company operations were made by affiant throughout and where appropriate through his Board of Directors, but affiant effectively retained the decision making power in all aspects of corporate decision making." So a question arises as to whether the organization which DeVita individually dominated and controlled could in legal contemplation be treated only as a corporation. The further question is whether the Secretary was correct in his apparent conclusion that he lacked discretion to treat the DeVita organization in any other way.

⁸⁸See note 15, *supra*.

A corporation is ordinarily to be viewed as a distinct entity,⁸⁹ even when it is wholly owned by a single individual.⁹⁰ This concept is, however, designed to serve normal, inoffensive uses of the corporate device, and is not to be stretched beyond its reason and policy.⁹¹

Only recently we reminded that "[t]he courts have consistently recognized that a corporate entity must be disregarded in the interest of public convenience, fairness and equity"⁹² and that

[i]f any general rule can be laid down, in the present state of authority, it is that a corporation can be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.⁹³

This doctrine is firmly entrenched in our jurisprudence,⁹⁴ and it has been

⁸⁹ *E.g., Jones v. Helvering*, 71 F.2d 214, 217 (D.C. Cir.), *cert. denied*, 293 U.S. 583 (1934); *Callas v. Independent Taxi Owners' Ass'n*, 66 F.2d 192, 193 (D.C. Cir.), *cert. denied*, 290 U.S. 669 (1933).

⁹⁰ *Eichelberger v. Arlington Bldg., Inc.*, 280 F. 997, 999 (1922); *El Salto, S.A. v. PSG Co.*, 444 F.2d 477, 483 (9th Cir.), *cert. denied*, 404 U.S. 940 (1971); *Robertson v. Roy L. Morgan Prod. Co.*, 411 F.2d 1041, 1043 (10th Cir. 1969).

⁹¹ "[T]here is an exception to the entity rule, where its recognition would result in promoting illegality, fraud, or injustice. In other words, since the franchise is granted by the state for a useful and valid purpose, it may not be employed to further wrong. Where it is so employed the law will disregard the rule, go behind the fiction, and treat the stockholders as if the corporation did not exist." *Eichelberger v. Arlington Bldg., Inc.*, *supra* note 90, 280 F. at 999 (citations omitted).

⁹² *Capital Tel. Co. v. FCC.*, 498 F.2d 734, 738 (D.C. Cir. 1974) (citations omitted).

⁹³ *Id.*, quoting *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905). See also *Francis O. Day Co. v. Shapiro*, 267 F.2d 669, 673 (D.C. Cir. 1959); *Callas v. Independent Taxi Owners' Ass'n*, *supra* note 89, 66 F.2d at 193.

⁹⁴ See the cases collected in 1 W. Fletcher, *Corporations*, §§ 41-46 (rev. ed. 1963) and *Annot.*, 46 A.L.R.3d 428 (1972).

utilized in a variety of situations,⁹⁵ not the least of which are those wherein the corporation is simply the alter ego of its owners.⁹⁶ Here we speak not merely of single ownership,⁹⁷ or of deliberate adoption and use of a corporate form in order to secure its legitimate advantages,⁹⁸ but of such domination of a corporation as in reality to negate its separate personality.⁹⁹ When, at some innocent party's expense, the corporation is converted into such an instrumentality, "the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."¹⁰⁰

So, in *Capital Telephone Company v. FCC*,¹⁰¹ we upheld an agency's treatment of separate applications by a corporation and an individual for two high-band radio channels as a single application because the individual was the sole stockholder of the corporation and controlled its operations as well as his

⁹⁵Prominently included are those wherein the corporate fiction would enable circumvention of a statute, *Anderson v. Abbott*, 321 U.S. 349, 362-363 (1944); *Alabama Power Co. v. McNinch*, 94 F.2d 601, 618 (D.C. Cir. 1937), or evasion of personal liability, *Anderson v. Abbott*, *supra*, 321 U.S. at 362-363; *Francis O. Day Co. v. Shapiro*, *supra* note 93, 267 F.2d at 673-675; *Callas v. Independent Taxi Owners' Ass'n*, *supra* note 89, 66 F.2d at 193-195.

⁹⁶*Chicago, M & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 500, 501 (1918); *Capital Tel. Co. v. FCC*, *supra* note 92, 498 F.2d at 737-739; *Rosen v. Cain*, 211 F.2d 809 (D.C. Cir. 1954); *Mansfield Journal Co. v. FCC*, *supra* note 180 F.2d 28, 37 (D.C. Cir. 1950). See also *Pardo v. Wilson Line of Washington, Inc.*, 414 F.2d 1145, 1149-1150 (D.C. Cir. 1969); *Francis O. Day Co. v. Shapiro*, *supra* note 93, 267 F.2d at 673-674. See also cases cited *infra* note 107.

⁹⁷See text *supra* at note 90.

⁹⁸See, e.g., *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 436-437 (1946).

⁹⁹See cases cited *supra* notes 91-93, 95-96 and *infra* note 107.

¹⁰⁰*Chicago, M. & St P. Ry. v. Minneapolis Civic & Commerce Ass'n*, *supra* note 96, 247 U.S. at 501. See also *Anderson v. Abbott*, *supra* note 95, 321 U.S. at 363.

¹⁰¹*Supra* note 92.

own.¹⁰² In *Mansfield Journal Company v. FCC*,¹⁰³ we sustained the agency's denial of separate applications by two newspaper companies for two radio-station licenses because the companies were wholly owned and actively controlled by one family.¹⁰⁴ In *S.O.U.P., Inc. v. FTC*,¹⁰⁵ we looked past a corporation to its members to ascertain eligibility to appeal in *forma pauperis*.¹⁰⁶ Many other courts for a variety of purposes have similarly disregarded the corporate fiction where its recognition would pervert the truth.¹⁰⁷

We are mindful that penetration of the corporate veil is a step to be taken cautiously,¹⁰⁸ and usually it is urged by rather than against the Government,

¹⁰² 498 F.2d at 737-739.

¹⁰³ *Supra* note 96.

¹⁰⁴ 180 F.2d at 37.

¹⁰⁵ 449 F.2d 1142 (1971).

¹⁰⁶ 449 F.2d at 1142-1143.

¹⁰⁷ *Dickey v. NLRB*, 217 F.2d 652, 653 (6th Cir. 1954) (to subject partners who incorporated to a certification order); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1342-1343 (8th Cir. 1971) (to sustain a cease and desist order against corporate officers individually); *Oscarson v. Norton*, 39 F.2d 610, 612 (9th Cir. 1930) (to treat a dedication by a corporation as one to the stockholders' uses); *Sell v. United States*, 336 F.2d 467, 472 (10th Cir. 1964) (to ascertain the ownership of grain for purposes of a criminal prosecution); *United States v. Goldberg*, 206 F. Supp. 394, 405-406 (E.D. Pa. 1962) (ascertain the recipient of taxable income); *Industrial Research Corp. v. General Motors Corp.*, 29 F.2d 623, 625-626 (N.D. Ohio 1928) (to sustain the service of process); *In re Rieger, Kapner & Altmark*, 157 F. 609 (S.D. Ohio 1907) (to extend a receivership of a firm to a subsidiary corporation's property); *Palmolive Co. v. Conway*, 43 F.2d 226, 229-230 (W.D. Wis. 1930) (to prevent a tax evasion); *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673, 676 (1921) (to regard payments by a corporation as individual payments, tolling the limitation period on an individual dept); *Caspers v. Chicago Real Estate Bd.*, 58 Ill. App.2d 113, 206 N.E.2d 787, 789(1965) (to bar a malicious prosecution suit against plaintiff's corporation); *Telis v. Telis*, 132 N.J.Eq. 25, 26 A.2d 249, 250-251 (1942) (to allow dower in a husband's realty); *Commonwealth v. Shafer*, 414 Pa. 613, 202 A.2d 308, 313-314 (1964) (to impose criminal liability).

¹⁰⁸ *Pardo v. Wilson Line of Washington, Inc.*, *supra* note 96. 414 F.2d at 1149-1150.

but the ultimate principle is one permitting its use to avoid injustice, and the case at bar presented a situation warranting consideration of just such a step. Quinn made a preliminary showing that John DeVita dominated and exclusively controlled DeVita Fruit Company, and that his dominion over its affairs and operations was as complete as when the business was conducted as a sole proprietorship. Quinn's showing plainly indicated, too, that acceptance of the company as a Section 1(9) corporation, and as a result the invocation against Quinn of the statutory restriction on employment, would work a grave injustice on him.¹⁰⁹ Moreover, the irrationality of holding an employee "responsibly connected" with the licensee when actually he was not is self evident.

We conclude that the Secretary erred in failing to consider Quinn's evidence. We have admonished that "the fiction of a corporate entity, cannot stand athwart sound regulatory practice,"¹¹⁰ we have said that, on the contrary, "[t]o carry out statutory objections, it is frequently necessary to seek out and to give weight to the identity and characteristics of the controlling officers and stockholders of a corporation."¹¹¹ Nothing in the legislative history of the Perishable Agricultural Commodities Act suggests that the Secretary is powerless, in administering Section 1(9), to apply a doctrine commonplace in judicial decision making. The Act entrusts many regulatory matters to the Secretary's discretion,¹¹² and Section 1(9) is not so all-inclusive a definition of "responsible connect[ion]"¹¹³ as to negate the normal

¹⁰⁹See note 81, *supra*.

¹¹⁰*Capital Tel. Co.*, *supra* note 92, 498 F.2d at 738 n. 11, quoting *H. P. Lambert Co. v. Secretary of Treasury*, 354 F.2d 819, 822 (1st Cir. 1965). See also *Central & So. Motor Freight Tariff Ass'n v. United States*, 273 F. Supp. 823, 931-932 (D. Del. 1967).

¹¹¹*Mansfield Journal Co. v. FCC*, *supra* note 96, 180 F.2d at 37 (citations omitted). See also *Capital Tel. Co. v. FCC*, *supra* note 92, 498 F.2d at 739.

¹¹²See note 82, *supra*, and accompanying text.

¹¹³An employee managing the operations of a concern doing business as a sole proprietorship, for example, is "responsibly connected" with the owner of the business, and seemingly would encounter the employment bar of § 8(b) as a person "responsibly connected" although he does not fit the definition of "responsibl[e] connect[ion]" supplied by § 1(9), which in scope is limited to organizational personnel.

function of administrative interpretation of its terminology.¹¹⁴

It was not necessary for Quinn to allege actual fraud in the incorporation of DeVita Fruit Company,¹¹⁵ it sufficed that the corporate fiction actually visited an injustice upon him.¹¹⁶ Quinn's proffer suitably challenged the operation of Section 1(9) and he is entitled to an opportunity to show that the company was not in truth a corporation within the objective which Congress contemplated.¹¹⁷ If Quinn succeeds in establishing that the company is not properly to be recognized as a legal entity, it would follow that the definition of "responsibl[e] connect[ion]" contained in Section 1(9) has no application to him.¹¹⁸

We affirm the Secretary's action save to the extent that Quinn's evidentiary proffer was rejected. To the end that it may now be considered, we reverse the Secretary's action and remand the case to the Secretary for proceedings in harmony with this opinion.

So ordered.

LILLY MINOTTO v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 82-2174.

Decided July 19, 1983.

(Cite as: 711 F.2d 406)

Responsibly connected - Prima facie evidence - Personal fault and knowledge.

The United States Court of Appeals for the District of Columbia Circuit reversed the final

¹¹⁴ Compare *Capital Tel. Co. v. FCC*, *supra* note 92, 498 F.2d at 737; *Mansfield Journal Co. v. FCC*, *supra* note 96, 180 F.2d at 32, 33; *Bruhn's Freezer Meats of Chicago Inc. v. United States Dep't of Agric.*, *supra* note 107, 438 F.2d at 1343.

¹¹⁵ *Francis O. Day Co. v. Shapiro*, *supra* note 93, 267 F.2d at 673 n. 11.

¹¹⁶ 267 F.2d at 673. See also cases cited *supra* note 81.

¹¹⁷ Compare *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402 (1960).

¹¹⁸ See cases cited *supra* notes 91-93, 95-96, 100-107.

decision of the Secretary which found that Petitioner was responsibly connected with an agricultural products marketing company which violated the Perishable Agricultural Commodities Act. Being a director, officer, or ten percent stockholder is *prima facie* evidence that one is responsibly connected to a company. A finding of liability must be premised upon personal fault or the failure to counteract or obviate the fault of others. The District of Columbia Circuit stated that Petitioner's mere presence at Board meetings during which illegal transactions were never discussed could not be the basis for imputing personal knowledge to her. Petitioner was a nominal director. No evidence supported the conclusion that she knew of the company's misdeeds; thus, Petitioner could not be deemed responsibly connected to the company which violated the PACA.

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

Before EDWARDS, Circuit Judge, McGOWAN and MacKINNON, Senior Circuit Judges.

MACKINNON, Senior Circuit Judge:

Petitioner Lilly Minotto seeks review of a final order issued by the Secretary of Agriculture wherein she was found to have been "responsibly connected" with an agricultural products marketing company which violated the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499a *et seq.* (1976 & Supp. V 1981) (the Act).¹ Based upon this finding, Minotto was barred from employment with a Department licensee for two years. Petitioner asserts that the Secretary's conclusion is not supported by facts on the record as a whole. We agree. The petition for review is, therefore, granted and the decision of the Secretary is reversed.

I.

Minotto was employed by Conte, Inc. (the Company), a wholly owned subsidiary of American Specialty Foods, Inc., which markets fresh fruits and vegetables and is, therefore, subject to the Act. In November 1980 the

¹The Perishable Agricultural Commodities Act regulates the shipment of perishable agricultural products in interstate and foreign commerce through a system of licensing and administrative supervision. As a precondition of doing business, merchants, dealers, and brokers in such commodities must obtain a license from the Secretary of Agriculture. Section 2 of the Act forbids licensees from engaging in certain enumerated unfair practices, including the failure to make prompt, full payment for commodities. An unfair practice subjects the licensee to liability for damages and to suspension or revocation of its license.

enforcement branch of the Department of Agriculture filed a complaint against Conte under section 499f of the Act, charging the Company with failure to make full and prompt payment for 250 lots of perishable agricultural commodities received during August and September, 1979. When the Company failed to answer the complaint, the agency obtained a default order. *In re Conte, Inc.*, 40 Agric. Dec. 620 (1981).

After obtaining the order of liability, the Department of Agriculture notified Company officers and directors, including Minotto, that they were "responsibly connected" to the Company within the meaning of section 499h of the Act and therefore would be subject to employment sanctions.² The Chief of the Department's Regulatory Branch concluded that Minotto was "responsibly connected" solely because she was a corporate director and she had attended nine corporate board meetings. File PACA D-0042; Joint Appendix (JA) 47. Minotto disagreed with the determination and requested a hearing.³

²The Secretary is authorized to limit employment, within the agricultural industry, of individuals who violate the Act. The Act provides:

- (b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person-(1) whose license has been revoked or is currently suspended by order of the Secretary . . .

7 U.S.C. § 499h (1976):

and

- (9) The term "responsibly connected" means affiliated with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association . . . *Id.* § 499a.

The Secretary may approve the reemployment of such "responsibly connected" person following the violating company's payment of a reparation award, or upon the individual's posting of a bond following one year of the employment sanction.

³The terms of the Act do not expressly require a hearing, but in *Quinn v. Buzz*, 510 F.2d 743 (D.C. Cir. 1975), this court required the agency to provide "responsibly connected" persons with an opportunity to rebut the agency's charge. The agency has complied with this judicial directive by implementing regulations governing the proceedings and review applicable in a "responsibly connected..."

The facts developed at the hearing are uncontested. Minotto was employed by Conte from 1974 until 1980 as a bookkeeper with secretarial and accounting duties. She had completed one year of post-high school business training and was twenty-three years of age when she began working for the Company. Although during her tenure Minotto was given additional clerical, bookkeeping, and accounting responsibilities, she remained an hourly employee.

In January 1976, Conte was restructured under a Chapter XI bankruptcy proceeding and Minotto was appointed to its newly created five-person Board of Directors.⁴ Her election was solely for the convenience of the Company; because of her presence in the office, Minotto could be counted upon to attend Board meetings and to insure the availability of a quorum. The other four members of the Board were James L. Price, a director of the parent company, American Specialty Foods, and President of Conte; Samuel Schreffler, Secretary/Treasurer and later President of Conte; George McLaughlin; and Kenneth Kalligher, Vice President of Conte. Minotto did not receive an increase in salary upon assuming a director's position, nor did she receive any stock as compensation for her new duties. Except to attend Board meetings, Minotto performed no additional work in conjunction with her appointment. During the four years of her directorship Minotto attended all nine Board meetings which were held. She never proposed any motions at these meetings, but is recorded as having voted in favor of all resolutions proposed. Minotto denied knowledge of the Company's transactions which gave rise to the underlying violations, and she asserted that such business was never discussed at Board meetings. The minutes of the Board meeting confirm her assertion.

Based upon this evidence, the Department's Hearing Officer held that Minotto was "responsibly connected" with Conte during the time period when

³(...continued)
connected" determination. 7 C.F.R. §§ 47.47-68 (1983).

Neither party disputes that the "substantial evidence" test is the applicable standard of review. The hearing authorized by the regulations, and which was in fact provided to Minotto, was a formal, on-the-record adjudicatory proceeding. See *id.* §§47.58-63. Therefore, the substantial evidence test is appropriate.

⁴In December 1979, after the underlying violations by the company were consummated, Minotto was appointed Assistant Secretary. In this capacity she was authorized to co-sign checks for the Company.

the violations occurred. Decision, PACA RC 81-1005 (June 21, 1982); JA 102-11. Characterizing Minotto's directorship as being "more than nominal," the Officer reasoned that Minotto's "participation in the Board of Directors meetings" was the "critical issue" because her attendance assured the quorum necessary to enact resolutions dealing with the "well-being of the Company." *Id.* at 8; JA 109. The Hearing Officer found the mere fact that Minotto was a director to be dispositive, regardless of whether she exercised any real authority within the Company. Because she was found to be "responsibly connected," Minotto was subject to the employment sanctions of the Act.

Minotto appealed, but the Department of Agriculture affirmed the Hearing Officer's decision. Decision, PACA RC 81-1005 (Aug. 6, 1982); JA 117. This petition for review followed.

II.

As a "director" of a company which violated the Act, Minotto falls within the language of section 499a of the Act. However, that fact alone is not sufficient to render her automatically subject to the sanctions of the Act. In *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), this court established that being a director, officer, or ten per cent stockholder was only *prima facie* evidence that one was "responsibly connected" to a company which had violated the Act. The *Quinn* court held the statute was not intended to establish absolute liability. A finding of liability under section 499h of the Act must be premised upon personal fault or the failure to "counteract or obviate the fault of others." *Id.* at 756.

At oral argument, counsel for the Department conceded that the Department's decision was not premised upon Minotto's failure to counteract the fault of others. Instead, the Department's decision was based upon its conclusion that Minotto was personally at fault. Conspicuously absent from the record evidence and from the Hearing Officer's findings of facts or conclusions, however, is any suggestion that Minotto knew or should have known of the Company's misdeeds. Her mere presence at Board meetings during which the illegal transactions were never discussed cannot be the basis for imputing personal knowledge to her. Such a conclusion would be the functional equivalent of an absolute liability standard which this court expressly rejected in *Quinn*. See *id.* The finding that an individual was "responsibly connected" must be based upon evidence of an actual, significant nexus with the violating company. "[W]here the affiliation is purely nominal and the so-called [director] had no powers at all," the "responsibly connected"

determination cannot stand. *Id.* at 756 n. 84.

The record in this case clearly establishes that Minotto was no more than a nominal director. She lacked both the training and the experience to be an active director. She had no real authority within the Company and simply acquiesced in the decisions made by the Company President, her boss. The nominal nature of her role at the Board meetings was attested to by both the former President of the Company and a fellow member of the Board; she had no policy or decision-making role. She was essentially a clerical employee.

Notwithstanding her designation as a director, it cannot be said that Minotto was "responsibly" affiliated with the Company. There is no evidence in the record to support the conclusion that Minotto knew or should have known of the Company's misdeeds. The fact that Minotto was an uncompensated, nominal director who attended Board meetings at the request of her employer does not support the conclusion that she was "responsibly connected" to the violating company within the meaning of the Act.

The petition for review is *granted* and the decision of the Department of Agriculture is *reversed*.

Judgment accordingly.

**VEG-MIX, INC. V. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 85-1771.**

**KUZZENS, INC. V. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 86-1201.**

**HARRIS V. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 86-1202.
Decided October 30, 1987.**

(Cite as: 832 F.2d 601)

Bankruptcy petition properly considered by ALJ - Hearing not required when no genuine dispute of material fact - Flagrant and repeated violations - Piercing the corporate veil - Rebuttable presumption - Responsibly connected.

This decision covers three connected cases. In *Veg-Mix, Inc.*, the United States Court of Appeals for the District of Columbia Circuit held that administrative law judge was authorized to consider corporation's invoices and bankruptcy petition in determining whether the corporation failed to make full payment promptly for produce, regardless of whether bankruptcy petition was

made on personal knowledge of person who signed it. The court further stated that an agency may ordinarily dispense with a hearing when there is no genuine dispute as to material issue of fact. The court remanded the decision in *Veg-Mix, Inc.*, however, to determine whether violations occurring prior to director's resignation were flagrant and repeated. Petitioners Harris and Kuzzens, Inc., asserted that the Secretary was obliged to pierce the corporate veil of Petitioner Veg-Mix, Inc., and exonerated them. In *Kuzzens, Inc.*, the District of Columbia Circuit affirmed the Secretary's decision that Kuzzens, Inc., was a majority shareholder of Veg-Mix, Inc., and therefore was responsibly connected to the corporation. The court stated that there is a rebuttable presumption that an officer, director, or large shareholder of a corporation found to have violated the PACA is "responsibly connected" to that corporation and subject to sanctions. In *Harris*, the court stated that Petitioner Harris' resignation as director did not have to be in writing to absolve him from liability for corporation's violations occurring after his resignation and remanded the case to the Secretary.

Before MIKVA, STARR and WILLIAMS, Circuit Judges.

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

WILLIAMS, Circuit Judge:

The Perishable Agricultural Commodities Act ("PACA") attempts to facilitate interstate commerce in fresh fruits and vegetables. 7 U.S.C. § 499a *et seq.* (1982 & Supp. III 1985). To help instill confidence in parties dealing with each other on short notice, across state lines and at long distances, it provides special sanctions against dishonest or unreliable dealing. In the cases before us, the sanctions provided evidently failed to deter one merchant, and the Department of Agriculture launched its enforcement machinery. The main culprit having disappeared, it proceeded against lesser lights, with results that we do not find fully in conformity with the law.

PACA makes it unlawful for certain merchants of fresh fruits and vegetables to fail to pay fully and promptly for their purchases. 7 U.S.C. § 499b(4). It allows the Secretary of Agriculture to revoke the licenses of those whose offenses are "flagrant or repeated." *Id.* § 499h(a). Persons "responsibly connected" to such a violator may be barred from a PACA license for two years and from employment with any licensee for a year. *Id.* §§ 499a(9), 499(b), 499h(b).

Our decision covers three connected cases. In No. 85-1771, petitioner Veg-Mix, Inc., challenges the Secretary's determinations of flagrant and repeated PACA violations, and in Nos. 86-1201 and 86-1202, petitioners Kuzzens, Inc., and Charles M. Harris challenge orders finding them to be responsibly

connected with Veg-Mix. For the reasons given below, we remand the *Veg-Mix* decision (No. 85-1771) for a limited factual determination, affirm in *Kuzzens* (No. 86-1201), and remand in *Harris* (No. 86-1202).

I. BACKGROUND

Veg-Mix was a fruit and vegetable business conceived by William Lipman (acting on behalf of Kuzzens) and Larry Watkins, who was to become its president and part owner, and whose manipulations and ultimate disappearance are at the root of these cases. Early in September 1982 Watkins and Kuzzens entered into a preincorporation agreement, and articles of incorporation were filed with the Florida Secretary of State that same month. Shortly thereafter, Veg-Mix obtained a PACA license.

By the terms of the preincorporation agreement, Kuzzens invested \$30,000 directly (\$12,000 in exchange for equity, \$18,000 for debt) and lent Watkins \$20,000 for him to invest; Kuzzens was to own 60 percent and Watkins 40 percent. The agreement obliged Watkins to "devote his undivided time and attention and use the utmost of his skills and ability to the furtherance of the Corporation" and gave him complete management authority over day-to-day affairs, subject to review by the board of directors.

The directors designated in both the agreement and the articles of incorporation were Watkins, Wayne M.D. Press, and Charles M. Harris. Press and Harris were relatives of William Lipman and salesmen for Six L's Packing Company, another enterprise owned in part by the Lipman family and operating in the same offices as Kuzzens, Inc. William Lipman originally designated Press and Harris as directors without their knowledge, although Harris a lawyer, learned of his directorship when Lipman directed him to prepare the articles of incorporation. No scheduled directors' meetings, shareholders' meetings, or other corporate formalities were observed during Veg-Mix's single season of operations, from November 1982 to late May or early June 1983.

In March 1983, Watkins offered to buy Kuzzen's interest in Veg-Mix for \$100,000. Lipman and Watkins shook hands in agreement on the deal, but they never prepared or signed a written agreement and Watkins never paid up. Though the sales agreement remained executory, it led to the resignations of Press and Harris either in late March or early April, as we shall see in more detail in reviewing the "responsibly connected" findings.

At the end of the marketing season, in late May or early June 1983, Veg-Mix ceased merchant operations. (Bookkeeping activity continued.) Kuzzens

officials discovered in October 1983 that Watkins had written checks on Veg-Mix's accounts without proper authorization. Watkins himself had by this time disappeared. The Kuzzens representatives took steps to staunch the flow of funds, temporarily reinvolving Press and Harris in Veg-Mix's affairs. In March 1984 a bankruptcy petition was filed on Veg-Mix's behalf. The petition was prepared by lawyer who examined Veg-Mix documents, Joint Appendix ("J.A.") B-385-86, and was signed by Paula Berry, as Secretary, for Veg-Mix. The petition listed Harris and Press as directors and Kuzzens and Watkins as shareholders.

The Agriculture Department's Agricultural Marketing Service, Fruit and Vegetable Division filed an administrative complaint in August 1984 alleging that Veg-Mix violated 7 U.S.C. § 499b(4) during the February-July 1983 period by failing to make full, prompt payment of agreed purchase prices for 50 lots of fruits and vegetables in interstate commerce. The total sum asserted was \$191,306.60, owed to six sellers. J.A. B-387. It further alleged that these failures were willful, flagrant, and repeated, and thus it requested publication of the relevant facts and circumstances pursuant to 7 U.S.C. § 499h(a). (The de-licensing remedy of § 499h(a) was moot because Veg-Mix had already lost its license for failure to pay the required annual fee.) Also in August, the agency notified Harris, Press, Kuzzens, and others of a preliminary determination that they were "responsibly connected" with Veg-Mix.

After various delays, the administrative law judge ("ALJ") issued a dispositive order against Veg-Mix. *In re Veg-Mix, Inc.*, PACA Docket No. 2-6612 (June 26, 1985). Veg-Mix appealed unsuccessfully to a judicial officer and then, equally unsuccessfully, petitioned for reconsideration. Meanwhile, the cases of Kuzzens and Harris were considered in a consolidated hearing on May 22, 1985. In *In re Kuzzen's [sic], Inc.*, PACA RC 84-1022 (September 27, 1985) and *In re Harris*, PACA RC 84-1024 (September 30, 1985), the presiding officer determined that both were responsibly connected with Veg-Mix during the period at issue. Soon afterwards the same officer found Press not so connected. *In re Press*, PACA RC 84-1023 (October 16, 1985). The administrator of the agricultural marketing service summarily affirmed the Kuzzens and Harris decisions on February 6, 1986.

II. VEG-MIX'S CLAIMS

Veg-Mix challenges the agency's determination on several grounds. First, it claims that the ALJ should not have considered the bankruptcy pleadings

and invoices that formed the principal documentary evidence. Second, it contends that it was wrongly denied an evidentiary hearing, in violation of the agency's procedural rules and in the face of material factual disputes. Third, it claims that the judicial officer erred by insufficiently addressing the issues Veg-Mix raised in its appeal and in not admitting newly discovered evidence. We disagree with all these contentions.

A. *The Invoices and the Bankruptcy Petition*

The strongest evidence against Veg-Mix consisted of 50 invoices from transactions which the agency contended had not been fully and promptly paid. Veg-Mix contends that the ALJ should not have considered these. The business records exception to the hearsay rule ordinarily requires "the testimony of the custodian or other qualified witness." Fed. R. Evid. 803(6). As that was not offered, Veg-Mix argues, the invoices lacked authentication.

Laxer standards of admissibility, however, apply to administrative tribunals. See, e.g., 3 K. Davis, *Administrative Law Treatise* § 16.5 (1980). Generally, for example, if hearsay evidence meets the standards of the Administrative Procedure Act by being relevant, material, and unrepeatitious, see 5 U.S.C. § 556(d) (1982), agencies are entitled to weigh it according to its "truthfulness, reasonableness, and credibility," see *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980); see also *National Association of Recycling Industries, Inc. v. Federal Maritime Commission*, 658 F.2d 816, 825 (D.C. Cir. 1980) (finding agency's disregarding of probative hearsay evidence to be arbitrary and capricious).

This case is not one for testing the outer limits of these more permissive rules. Veg-Mix stresses the agency's purported technical error, rather than the truthfulness of the invoices. Brief for Petitioner at 28-32. In the absence of a serious, nonspeculative argument that the records were something other than they appeared to be, the practical standards applicable to administrative proceedings are not offended.

Veg-Mix makes a similarly technical objection with regard to the ALJ's taking official notice of Veg-Mix's bankruptcy petition. The bankruptcy petition listed debts that generally corresponded to the debts shown by the sales invoices. The papers were signed by Paula Berry, as Secretary of Veg-Mix, who was required to "certify under penalty of perjury" that the information was "true and correct to the best of [her] knowledge, information, and belief." Respondent's Appendix 57-63. Veg-Mix argues that because affidavits submitted under Fed. R. Civ. P. 56(e) must be made "on personal

knowledge," the bankruptcy pleadings--which by Berry's statement may have rested on mere "information and belief"--should have been excluded. Whatever merit the claim might have in a formal civil litigation context, it has none in informal administrative proceedings.

The agency's rules provide that "[o]fficial notice shall be taken of such matters as are judicially noticed by the courts of the United States" 7 C.F.R. § 1.1141(g)(6)(1987). Courts may take judicial notice of official court records, including bankruptcy pleadings. *See, e.g., Freshman v. Atkins*, 269 U.S. 121, 123-24, (1925); *In re Aughenbaugh*, 125 F.2d 887, 890 (3d Cir. 1942); *In re Eaason Corp.*, 37 B.R. 471, 479-80 (Bankr. E.D. Pa. 1984). Indeed, this court has observed, "[I]t is settled law that the court may take judicial notice of other cases including the same subject matter or questions of a related nature between the same parties." *Fletcher v. Evening Star Newspaper Co.*, 133 F.2d 395, 395 (D.C. Cir. 1942), *cert. denied*, 319 U.S. 755 (1943). *Accord Hart v. Commissioner*, 730 F.2d 1206, 1207-08 n. 4 (8th Cir. 1984); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983); *St. Louis Baptist Temple, Inc. v. Federal Deposit Insurance Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979). The agency has previously indicated, albeit in dictum, that it will take official notice of bankruptcy petitions. *In re Fava & Co.*, PACA Docket No. 2-6547 (Dec. 4, 1984) [43 Agric. Dec. ____].

Veg-Mix invokes *In re Aughenbaugh*, 125 F.2d 887 (3d Cir. 1942), in which the Third Circuit examined a district court's reliance on information in a bankruptcy referee's files. The court of appeals found fault with the district court's reliance on evidence not properly introduced before the bankruptcy referee or the district court.

Aughenbaugh appears to rest on a vulnerability in classic judicial notice: that it may operate without parties having a chance to identify defects or to explain away apparent implications. No such problem exists here, as Veg-Mix knew that the agency was offering the bankruptcy proceedings and thus had ample opportunity to respond. Indeed, even now Veg-Mix's position rests only on the supposed technical deficiency. Although it contested the inferences naturally to be drawn from the bankruptcy petition and invoices, the data it offered in support did not truly draw them in question, as we shall shortly see.

B. *The Failure to Hold a Hearing*

1. *Agriculture Department Requirements.* Agriculture Department rules

dispense with a hearing when no answer is filed, 7 C.F.R. § 1.139 (1987),¹ and Veg-Mix would have us infer from this that under every other circumstance a hearing must occur, regardless of the non-existence of material factual disputes. Since Veg-Mix answered the complaint with a denial of the allegations that some of the transactions were in interstate commerce and denials that some of the transactions were accurately described, it contends that a hearing was required.

This argument strikes us as an utterly implausible application of the ancient maxim *expressio unius est exclusio alterius*. Common sense suggests the futility of hearings where there is no factual dispute of substance. Moreover, the agency has previously held that obviously meritless denials and affirmative defenses do not require a PACA hearing, and it placed the burden on the respondent to show a substantial issue requiring a hearing. *In re Fava & Co.*, 44 Agric. Dec. 870 (1985).

The Department's view in *Fava* accords with our rulings that an agency may ordinarily dispense with a hearing when no genuine dispute exists. See *Citizens for Allegan County, Inc. v. Federal Power Commission*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (Leventhal, J.) ("the right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing"). In *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985), cert. denied, 475 U.S. 1123 (1986), we suggested that a "request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held." See also *Cerro Wire & Cable Co. v. Federal Energy Regulatory Commission*, 677 F.2d 124, 128-29 (D.C. Cir. 1982). Thus we think the agency's approach on the general issue of when a hearing is required was unexceptionable. We therefore turn to the question of whether Veg-Mix raised a material issue of fact.

2. *Possible Genuine Disputes.* The agency presented evidence with its motion for decision--the invoices, the bankruptcy petitions, and two affidavits by agency investigators--strongly suggesting numerous PACA violations. We think that the agency satisfied its initial burden with this evidence. Cf. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (describing genuine

¹Section 1.139 provides in part:

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. . . .

dispute in civil action as one in which "a reasonable jury could return a verdict for the nonmoving party"); *Celotex Corp. v. Catrett*, 477 U.S. 417 (1986) (describing burden of party seeking summary judgment in a civil action). It was thus incumbent on Veg-Mix to come forward with evidence rebutting this showing. See *In re Fava & Co.*, 44 Agric. Dec. 870 (1985). Cf. *Anderson*, 106 S. Ct. at 2510 (in the face of a properly supported motion for summary judgment, nonmoving party may not rest on allegations in pleadings but must come forward with significant probative evidence); *Celotex Corp.*, 106 S. Ct. at 2553-54 (same).

Veg Mix, however, chose not to exercise its right under the agency's regulations to oppose the agency's motion for decision. All that it presented in its defense was what it styled a Request for Issuance of Subpoenas Duces Tecum to compel the appearance of nine individuals to testify at a hearing. (In fact, as both sides now agree, Veg-Mix was seeking subpoenas ad testificandum.)²

This submission placed great stress on the nefarious character of the missing Watkins, and suggested that the accuracy of the records and bankruptcy pleadings could not be assessed in his absence. It included exhibits suggesting that Watkins had composed false Veg-Mix invoices in order to benefit himself or had had Veg-Mix billed by other companies in his control. J.A. B-17, 22 (Affidavit of James P. Doherty), J.A. B-30 (Affidavit of Jack Rosenthal). Veg-Mix now argues that this information of Watkin's dishonesty casts doubt on the accuracy of the bills to Veg-Mix from independent firms.

The logic of this escapes us. The exhibits suggest various devices by Watkins for raiding Veg-Mix. But in the absence of some reason to believe that Watkins had somehow manipulated the firms whose bills are at issue--and even now no such thing is suggested--the items do not undermine the apparent significance of the invoices before the ALJ. As the Court in *Anderson* noted, once a moving party has satisfied its burden, "[i]f the evidence [offered by the nonmoving party] is merely colorable, or is not significantly probative, summary judgment may be granted." 106 S. Ct. at 2511 (citation omitted). Here the submissions by Veg-Mix were not substantial enough to create a genuine dispute requiring a hearing.

²There is no indication in the record before us that this request was ever ruled on. At oral argument counsel for Veg-Mix indicated that he did not press for a response because he was pessimistic about the chances for success.

C. *Objections to the Administrative Appeal*

Veg-Mix appealed the ALJ's decision to the judicial officer, who found no error and adopted the ALJ's decision. It then petitioned for reconsideration and sought to submit new evidence. Veg-Mix now claims two errors. Although both are meritless, we remand for the agency to decide whether Veg-Mix's violations reached the "flagrant or repeated" level before Harris ceased to be "responsibly connected" to the firm.

1. *Reliance of the Judicial Officer on the ALJ's opinion.* The judicial officer affirmed on the basis of the ALJ's opinion and Veg-Mix argues that this conduct breached the agency's duty to explain its actions. See, e.g., *Harborlite Corp. v. Interstate Commerce Commission*, 613 F.2d 1088, 1092-93 (D.C. Cir. 1979). So long as the explanations offered by the lower administrative level are adequate--and Veg-Mix doesn't claim otherwise--obviously the practice here is a sensible fulfillment of the duty to explain. Cf. *Martino v. Department of Agric.*, 801 F.2d 1410, 1412 (D.C. Cir. 1986). It happens, in fact, to be expressly authorized by the Agriculture Department's regulations.³

2. *Refusal to consider new evidence.* Veg-Mix also argues that the judicial officer should have granted its request to reopen the proceedings to consider new evidence. This consisted of an affidavit from Gary Syracuse relating to the earliest transactions at issue, in which Veg-Mix was alleged to owe \$12,360.70 to Syracuse and Jenkins Produce, Inc. The affidavit said that the amounts shown on the invoices from February and March 1983 were in dispute until May 1983. Veg-Mix concedes that exoneration on these transactions would not render its violations *de minimis*, Brief for Petitioner at 39, but argues that the evidence casts doubt on the validity of the other invoices and may exculpate some of the "responsibly connected" parties.

In rejecting these arguments, the judicial officer relied on the agency's rule on petitions to reopen hearings, which requires that such petitions be

³7 C.F.R. § 1.145(i) (1987) provides in part:

If the Judicial Officer decides that no change or modification of the [ALJ's] decision is warranted, the Judicial Officer may adopt the [ALJ's] decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. We note with some surprise that agency counsel failed to direct our attention to this regulation.

filed "prior to the issuance of the decision by the Judicial Officer." 7 C.F.R. § 1.146(a)(2) (1987). Veg-Mix did not meet that deadline.

Veg-Mix argues that this rule does not apply: given the summary judgment, there was no "hearing" to reopen. We think the agency could properly read the rule as applying to summary proceedings. No regulation specifically addresses the subject of petitions to reopen summary proceedings. To adopt Veg-Mix's view might mean either that *no reopenings* of summary proceedings were permitted or that there are *no limitations* on petitions to reopen. Neither of these outcomes would be sensible. On the other hand, the limitations provided in § 1.146(a)(2)--requirements that the petitioner raise the matter of new evidence before a final decision has issued, show why such evidence is significant, and give a good reason for late filing--make quite as much sense in a challenge to a summary proceeding as in a challenge to a hearing.

The application of the rule here clearly was not unfair. Veg-Mix had some four months to gather evidence before the deadline to respond to the agency's motion for decision before the ALJ, and about two more months before the judicial officer's decision. It has not provided any explanation for its failure to offer the Syracuse affidavit sooner. We do not think the judicial officer erred in refusing to accept the evidence.

We nevertheless remand the case for a single factual determination. As developed in the next part, only the Syracuse and Jenkins transactions occurred before the end of petitioner Harris's association with Veg-Mix. Instead of evaluating these few transactions ourselves to determine whether standing alone they qualify as "flagrant or repeated" violations, we return the issue to the agency. *See Securities and Exchange Commission v. Chenery*, 318 U.S. 80 (1943). As we understand the relevant regulations, the agency is not barred from considering the untimely evidence drawing the status of the Syracuse and Jenkins transactions in question, and it may well wish to do so.⁴

⁴Counsel for the agency has suggested in a footnote unaccompanied by record authority that "the seeds of injury were inevitably planted during . . . Harris' tenure in office as a director." Brief for Respondents in Nos. 86-1201 and 86-1202 at 19 n. 10. We fail to see the inevitability; this statement is *pre ipse dixit*. It strikes us as unlikely, moreover, that the definition of responsibly connected could stretch far enough to include connection to an enterprise that will one day become a PACA violator.

III. CLAIMS OF KUZZENS AND HARRIS

PACA is relatively clearcut in identifying the persons subject to sanction because of their link to a PACA violator. Under 7 U.S.C. § 499a(9), "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association." As previously noted, the agency alleged that Charles M. Harris, Wayne M.D. Press, as directors and Kuzzens, Inc., as a 60 percent shareholder, were responsibly connected to Veg-Mix. After a joint hearing, the presiding officer issued three separate opinions, finding that Harris and Kuzzens were responsibly connected but that Press was not.

Harris and Kuzzens, Inc., challenge the adverse findings on the grounds that piercing the corporate veil was appropriate in these circumstances. We reject these claims. They also invoke prior decisions of this court tightening the requirements for a finding of responsible connection, but we find those decisions inapplicable here. We therefore conclude that Kuzzens was responsibly connected, as owner of 60 percent of Veg-Mix's stock. But as Harris resigned as a director of Veg-Mix prior to the bulk of the transactions at issue, we remand his case for further consideration.

A. *Veg-Mix's Legal Status*

Harris and Kuzzens assert that under *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975) (Robinson, J.), the agency was obliged to pierce the corporate veil of Veg-Mix and exonerate them. In *Quinn*, the court indicated a willingness to engage in veil piercing when necessary to prevent injustice to a mere employee of a PACA violator. No sensible reading of *Quinn*, will aid petitioners. Cf. *Martino v. Department of Agric.*, 801 F.2d 1410, 1414 n. 46 (D.C. Cir. 1986) (Robinson, J.) ("*Quinn* required no more than that petitioners receive 'an opportunity to show that the company was not in truth a corporation within the objective that Congress contemplated.'") (quoting *Quinn*, 510 F.2d at 760). *Quinn* involved an employee of a sole proprietorship who was asked by the owner to become a vice president when the owner converted the business to a corporation. The employee's officership was purely nominal; it was conferred by the owner to meet a state corporation law requirement and involved no change in duties. The original proprietor continued to have exclusive control of the business.

Kuzzens, Inc., by contrast, was a majority shareholder of Veg-Mix, not a

powerless employee. There is no injustice analogous to that in *Quinn* in holding such a party accountable for PACA violations. As for Harris, he was a lawyer by training, and thus presumably aware of the responsibilities of corporate directors. He accepted a directorship in Veg-Mix and even helped in the preparation of the corporate documents. Unlike the employee in *Quinn*, he was not directly or indirectly accountable to the proprietor of the transgressing business. In short, there is no indication that he was a helpless pawn who could not in good conscience be held accountable as a bona fide director. Thus we do not think that the presiding officer erred in refusing to apply *Quinn*.⁵

B. The Evidence of Responsible Connection

Our decisions have read § 499a(9) as establishing only a rebuttable presumption that an officer, director, or large shareholder of a PACA violator is responsibly connected. *Quinn*, 50 F.2d at 756; *Minotto v. Department of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983). The *Quinn* court suggested that one who was an officer "only on paper" and both "unaware of the wrongdoing [and] powerless to curb it," 510 F.2d at 755, could not be held

⁵Petitioners also argue that there is some uncertainty as to Veg-Mix's corporate status under Florida law. That law requires a corporation to have the number of initial directors fixed by the articles of incorporation, Fla. Stat. Ann. § 607.114(1) (West 1976), in this case three, J.A. B-343-44. Petitioners allege that Press never became a director, J.A. 368-69, and therefore that Veg-Mix never came into being as a corporation.

Before the presiding officer, petitioners made no such claim, but rather asserted in their Proposed Findings of Fact that "Veg-Mix was a Florida corporation. . . ." J.A. B-406. They did raise the contention in their petition for administrative review, J.A. B-469, but the judicial officer did not address the matter, perhaps relying on 7 C.F.R. § 1.141(g)(2)(ii) (1987) (requiring objection below). Jurisdictional objections aside, petitioners' argument avails Kuzzens nothing, for in default of corporate form Veg-Mix would be either a partnership (of which it would be a partner) or an association (of which it would be a shareholder within the meaning of 7 U.S.C. § 499a(9)). Invocation of the defect by Harris encounters Florida's provision that no "persons acting as a corporation shall be permitted to set up the lack of legal organization as a defense to an action against them as a corporation." Fla. Stat. Ann. § 607.401 (West 1976). While perhaps not directly in point, it suggests that one who acts as incorporator (as Harris did) could not, to escape any obligations arising out of the corporate form, invoke the corporation's failure to secure the acceptance of a directorship by a person named as a director in the articles of incorporation. See also id. § 607.397 ("All persons who assume to act as a corporation without authority to do so shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.").

responsibly connected under PACA. The court required the agency to consider the issue at a hearing. Similarly, in *Minotto*, the court found that a clerical employee designated as a corporate director was not automatically responsibly connected under PACA. The court articulated a loose fault concept, saying that “[a] finding of liability under section 499h of the Act must be premised upon personal fault or the failure to ‘counteract or obviate the fault of others.’” *Id.* at 408 (quoting *Quinn*, 510 F.2d at 756).⁶

We apply the standard of these cases, but find it unavailing for Kuzzens and unnecessary for Harris.

2. *Kuzzens, Inc.* The analogy to *Quinn* and *Minotto* is weakest here. Neither case involved shareholders, although *Minotto* suggests in dictum that the same rule applies to them. 711 F.2d at 408. In any event, a majority shareholder, such as Kuzzens, can hardly be viewed as powerless to control delinquent management, as the petitioners in *Quinn* and *Minotto* arguably were. As we indicated in *Martino v. Department of Agric.* 801 F.2d 1410, 1414 (D.C. Cir. 1986), the crucial inquiry is whether an individual has an “actual, significant nexus with the violating company,” rather than whether the individual has exercised real authority. In *Martino*, we found that ownership of 22.2 percent of the violating company’s stock was enough support for a finding of responsible connection. Majority ownership obviously suffices.

Apart from its reliance on *Quinn* and *Minotto*, Kuzzens argues that it either was never a stockholder or sold its interest before the majority of the transactions at issue. Neither of these contentions withstands analysis.

In arguing that it never became a shareholder, Kuzzens states that no executed stock certificate was issued to it. We are puzzled by this contention. A stock certificate for twelve shares of Veg-Mix, Inc., issued to Kuzzens, Inc., is part of this record. Even if there is some technical inadequacy in the certificate, on the facts here it would matter little, since the preincorporation agreement and bankruptcy pleadings both list Kuzzens as 60 percent

⁶Other circuits have read § 499a(9) as establishing a *per se* rule of accountability for officers, directors, and major stockholders of PACA violators. *Pupillo v. United States*, 755 F.2d 638, 643-44 (8th Cir. 1985); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966). See also *Steinberg & Son v. Butz*, 491 F.2d 988, 992, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110, 118-19 (2d Cir.) (noting that the sanctions desired by Congress according to § 499h(b) “could be harsh in some cases,” but finding the *per se* approach constitutionally valid), cert. denied, 389 U.S. 835 (1967). The court in *Pupillo*, 755 F.2d at 644, explicitly criticized our analysis in *Quinn* and *Minotto* as “run[ning] afoul of Congressional intent.”

shareholder, and the former clearly recites the consideration of \$12,000. Moreover, one can be a shareholder without a stock certificate having been physically issued. 11 L. Zajdel, *Fletcher Cyclopedia of the Law of Private Corporations* § 5094 (1986). Substantial evidence thus supports the finding that Kuzzens was a 60 percent shareholder.

Kuzzens is more energetic, but no more persuasive, in arguing that it sold its interest to Watkins in late March 1983, before most of the offending transactions took place. William Lipman, vice-president of Kuzzens, testified that he agreed to sell Kuzzens's interest to Watkins, but said that this agreement was never reduced to a writing. Under Florida law a contract for a sale of securities is generally unenforceable unless it is in writing and signed by the party against whom enforcement is sought. Fla. Stat. Ann. § 678.8-319 (West 1966). No claim is made that any exception to the Florida Statute of Frauds applies, and, even if the contract were binding, Kuzzens regarded it as executory throughout the relevant transactions here. When it was discovered in October 1983 that Watkins was writing checks for his personal purposes on Veg-Mix's account, Lipman directed employees of Six-L's (an enterprise with some of the same management and the same office space as Kuzzens) to protect Veg-Mix's assets. When an attorney for Watkins sought corporate documents from Kuzzens, Geoffrey Fradin (a Six-L's employee) refused to turn them over, stating that he would not do so until the purchase price was paid. J.A. B-145-46. Finally, Kuzzens is listed as a shareholder on the bankruptcy petition. Substantial evidence supports the finding that there was no completed sale.⁷

2. *Harris*. Harris likewise argues that his association with Veg-Mix was merely nominal, and thus insufficient to support a finding of responsible connection under *Quinn* and *Minotto*. Harris is a lawyer by training. William Lipman selected him as a director of Veg-Mix and secured his help in drafting the Veg-Mix articles of incorporation. These named him as a director, along with Watkins and Press. His legal training put him on notice of the responsibilities of a corporate director. If he was aware of the preincorporation agreement, he would have recognized that it left Watkin's authority subject to the directors' review; if not, then he ought to have assumed the usual. See Fla. Stat. Ann. § 607.111(4), (6) (West 1976). He was under no obligation to Watkins; rather he was employed by Six-L's. Thus his case is easily distinguishable from those of the nominal officer and corporate

⁷See *Minotto*, 711 F.2d at 407 n. 3 (finding substantial evidence test applicable).

director in *Quinn* and *Minotto*, who were unsophisticated persons employed by the wrongdoers. Cf. *Martino*, 801 F.2d at 1414 (contrasting the enticement or coercion present in *Quinn* and *Minotto* with voluntary assumption of stock ownership or a responsible position in the violating company). Although there is language in those cases suggesting that liability under PACA should be premised on personal fault, they also indicate that realistic capacity to counteract the fault of others will also suffice. *Quinn*, 510 F.2d at 756 & n. 84; *Minotto*, 711 F.2d at 408.

Harris also argues that he resigned as a director at Watkins's request shortly after the sales agreement, in late March or early April 1983. The presiding officer rejected this argument, relying mainly on Harris's conduct and statements after he purported to resign. We find here that substantial evidence does not support the officer's conclusion.

Harris testified that he and Press tendered their resignations as directors to Watkins in late March 1983. Watkins responded by saying that he would get Harris and Press "off the books." J.A. B-216-17. Harris's testimony was uncontested. It was also corroborated by Wayne Press, who attended the same meeting and resigned at the same time. J.A. B-165. There is no specific credibility determination concerning Harris, but there is absolutely no indication that the presiding officer did not credit Harris's account of the meeting. Indeed, in the separate decision finding Press not to be responsibly connected, the presiding officer invoked Harris's testimony to support Press's account, suggesting that he found both Harris and Press to be credible witnesses. J.A. B-386.

Furthermore, the presiding officer's discussion of the need for formal removal, though expressing legally erroneous views, reflects his acceptance of Harris's testimony. He stated, "There is nothing in the record to show that Watkins fulfilled his commitment to buy the firm or have Petitioner removed as director." J.A. B-307. The officer's objection here is plainly not to the testimony. He regarded either the failure of Watkins to fulfill his commitment, or of Harris to resign in writing, as somehow rendering the resignation ineffective. But a director's resignation ordinarily need not be in writing. 2 C. Scotti, *Fletcher Cyclopedia of the Law of Private Corporations* § 346 (1982). It certainly does not ordinarily require the approval of another director. See *id.* § 347 (no acceptance of a director's resignation is necessary). Nothing in Veg-Mix's articles of incorporation or in the

preincorporation agreement modified the usual rules.⁸

The presiding officer laid considerable weight on Harris's role in the efforts to protect Veg-Mix from Watkin's piracy. In October 1983 Paula Berry, Veg-Mix's bookkeeper and at the time its only employee, discovered that Watkins was drawing checks on its account for his personal purposes. She called Carlos Bustabad, the comptroller for Six L's, who in turn alerted Lipman. After discussing it with an attorney, Lipman told Bustabad and Fradin to try to stop the looting. They spoke to the bank, which agreed to cooperate, but only on the condition that Veg-Mix's directors sign a resolution. J.A. B-150-52. The Kuzzens officials sent resolution forms authorizing new check-signing procedures to Press and Harris for their signatures. Both signed such forms, despite their earlier resignations.

The presiding officer took this act (and the appearance of Harris's name on the bankruptcy petition) as showing that he had continued as a director. He quoted at length from a letter written by Harris to his attorney as follows:

After these facts had become evident, I was then made aware that my name may never have been formally removed as Director (i.e., writing) notwithstanding my oral resignation at the prior Director's meeting. It was at this point I sought legal counsel and he advised me that since Watkins had disappeared, there might be a moral obligation to preserve whatever assets could be located. He instructed me to see that this was done and I did just that.

Our method was to revoke any oral resignation since it was not in writing and Watkins was not present to verify that my resignation had been formally accepted. I was further advised to take steps to bring the corporation under the protection of the bankruptcy court by participating in the bankruptcy proceedings.

The presiding officer failed to make clear exactly what inference he drew from this letter, but counsel for the agency suggests that it shows that Harris questioned the validity of his own resignation. Brief for Respondent in 86-1201 and 86-1202 at 47. We agree that it shows uncertainty on Harris's part as to his status. But far from undermining his claims, the letter in the main

⁸The government argues that the preincorporation agreement's requirement that "[a]ny and all notices between the parties hereto provided for or permitted under this Agreement or by law shall be in writing" binds Harris. Brief for Respondents in 86-1201 and 86-1202 at 47. The only parties to the agreement, however, were Watkins and Kuzzens. J.A. B-331.

supports them. Obviously, Harris's legal notions do not determine the legal effect of his oral resignation. Similarly, his supposition that he could revoke his resignation would not make it so. See Fla. Stat. Ann. § 607.114(3), (6) (West 1976) (shareholders to elect directors except in certain limited cases); see also 2 C. Scotti, *supra*, at § 285 (same). The evidence strongly indicates that he made an effective resignation. His letter is completely consistent with his testimony describing his resignation.

The letter is also consistent with the testimony of Press. Indeed, the participation of Press in the affairs of Veg-Mix was in most respects identical to that of Harris. Each acted to keep Watkins from wrongfully withdrawing funds, signing documents representing himself as a director for the bank; the names of both appeared on the bankruptcy petition. Although Harris knew about his directorship sooner than Press, their activity affecting Veg-Mix after the resignation was almost identical. It made no sense for the presiding officer to find that Harris's signing of banking resolutions showed that he was a director, while Press's signing did not prove the same for him.⁹

In sum, we find that substantial evidence supports the finding that Harris was initially a director of Veg-Mix, but not the finding that he continued to be a director (or responsibly connected person) after his resignation. At the time of the resignation, only a few of the transactions had taken place - the ones with Syracuse & Jenkins. Both because of their quantity and the newly offered evidence that they were open to legitimate dispute at the time, there is reason to doubt that they constitute repeated or flagrant transactions for purposes of § 499h(a). If they do not, then Harris would face no penalties as a responsibly connected person. We therefore remand Harris's case to await the agency's decision in Veg-Mix.

So ordered.

MIKVA, Circuit Judge, dissenting in part and concurring in part:

I would affirm all three of these connected cases rather than remand the Veg-Mix and Harris decisions for further proceedings by the Secretary of

⁹It is also worth noting that Bustabad and Fradin posed as Veg-Mix officers. This was apparently the agency's basis for issuing them preliminary notification of responsible connection liability. Bustabad's participation in Veg-Mix appears to have been more active than either Press or Harris - he organized the bank change and perhaps the bankruptcy petition - but he was determined not to be a responsibly connected person prior to the hearing. Fradin similarly participated in these affairs and was dropped from the proceedings.

Agriculture under the Perishable Agricultural Commodities Act ("PACA"). The record fully supports the Secretary's conclusion that Mr. Harris was "responsibly connected" with Veg-Mix during the entire period of its "flagrant" and "repeated" misconduct. In deciding that the Secretary's determination on this point is not supported by substantial evidence, this Court indulges in an excessively intrusive and picayune review of the factfinder's decision and arrogates to itself the role assigned to the administrator. By remanding for an evaluation of whether transactions predating Harris' alleged resignation as a Veg-Mix director constitute a course of "flagrant or repeated" misconduct in violation of PACA, we invite the very full-scale hearing which the majority itself concedes was properly denied under PACA.

PACA accords sellers of perishable fruits and vegetables some very special protection against non-payment. Merchants in these commodities must be licensed, and the Act allows the Secretary of Agriculture to revoke the licenses of merchants whose offenses are "flagrant or repeated." Persons "responsibly connected" to merchants who so violated the Act can be barred from holding a license or working for a licensee for specified periods.

The majority agrees with the hearing officer's determination, which was affirmed by the agricultural marketing administrator and adopted by the Secretary, that the violations of PACA by Veg-Mix were "flagrant" and "repeated" in nature. The Secretary additionally affirmed the findings that appellants Kuzzens, Inc. and Harris were "responsibly connected" with Veg-Mix throughout the relevant period. On review, the majority acknowledges that Kuzzens was responsibly connected with Veg-Mix, but weaves a convoluted and tortuous doubt about whether Harris was appropriately found to be responsibly connected with Veg-Mix during the period in question. The record and the decision of the presiding officer make this doubt unreasonable.

Harris, a lawyer and family member of the dynastic financial sponsor of Veg-Mix and Kuzzens, Inc., drew the original articles of incorporation for Veg-Mix. Harris inserted himself as one of three directors (as well as the registered agent) of the corporation. The preincorporation agreement and the bylaws of Veg-Mix provided that the day-to-day affairs would be managed by the disappeared culprit, Watkins, subject to "periodic review" by the board of directors.

The disposition of this case turns on whether Harris continued as a director of Veg-Mix throughout its short and unhappy life. Harris claimed that he orally resigned as director in late March or April of 1983, after at least some of the delayed payment purchases were made by Veg-Mix. The

presiding officer obviously found nothing in the record to conclusively confirm Harris's resignation and he noted that the particular actions Harris took subsequent to his alleged oral resignation contradicted his testimony. These actions included signing bank resolutions and bankruptcy petitions as a director. Accordingly, the Secretary specifically held that "[t]he record fully supports the conclusion that petitioner (Harris) was appointed a director of Veg-Mix, Inc. and he remained a director during the business span in question." I think it can be reasonably concluded, therefore, that he did not believe Harris' version of events.

The majority boldly pries into the factfinder's reasoning process and faults him for not explicitly stating that Harris was not credible. From this omission it is inferred that the presiding officer believed Harris' story about the oral resignation as director, thereby undermining the fact-finder's own conclusion. The majority even suggests that the hearing officer must have found Harris a credible witness here, since he cited a corroborating statement by Harris in a related proceeding.

However, it is simply not our place to lay down a rule of "once credible, always credible" when certain witness statements were contradicted by a course of conduct, and greater weight was justifiably placed on the latter. The fact-finder need not make every step of his reasoning explicit in order to insulate his conclusions from this kind of high-handed judicial revisionism. I have never understood our reviewing process to include a course in opinion-writing for Article II officials. I have no doubt that such a course might be helpful, just as it might help those of us laboring as Article III officials. The test, however, is not whether the opinion is well-written but whether it meets the requirements of reasoned decision-making when reviewed under an "arbitrary and capricious" standard. While the reviewing court may not supply a reasoned basis for the agency's action that the agency itself has not given, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), the court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). The administrative adjudicator is only required "to state findings of fact and reasons to support its decision . . . [that] must be sufficient to reflect a considered response to the evidence and contentions of the losing party." *Harborlite Corp. v. I.C.C.*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). It certainly cannot be said here that the Secretary failed to "articulate any rational connection between the facts found and the choice made," *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962), or that the agency offered an explanation for its decision that runs

counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view." *Motor Vehicle Mrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1982).

It is hardly doubtful that the opinion of the Secretary can be matched with his duties under the Act. He found "repeated" and "flagrant" violations of PACA by Veg-Mix. There is ample evidence to sustain that finding. He found Harris to be "responsibly connected" with Veg-Mix during the entire period in question. There is ample evidence to sustain that finding. That ought to be the end of our review.

The Supreme Court has advised, admonished, and instructed us as reviewing courts not to try to assume the role that Congress ordained for administrators. When reviewing the record, as in *SEC v. Chenery Corp.*, 318 U.S. 80 (1942), or addressing agency choice of procedure, see *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519 (1978), or scrutinizing agency statutory interpretation, see *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1983), the Court has repeatedly exhorted us to remember the limited nature of our review. We neither teach nor supervise administrators in their administrative capacities. Our review must be cabined to those tasks which preserve the primacy of the administrators as the fact-finding, interpretive, and enforcement officials under the statutes creating their distinctive role.

The instant case represents a classic example of overreaching the modest review tasks assigned to us under statute. Had Congress wanted the courts to play a more active role in carrying out the statutory mission, it could have made these violations of PACA criminal offenses. Instead, Congress provided for civil sanctions and knowingly chose the machinery of administrative law. We ought to respect that choice and resist the temptation to teach the administrators how to write opinions, or how to order their reasoning.

**ANITA KAPLAN v. UNITED STATES DEPARTMENT OF AGRICULTURE
and UNITED STATES OF AMERICA.**

No. 87-1176.

Decided July 22, 1988.

Responsibly connected - Substantial evidence - Rebuttable presumption.

The United States Court of Appeals for the District of Columbia Circuit denied Petitioner's petition for review, finding that substantial evidence supported the Secretary's determination that Petitioners were responsibly connected to a company found to have violated the Perishable

Agricultural Commodities Act. Under PACA, the rule of responsible connection is rebuttable rather than absolute. Petitioners failed to produce evidence to rebut the presumption of responsible connection.

Before GINSBURG, STARR and WILLIAMS, Circuit Judges.

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

JUDGMENT

This case was considered on the record and on briefs filed by the parties on petitions for review of Orders of the United States Department of Agriculture. The court had determined that the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 14(c). Subsequently for the reasons indicated in the Presiding Officer's decisions, *In re Anita Kaplan*, PACA RC 85-1008, filed September 29, 1986, and *In re Milton Kaplan*, PACA RC 85-1009, filed September 25, 1986, and in the accompanying memorandum, it is

ORDERED and ADJUDGED that the petitions for review be denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam¹

MEMORANDUM

Petitioners Anita and Milton Kaplan seek review of two final orders of the United States Department of Agriculture ("USDA"), declaring them persons "responsibly connected" to Kaplan's Fruit & Produce Co., Inc. ("KFP") during the five-month period in which KFP was found to be in violation of the

¹Rule 11(c) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit provides that "[u]npublished orders or judgments, including explanatory memoranda and sealed opinions, of this Court are not to be cited as precedents." Counsel may refer to an unpublished disposition, however, when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a *et seq.* (1982 & Supp. IV 1986). The court is satisfied that substantial evidence in the record supports the findings and conclusions of the Presiding Officer regarding petitioners' "responsibly connected" status. *See 7 U.S.C. § 499a(9); Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 612 n.7 (D.C. Cir. 1987); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 407 n.3 (D.C. Cir. 1983).

Under PACA, the rule of "responsibl[e] connect[ion] . . . is rebuttable" rather than absolute. *Quinn v. Butz*, 510 F.2d 743, 756 & n.84 (D.C. Cir. 1975). Petitioners thus bore the burden of rebutting the presumption raised by the weight of the evidence in the record. They failed, however, to adduce any evidence, other than self-serving testimony, to rebut the presumption.

Indeed, there is ample support in the record relative to both Kaplans' continued involvement with KFP, even after Frangipani had obtained practical control of the company. The existence of various telltale corporate records (e.g., PACA licensing documents, KFP checks, the Memorandum of Intent and the amendment thereto) undercuts petitioners' disavowal of responsibility. Moreover, the Kaplans' continued course of dealing relative to KFP sales, shareholding and officer responsibilities also undermines their position and further buttresses the conclusion as to their "actual, significant nexus with the violating company." *See Veg-Mix, Inc.*, 832 F.2d at 611; *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986).

As there is no reason to disturb the agency's final orders, we deny the petitions for review.

TONY HUDLER v. SECRETARY OF AGRICULTURE and UNITED STATES OF AMERICA.
No. 93-4111.
Decided October 8, 1993.

Responsibly connected - Per se reading of statute.

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review, affirming the Secretary's decision that Petitioner was responsibly connected to a company found to have violated the Perishable Agricultural Commodities Act. "Responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than ten percent of the outstanding stock of a corporation or association. Proof that a person falls in one of the enumerated categories establishes that he is responsibly connected to the wrongdoing company.

Before HIGGINBOTHAM, DAVIS, and SMITH, Circuit Judges.

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

PER CURIAM:*

I.

In late 1988 the Green Grove Citrus company failed to pay for fruit it ordered. On July 10, 1990, the director of the Fruit and Vegetable Division of the Agricultural Marketing Service filed an administrative complaint against the company. On August 6, 1990, the agency told Hudler that he might be "responsibly connected" to Green Grove and thus personally subject to sanctions. The agency issued an unopposed order finding that Green Grove had violated the Perishable Agricultural Commodities Act (PACA). A series of administrative appeals about Hudler's status ensued, culminating in a decision by the Administrator of the Agricultural Marketing Service on December 7, 1992 that Hudler was "responsibly connected" to Green Grove.

II.

PACA allows regulators to deny work in the interstate agriculture commodity market to persons "responsibly connected" to an organization making a "flagrant or repeated violation" of the statute. See 7 U.S.C. § 499h(b)(2). "Responsibly connected" means:

affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.

7 U.S.C. § 499a(b)(9). This court joins the Second, Third, and Eighth Circuits in using a "per se" reading of the statute. *Faour v. United States Dep't of*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Agric., 985 F.2d 217, 221 (5th Cir. 1993). Proof that a person falls in one of the three categories enumerated in (B) establishes that he was "responsibly connected" to the wrongdoing company. An agency's determination of "responsibl[e] connection" is upheld if supported by substantial evidence. *Id.* at 219.

At least two pieces of evidence support the agency's conclusion. First, on September 22, 1988 Hudler signed an assignment as:

/s/Tony Hudler Pres.
Green Grove Citrus, Inc.

Hudler countered in the agency hearing that he was signing as president of the Val-Mex Fruit Company. Since the document on its face counters his testimony, the agency did not lack substantial evidence for its decision. See *Suntex Dairy v. Block*, 666 F.2d 158, 162 (5th Cir.), cert. denied, 459 U.S. 826 (1982) ("If the evidence of record is such that it supports inconsistent inferences and conclusions, the courts must defer to administrative choice." (citing *Illinois Central R.R. v. Norfolk & Western Ry. Co.*, 385 U.S. 57, 69 (1966)).

Second, Hudler declared four times in Green Grove's bankruptcy petition, filed January 27, 1989, that he was its president. Hudler counters that "the presumption of continuity" makes this evidence irrelevant. He contends that:

As a general rule, mere proof of the evidence of a present condition or state of facts or proof of the existence of a condition or state of facts at a given time does not raise any presumption that the same condition or facts existed at a prior date, since inferences or presumptions of fact ordinarily do not run backward. 31A C.J.S. *Evidence* § 140 (1964), pp. 305-306.

The argument continues that the petition proves only that Hudler was president in 1989, and the presumption of continuity blocks any inference back in time that he was president before that.

This argument is weak. This kind of evidentiary rule is designed to control juries and is of questionable relevance to the proceedings of an administrative agency. See, e.g., *Dirt, Inc. v. Mobile County Comm'n*, 739 F.2d 1562, 1566 (11th Cir. 1984); *People v. ICC*, 722 F.2d 1341, 349 (7th Cir. 1983). Further, the assignment Hudler signed as president predates Green Grove's activities of 1988, so even if the presumption has effect it does not do enough for

Hudler.

III.

Hudler also argues that the agency's finding should be set aside as arbitrary and capricious even if it is supported by substantial evidence, as the facts found do not match the decision it reached. *See Bowman Transp. Co. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974). On its face this argument is flawed, as the fact the agency found (Hudler is president) is the same as the decision it reached (Hudler is president).

Hudler appears to be arguing that the agency acted arbitrarily by sending him a letter on June 26, 1991. That letter referred to the articles of incorporation, which do not say anything about who the officers of Green Grove are, as one of the sources the agency relied on in deciding to investigate his connection to Green Grove. However, the letter makes clear that the agency is contacting him because his signature appeared on Green Grove's bankruptcy petition. Furthermore, there is a distinction between the decision to send a letter out to Hudler and the ultimate decision the agency reached about his status. The initial letter is a notice of the beginning of an inquiry. This kind of housekeeping decision is due deference. *See Moog Indus. v. FTC*, 355 U.S. 411, 413 (1958) (per curiam).

IV.

Hudler argues that it was arbitrary and capricious for the agency to find that Robert Barnes, his co-owner in Green Grove's parent company, was not responsibly connected with Green Grove while he was. This argument lacks merit.

Assuming that the events in the Barnes proceeding do amount to a decision to prosecute one co-owner and not the other, the agency's decision is protected by *Heckler v. Chaney*, 105 S. Ct. 1649, 1659 (1985). Hudler is unable to maintain that the agency exceeded any regulations setting guidelines for the exercise of its authority.

We deny the petition for review and affirm the order of the Secretary.
Petition denied and order affirmed.

**GARY C. BAKER v. UNITED STATES DEPARTMENT OF AGRICULTURE,
ADMINISTRATOR, AGRICULTURAL MARKETING SERVICE, ET AL.
No. 93-9128.**

Decided July 26, 1994.

Exhaustion of administrative remedies - Denial of injunctive relief - Abuse of discretion.

The United States Court of Appeals for the Fifth Circuit affirmed the district court's denial of Appellant's request for injunctive relief in connection with an administrative proceeding charging him with misconduct in the performance of his job. The issue before the Fifth Circuit was the request for discovery and other injunctive relief relating to a pending and incomplete administrative proceeding. The court determined that the district court did not abuse its discretion by denying injunctive relief to the Appellant because administrative remedies had not yet been exhausted. Parties are required generally to exhaust administrative remedies before seeking relief from the federal courts.

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

PER CURIAM:

This appeal challenges the decision of the district court denying injunctive relief sought by appellant Gary C. Baker in connection with an administrative proceeding charging him with misconduct in the performance of his job. Having determined that the district court properly dismissed Baker's claims, we AFFIRM.

I.

Baker was previously employed by Goodman Produce Co. This company was the subject of a disciplinary complaint filed by the Agriculture Marketing Service alleging wilful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a, *et seq.* In connection with the proceedings against Goodman, Baker was advised in April

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

1992 that his employment within the produce industry could be restricted if the Secretary of Agriculture determined that he engaged in violation of PACA and was "responsibly connected" with Goodman at any relevant time. After Baker was given an opportunity to provide information, he was determined in December 1992 to be responsibly connected with Goodman. Baker sought review and the matter was assigned to a hearing officer who advised Baker, by letter dated June 22, 1993, that a hearing would be held on October 5, 1993, to determine whether he was a "responsibly connected" person.

By letter dated September 15, 1993, Baker's counsel requested that certain subpoenas duces tecum be issued for the October 5 hearing. The defendants promptly advised Baker's counsel that the issuance of such subpoenas was not authorized. Thereafter, on October 4, 1993, Baker initiated this action seeking a temporary restraining order, and temporary and permanent injunctions enjoining the defendants from holding the October 5 hearing. Baker further requested the district court to enter an order allowing him to take discovery for the administrative hearing.¹

Baker's motion for a temporary restraining order was heard by the district court on October 5, 1993. In denying the request to restrain the administrative hearing set for the same day, the district court questioned why Baker had not pursued other forms of discovery since the dispute first arose in April 1992. At a subsequent hearing before the district court, Baker withdrew the request for preliminary and permanent injunctive relief as moot. Following that hearing, the district court denied the request for discovery, stating that Baker's complaints must be addressed to the Fifth Circuit in an appeal of the agency's final order. Baker timely appealed the district court's order denying his requested relief.

II.

The only issue before this court is a request for discovery and other injunctive relief relating to a pending and incomplete administrative proceeding. We review the denial of injunctive relief for abuse of discretion. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981). We, therefore,

¹Specifically, Baker requested the district court to issue subpoenas and subpoenas duces tecum or, alternatively, to order the Secretary of Agriculture to promulgate regulations providing for depositions and subpoenas in the rules applicable to the administrative hearing or, alternatively, to order the Secretary of Agriculture to designate a person to sign and issue subpoenas for the hearing.

must determine whether the district court abused its discretion in denying the injunctive relief that Baker sought. As a general rule, parties are required to exhaust administrative remedies before seeking relief from the federal courts. *McCarthy v. Madigan*, 112 S. Ct. 1081, 1086 (1992). Although there are exceptions to this rule, it is not clear from the record that the applicability of any exception was raised before the district court. Accordingly, we cannot conclude that the district court abused its discretion in denying injunctive relief under these circumstances.² We, therefore, AFFIRM the district court's denial of Baker's request for injunctive relief.

III.

For the foregoing reasons, the judgment is AFFIRMED.

JOHN J. CONFORTI, d/b/a C & C PRODUCE v. UNITED STATES OF AMERICA.

No. 95-1735.

Decided January 18, 1996¹

(Cite as: 74 F.3d 838)

Employment restrictions - "Responsibly connected" employee - Official notice - Good faith effort to secure bond not sufficient - Reduction of sanction.

The United States Court of Appeals for the Eighth Circuit affirmed the Secretary's decision sanctioning Petitioner for violating the employment restrictions in PACA by employing a "responsibly connected" person. PACA prohibits licensees from employing individuals "responsibly connected" to a company that has failed to satisfy USDA reparation orders. Petitioner contended that the Judicial Officer improperly took official notice of ALJ's opinion to conclude that employee was "responsibly connected." The Judicial Officer may take official notice of "relevant publications and records of the department." An officer, director, or holder

²We also note that Baker had known since June 1993 that he would have a hearing on October 5 and yet he waited until September 15 to request subpoenas for that hearing. Moreover, he waited from September 17 until October 4 to seek injunctive relief from the district court.

¹This decision revises and supersedes the opinion printed at 69 F.3d 897 and 54 Agric. Dec. 1212.

of more than ten percent of the outstanding stock of a corporation is "responsibly connected" to that corporation. Petitioner further alleged that he did not violate PACA because he made a good faith effort to obtain a bond, and USDA led him to believe that he could continue to employ a "responsibly connected" person while searching for a bond. The Eighth Circuit held that such good faith efforts could not excuse Petitioner's failure to fire the "responsibly connected" employee. The court reversed the Judicial Officer's imposition of a 90-day suspension as being unjustified by the facts and an abuse of discretion and reinstated the ALJ's 30-day license suspension.

Before WOLLMAN, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

**UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT**

MORRIS SHEPPARD ARNOLD, Circuit Judge:

John Conforti appeals the Secretary of Agriculture's decision sanctioning him for violating the employment restrictions in the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499h(b) (1980) ("PACA"). We uphold the Secretary's determination that Conforti violated PACA, but modify the penalty that the Secretary imposed.

I.

PACA was enacted to protect growers "from the 'sharp practices of financially irresponsible and unscrupulous brokers in perishable commodities.'" *In re Lombardo Fruit & Produce Co.*, 12 F.3d 110, 112 (8th Cir. 1993) (quoting *Hull Co. v. Hauser's Foods, Inc.*, 924 F.2d 777, 780 (8th Cir. 1991)). PACA requires wholesale produce dealers to obtain a license from the United States Department of Agriculture ("USDA"), 7 U.S.C. § 499c(a), and prohibits licensees from employing individuals "responsibly connected" to a company that has failed to satisfy USDA reparation orders. *Id.* § 499h(b)(3). Under the statute, a person is responsibly connected to a company if he serves as a partner, officer, or director of it, or if he holds more than 10 percent of its outstanding stock. *Id.* §§ 499a(b)(9).

Conforti operates C & C Produce, a licensed produce dealership. In June, 1993, Conforti hired Joseph Cali, his life-long friend, to work for C & C Produce. On June 24, 1993, Conforti received a letter from the USDA informing him that Cali was responsibly connected to Royal Fruit, a company with several outstanding reparation orders. The letter indicated that Conforti could not employ Cali after July 24, 1993, unless he posted a bond that was

later set at \$100,000.

Conforti then tried to obtain a bond. He first asked his insurance company for one, but it required full collateralization. He next applied for a line of credit at United Missouri Bank ("UMB") to collateralize the bond, but learned that approval would take three months. Conforti then decided to post \$100,000 of his own funds to guarantee the line of credit. UMB initially approved the transaction, but changed its mind after the USDA advised the loan officer that Conforti's license was going to be revoked. In November, Conforti secured a line of credit at a different bank, but when he learned that the insurance company charged an additional \$15,000 fee to issue the bond, he "threw up his hands" and abandoned his efforts.

Conforti did not fire Cali on July 24 as instructed; he did not finally fire him until November 19, 1993, after he gave up his search for a bond. In the interim, the USDA warned Conforti at least five times that Cali's continued employment could result in the suspension or revocation of his PACA license.

Three months after he fired Cali, the USDA filed a complaint seeking to revoke Conforti's PACA license. The Administrative Law Judge ("ALJ") found that Conforti had violated PACA and suspended his license for thirty days. The USDA appealed to the Judicial Officer ("JO"), who affirmed the ALJ's decision that Conforti violated PACA but increased the suspension to 90 days. The JO's decision is the final decision of the Secretary of Agriculture. 7 C.F.R. § 2.35 (1993). Conforti petitioned this court to review the Secretary's order pursuant to 28 U.S.C. § 2342.

II.

Conforti first argues that the JO improperly found that Cali was responsibly connected to Royal Fruit. He contends first that the finding cannot stand in the absence of a predicate finding in a special hearing on the question of Cali's connection to Royal Fruit. We disagree. It is true that USDA regulations establish a procedure to challenge the USDA's "responsibly connected" designation. 7 C.F.R. §§ 47.48-47.63 (1993). This proceeding, however, commences after the USDA finds that a person is responsibly connected, *id.* § 47.49(a), and nothing in the statute indicates that PACA's employment restrictions take effect only after this proceeding is completed. The statute straightforwardly prohibits employing anyone who is a responsibly connected person as defined by PACA. 7 U.S.C. § 499h(b). Thus, if the record contains evidence that Cali was a partner, director, or officer in Royal Fruit, or held more than 10 percent of Royal Fruit's stock, his employment is

restricted and Conforti violated PACA by employing him. *Id.* § 499a(b)(9).

Conforti also maintains that even if a previous hearing under 7 C.F.R. §§ 47.48-47.63 was not required, the record lacks evidence indicating that Cali met PACA's definition of a responsibly connected individual. This argument is without merit. Prior to issuing his final order, the JO took official notice of an ALJ's opinion in *In re Midland Banana and Tomato Co.*, PACA Docket No. D-93-548, and *In re Royal Fruit*, PACA Docket No. D-93-549 (USDA 1994) ("Royal Fruit"). In *Royal Fruit*, the ALJ found that Cali was the President and a director of Royal Fruit and that he held 50 percent of the company's stock. Given these previous findings, we believe that the JO was justified in concluding that Cali was responsibly connected.

Conforti contends that the JO was not entitled to consider these previous findings because he improperly used the device of official notice. We find no error in the JO's procedure. USDA regulations allow the JO to take official notice of "such matters as are judicially noticed by the courts of the United States," 7 C.F.R. § 1.141(g)(6) (1993), and the USDA Rules of Practice permit the JO to consider "any matter of which official notice is taken." 7 C.F.R. § 1.145(i) (1993). We have held that "federal courts may *sua sponte* take judicial notice of proceedings in other courts if they relate directly to the matters at issue." *Hart v. Comm'r*, 730 F.2d 1206, 1207 n. 4 (8th Cir. 1984); see also *United States v. Jackson*, 640 F.2d 614, 617 (8th Cir. 1981). The JO also gave Conforti the required opportunity to object to the order taking official notice. 5 U.S.C. § 556(e).

Alternatively, Conforti contends that Cali is not responsibly connected because he played only a minor role in Royal Fruit. Conforti points to the ALJ's findings in *Royal Fruit* that Cali was by-and-large a "front man" and that Royal Fruit was actually the "alter ego" of Robert Heimann. Conforti argues that, under the doctrine adopted in *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975), Cali's nominal status in Royal Fruit merely raises a rebuttable presumption that he is responsibly connected.

The central difficulty that Conforti's argument encounters is that we specifically rejected it ten years ago. See *Pupillo v. United States*, 755 F.2d 638, 643 (8th Cir. 1985). We apply a *per se* rule: "Section 499a(9) [is] an irrebuttable statement that an officer, director, or holder of more than ten percent of the outstanding stock of a corporation is responsibly connected with that corporation or association." *Id.* Cali's actual responsibilities or interests in Royal Fruit are, therefore, irrelevant to the question of whether he was responsibly connected; because he was both an officer in the company and held 50 percent of its stock, he was responsibly connected as a matter of law.

Because we find that the JO's decision that Cali was a responsibly connected person is supported by substantial evidence, we affirm it. *Pupillo*, 755 F.2d at 643.

III.

Conforti also asserts that he did not violate PACA because he made a good faith effort to obtain a bond and because the USDA led him to believe that he could continue to employ Cali while he was searching for a bond. We see how Conforti could have gotten this impression from his communications with the USDA. Although the USDA initially told Conforti to obtain a bond or fire Cali by July 24, the USDA did not set the bond amount until July 16, leaving very little time before the deadline. Conforti then asked the USDA to reduce the bond; the USDA denied his request on August 9. The August 9 letter reiterated that Conforti needed either to obtain a bond or fire Cali, but it did not mention the July 24 deadline. On July 30, the USDA sent a letter asking Conforti whether he intended to fire Cali or to obtain a bond. Finally in November, after Conforti stopped looking for a bond, M.A. Clancy, the PACA Licensing Program Review Head, advised him that if he could not post a bond, he should fire Cali.

Conforti does not cite any authority to support his official estoppel argument, and we know of none. In point of fact, the Supreme Court has repeatedly indicated that an estoppel will rarely work against the government. See, e.g., *Office of Personnel Management v. Richmond*, 496 U.S. 414, 423 (1990). As the Court has noted, "When the government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interests of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Community Health Services*, 467 U.S. 51, 61 (1984). Therefore, in the absence of "affirmative misconduct" by the government, *INS v. Hibi*, 414 U.S. 5, 8 (1973), "not even the temptations of a hard case" like Conforti's justify applying an estoppel against the USDA. *Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380, 386 (1947).

We strictly construe PACA's employment restriction, see *Hull Co. v. Hauser's Foods*, 924 F.2d 777, 782 (8th Cir. 1991); *Pupillo*, 755 F.2d at 643, and, as the D.C. Circuit has noted, the "employment bar is phrased as an absolute." *Siegel v. Lyng*, 851 F.2d 412, 415 (D.C. Cir. 1988); 7 U.S.C. § 499h(b) ("The Secretary may . . . suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section."). Therefore, Conforti's good faith efforts, however

sincere, cannot excuse his failure to fire Cali.

IV.

After the Secretary determines that a licensee violated PACA's employment restrictions, he may suspend or revoke the license. 7 U.S.C. § 499h. Conforti argues that suspending his license for 90 days was unduly harsh. We review the Secretary's sanction for an abuse of discretion, affirming it unless it is "without justification in fact." *ABL Produce v. United States Dep't of Agric.*, 25 F.3d 641, 645 (8th Cir. 1994). Even under this deferential standard, we agree that a 90-day suspension was not justified by the facts. We therefore reverse the JO's sanction and reinstate the ALJ's 30-day license suspension.

In *ABL Produce*, 25 F.3d at 645, a license-holder challenged an order revoking his license for violating PACA's employment restrictions. We reversed the sanction and reinstated the 30-day suspension awarded by the ALJ because the JO failed to consider several "relevant factors," namely, whether the company's conduct threatens to undermine PACA's purposes, the circumstances of the violation, and the effect the sanction will have on the company. *Id.* at 646. We apply these considerations to the case at hand.

A.

The JO found that by employing Cali, Conforti threatened to undermine PACA's purposes. As we have already noted, PACA was designed to protect produce growers from "sharp" and "unscrupulous" practices of financially irresponsible brokers. *In re Lombardo Fruit & Produce Co.*, 12 F.3d at 112. Congress was particularly concerned about the risk of non-payment. *ABL Produce*, 25 F.3d at 646.

The record in this case is devoid of evidence that Conforti is in any way a threat to produce growers. C & C Produce is financially healthy, and Conforti's suppliers themselves characterized his payment practices and ethics as "exemplary." The JO disregarded this information, however, concluding that "Mr. Conforti's ethics, payment practices, complaints against C & C produce and the financial health of Mr. Conforti's company are irrelevant." Given the fact that PACA was intended to protect suppliers, we do not see how this kind of information can be characterized as irrelevant. The JO therefore erred when he refused to consider it.

The JO further found that employing Cali threatened the industry because

he was responsibly connected to Royal Fruit. As we have already said, however, Cali was simply a "front-man" who lacked both authority and an actual interest in Royal Fruit. The ALJ considered Cali's "front man" status and concluded that "to say that Mr. Cali was a great risk to the industry is hyperbole." The JO, on the other hand, disregarded Cali's limited involvement because it "did not lessen the responsibility of Mr. Cali for Royal's PACA violations."

We agree entirely, as we said above, that the extent of Cali's participation has no bearing on whether he is responsibly connected to Royal Fruit. *Pupillo*, 755 F.2d at 643. We believe, however, that his actual position at Royal Fruit is relevant to whether Cali's employment at C & C Produce threatened the produce industry. By disregarding the fact that Cali's role in Royal Fruit was *de minimis*, therefore, the JO overstated the threat that Cali's employment posed to the produce industry.

B.

The JO also increased the ALJ's sanction because Conforti "deliberately chose not to heed [the government's] warning" to fire Cali or obtain a bond. We agree that Conforti should be punished for employing Cali for four months after the USDA's deadline. We find, however, that the JO abused his discretion by not considering the mitigating circumstances in the case.

As the ALJ noted, Conforti "made a diligent and good faith effort to comply with the complainant's demands that he obtain a bond." During the period that Conforti employed Cali, he tried to obtain a bond from several different sources, and he consistently updated the USDA about his progress. While, as we have said, we do not agree with Conforti that his diligence absolves him of guilt in the matter, we do think that, particularly in light of the mixed signals sent by the USDA, all of which we rehearsed above, the JO erred by completely discounting his efforts.

C.

Finally, we think that the JO abused his discretion when he failed to consider how the 90-day suspension would affect C & C Produce. Conforti operates a wholesale produce dealership. Because his customers, primarily restaurants, require daily service, even a 30-day suspension is likely to have devastating financial consequences. *ABL Produce*, 25 F.3d at 647; see also *Capital Produce Co. v. United States*, 930 F.2d 1077, 1081 (4th Cir. 1991) ("The

45-day suspension may destroy or seriously hamper [the produce company's] relationships with its customers, who depend upon daily services"). We think that there is every chance that suspending his license for 90 days will drive Conforti, a man with a previously spotless record, out of the produce business altogether.

V.

For the reasons adduced, we affirm the decision of the Secretary of Agriculture finding that Conforti violated PACA's employment restrictions. We find, however, that the facts in the case do not justify the sanction imposed. In light of Conforti's exemplary record, his diligent efforts to obtain a bond, and Cali's limited participation in Royal Fruit, we reverse the JO's sanction and reinstate the ALJ's decision suspending Conforti's PACA license for 30 days.

PERISHABLE AGRICULTURAL COMMODITIES ACT**DEPARTMENTAL DECISIONS****In re: PETE'S TROPICAL CORPORATION.****PACA Docket No. D-95-532.****Decision and Order filed November 22, 1995.**

Failure to show cause why application for PACA license should not be denied - Prohibited affiliation - Failure to promptly pay for produce constitutes conduct of character prohibited by PACA.

Judge Hunt denied the PACA license application of Respondent Pete's Tropical Corporation, which failed to make full payment promptly for produce purchases amounting to approximately \$17,000. Failure to pay promptly for produce constitutes conduct of a character prohibited by the PACA. Respondent's business relationship with PACA-barred person constitutes a prohibited affiliation. Respondent failed to show cause why its application for a PACA license should not be denied.

Kimberly S. Hart, for Complainant.

Plinio Almeida, for Respondent.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding arises under the Perishable Agricultural Commodities Act, 1930, as amended, ("PACA"), (7 U.S.C. § 499a *et seq.*). It was instituted on July 26, 1995, by a Notice to Show Cause why respondent Pete's Tropical Corporation's application for a PACA license should not be denied. The Notice was filed by the complainant, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture ("USDA").

A hearing was held in New York, New York, on August 22, 1995. Complainant was represented by Kimberly S. Hart, Esq. Respondent was represented by its owner, Plinio Almeida.

Statement of the Case

Respondent, Pete's Tropical Corporation, incorporated in New York in 1993, is solely owned by Plinio Almeida. Respondent received a PACA license as a produce dealer in 1993. However, the license expired in April 1995 when respondent failed to renew it's license. Respondent applied for a new license in June 1995.

Complainant denied respondent's request for a license on the ground that

it was unfit to receive a license because it was allegedly affiliated with a Roger Almeida who was barred from being affiliated with a PACA licensee. Complainant contends that respondent should also be denied a license because it is undercapitalized and that it had failed to pay for certain produce purchases.

Plinio Almeida and Roger Almeida are brothers. Roger Almeida is the sole owner of a company called Plantains, Inc. Until 1994, Plantains was a PACA-licensed produce dealer. However, its license was revoked that year because the company was found to have committed flagrant and repeated violations of the PACA by failing to pay promptly for produce purchases totalling over \$347,000. Roger Almeida was found to be responsibly connected with Plantains and was barred from being employed by or affiliated with another PACA licensee until April 29, 1995, and barred thereafter unless his employment or affiliation was approved by USDA and a suitable surety bond was posted. Respondent was notified by USDA of this bar to Roger's employment and affiliation. Roger Almeida has not received permission to be employed by or affiliated with a PACA licensee.

Complainant contends that Roger Almeida and respondent Pete's Tropical Corporation (referred to as "Pete's Tropical") have a business relationship that constitutes an affiliation and that respondent therefore is unfit to receive a PACA license.

Plantains, Inc., owned by Roger Almeida, has two operations called, respectively, Plantains Beverage Wholesale and Plantains Cash & Carry. The two businesses are separated by a driveway. Plantains Beverage Wholesale conducts its business at the same site as respondent Pete's Tropical Corporation. Plantains Beverage Wholesale sells soft drinks and beer while Pete's Tropical sells produce. An outdoor sign identifies the site to the public and customers as the location for Plantains Beverage but there is no similar identifying sign for Pete's Tropical.

Plantains Beverage and Pete's Tropical share a common sales area in the building. A cashier makes sales for both businesses, but gives customers separate receipts indicating the company from which merchandise was purchased.

Plantains Beverage and Pete's Tropical maintain separate bank accounts and separate payrolls. Cash for the two companies is kept separate, but kept in a common safe located in Roger Almeida's office at Plantains Cash & Carry. Pete's Tropical keeps its money in Plantains safe because of concern about robberies in the area.

Plantains Beverage and Pete's Tropical use the same bookkeeper who

works in the same office area as Roger Almeida. The record is not clear as to which company, or both, pay the bookkeeper's salary. The records for the two companies are kept separate but kept in the same filing cabinet. Complainant's investigator testified that respondent makes a "diligent" effort to keep its records and inventory separate from Plantains.

In addition to sharing space, Plantains Beverage and Pete's Tropical share many business activities. The workers compensation and liability insurance policy is in the joint name of Plantains Beverage and Pete's Tropical, with each company paying for half the premium. The telephone bill for the phone used by Pete's Tropical is in Plantains name, but Pete's Tropical pays the telephone company directly for the phone's use. The two companies share costs for security and trash removal. Pete's Tropical also paid a fine levied against Plantains by the State Department of Agriculture.

Pete's Tropical rents its store space from a company owned by Roger Almeida. There is no formal rental agreement and Pete's Tropical owes several months back rent.

Pete's Tropical uses Plantains' trucks. An unwritten informal arrangement apparently provides for Pete's to pay for the repair and upkeep of the trucks in return for their use. Plinio Almeida testified that Pete's pays Plantains for the services it receives and that such payments are made directly to Plantains. He said that no payments are made to Roger personally.

Plantains and Pete's have engaged in joint advertising. One such advertisement, a circular, told prospective customers that "To Order Groceries, Cigarette and Candy call (212) 777-1044 ask for: Andres," and that "To Order Fruit, Vegetables, Tropical Products, A Full Variety of Imported and Domestic Beers call (212) 777-4940 ask for: Peter or Roger." The only "Roger" is Roger Almeida and Plinio Almeida testified that he goes by the name Pete. The circular carried only the name of Plantains Cash & Carry.

Roberta Rucker, a USDA senior marketing specialist, testified that both customers and creditors of Pete's Tropical and Plantains appear to believe that the two businesses are two divisions of the same company. She also testified that, after reviewing respondent's records, she determined that it had an inventory of fruits and vegetables of about \$12,000, that it had unpaid produce purchases totalling \$17,000, that it had accounts receivable of \$4,500, that its April 1995 bank statement showed a balance of between \$1,401 and \$3,031, and that fifteen checks had been returned because of insufficient funds. (Tr. 24-25, 39-42, 47.)

The owner of Pete's Tropical, Plinio Almeida, denied that respondent was affiliated with Roger Almeida. He said that Pete's Tropical and Plantains are

separate operations and that the reason they share services is to save on expenses. He also contends that respondent's unpaid produce purchases are \$9,752.50 rather than the \$17,000 claimed by complainant.

Jane Servais, the head of PACA's Trade Practices Section, testified that respondent Pete's Tropical should be denied a PACA license because the comingling of its activities with Plantains constitutes an affiliation with Roger Almeida, Plantains' sole owner. She also said that she did not believe that Pete's Tropical could comply with PACA's prompt payment requirements because it is undercapitalized.

Law

Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides:

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in the case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practices of the character prohibited by this Act or was convicted of a felony in any State or Federal Court, or (b) whether the application contains any materially false or misleading statement or involved any misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee of the applicant. If after investigation, the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing, the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer or broker because the applicant or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by the Act or was convicted of a felony in any State or Federal Court, or because the application contains a materially false or misleading statement made by the

applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

Section 8(b) (7 U.S.C. § 499h(b)) states:

(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person- . . .

- (1) whose license has been revoked or is currently suspended by the order of the Secretary;
- (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2 of this Act; or
- (3) against whom there is an unpaid reparation award issued within two years, subject to his right to appeal under Section 7(c) of this Act.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation. . . if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

Section 1(10) (7 U.S.C. § 499a(1)(10)) provides:

- (10) the terms "employ" and "employment" mean any affiliation of any person with the business of a licensee, with or without compensation, including ownership or self-employment.

Section 2(4) (7 U.S.C. § 499b(4)) states:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purpose or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or fail to maintain the trust as required under Section 5(c);

Regulations

9 C.F.R. § 46.22(aa) states:

'Full payment promptly' is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. 'Full payment promptly,' for the purpose of determining violations of the [PACA], means; . . . (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted; . . .

Discussion

Complainant contends that respondent Pete's Tropical Corporation should be denied a license because its relationship with Plantains, a business owned solely by Roger Almeida, constitutes a prohibited affiliation. It also contends that it should be denied a license because its failure to pay for produce constitutes an act of a character prohibited by the PACA and because it is undercapitalized.

Complainant argues that the relationship between Pete's Tropical and Plantains shows that Pete's Tropical is "some sort" of subsidiary of Plantains.

Plinio Almeida, however, contends that his business, Pete's Tropical, is a separate business from Plantains. He contends that the relationship is with Plantains as a business and not with Roger personally. He also contends that the relationship is a means of reducing respondent's costs of doing business.

As far as the record shows, Pete's Tropical and Plantains are separately owned businesses. There is no evidence that Pete's is a subsidiary of Plantains. There is also no evidence showing that the relationship between Pete's Tropical and Plantains is based on other than cost-cutting considerations. PACA's concern, however, in scrutinizing the relationship, is that it is not two independent businesses dealing with each other at arm's length, but rather a situation where one of the two businesses, Pete's Tropical, which is engaged in a PACA-regulated business, appears to be closely interacting with a company whose sole owner is barred from being affiliated with a PACA-licensed business.

Complainant contends that a PACA-barred person, like Roger Almeida, is not only personally prohibited from affiliating with a PACA-licensed business, but also prohibited from affiliating through a solely owned corporation, such as Plantains. This argument has merit. An unscrupulous person could otherwise easily evade the PACA and defeat its purpose by the simple device of forming a corporation to affiliate with a business from which he is personally barred. I therefore find that it is immaterial whether Roger Almeida maintains his relationship with Pete's Tropical personally or through his solely owned corporation in determining whether the relationship is a prohibited affiliation.

Affiliation is also defined as meaning "to associate or connect oneself." (Webster's II New Riverside Dictionary, 1984.) PACA's bar against any form of prohibited affiliation is sweeping. "The word 'any' is a broad and comprehensive term . . . [it] includes all kinds of affiliation -- whether minimum or maximum; whether deliberate or not." *Tri-County Wholesale Produce Co., Inc.*, 45 Agric. Dec. 286, 304 (1986).

In the circumstances here it is clear that Pete's Tropical and Plantains have a close association and connection. They share common store space, safe, insurance, utilities, bookkeeper, vehicles, advertising, and phones. Pete's Tropical also rents space and vehicles from a Roger Almeida-owned corporation and does so without any form of written agreement. To the public the two businesses appear to be divisions of the same enterprise. While the reason for this close interaction may be due to economic considerations, it is nevertheless such a close association or connection as to constitute an affiliation. As Plantains is a corporation solely owned by Roger Almeida, its

affiliation constitutes a prohibited affiliation between Roger Almeida and Pete's Tropical. Accordingly, the application of Pete's Tropical for a license will be denied.

Complainant further argues that Pete's Tropical should be denied a license because its failure to pay its produce suppliers constitutes an act of a character prohibited by the PACA. Pete's Tropical contends that the amount of its unpaid purchases is \$9,752, rather than the \$17,000 claimed by respondent. However, whether \$9,000 or \$17,000, the amount in either event is more than *de minimis*. The failure to pay even \$9,000 is therefore an act of a character prohibited by the PACA and thus a ground for denying respondent a license.

Finally, complainant contends that Pete's Tropical should also be denied a license because it is undercapitalized. The PACA, however, does not provide that undercapitalization is a basis for denying a license. Complainant cites no authority for its position except for the argument that undercapitalization shows that an applicant would be unable to comply with the PACA.

As it has already been determined that respondent's application for a license is to be denied, and as the adequacy of an applicant's capitalization is a matter of general concern that is better considered in a notice-and-comment rulemaking procedure, there is no need to decide the matter in this proceeding.

Findings of Fact

1. Pete's Tropical Corporation, the respondent, is a corporation organized and existing under the laws of the state of New York. Its sole owner is Plinio V. Almeida. It is in the business of selling produce.
2. Respondent was issued a PACA license on March 9, 1993. The license terminated on March 9, 1995, when respondent failed to pay the required annual renewal fee.
3. Respondent applied for a new license on June 27, 1995.
4. Plantains, Inc., is a corporation organized and existing under the laws of the state of New York. Plantains, Inc., is owned solely by Roger Almeida.
5. Plantains, Inc., was issued a PACA license on September 21, 1988. The license was suspended in 1992 for failing to pay reparation awards and was revoked on March 8, 1994, for committing wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).
6. Roger Almeida was found to be responsibly connected with Plantains,

Inc., and informed that he could not be employed by or affiliated with another licensee, in any capacity, until April 29, 1995, and then only with the approval of the Secretary and the posting of a suitable surety bond. Roger Almeida has not received approval from the Secretary to be employed by or be affiliated with a PACA licensee.

7. Respondent was notified that it could not employ or be affiliated with Roger Almeida.

8. Respondent and Plantains, Inc., at all times relevant to this proceeding, conduct their respective business operations at the same site; use the same bookkeeper; use the same safe to keep money from their operations; keep their books at the same location; and have a joint business and workers compensation insurance policy. The bookkeeper maintains his office at the offices of Plantains, Inc.

9. Respondent leases space from a company owned by Roger Almeida and rents trucks owned by Roger Almeida. There is no formal agreement for these leasing and rental arrangements.

10. Respondent and Plantains, Inc., engage in joint advertising without identifying respondent as a business separate from Plantains, Inc. Respondent and Plantains, Inc., appear to the public and their customers as being part of the same operation and not as separate and distinct businesses.

11. Respondent has not made prompt payment for produce purchases amounting to approximately \$17,000.

Conclusions of Law

Respondent's business relationship with Plantains, Inc., a business owned solely by Roger Almeida, constitutes an affiliation with Roger Almeida. Respondent's failure to promptly pay for its produce purchases constitutes conduct of a character prohibited by the PACA. Respondent has failed to show cause why its application for a PACA license should not be denied.

Order

Respondent's application for a PACA license is denied.

This Order shall become final and effective thirty-five (35) days after the date of service of this Order on respondent unless there is an appeal to the Judicial Officer within thirty (30) days after service pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

This Decision and Order became final and effective January 3, 1996.-

Editor]

**In re: N. PUGACH, INC.
PACA Docket No. D-94-558.
Decision and Order filed November 30, 1995.**

Failure to make full payment promptly - "Full payment promptly" defined - Mere excuses for payment violations never sufficiently mitigating - Finding of willful misconduct not required - Flagrant and repeated violations - Publication.

Judge Kane published the finding that Respondent committed repeated and flagrant violations of PACA by failing to make full payment promptly, during the period August 1992 through July 1993, to 24 sellers for 166 lots of perishable agricultural commodities, totaling \$384,979.33. "Full payment promptly" is defined by the Regulations as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted. Trust payments were made by Respondent's trustee to qualified trust claimants in the amount of \$29,866.75, leaving an unpaid balance of \$355,112.58 at the time of the hearing. Mere excuses for payment violations are never sufficiently mitigating to prevent a failure to pay from being considered flagrant or willful. A finding of willful misconduct is not required because complaint counsel did not seek revocation or suspension of a license as part of the sanction.

Kimberly D. Hart, for Complainant.

Gerard DeGregoris, Jr., Mineola, NY, for Respondent.

Decision and Order issued by Paul Kane, Administrative Law Judge.

This decision is promulgated pursuant to the Administrative Procedure Act, Pub. L. 89-554, 80 Stat. 384 (1966), as amended Pub. L. 95-251, 92 Stat. 183 (1978)¹ and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. §§ 1.130-.151 (1995).

The Deputy Director of the Fruit and Vegetable Division of the Department's Agricultural Marketing Service, by complaint filed July 25, 1994, alleges that respondent N. Pugach, Inc., hereinafter "respondent," willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act, ch. 436, 46 Stat. 531, as amended, ch. 120, 48 Stat. 584 (1934); ch. 719, 50 Stat. 725 (1937); ch. 456, 54 Stat. 696 (1940); Pub. L. 87-725, 76 Stat. 673 (1962); Pub. L. 91-107, 83 Stat. 182 (1969); Pub. L. 95-562, 92 Stat. 2381

¹Particular reference is made to 5 U.S.C.A. §§ 554, 557 (West 1977 & Supp. 1995) [unofficial codifications of statutes are cited herein].

(1978); Pub. L. 97-98, Title XI, 95 Stat. 1269 (1981); Pub. L. 97-352, 96 Stat. 1667 (1982); Pub. L. 98-273, 98 Stat. 166 (1984) [hereinafter the Act, or PACA] specifically § 2(4) thereof.² The complaint alleges that respondent violated the Act by failing to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that it purchased, received and accepted in interstate and foreign commerce.

By answer filed September 6, 1994, counsel for respondent admits that respondent is a corporation, admits that a PACA license was issued to it, denies the essential allegations of the complaint, avers that its alleged conduct was not willful, flagrant or repeated, avers it has not engaged in a course of conduct which resulted in the failure to pay promptly for agricultural commodities, and further avers that some of the perishable agricultural commodities allegedly received and accepted were not in interstate commerce.

A public hearing was held on March 22, 1995, in Uniondale, New York, before the undersigned. Subsequently, proposed findings of fact and briefs were filed by counsel. To the extent indicated, they are adopted herein. All other proposed findings, conclusions and arguments are rejected as being irrelevant, or lacking legal or evidentiary bases. In this opinion, "Tr." refers to the transcript of the hearing. "CX" refers to the numbered exhibits offered by complaint counsel. "CRX" refers to the lettered exhibits offered by counsel to respondent.

The United States Department of Agriculture, hereinafter the Department, is represented by Kimberly D. Hart, Esq., Washington, D.C. N. Pugach, Inc., is represented by Gerard DeGregoris, Jr., Esq., Mineola, New York.

Upon consideration of all matters of record, the following Findings of Fact are made and Conclusions of Law reached. As a result, violations are found as alleged, and there is entered an order as requested by complaint counsel.

Findings of Fact

1. Respondent, N. Pugach, Inc., is a corporation organized and existing under the laws of the State of New Jersey whose business address was Row B, 269 New York Terminal Market, Bronx, New York 10474.
2. Pursuant to the licensing provisions of the PACA, license number 910212 was issued to respondent on November 14, 1991. This license

² U.S.C.A. § 499b(4) (West 1980 & Supp. 1995).

terminated on November 14, 1993, when respondent failed to pay the required annual renewal fee.

3. During the period of time prior to the commencement of the investigation, the Department was in receipt of numerous trust notices and reparation complaints against respondent. (Tr. 12) In addition, the Department became aware that respondent has ceased business operations in August 1993. (Tr. 12)

4. Roberta Rucker, a senior marketing specialist with complainant's PACA branch in North Brunswick, New Jersey, was assigned to investigate respondent as a result of the numerous trust notices and reparation complaints being filed against respondent as well as respondent ceasing business operations. The purpose of the investigation was to determine if there were violations of the Act on the part of respondent. (Tr. 12)

5. Ms. Rucker's investigation took place between December 13-21, 1993. (Tr. 14) Ms. Rucker had spoken with Mr. Pugach, respondent's principal, by telephone prior to the investigation regarding the location of respondent's business records, and he informed her the records had been boxed and moved and that she should contact the trustee, Mr. Kreinces, to obtain access to the firm's records. (Tr. 13) Mr. Pugach also informed Ms. Rucker that he would be unable to meet with her. (Tr. 13) Ms. Rucker visited with Mr. Kreinces and determined that he was only in possession of records relating to respondent's outstanding receivables and the money being held in trust for creditors. (Tr. 14) Ms. Rucker reviewed the records in Mr. Kreinces' possession and determined that there was approximately \$150,000.00 in outstanding receivables at that time. (Tr. 15)

6. Ms. Rucker later determined that respondent's attorney, Mr. DeGregoris, was also in possession of some of respondent's business records. (Tr. 15-16) Ms. Rucker visited with Mr. DeGregoris and reviewed the records in his possession which included a "purchase book," bank statements, disbursement journals, canceled checks, payable invoices, and additional records pertaining to the business. (Tr. 17) Ms. Rucker testified that she conducted a search of all of the records provided by Mr. DeGregoris but was unable to locate respondent's unpaid invoices. (Tr. 21) Ms. Rucker questioned Mr. Pugach, Mr. Kreinces and Mr. DeGregoris about the missing unpaid invoices and none of these individuals was able to give her information as to where those records could be located. (Tr. 22)

7. Being unable to locate respondent's unpaid invoices within its records, Ms. Rucker utilized the "purchase book" as a source of information to ascertain whether respondent had any additional creditors who had not filed

trust notices or reparation complaints. (Tr. 17) Ms. Rucker testified that the "purchase book" was a receiving book listing in date order the purchases received by respondent, the names of shippers, the lot numbers, the quantities of commodities and the amounts owed to the shipper. (Tr. 17) Ms. Rucker compiled a list of respondent's creditors and contacted the creditors either by telephone or in person requesting copies of all unpaid invoices involving produce sold to respondent. (Tr. 19) She requested that the creditors located outside the State of New York send the unpaid invoices by mail and she personally picked up most of the unpaid invoices from the creditors who were located in the local New York area. (Tr. 19)

8. Ms. Rucker personally obtained sworn affidavits from those local creditors who indicated whether produce sold to respondent originated outside the State of New York and/or within the State of New York. (CX 28; Tr. 19, 21) Ms. Rucker testified that it took several weeks to receive unpaid invoices from the creditors located outside the State of New York but she was able to make a preliminary determination as to the extent of respondent's produce debt at the time that she completed her review of respondent's records located at Mr. DeGregoris' office. (Tr. 23) Since she was unable to contact Mr. Pugach, Ms. Rucker conducted an exit interview with Mr. DeGregoris and informed him about the unpaid produce debt shown by the trust notices and reparation complaints, advised him about the prompt pay requirements of the Act and the possible administrative action that could be taken by the Department. (Tr. 23) During the course of the interview, Mr. DeGregoris stated to Ms. Rucker that "he was aware that his client owed approximately \$400,000.00 in produce debt." (Tr. 24)

9. Ms. Rucker testified that upon receiving the necessary unpaid invoices, she compared the unpaid amounts listed on the invoices against the unpaid amounts found in respondent's "purchase book" for the corresponding shipments. (Tr. 25) Ms. Rucker also testified that she did not merely take the creditor's word as to the unpaid amounts listed on the invoices but made a conscientious effort to apply respondent's figures to those invoices in instances where the two figures differed. (Tr. 25)

10. As a result of her investigation, Ms. Rucker found that, during the period of August 1992, through July 1993, respondent purchased, received and accepted perishable agricultural commodities from 24 sellers in 166 lots in interstate commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$384,979.33, as more fully set forth in paragraph III of the complaint. (Complaint ¶ 3; CX 3, 28; Tr. 28)

11. Trust payments were made by respondent's trustee to qualified trust claimants contained in the complaint in the amount of \$29,866.75; however, no other sums have been paid, leaving an unpaid balance of \$355,112.58 at the time of the hearing. (CX 30; Tr. 62-65)

Statutes and Regulations

Respondent is alleged to have willfully, flagrantly and repeatedly violated the PACA in the following specific section:

It shall be unlawful on or in connection with any transaction in interstate or foreign commerce--

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 499e(c) of this title.³

The Act assigns liability for violations as follows:

....

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or . . . , the

³7 U.S.C.A. § 499b(4) (West 1980 & Supp. 1995).

Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.⁴

The Secretary has applied the following definition to the interpretation of the relevant section of PACA in the following regulation:

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;⁵

Discussion

The Perishable Agricultural Commodities Act was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities⁶ "Accordingly, certain conduct by commission merchants,

⁴7 U.S.C.A. § 499h(a) (West 1980 & Supp. 1995).

⁵7 C.F.R. § 46.2 (1992, 1993).

⁶It has also been held that Congress intended, by enactment of the Perishable Agricultural Commodities Act, to establish bars to preclude all but financially responsible persons from engaging in the business subject to the Act. *Zwick v. Freeman*, 373 F.2d 110, 117 (2nd Cir.), *cert. (continued...)*

dealers, or brokers [was] declared to be unlawful." *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 858 (9th Cir. 1976). Enforcement is effectuated through a system of licensing with penalties for violation. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930); *See also George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2nd Cir.), cert. denied, 419 U.S. 830 (1974).

The instant proceeding is an enforcement action with a two-fold purpose: (1) to determine whether respondent violated section 2(4) of the PACA (7 U.S.C.A. § 499b(4); and (2) if so, to further determine what sanction should be issued as a consequence thereof. These issues are dealt with below.

Section 2(4) of the PACA makes it unlawful for any commission merchant, dealer, or broker to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. 7 U.S.C. § 499b. Insofar as is pertinent here, "full payment promptly" is defined by the regulations as requiring payment of the agreed purchase prices for produce within ten (10) days after the day on which the produce is accepted. The regulations in effect during 1992 and 1993, 7 C.F.R. § 46.2(aa)(10), (1992, 1993) provided, that "when contracts are based on terms other than those described in these regulations, payment is due the supplier/seller within twenty (20) days from the date of acceptance of shipment under the terms of the contract. . . ." The provisions of the Act do not allow partial payments or settlements to constitute "full payment promptly."

Complainant presented sufficient evidence at the hearing to prove that respondent failed to make full payment promptly to 24 sellers of the agreed purchase prices totaling \$384,979.33 for 166 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce during the period of August 1992, through July 1993. (Complaint ¶ 3; CX 3, 28; Tr. 28)

Respondent's failure to pay promptly and in full for 166 transactions occurring over a period of 11 month, totalling \$384,979.33 constitutes repeated and flagrant violations of section 2 of the Act. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-374 (5th Cir. 1980); *George Steinberg and Son, Inc.*, 32 Agric. Dec. 236 (1973), aff'd sub nom., *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 830 (1974). The

⁶(...continued)
denied, 389 U.S. 835 (1967).

violations alleged in the complaint are repeated because they occurred 166 times. The violations are flagrant because of the number of violations, the amount of money involved and the length of the period of time during which the violations occurred. *See, Veg Mix, Inc.*, 48 Agric. Dec. 595 (PACA Dkt. No. 2-6612) (May 19, 1989).

Respondent's principal, Mr. Pugach, testified that there were two major factors which accounted for respondent's financial difficulties: (1) the fact that it hired several salesman who brought to the business customers who did not pay their bills in a prompt manner (Tr. 77-79); and (2) the fact that respondent's accountant made an accounting error in computing and reporting respondent's profits and losses over a three-month period. (Tr. 82-84). Such excuses do not mitigate against a finding that respondent committed the violations as alleged. The inability to make prompt payment for produce because of financial difficulties does not negate the violations under the Act. *See, B.G. Sale's Co., Inc.*, 44 Agric. Dec. 2021 (PACA Dkt. No. 2-6790) (October 9, 1985); *Oliverio, Jackson Oliverio, Inc.*, 42 Agric. Dec. 1151 (PACA Dkt. Nos. 2-6193 and 2-6200) (August 31, 1983). Moreover, as stated by the Judicial Officer in *Atlantic Produce Co. and Joseph Pinto*, 54 Agric. Dec. 701, 712 (PACA Dkt. No. D-94-533) (March 22, 1995), "[e]ven though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful."

Although trust payments have been made by respondent's trustee to qualified trust claimants, some of which were identified in the complaint in the amount of \$29,866.75, no other sums have been paid, leaving an unpaid balance of \$355,112.58. (CX 30; Tr. 62-65) However, it is the Department's policy ". . . [I]f full payment is not made by the opening of the hearing, together with present compliance with the payment provisions of the Act and regulations, . . . the case will be treated as a 'no pay' case." *Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 150 (PACA Dkt. No. 2-6186) (January 27, 1984), *aff'd* 815 F.2d 706 (6th Cir. 1987) (Table). *See also, Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 506 (PACA Dkt. No. 2-6846) (March 26, 1987), *aff'd* 851 F.2d 1500 (D.C. Cir. 1988) (Table).

Accordingly, I find that respondent committed flagrant and repeated violations of the PACA by failing to make full payment promptly for perishable agricultural commodities purchased in interstate commerce.

Sanction

As stated above, respondent has presented many arguments in mitigation of the sanction. However, ". . . [E]xcuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful." *Caito Produce Co.*, 48 Agric. Dec. 602, 614 (PACA Dkt. No. D-88-511) (June 1, 1989); *Atlantic Produce Co. and Joseph Pinto, id.*, 54 Agric. Dec. at 701, 712; *Gilardi Truck & Transportation, Inc., id.*, 43 Agric. Dec. at 118 150 (holding that all excuses have been routinely rejected in determining whether payment violations occurred since "the Act calls for payment--not excuses.")

Accordingly, the appropriate sanction is the publication of a finding that respondent committed repeated and flagrant violations of the PACA. As stated by the Judicial Officer in *S.S. Farms Linn County, Inc., et al.*, 50 Agric. Dec. 476, 497 (AWA Dkt. No. 89-3) (February 8, 1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (Table):

. . . the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The record contains analyses of criteria upon which the Department relies in support of its recommended sanction. These primarily relate to the number of transactions jeopardized by respondent's conduct and the time-span during which such behavior was displayed. As noted, 166 transactions were flawed during 11 months. (Tr. 66-70) This justifies a finding that respondent has committed repeated and flagrant violations and publication of that finding.⁷

In this case, a finding of willful misconduct is not required because complaint counsel is not seeking revocation or suspension of a license as part of the sanction.

⁷See *Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (PACA Dkt. No. 2-5845) (December 2, 1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984)

Conclusions

Based upon entry of the above findings of fact and upon the existence of those facts within the content of the Perishable Agriculture Commodities Act, it is concluded that respondent repeatedly and flagrantly violated the Act at 7 U.S.C.A. § 499b(4) (West 1980 & Supp. 1995) by failing to timely pay for produce it received in interstate commerce.

Accordingly, the following order is entered.

Order

A finding is hereby made that respondent has committed repeated and flagrant violations of section 2 of the PACA (7 U.S.C. § 499b), and such finding shall be published.

This Order shall take effect on the eleventh (11th) day after this Decision becomes final. Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five (35) days after service unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 8, 1996.-Editor]

**In re: MIDLAND BANANA & TOMATO CO., INC., SUSAN E. HEIMANN,
ROBERT S. HEIMANN, and JEFFREY B. HEIMANN.
PACA Docket No. D-93-548.**

and

**In re: ROYAL FRUIT CO., INC., and ROBERT S. HEIMANN.
PACA Docket No. D-93-549.**

**Decision and Order on Application for Attorney's Fees and Expenses
Pursuant to the Equal Access to Justice Act filed November 30, 1995.**

Equal Access to Justice Act - "Substantially justified."

Judge Bernstein found that the government was substantially justified in bringing the Complaint against Respondent Jeffrey B. Heimann and dismissed Respondent's Application for Fees and Expenses. To recover fees under the Equal Access to Justice Act, applicant must file a timely

application, be the prevailing party, and it must be found that the government's position in bringing the proceeding was not substantially justified. Respondent was a prevailing party and his application was timely. To be "substantially justified" an action must be justified in substance or in the main, not justified to a high degree. The action must be justified to a degree that could satisfy a responsible person, and must have a reasonable basis in both law and fact. The government need not show that it had a substantial likelihood of prevailing.

Eric Paul, for Complainant.

Richard L. Katz, Coral Gables, FL, for Respondent.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an application by Jeffrey B. Heimann for an award of attorney's fees and other expenses under the Equal Access to Justice Act (EAJA), as amended (5 U.S.C. § 504). In my initial decision, I dismissed the Complaint with respect to Respondent Jeffrey B. Heimann in Docket No. D-93-548. To recover fees under the Act, an applicant must file a timely application, be the prevailing party, and it must be found that the government's position in bringing the proceeding against the applicant was not substantially justified.

I have previously found that Mr. Heimann's application was timely. It is clear that he is a prevailing party (5 U.S.C. § 504(a)(2); 7 C.F.R. § 1.184(a)). The issue in this decision is whether or not filing of the Complaint against Jeffrey B. Heimann in this proceeding was substantially justified. I conclude that it was.

In this proceeding Complainant is represented by Eric Paul, Esq., Office of the General Counsel, United States Department of Agriculture. Respondent is represented by Richard L. Katz, Esq., of Coral Gables, Florida. Complainant's exhibits in the original action are referred to as "CX"; Respondent's exhibits in the original action are referred to as "RX"; and the hearing transcript is referred to as "Tr."

Under the EAJA there is a rebuttable presumption that a prevailing party in litigation against the government is entitled to fees. *Thomas v. Peterson*, 841 F.2d 332, 335 (9th Cir. 1988); *United States v. First Nat'l Bank of Circle*, 732 F.2d 1444, 1447 (9th Cir. 1984). The government can rebut the presumption by demonstrating that its position was substantially justified. *Poole v. Rourke*, 779 F. Supp. 1546, 1562 (E.D. Cal. 1991) (citation omitted). The burden is on the government to present a substantial justification for its actions. *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987).

The words "substantially justified" as used in the provision of the EAJA means to be justified in substance or in the main, not justified to high degree; the action must be justified to a degree that could satisfy a reasonable person, and must have reasonable basis in both law and fact. *Pierce v. Underwood*,

487 U.S. 552, 565 (1988). The government need not "show that it had a substantial likelihood of prevailing." *United States v. First Nat'l Bank of Circle*, 732 F.2d 1444, 1447 (9th Cir. 1984).

To understand the factual background, it is important to consider the interrelationship between Midland Banana & Tomato Co., Inc. ("Midland"), Royal Fruit Co., Inc. ("Royal"), and Robert, Jeffrey and Susan Heimann. As the Judicial Officer stated in his decision affirming my initial decision, this proceeding is ultimately all about Robert S. Heimann who involved his son Jeffrey and his daughter Susan in subterfuges in order to conceal the actual control of these two business entities by Robert himself. At the times that Royal began business and Midland later began business as Royal's successor, Robert Heimann did not want it to be known that he was actually in control of these two businesses. Therefore, an application for a license was filed by Royal Fruit Company, a partnership, and a license was subsequently issued under the PACA on October 13, 1988, to Jeffrey Heimann (Robert's son), Joseph Cali, and Beverly Heimann (Robert's wife) (CX 2, p. 5). Subsequently, Royal became a corporation with shares of stock being held by the same three principals, and the corporation was licensed under the PACA. Funds for the corporation were obtained through Small Business Administration (SBA) loans in the amount of \$650,000, secured by the assets of Royal and personal guaranties of Jeffrey Heimann, Robert and Beverly Heimann, and Joseph Cali (CX 15, 16, 61; Tr. 586-87).

On November 9, 1992, Jeffrey Heimann distributed to Royal's employees an announcement which stated that the company would cease operations effective November 17, 1992 (CX 62). The announcement also stated that beginning November 18, 1992, "a new company, similar to Royal Fruit Co., will be leasing the building" and that the new company might possibly hire some of the Royal employees (CX 62).

Midland was incorporated on November 17, 1992. Its PACA license application, dated November 23, 1992, identifies Susan Heimann, Respondent's sister, then a full time college student, as the sole officer, director and shareholder (CX 26, pp. 2-6). A license was issued to Midland on November 30, 1992 (CX 26, p. 1; Tr. 539).

Jeffrey Heimann was initially employed by Midland as a bookkeeper, then as a warehouse foreman, overseeing loads and supervising the packaging of tomatoes (Tr. 487, 603-07). For the quarter ending December 31, 1992,

Jeffrey Heimann received \$2,880 in salary (CX 37)¹; for the quarter ending March 31, 1993, he received [REDACTED] (CX 39). Jeffrey Heimann was no longer employed by Midland as of July 1993 (RX 13; Tr. 607).

Prior to becoming the sole officer and director of Midland, Susan Heimann's experience in the produce industry was limited to her work during weekends on a few occasions (CX 17, p. 19; Tr. 474). In connection with her duties at Midland, Susan testified that she made up to three trips from college to visit the facility for a total of approximately 15 hours per week (Tr. 485-8).

In its Notice to Show Cause and Complaint in Docket No. D-93-548, USDA alleged among other things, "Respondents Robert S. Heimann and Jeffrey B. Heimann manage, control and direct the operations subject to the PACA of Respondent Midland Banana & Tomato Co., Inc., behind the nominal ownership and direction of Respondent Susan E. Heimann." Further, USDA alleged that Respondents Robert S. Heimann, Jeffrey B. Heimann and Susan E. Heimann arranged for the incorporation of respondent Midland Banana & Tomato Co., Inc., on November 17, 1992, and the concealment of the fact that Respondents Robert S. Heimann and Jeffrey B. Heimann were the persons in control of the operations and assets of Respondent Midland Banana & Tomato Co., Inc., in an attempt to evade the sanctions and prohibitions that the PACA places on persons who are responsibly connected to licensees that fail to pay reparation awards and/or engage in repeated or flagrant violations of § 2(4) of the PACA."

In my initial decision in Docket No. D-93-548, I stated:

Complainant has failed to meet its burden of proof with respect to the allegations relating to Jeffrey Heimann. Although Jeff Heimann was employed in various capacities at Midland, I conclude that the evidence is insufficient to meet the requirements discussed, *supra*, necessary for a finding that Midland was his *alter ego*, as Complainant alleges.

Despite my dismissal of the proceeding against Jeffrey Heimann, I find that the government's bringing of its Complaint against Jeffrey Heimann in that proceeding was substantially justified. Robert Heimann had established Royal to conceal his involvement in Royal, and Jeffrey Heimann, together with Robert's wife, Beverly, and Joseph Cali were installed as the nominal owners

¹The average of these two salaries per quarter is substantially similar to Jeffrey Heimann's salary at Royal of [REDACTED] for the quarter ending September 30, 1992.

and managers of the business. Jeffrey was involved in the business but, in fact, Robert controlled the business.

I also found that Midland was a successor in business to Royal. At page 28 of my initial decision I stated:

With the exception of the names on the PACA license applications, there is little to distinguish Royal and Midland. Midland operated out of Royal's facility at 303 Grand Avenue in Kansas City, using the same telephone and facsimile numbers (CX 18, p. 12). Even though Midland commenced business in November, Midland employees did not begin answering the telephones as "Midland Banana and Tomato" until January 1 (CX 17, p. 20). Midland utilized Royal's office equipment, assumed the lease on Royal's tomato wrapping machine and used other Royal warehouse equipment such as jacks and two-wheelers (CX 17, p. 20; RX 21). Midland's customers were the same as Royal's: government purchases, Associated Grocers and Fleming Foods continued to comprise the bulk of sales (CX 17, p. 21; Tr. 380-82). Indeed, the testimony of several experienced members of the produce industry who dealt with both Royal and Midland indicated that they perceived no real difference between the two entities (Tr. 71, 187, 207-08).

When Midland succeeded Royal, instead of Jeffrey being held out as one of those in control, now Susan, a full-time college student, was held out as being the owner who controlled Midland. In fact, I found that Robert controlled Midland as he previously controlled Royal. However, as was the case in Royal, Jeffrey had a conspicuous and prominent role in connection with Midland. Thus when asked as to what his role was in Midland, Jeffrey answered as follows:

Q. All right. And so when you started to work at Midland, what were you doing?

A. When I started to work at Midland, you know I was doing bookkeeping. I was ripening bananas. I was running a tomato crew, unloading trucks, loading trucks, uh, checking inventory, maintaining trucks, tractor-trailers, straight trucks, delivery trucks. I was selling produce to people in the Kansas City Area. I was doing everything I can, you know, just everything almost-- aspect in the business, really.

Q. All right. And were you also assisting in terms of training people to take on these jobs after you were going to be forced to leave?

A. Yes.

(Tr. 603)

When asked about Jeffrey's involvement, Susan testified as follows:

Q. And in connection with the duties of a warehouse foreman, what does a warehouse foreman do? What's your understanding of his duties during the day?

A. He takes inventory; he controls all the temperatures in all the coolers; he gasses bananas; he loads and unloads trucks; he makes sure all the trucks are working properly. Those are his duties.

Q. Does he act as bookkeeper?

A. He was not at this time, no.

Q. Does he sign checks for the firm?

A. He was not at this time, no.

Q. He was doing that previously?

A. Yes, he was.

(Tr. 487)

Susan further testified:

Q. Do you think that you had substantial credibility at Midland because of the fact that your father, Bob, and your brother, Jeff, were key employees of that business?

A. Yes.

(Tr. 499)

Furthermore, at the hearing Richard Armstrong, a USDA investigator, testified as follows as to his conversation with Robert Heimann in which Robert gave him some background about Midland:

A. And Jeff with the closure of the business [Royal], they were aware that there was a strong possibility that he would come under sanctions as a result of unpaid reparation awards and also as a result of the pending disciplinary investigation.

So, therefore, he was not -- it was not an option for Jeff to be involved directly as an officer or director of the new company and, therefore, it provided Susan with the opportunity.

Q. And when Mr. Robert Heimann gave you this explanation, was anyone else present?

A. Jeff was present.

Q. And did Jeff Heimann say anything to you at that point?

A. No. Not to --

(Tr. 261-62)

Therefore, the government was substantially justified in bringing the Complaint against Jeffrey Heimann in Docket No. D-93-548. Jeffrey was actively involved in Royal. Midland succeeded Royal. Jeffrey was conspicuously involved in Midland. Although I found that the government had not proven its case, I find that it was justified in making the allegations in the Complaint inasmuch as it appeared that Jeffrey's involvement in Midland was substantially similar to his involvement in Royal.

Order

Respondent's Application for Fees and Expenses is dismissed.

Pursuant to the Rules of Practice governing procedures under this Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in 7 C.F.R. §§ 1.145 and 1.201.

[This Decision and Order became final January 16, 1996.-Editor]

In re: COUNTY PRODUCE, INC.
PACA Docket No. D-94-548.
Decision and Order filed January 22, 1996.

Revocation of license — Affiliation — Repeated and flagrant violations — Employ — Responsibly connected — Sanction policy.

The Acting Judicial Officer affirmed Judge Hunt's (ALJ) decision holding that Respondent permitted Ms. Linda Wright to continue her affiliation with it after being notified that Wright was ineligible to be employed or affiliated with any PACA licensee for a 1-year period because

of a disciplinary order issued against Wright's company. The Acting Judicial Officer also affirmed the ALJ's sanction, revoking Respondent's license. Respondent received adequate notice that to continue Wright's affiliation with Respondent could result in suspension or revocation of its license. When Complainant has determined, by the procedure set forth in 7 C.F.R. § 47.47 *et seq.*, that Linda Wright was responsibly connected to a licensed produce dealer found to have engaged in flagrant and repeated PACA violations, the ALJ has no authority to review such determination. Wright's defense that she was not paid is irrelevant, since 7 U.S.C. § 499a(10) proscribes any affiliation, whether compensated or not. Ignorance of PACA laws and regulations is no excuse. Wright's claim, that USDA investigator misled her into signing Consent Decision premised upon USDA's non-enforcement of PACA sanctions, is not credible. Respondent argues that the factual situation herein is the same as in *ABL Produce*, but the ALJ and Acting Judicial Officer find this case more akin to *Tri-County Produce*. In *ABL Produce*, the ALJ recommended a 30-day suspension, but the Agency officials and the Judicial Officer recommended revocation. In this case, however, all three recommended revocation. Some recent Courts' decisions interpret USDA sanction policy to be "all circumstances of the case relevant to the sanction." In fact, it is opposite to that—"all relevant circumstances" shall be considered in fashioning a sanction, which gives the Judicial Officer the opportunity to consider Congressional intent. Congress regards a non-payer of a reparation award to be a "defiled person likely to contaminate any licensee." Facts of this proceeding contrasted with *ABL Produce* and *Tri-County Produce*. Respondent's mitigating circumstances, when analyzed, are found not at all mitigating: employee's ethics, payment practices, company financial health, and lack of reparation complaints against Respondent not mitigating.

Julie Cook, for Complainant.

Harold James Pickerstein, Fairfield, CT, for Respondent.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Decision and Order issued by Michael J. Stewart, Acting Judicial Officer.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (PACA) (7 U.S.C. § 499a *et seq.*),¹ in which Administrative Law Judge James W. Hunt (ALJ) filed an Initial Decision and Order on July 17, 1995, revoking Respondent's license for permitting Linda Wright to continue her affiliation with it after being notified that Ms. Wright was ineligible to be employed by or affiliated with any PACA licensee for a 1-year period because of a disciplinary order issued against Ms. Wright's company.

On August 24, 1995, Respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5

¹See generally Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).^{**} Complainant responded to Respondent's appeal on September 18, 1995. Complainant supports the ALJ's revocation order; Respondent seeks no revocation. The case was referred to the Judicial Officer for decision on September 26, 1995.

Based upon a careful consideration of the record in this case, I agree with Complainant that Respondent's license should be revoked. The Initial Decision is adopted as the final Decision, with changes or additions shown in brackets, deletions shown by dots, and a few trivial changes not specified. The reasons for revoking Respondent's license are set forth in the additional conclusions by the Judicial Officer, which follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This proceeding was instituted by a complaint filed on June 13, 1994, under the Perishable Agricultural Commodities Act (7 U.S.C. § 499a *et seq.*) ("PACA") and regulations promulgated thereunder (7 C.F.R. §§ 46.1 through 46.45). It alleges that respondent County Produce, Inc., a produce dealer licensed under the PACA, violated section 8(b) of the PACA (7 U.S.C. § 499h(b)) by continuing to employ Linda Wright after being notified that Wright's continued employment was prohibited. In its answer, respondent denied that it employed Wright in violation of the PACA.

A hearing was held on March 14, 1995, in Bridgeport, Connecticut. Complainant was represented by Julie Cook, Esq. Respondent was represented by Harold James Pickerstein, Esq.

Facts

Linda Wright's background includes working in the banking industry in Connecticut for over 8 years. She started her banking career with the Valley Bank and Trust Company where, over the course of 8 years, she progressed to vice-president and auditor. She worked at the Valley Bank with David

^{**}The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1280 (1988), and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (Pub. L. No. 103-354, § 212(a)(1), 108 Stat. 3178, 3210 (1994)). (By "Delegation of Authority" dated January 3, 1996, the Secretary of Agriculture designated the Assistant to the Judicial Officer as Acting Judicial Officer until a new Judicial Officer has taken office.)

Nyden who was later to become the owner of the respondent in this case, County Produce, Inc. She has attended Fairfield University and has had training in accounting and as a paralegal. (Tr. 213-215.)

Wright left Valley Bank to set up "operationally and financially" banks in Stamford and Darien, Connecticut. When she was asked to set up two more banks, including one in Massachusetts, she decided to discontinue working as a bank employee to become an independent banking consultant. The work was demanding: "I simply did not have enough time to keep everybody happy." (Tr. 213-21[5].)

In 1988, Wright accepted an offer from David Nyden, her former associate at Valley Bank, to work for him at a produce company, L. Bernstein and Sons, in which he had acquired a 50 percent interest. She set up a computer system to help Nyden "with the operations, the financial end of it, reconciling items, posting items to the computer." (Tr. 216.)

In 1989, Nyden sold his interest in L. Bernstein to Arthur Stollman who acquired full ownership of the company. Stollman, however, told Wright that he was not comfortable running the business by himself and offered to sell her a 50 percent interest. Wright discussed the offer with her husband, Gerald Wright, who also worked in the banking industry as a commercial loan officer. They decided to accept Stollman's offer. Wright received 50 percent ownership in return for paying Stollman \$10,000 and assuming liability for half of L. Bernstein's debts. Stollman and Wright both then ran the company. (Tr. 217-219.)

Wright testified that initially she performed mostly clerical duties, but when she began to receive complaints from customers and suppliers that Stollman's abrasive personality was affecting the business, she became more active in the company's operations as a go-between for Stollman and the customers. Stollman also agreed to confine his activities to the New York area while Wright handled Connecticut. However, Stollman-related problems continued, the economy worsened, the company was slow paying its suppliers, and Stollman began paying suppliers when there were insufficient funds in the company's bank account. Wright said she tried to cover for Stollman but some suppliers stopped doing business with the company. (Tr. 219-224.)

Stollman then said he wanted out of the business. Wright agreed to buy him out and attempted to obtain a loan for that purpose. However, Stollman changed his mind about the buy out and said the company should be closed. At this point a bank seized L. Bernstein's receivables which resulted in the company being unable to buy produce. L. Bernstein closed in November 1991 and filed for bankruptcy. When Wright and her husband were unable to cover

the company's loans for which they had assumed personal liability, they too filed for bankruptcy. (Tr. 224-229.)

In August 1992, Wright received a formal complaint from complainant alleging that L. Bernstein had committed repeated and flagrant violations of the PACA by failing to pay \$185,909.00 to 16 produce sellers between January 1991 and August 1991. Wright filed an answer for L. Bernstein in which she stated, *inter alia*, that she did not have an attorney, that she had been a 50 percent stockholder in L. Bernstein from 1989 until it closed, and that she did not "have any knowledge of PACA rules, regulations, etc." She attributed the company's failure to the poor economy, Stollman writing bad checks, and the lack of a cash flow due to the bank's seizure of the company's receivables. She also said that she was in the process of turning the company around. (RX-3, 4.)

In the meantime, in June 1992, David Nyden had formed a new produce company, the respondent here, County Produce, Inc. He owned 80 percent of the company and became its president. In June 1993, he applied for and received a PACA license as a produce dealer. (CX-1.)

A hearing had also been scheduled for June 1993 on the complaint against L. Bernstein. Complainant's attorney for that case, John Vos, had written to Wright earlier about entering into a settlement agreement. On the eve of the hearing Wright and Vos had a 5-minute telephone conference in which they agreed on a settlement through a consent decision wherein L. Bernstein admitted the material allegations of the complaint that it had committed repeated and flagrant violations of the PACA by failing to pay its produce suppliers. Wright signed the decision for L. Bernstein as its vice-president. (RX-8, 9; CX-3.)

In the course of their phone conversation concerning the settlement, Wright, who at the time was helping Nyden set up County Produce, testified that the following exchange occurred between her and Vos concerning sanctions resulting from the consent decision:

Q. [Pickerstein] And did you ask him [Vos] what sanctions he meant?

A. [Wright] I asked him what the sanctions were.

He said that, what the sanctions were, that I would not be able to work for a produce company, for a year, and I would not be able to have ownership of a produce company, for three years.

Q. All right. That was, to the best of your recollection, ma'am, his exact words?

A. Those are. Yes.

Q. And what did you say, in response to that?

A. I told him that, I explained to him that we had filed a bankruptcy, that I had been out of work, that, on and off, my husband had been out of work. I said, "If I have to work in the produce industry, if that is the only job I can find," I said, "I have to take that job."

He responded with, he said that PACA is not unsympathetic to the economical conditions, in the Northeast, that there have been in fact a number of companies in our very same situation, that have closed, and that the sanctions are a formality, that they do not impose them, or they do not follow up on them, they do not, I do not remember the exact word.

Q. Enforce?

A. Enforce them. Yes.

....

A. And, as such, the sanctions were a formality, and they did not enforce them.

....

A. That is why I signed the sanctions. (Tr. 237-238, . . . 263-264.)

Vos' version of his conversation with Wright was that:

Her concern -- and again, my recollection is vague on this -- her concern was that, she had suffered a major financial setback, and that, she was very concerned about finding a job, and that, she had certain

skills, she felt, that were, and I think it was either accounting or insurance, that is what my recollection was, that she had said, "I am going to get a job. I am looking at this accounting or insurance industry job. That is what I want to do." And I assured her that employment, under the Act, as it was forbidding her from being employed, would not preclude her from being employed in the insurance business, or the accounting business. It would, however, preclude her from being employed, under the Perishable Agricultural Commodities Act. (Tr. 282.)

Vos also testified that "I did not tell her that we never enforce the Act, because, obviously, we do," and that he has never told a respondent that the complainant does not impose sanctions. (Tr. 299, 302.)

Neither Wright nor Vos testified that Wright told him that she was helping Nyden at County Produce at the time of the settlement agreement. Wright said that she understood from her talk with Vos that "for one year, I would not be able to work for a produce company." She testified that she understood this to mean that she was only prohibited from getting paid for her work and that Vos did not tell her that she could not be "affiliated" with a produce company. Wright further testified that Vos did not send her a copy of the Perishable Agricultural Commodities Act and that she has never read any "text" from the Act. She implied that she signed the consent order on the basis of what Vos had purportedly said about complainant not enforcing its sanctions. (Tr. 240-241, 247, 259.)

Wright testified that her work at County Produce included anything that Nyden asked her to do, such as doing work on the computer, answering phones, and occasionally taking orders from customers. She said that she works at County Produce from 2 to 20 hours a week, that she considers the work valuable to the company, that she makes no decisions for the company, that Nyden does the accounting for the business, that she does not know how the company is doing financially, and that she and her husband had guaranteed a loan to the business "as a favor" to Nyden. She denied receiving any payment for her services, or the promise of any, and denied that she is an owner, principal, or manager, or that she has received any promises of future employment or ownership in the business. She said she does the work because "somewhere down the road" there would be a job for her. Wright testified that she also works for Nyden at his separate accounting business and that she gets paid "some" money for that work. (Tr. 247-250, 266-272.)

Other testimony shows that Wright's activities at County Produce include

selling produce and servicing the company's customers. Elizabeth King, the food service manager at St. Joseph's Medical Center in Bridgeport, testified that she has been buying produce from Wright at County Produce since November 1993 and that if she had any problems she would contact Wright. (Tr. 73-75.)

James Laliberte, the food purchaser at the Marriott Hotel in Trumbull, testified that he has dealt with Wright in making produce purchases from County Produce since November 1993. He said that Wright has made deliveries to the hotel and that he also bought produce from Wright when she worked at L. Bernstein. (Tr. 98-101.)

Vincent Fazio, the chief executive officer for Emerald Financial Corporation, which made the loan to County Produce that Wright and her husband guaranteed, testified that it was his "perception" that Wright operated County Produce. (Tr. 110, 129.)

In August 1993, Wright was sent a letter by a PACA official notifying her that, because of her status as an officer and stockholder in L. Bernstein, she could "not be employed by or affiliated with another licensee, in any capacity, until July 19, 1994." (CX-3.)

In October 1993, Nyden was sent a letter by a PACA official telling him that Wright was ineligible to be employed by or affiliated in any capacity with any licensee until July 19, 1994. The letter added:

Please note the terms "employ" and "employment" are defined by the Act as any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

Pursuant to Section 8(b) of the Act, copy enclosed, notice is hereby given that after 30 days from the receipt of this letter, Ms. Linda Wright cannot continue her affiliation with County Produce, Inc. To continue such affiliation after that date will result in the suspension or revocation of its license. (CX-4.)

Nyden responded with a letter stating in part:

Ms. Linda Wright is not currently employed by County Produce, nor is she affiliated with this company through any form of ownership or self-employment, per Section 8(b) of your act. (CX-4.)

The record does not contain any evidence that Wright's activities at County Produce had ceased as of the time of the hearing in March 1995. On the contrary, King's and Laliberte's testimony indicates that, as of the date of the hearing, which was 17 months after Nyden was warned of the consequences of employing Wright, she continued to work for County Produce. (Tr. 75, 100.) Nyden did not testify at the hearing and respondent presented no testimony, other than Wright's, concerning her relationship with County Produce or why respondent disregarded the warning not to employ or be affiliated with Wright.

Law

Section 8(b) (7 U.S.C. § 499h(b)) of the PACA provides that:

(b) Except with approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

....

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment . . . after one year following the revocation . . . if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval . . . The Secretary may, after

thirty days of notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

Section 1(9) (7 U.S.C. § 499a(9)) states:

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as . . . (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.

Section 1(10) (7 U.S.C. § 499a(10)) provides:

(10) The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

USDA has held that "[t]he word 'any' is a broad and comprehensive term [citations omitted] that includes all kinds of affiliation—whether minimum or maximum; whether deliberate or not." *Tri-County Wholesale Produce Co., Inc.*, 45 Agric. Dec. 286, 304 (1986)[, *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), reprinted in 46 Agric. Dec. 1105 (1987)].

Discussion

Complainant has determined that Linda Wright was responsibly connected with L. Bernstein, a licensed produce dealer which was found to have engaged in flagrant and repeated violations of the PACA.¹ She was therefore barred from employment by another PACA licensee for at least one year.

Despite this prohibition, she engaged in work activities on County Produce's behalf which I find clearly constitutes an affiliation. It is irrelevant

¹Administrative law judges do not have the authority to determine or review determinations made of a person's responsibly-connected status in PACA disciplinary proceedings like the instant case. The procedure for making such a determination is provided in 7 C.F.R. § 47.47 *et seq.*, which, in part, provides that a person who is found to be responsibly connected has 30 days from the date of that determination to request review by the Administrator of USDA's Agricultural Marketing Service. It is therefore presumed that complainant followed these required procedures in determining Wright's responsibly-connected status with L. Bernstein.

whether she was paid for this work, since the PACA provides that any affiliation is considered to be employment, whether compensated or not. County Produce continued this business association with Wright even after Nyden, its president, was specifically warned that continued affiliation could result in the company's PACA license being suspended or revoked. Nyden not only denied that such an affiliation even existed, but continued the relationship for 17 months up to the date of the hearing. In *Tri-County, supra*, this circumstance resulted in the respondent's license being revoked.

Respondent County Produce's defense to its conduct is that its affiliation with Wright resulted from Wright's reliance to her detriment on Vos' alleged representations to her that, if she signed the consent decision against L. Bernstein, sanctions would not be enforced. Therefore, the argument goes, complainant is estopped from imposing any sanctions in this proceeding.

However, Wright's claim that she was led to believe that sanctions would not be imposed is equivocal. On the one hand she testified that she understood that there would be no sanctions if she signed the consent decision, but on the other hand she states that she knew she would be barred from employment for a year, which is certainly an imposition of a sanction. She attempted to escape from this dilemma by claiming that she thought this meant only that she was prevented from doing work for which she would be paid and that Vos did not tell her that she could not be affiliated with a produce company. She also implied that she was ignorant of the law's provisions by stating that she never read any of PACA's "text" and had stated, in her answer to the complaint against L. Bernstein, that she had no knowledge of the PACA or its regulations.

Apart from the general principle that ignorance of the law is no excuse, it is not a credible argument for someone with Wright's training as a paralegal and her experience setting up banks, which obviously required her to learn banking laws and regulations, to claim that she did not know after working 5 years in the highly regulated produce industry, including two as a dealer, that anyone responsibly connected with a produce firm found to have failed to pay for its purchases will be barred from being affiliated with another licensee, whether compensated or not. It is a specious argument to claim ignorance of PACA's penalties because she had not taken the time to read them and no one had told her about them. Vos was under no duty to explain elementary law to her. It was a matter of which she should have been aware when she entered the produce business as a dealer. Moreover, she continued her affiliation with County Produce even after she was specifically told that affiliation with a licensee was prohibited.

Furthermore, considering USDA's long-standing policy of non-lenienty in the enforcement of the PACA, it is highly unlikely that Vos, as one of its attorneys, would even suggest the possibility of leniency in a no-pay case. This 20-year non-lenienty policy was re-affirmed in 1995 in *Atlantic Produce Co., and Joseph Pinto*, 54 Agric. Dec. [701 (1995)]. The Judicial Officer, as USDA's policy maker in these disciplinary cases, stated, "it is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department . . . [e]ven though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful." [54 Agric. Dec. at 711-12.]

In view of this clear policy statement, I do not credit the assertion that Vos, as complainant's agent, told Wright that sanctions would not be enforced and I do not find any circumstances which would constitute an estoppel to complainant's request for sanctions in this proceeding.

As respondent County Produce, Inc., has not advanced any meritorious reasons for its continued affiliation with Linda Wright after being notified to cease such affiliation, I find that it violated section 8(b) of the PACA and that such violation was willful and flagrant. Its license shall be ordered revoked.

Findings of Fact

1. Respondent County Produce, Inc., is a PACA licensed produce dealer.
2. L. Bernstein and Sons, Inc., had been a licensed produce dealer and was found to have engaged in repeated and flagrant violations of the PACA in 1991.
3. Linda Wright was responsibly connected with L. Bernstein and Sons, Inc., at the time it engaged in repeated and flagrant violations of the PACA.
4. Linda Wright was notified in August 1993 that because she was responsibly connected with L. Bernstein she was prohibited from being employed by or affiliated with another produce dealer until July 19, 1994.
5. Respondent was affiliated with Linda Wright from August through October 1993.
6. Respondent was notified in October 1993 that it was prohibited from being affiliated with Linda Wright and that continued affiliation with Linda Wright could result in its PACA license being suspended or revoked.
7. Respondent continued its affiliation with Linda Wright from October 1993 to at least February 1994.

Conclusion of Law

Respondent willfully and flagrantly violated section 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §499h(b)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

It is appropriate to state expressly the practice that has been followed by the Judicial Officer in recent cases, *viz.*, that reliance will no longer be placed on the "severe" sanction policy set forth in many prior decisions, e.g., *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd on other grounds*, 841 F.2d 1451 (9th Cir. 1988). Rather, the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondent appeals the sanction of license revocation, arguing that mitigating, relevant circumstances would not allow license revocation. More specifically, Respondent argues that the ALJ's decision to revoke does not meet the standard of substantial evidence; rather, that this case is similar to *ABL Produce* (*In re ABL Produce, Inc.*, 52 Agric. Dec. 1578 (1993), *aff'd in part & rev'd in part*, 25 F.3d 641 (8th Cir. 1994), *reprinted in* 53 Agric. Dec. 690 (1994)), wherein the Eighth Circuit reduced license revocation to a 30-day suspension. (For an extensive examination of *ABL Produce*, and the reason why this decision is the wrong approach to enforcing the responsibly connected prohibition in PACA, see *In re John J. Conforti*, 54 Agric. Dec. 649, 683-92 (1995), *aff'd in part & rev'd in part*, 69 F.3d 897 (8th Cir. 1995)).

However, I find that the ALJ's Findings of Fact, and sanction herein, do meet the test of substantial evidence; and that the proceeding, *sub judice*, is not substantially similar to *ABL Produce*; but rather, is akin to *Tri-County*, as the ALJ noted (Initial Decision at 9-10). A copy of *Tri-County* is attached as

an Appendix.

Recently, the substantial-evidence test was restated in *Valkering*, as follows (*Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 307 (8th Cir. 1995)):

The Secretary's decision must be upheld if it is supported by substantial evidence. *Cox v. United States Dept. of Agric.*, 925 F.2d 1102, 1104 (8th Cir.), cert. denied, 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 141 (1991). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)).

The ALJ's sanction decision easily meets this test, for the reasons below. Respondent does not appeal the ALJ's finding that Linda Wright was affiliated with Respondent as charged in the Complaint; but, rather, Respondent argues that the ALJ, in fashioning the sanction, "neglected to consider the nature of the violation along with the relevant circumstances of the case" (Respondent's Appeal at 4). To this end, Respondent argues, *inter alia*, that the ALJ erroneously failed to consider that, since none of County's bills went unpaid, nobody suffered the harm PACA was designed to prevent; that Linda Wright's affiliation was only 2½ months' duration; that Linda Wright was not compensated by County in any manner; that Linda Wright engaged in no deceptive activity to circumvent the sanctions; that Linda Wright did not profit from her prohibited conduct; and that Linda Wright conceded that she helped out at County to secure possible future employment (Respondent's Appeal at 4-5).

Each of these arguments is rejected, either because the ALJ properly considered and decided that particular point, or because the argument is legally wrong--being either irrelevant, or based upon Respondent's faulty analysis of case law, as explained below.

Respondent argues that the affiliation was for only 2½ months, but the ALJ properly found that Linda Wright was affiliated with County from August 1993 to at least February 1994 (Findings of Fact 5, 7). Moreover, the ALJ specifically included record evidence of testimony that County continued to employ Wright 17 months after Respondent's owner, Mr. Nyden, was warned of the consequences of employing Wright, as follows (Initial Decision at 8, 10):

The record does not contain any evidence that Wright's activities at County Produce had ceased as of the time of the hearing in March 1995. On the contrary, King's and Laliberte's testimony indicates that, as of the date of the hearing, which was 17 months after Nyden was warned of the consequences of employing Wright, she continued to work for County Produce. (Tr. 75, 100.)

....

Despite this prohibition, she engaged in work activities on County Produce's behalf which I find clearly constitutes an affiliation. It is irrelevant whether she was paid for this work, since the PACA provides that any affiliation is considered to be employment, whether compensated or not. County Produce continued this business association with Wright even after Nyden, its president, was specifically warned that continued affiliation could result in the company's PACA license being suspended or revoked. Nyden not only denied that such an affiliation even existed, but continued the relationship for 17 months up to the date of the hearing. In *Tri-County, supra*, this circumstance resulted in the respondent's license being revoked.

The fact that Linda Wright received no payment, no profit, and no promise of future employment from County is legally irrelevant, because the statute plainly states, as the ALJ pointed out, "employment" means *any* affiliation, with or without compensation, ownership or self-employment, as follows (Initial Decision at 9):

Section 1(10) (7 U.S.C. § 499a(10)) provides:

(10) The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

USDA has held that "[t]he word 'any' is a broad and comprehensive term [citations omitted] that includes *all* kinds of affiliation—whether minimum or maximum; whether deliberate or not." *Tri-County Wholesale Produce Co., Inc.*, 45 Agric. Dec. 286, 304 (1986)[, aff'd per curiam, 822 F.2d 162 (D.C. Cir. 1987), reprinted in 46 Agric. Dec. 1105

(1987)].

(Parenthetically, it strikes me as just too convenient that Linda Wright is paid for the accounting job she does for Nyden at one of his offices, but is not paid when she is at County Produce's office. However, since the ALJ did not develop this, it forms no part of my decision.)

Respondent's remaining two points--that Linda Wright engaged in no deceptive activity to circumvent the sanctions and that since *none of County's bills went unpaid, nobody suffered the harm PACA was primarily designed to prevent*--go directly to Respondent's reliance on *ABL Produce* as precedent to reverse Respondent's license revocation. In fact, Respondent has lifted the above language almost verbatim from *ABL*, as shown, *infra*.

However, *ABL Produce* is easily distinguished from this case, *sub judice*. In *ABL Produce*, the relevant parties and their relationship to this case's parties are ABL = County; Middendorf = Nyden; and Lombardo = Wright. The differences in the factual situations surrounding these cases are stark, because ABL and Middendorf *tried to prevent* Lombardo from involving himself in ABL's activities. Lombardo used deception and threats against ABL's employees to hide his ABL Produce activities from Middendorf. In the *ABL Produce* scenario, the Court apparently characterizes Middendorf as *both violator and injured party*, and construes the statute and relevant circumstances to soften the penalty on Middendorf, as follows (*ABL Produce, supra*, 25 F.3d at 698) (emphasis added)):

It is clear from the record that *ABL tried, albeit unsuccessfully, to prevent Lombardo from involving himself in the company's activities*. Though there is no denying that the violation calls for a punishment, consideration of the "relevant circumstances" should include consideration of the statute's purpose. *Here, none of ABL's bills went unpaid, so nobody has suffered the harm PACA was primarily designed to prevent*. We also note that the brunt of the sanction, if upheld, will be most keenly felt by Middendorf personally; as a person "responsibly connected" to ABL, Middendorf will be required to disassociate himself from his other PACA-licensed company. See 7 U.S.C. § 499h(b) (1988); cf. *Ferguson*, 911 F.2d at 1282 ("Our conclusion is not based upon but is strengthened by the fact that the six-month suspension would likely put Ferguson out of business."). This is particularly important in light of the *most compelling and unique circumstance contained in the record*: the fact that Lombardo engaged in deceptive

acts to hide his activities from Middendorf and issued threats to prevent those who discovered his involvement from reporting to Middendorf.

Clearly, the *ABL* case does not help County/Nyden because the *ABL* Court specifically noted that the "most compelling and unique circumstance contained in the record," was that Lombardo engaged in deceptive acts and threats to *ABL/Middendorf's* employees to hide Lombardo's activities from Middendorf. That scenario certainly does not fit Linda Wright's activities at County, which activities always had the complete support of Nyden, as explained by the ALJ, as follows (Initial Decision at 6-7):

Wright testified that her work at County Produce included anything that Nyden asked her to do, such as doing work on the computer, answering phones, and occasionally taking orders from customers. She said that she works at County Produce from 2 to 20 hours a week, that she considers the work valuable to the company, that she makes no decisions for the company, that Nyden does the accounting for the business, that she does not know how the company is doing financially, and that she and her husband had guaranteed a loan to the business "as a favor" to Nyden. She denied receiving any payment for her services, or the promise of any, and denied that she is an owner, principal, or manager, or that she has received any promises of future employment or ownership in the business. She said she does the work because "somewhere down the road" there would be a job for her. Wright testified that she also works for Nyden at his separate accounting business and that she gets paid "some" money for that work. (Tr. 247-250, 266-272.)

Other testimony shows that Wright's activities at County Produce include selling produce and servicing the company's customers. Elizabeth King, the food service manager at St. Joseph's Medical Center in Bridgeport, testified that she has been buying produce from Wright at County Produce since November 1993 and that if she had any problems she would contact Wright. (Tr. 73-75.)

James Laliberte, the food purchaser at the Marriott Hotel in Trumbull, testified that he has dealt with Wright in making produce purchases from County Produce since November 1993. He said that

Wright has made deliveries to the hotel and that he also bought produce from Wright when she worked at L. Bernstein. (Tr. 98-101.)

Consequently, when Respondent argues that Linda Wright committed *no deceptive acts*, Respondent actually hurts its case, *vis-a-vis* no sanction for Respondent, because deceptive activity by Lombardo (Wright's correlative in *ABL*) was a *major reason* given by the *ABL* Court for a reduced sanction for *ABL/Middendorf* (County/Nyden's correlatives in *ABL*).

Moreover, in *ABL*, the ALJ recommended a 30-day suspension, the Judicial Officer reversed and ordered instead revocation, which the Agency officials had originally recommended (*ABL, supra*, 25 F.3d at 693). The *ABL* Court, however, decided that "the ALJ's original sanction of a thirty-day suspension [was] more appropriate" (Id. at 698), and reduced the sanction accordingly. In the case, *sub judice*, however, it is very different from *ABL*, because herein the ALJ recommends revocation, as do the Agency officials. Thus, when the Judicial Officer agrees on revocation in this case, all agree on revocation: the Agency officials, the ALJ, and the Judicial Officer.

It is unfortunate, and I believe incorrect, that the *ABL Produce* Court used as relevant and mitigating circumstances that there were no unpaid bills and no apparent harm to anybody, as reasons to lessen the sanction against Middendorf, because such an interpretation contains the potential for great harm to the PACA's deterrent effect envisioned by Congress. As noted above, the *ABL* Court viewed Middendorf as both violator and victim, resulting in an unusual sanction situation--especially, for the evaluation of what circumstances could be considered mitigating. This *ABL* opinion, and some recent others, manifest the Courts' apparent reading of the USDA sanction policy to be "all circumstances of the case are relevant to the sanction." This is almost diametrically opposite to the actual wording of the sanction policy, which speaks to "all *relevant* circumstances."

This is not quibbling. Whereas the Courts apparently require the Judicial Officer to consider each and every circumstance, the sanction policy specifically states that "all *relevant* circumstances" be considered. The sanction policy should and does recognize that not all circumstances are relevant to a sanction and the Judicial Officer decides relevancy. This allows the Judicial Officer to consider Congressional intent. For example, a legislative history of section 8(b) of the PACA (7 U.S.C. § 499h(b)) appears at 45 Agric. Dec. 292-303 of *Tri-County*, and makes clear that Congress believed the person who did not pay a reparation award to be a "defiled person" likely to contaminate any licensee with whom that defiled person is affiliated. The Complainant makes

this point in Complainant's Response at 12, as follows:

The Judicial Officer noted in *In re Tri-County Wholesale Produce Co., Inc.*, *supra*, [45 Agric. Dec.] at 296-297, that Congress was aware of the need to protect the produce industry when it amended the PACA in 1962 to add the provisions of section 8(b) regarding unlawful employment, stating "it is clear that Congress regarded a person who fails to pay a reparation award is a defiled person who is likely to contaminate any licensee whose business operations he becomes affiliated with in any manner."

The ALJ noted that this case, *sub judice*, is similar to *Tri-County*, a point with which I have already agreed, *supra*. Complainant also argues that *Tri-County* is the factually-similar case; I agree with Complainant's analysis and adopt it as my own, as follows (Complainant's Response at 9-10, 12):

C. The applicable case law supports a finding of employment or affiliation in this case.

The case law in this area is consistent. The finder of fact will look at the totality of the circumstances to determine whether the restricted individual or individuals were employed by or affiliated with the licensee. For example, in *Tri-County Wholesale Produce Co., Inc. v. U. S. Department of Agriculture*, *supra*, a case with facts similar to the one at hand, the District of Columbia Circuit Court affirmed an order of the Secretary of Agriculture revoking the license of the appellant pursuant to section 8(b) of the PACA (7 U.S.C. § 499h(b)). In that case, the respondent had argued that the individual it was charged with employing in violation of section 8(b) was, in fact, an independent contractor, and not an employee. After reviewing the facts, the Judicial Officer of the Department determined that any change in the individual's employment status at the firm was merely cosmetic. Based on the fact that the individual in question continued to answer the company's telephone, frequented its premises, purchased produce for the firm and solicited business on the firm's behalf, the Judicial Officer found that relationship was one of employment or affiliation. See also *In re S.E.L. International Corporation*, 51 Agric. Dec. 1407 (1992); and *In re: DiCarlo Distributors, Inc., a/t/a North American Purveyors*, PACA Docket D-93-519, 53 Agric. Dec. [1680 (1994), appeal

withdrawn, No. 94-4218 (2d Cir. June 21, 1995)].

....

The sanction of revocation is consistent with the sanctions issued in similar cases. In In re Tri-County Wholesale Produce Co., Inc., supra, complainant's requested sanction, a license revocation, was issued under circumstances similar to the present case. In Tri-County, the respondent was found to have unlawfully employed an individual who had been found to be responsibly connected with a company that failed to pay reparation awards. The period of unlawful employment was over a year, from March 1982 through 1983. See also In re Williamsport Produce and Seafood, Inc., supra, In re: S.E.L. International Corporation, supra, and In re DiCarlo Distributors, Inc. a/t/a North American Purveyors, supra.

I have closely examined Respondent's criticisms of (the sanction witness) Ms. Jervis' testimony. I find that even if Respondent's arguments were true, they are irrelevant. Complainant's Response (at 11-12) correctly details the testimony of Ms. Jervis, and points out the relevance of the sanction testimony as follows:

Complainant's witness, Clare G. Jervis, gave testimony at the hearing concerning the need for the sanction of revocation (TR at 306-336). Ms. Jervis testified that respondent's employment violations are very harmful, as they undermine the intent of the employment restrictions in the PACA -- to protect the industry from individuals who have been found to be responsibly connected with firms that have violated the PACA (TR at 310). In addition, such violations undermine the deterrent effect of the sanctions imposed on the firms with which the individual was responsibly connected (TR at 310-311). As to the particulars of this case, Ms. Jervis testified that respondent unlawfully employed Linda Wright for a long time, from at least November 1993 until at least February 1994, a period of four months (TR at 310). She stated that respondent was given two notices that it was prohibited from employing or being affiliated with Linda Wright but did so nonetheless (TR at 311). Ms. Jervis also mentioned that only a revocation will be a meaningful sanction because of the deterrent effect it will have on respondent and the produce industry (Tr. at 310-311,

314).

Finally, the mitigating circumstances which Respondent raises to lessen the sanction penalty on Nyden are not mitigating at all. Nyden has freely employed, or been employed with, Wright at virtually every place Wright has worked: Valley Bank; L. Bernstein; County Produce; and Nyden's own accounting business. Nyden is nothing like the employer in *ABL*, where employer/Middendorf (Nyden's correlative in that case) acted to prevent employee/Lombardo's (Wright's correlative) employment and activities. No, Nyden's actions were just the opposite, they approved Wright's activities, and deserve no mitigating effect.

Moreover, the other circumstances raised by Respondent fail to mitigate. These types of things were discussed in *Conforti*, which case is argued by Complainant, and I agree with and adopt Complainant's argument as follows (Complainant's Response at 11):

In In re John J. Conforti d/b/a C & C Produce, PACA Docket No. D-94-524, 54 Agric. Dec. [649 (1995), aff'd in part & rev'd in part, 69 F3d 897 (8th Cir. 1995)], the Judicial Officer explains what is appropriate to be considered in mitigation in employment cases. The Judicial Officer notes that conclusions about the employer's ethics, the employer's payment practices, the non-existence of reparation complaints against the employer and the financial health of the employer are irrelevant to the respondent's unlawful employment of the employment restricted individual and will not be considered in mitigation. Conforti, [54 Agric. Dec. at 679]. In the instant case, therefore, the purported financial success and good standing of County Produce and David Nyden are irrelevant.

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

Order

Respondent's license is revoked.

The facts and circumstances as set forth herein shall be published.

This Order shall take effect on the 30th day after service thereof on Respondent.

APPENDIX

In re Tri-County Wholesale Produce Co., 45 Agric. Dec. 286 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

In re: COUNTY PRODUCE, INC.
PACA Docket No. D-94-548.
Stay Order filed March 5, 1996.

Julie, Cook, for Complainant.
Harold James Pickerstein, Fairfield, CT, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

The Order previously issued in this case, which would have revoked Respondent's license effective February 28, 1996, is hereby stayed pending the outcome of proceedings for judicial review. Respondent filed its motion for a stay pending judicial review on February 23, 1996. The Respondent's motion was referred to the Judicial Officer on March 1, 1996. This Stay Order is issued *nunc pro tunc* and is effective February 23, 1996.

In re: COASTAL BANANA & TOMATO CO.
PACA Docket No. D-94-570.
Initial Decision as Set Forth in Bench Decision of February 28, 1996, filed February 29, 1996.

Failure to make full payment promptly - "Full payment promptly" defined - Failure to pay required annual license renewal fee - "Willful" defined - Willful, flagrant and repeated violations - Publication.

Judge Baker published the finding that Respondent violated section 2 of the PACA by failing to make full payment promptly of the agreed purchase prices for twenty-seven lots of perishable agricultural commodities, totaling \$150,723.03. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or if a person carelessly disregards the requirements of a statute. Respondent knew or should have known that it could not make prompt payment for the produce it ordered, yet it continued to buy produce; therefore, Respondent's violations are willful. Since Respondent failed to pay the annual license renewal fee and its license has already terminated, publication is the appropriate sanction.

Julie Cook Schuster, for Complainant.

Respondent, Pro se.

Initial Decision issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter sometimes referred to as the "PACA"; the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151) hereinafter sometimes referred to as the "Rules of Practice".

The proceeding was instituted by a Complaint filed on September 21, 1994, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the Complaint that the Respondent, Coastal Banana & Tomato, Co., violated Section 2 of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly of the agreed purchase prices for twenty-seven lots of perishable agricultural commodities, for a total amount of \$150,723.03.

The sanction sought was a finding that Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that such finding be published.

Respondent, through counsel, filed an Answer, on November 3, 1994, in which it entered general denials and requested that the matter be set for oral hearing.

Pursuant to Motion to Assign a Date for Oral Hearing filed by Complainant on July 25, 1995, a pre-hearing conference call took place with attorney for Respondent on September 27, 1995 and it was agreed that unless the case was settled, the oral hearing would take place on February 28, 1996, by means of audio-visual telecommunications, the sites thereof being Washington, D.C. and Mobile, Alabama. The parties were to exchange copies of anticipated exhibits and a list of expected witnesses on or prior to December 15, 1995. This Complainant did. Respondent did not.

On October 12, 1995, Respondent's attorney withdrew as counsel.

The locations of Hearing Rooms for the Audio-visual Transmission Oral Hearing on February 28, 1996, were issued February 8, 1996.

The oral hearing took place on February 28, 1996, before Administrative Law Judge Dorothea A. Baker, by means of audio-visual telecommunications. Complainant was represented by Julie Cook Schuster, Esquire, Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250. Respondent did not appear.

On February 20, 1996, Complainant filed a Motion for a Bench Decision which motion is hereby granted.

Premised upon the uncontested evidence presented by Complainant at this hearing and the record as a whole, the following Findings of Fact are made.

Findings of Fact

1. Respondent, Coastal Banana & Tomato Co., is a corporation organized and existing under the laws of the State of Florida. Its last known business mailing address is 2243 Halls Mill Road, Mobile, Alabama 36606.

2. Pursuant to the licensing provisions of the PACA, license number 920749 was issued to Respondent on February 27, 1992. This license terminated on February 27, 1994, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period February, 1993, through October, 1993, Respondent purchased, received, and accepted twenty-seven lots of perishable agricultural commodities, from five sellers in interstate commerce, but failed to make full payment promptly of the agreed purchased prices, or balances thereof, in the total amount of \$150,723.03.

4. The acts of Respondent in failing to make full payment promptly of the agreed purchase prices for the twenty-seven lots of perishable agricultural commodities that it purchased, received, and accepted, as more specifically detailed in the evidence of the Complainant, constitute willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Conclusions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. Insofar as is pertinent here, "full payment promptly" is defined by the Department in its Regulations (7 C.F.R. § 46.2(aa)(5)) as requiring payment of the agreed purchase prices for produce within ten days after the day on which the produce is accepted. Complainant has shown by a preponderance of the evidence that the Respondent violated the PACA and the Regulations by failing to make full and prompt payment of the agreed purchase prices with

respect to the twenty-seven transactions involving perishable agricultural commodities, in interstate commerce, for a total of \$150,723.03.

Respondent's failures to make timely payment are in violation of the prohibitions of Section 2 of the PACA (7 U.S.C. § 499b). *In re: Atlantic Produce Co.*, 35 Agric. Dec. 1631 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir. 1978), *cert. denied*, 439 U.S. 819 (1978). Moreover, Respondent's failure to pay promptly and in full for twenty-seven transactions occurring over a period of eight months, totaling \$150,723.03 constitute repeated and flagrant violations of Section 2 of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-374 (5th Cir. 1980); *In re: G. Steinberg and Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub nom., George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir. 1974). The twenty-seven violations are "repeated" because repeated means more than one and twenty-seven is more than one. The violations are flagrant because of the number of violations, the amount of money involved and the length of period of time during which the violations occurred. See, *In re: Veg-Mix, Inc.*, 48 Agric. Dec. 595 (1989); and *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774 (D.C. Cir. 1983).

Furthermore, these violations were willful. *American Fruit Purveyors v. United States, supra*. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Cox v. United States Dep't of Agric.*, 925 F.2d 1102 (8th Cir. 1991). Respondent knew or should have known that it could not make prompt payment for the large amount of perishables it ordered, yet Respondent continued to make purchases. Respondent was aware of the Act's requirements, yet continued to buy knowing that each purchase would result in another violation. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not and, consequently, could not pay suppliers, thus the burden of nonpayment was shifted to the sellers. The sellers were required to involuntarily, and perhaps, unknowingly, extend credit to the Respondent. Under these circumstances, Respondent has both intentionally violated the Act and clearly operated in careless disregard of the payment requirements of the PACA, and Respondent's violations were, therefore, willful.

As sanction for these violations, Complainant seeks that a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that such finding be published. Support for the issuance of this sanction is found in the Departmental sanction policy and the precedent enunciated by the Judicial Officer. Where

the Respondent is not in compliance at the time of the hearing, the appropriate sanction is the revocation of the Respondent's license. *In re: Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re: Finer Foods Sales Co., Inc.*, 41 Agric. Dec. 1154 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re: Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984). In this case, because the license has already terminated, the appropriate sanction is that a finding of willful, repeated and flagrant violations be made and that the finding be published.

The decisive factors that the Department considers to determine the appropriate sanction include the number of violations, the seriousness of violations, the impact of violations on the industry as a whole, the interests of the Secretary in ensuring that the trust relationship which exists between members of the industry--the basis for virtually every transaction in this multibillion dollar industry--is maintained, the management decisions made by Respondent, and the financial status of Respondent.

In the instant case, Respondent failed to make full payment promptly for twenty-seven lots of perishable agricultural commodities over a period of eight months, for a total of \$150,723.03. Taking all these factors into consideration, the sanction sought by Complainant is granted.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above shall be published. Since this Initial Decision reflects the Bench Decision of February 28, 1996, it has been formatted in written form, with any necessary and appropriate grammatical, apparent, or necessary additions or corrections made.

This Order entered herein shall take effect on the eleventh (11th) day after this Decision becomes final. Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final April 17, 1996.-Editor]

In re: HOGAN DISTRIBUTING, INC.**PACA Docket No. D-94-556.****Decision and Order filed April 22, 1996.****Failure to make full payment promptly — Repeated, willful and flagrant violations — Publication of facts and circumstances — Sanction policy.**

The Judicial Officer affirmed the decision by Judge Bernstein (ALJ) publishing the finding that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b by failing to make full payment promptly for perishable agricultural commodities. Settlement with some produce creditors and failure of Respondent's customers to pay Respondent are irrelevant to the issue of Respondent's violation of PACA. Respondent should have been adequately capitalized or have been able to obtain additional capital to make full payment promptly to sellers. There can be no excuses for nonpayment under PACA where there are repeated failures to pay substantial amounts over an extended period. Publication of the facts and circumstances of a violation of 7 U.S.C. § 499b is not dependent on finding that the violation was willful. Willfulness is not relevant to the employment restrictions in 7 U.S.C. § 499h(b). A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or if a person carelessly disregards statutory requirements. Failures to make full payment promptly in numerous transactions over a period in excess of 1 year constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4). In view of the need for prompt payment and financial responsibility in the industry, the sanction of publication, recommended by administrative officials, is appropriate, clearly within the Secretary's discretion, and consistent with recent cases. Collateral effects of the sanction on those responsibly connected with Respondent, and those who have entered into settlement agreements with those responsibly connected with Respondent, are not relevant to a proceeding to determine whether Respondent violated 7 U.S.C. § 499b(4).

Barbara S. Good, for Complainant.

Scott A. Johnson, Wayzata, MN, for Respondent.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*) (hereinafter the PACA), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-48), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice).

The proceeding was instituted by a Complaint filed on July 11, 1994, alleging that during the period January 1993 through April 1994, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices of 224 lots of perishable agricultural commodities in the total amount of \$305,527.05, which Respondent had purchased, received, and accepted in

interstate commerce. Complainant contended that Respondent's failures to make full payment promptly constituted willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and requested revocation of Respondent's license. Because Respondent's license has terminated, Complainant seeks publication of the facts and circumstances of the violations alleged in the Complaint.

Respondent, in its Answer, denied that the sum alleged in the Complaint was due and owing to the sellers listed or that Respondent had engaged in willful, flagrant, or repeated violations of 7 U.S.C. § 499b(4). However, Respondent neither denied that the transactions set forth in the Complaint took place, nor did it deny that it had failed to make full payment promptly to the nine sellers for the 224 lots of perishable agricultural commodities.

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on June 28, 1995, in Minneapolis, Minnesota. Complainant was represented by Barbara S. Good, Esq., Office of the General Counsel, United States Department of Agriculture. Respondent was represented by Scott A. Johnson, Esq., of Wayzata, Minnesota. The ALJ filed an Initial Decision and Order on September 22, 1995, in which he found that Respondent had committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b and ordered publication of the facts and circumstances set forth in the decision.

On November 1, 1995, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35),¹ and requested oral argument pursuant to 7 C.F.R. § 1.145(d). On November 28, 1995, Complainant responded to Respondent's appeal, and on November 29, 1995, the case was referred to the Judicial Officer for decision.

The Judicial Officer may, under the applicable Rules of Practice, (7 C.F.R. § 1.145(d)), grant, refuse, or limit any request for oral argument. The issues in this case are not complex and are controlled by established precedents, and, thus, oral argument would appear to serve no useful purpose and is refused.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

....

Findings of Fact

1. Respondent, Hogan Distributing, Inc., is a corporation organized and existing under the laws of the State of Minnesota. (Answer ¶ II.) [Respondent] is no longer operating as a business. (Tr. 73.)

2. At all times material, Respondent was licensed under the PACA. License number 881451 was issued to Respondent on June 27, 1988. This license terminated when it was not renewed on or before June 27, 1994. (Complaint ¶ II; Answer ¶ II; Tr. 97.)

3. During the period January 1993 through April 1994, Respondent failed to make full payment promptly to nine sellers [at] the agreed purchase prices of 224 lots of perishable agricultural commodities in the total amount of \$305,527.05, which Respondent had purchased, received, and accepted in interstate commerce. (Tr. 11, 17-38; CX 3-13.) As of June 1[2], 1995, Respondent still had not paid \$283,201.12 in connection with the transactions set forth in the Complaint. (Tr. 38-[40; CX 16].)

Conclusion

Respondent's failures to make full payment promptly, as set forth in paragraph III of the Complaint, constitute willful, flagrant, and repeated violations of section 2(4) of the PACA. (7 U.S.C. § 499b(4).)

Discussion

At the hearing, Complainant introduced voluminous documentary evidence supporting the transactions as alleged in the Complaint. (Tr. 22-35; CX 3-13.) In addition, Complainant introduced evidence that \$283,201.12 of the \$305,527.05 remained unpaid as of June 1[2], 1995. (Tr. 3[8]-40; CX 16.) The parties stipulated [that the] transactions [alleged] in the Complaint [were in]

interstate commerce]. (Tr. 11.) Evidence was introduced to show that Respondent's license was terminated on June 27, 1994, due to nonpayment of the renewal fee. (Tr. 97; CX 1.) Respondent did not offer proof to refute any of this evidence.

Although Respondent did not deny that the transactions took place as alleged, Respondent disputed that it had engaged in any conduct which would constitute willful, flagrant, or repeated violations of section 2(4) of the PACA. (Answer ¶ III; Tr. 90-91.)

Respondent's evidence, submitted through the testimony of Dennis Hogan, its president and [owner of] 75 [percent of the shares of Hogan Distributing, Inc., (Tr. 68),] related primarily to potentially mitigating circumstances. Mr. Hogan's testimony consisted of a review of his own work history and his start-up of Respondent[, (Tr. 67-70)]; Respondent's financial difficulties, which led eventually to its failure[, (Tr. 70-73)]; and the accommodations which Respondent and some of its produce creditors have reached in connection with PACA trust litigation[, (Tr. 73-75, 77-89)].

Respondent [introduced into evidence] a Stipulation and Settlement Agreement (hereinafter Settlement Agreement) in Civil Action No. 4-94-158 in the U.S. District Court for the District of Minnesota. (RX 2.) The Settlement Agreement makes arrangement for partial payment to some of Respondent's produce creditors. Respondent also introduced into evidence an Order [for] Dismissal, which adopts the terms of the Settlement Agreement. (RX 3.)

It should be noted that the terms contained in the Settlement Agreement and the Order for Dismissal are unfavorable to the PACA creditors. It appears from a reading of RX 2 and RX 3 that the reason that five of Respondent's produce creditors entered the Settlement Agreement was that Respondent is insolvent and the Settlement Agreement was the only avenue available to them to obtain even a fraction of the \$236,079 in qualified PACA trust claims.

Moreover, Complainant presented evidence that shortly before the hearing on June 28, 1995, Respondent still owed \$283,201.12 in connection with the transactions set out in the Complaint. (Tr. 39-40; CX 16.)

Whether a PACA licensee, having repeatedly and flagrantly failed to pay promptly as required by the PACA, has come to a private accommodation with one or all of its produce creditors is irrelevant to the issue of whether or not its failures to pay in accordance with the [PACA] and the regulations [promulgated pursuant to the PACA] constitute violations for which it should be sanctioned. *See, e.g., In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1626

(1993), *aff'd*, [47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995)].

Respondent also offers as a mitigating circumstance Mr. Hogan's testimony that Respondent's failures to pay its produce obligations were the domino-like result of two of its customers defaulting in their obligations to Respondent. (Tr. 70-73.) However, such mitigating circumstances are irrelevant in determining whether a violation has occurred. *Frank Tambone, Inc. v. United States Dep't of Agric.*, [50 F.3d 52, 55 (D.C. Cir. 1995)]. There can be no excuses for nonpayment under the PACA where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time. *In re Atlantic Produce Co.*, 54 Agric. Dec. [701] (1995).

Respondent's violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Cox v. United States Dep't of Agric.*, [925 F.2d 1102, 1105 (8th Cir.), reprinted in 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991)]; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *In re Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 263-269 [(1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974)].

Respondent's failures to make full payment promptly in numerous transactions over a period in excess of 1 year also constitute flagrant and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)). In view of the need for prompt payment and financial responsibility in the industry, the sanction of publication, recommended by the administrative officials, is appropriate. *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989). As Respondent still owes approximately \$283,201.12 for the transactions [cited] in [paragraph III of] the Complaint, Respondent's failures to make full payment promptly call for the publication of the facts and circumstances of the violations. See *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 505 (1987), [*aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988)]; and *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 150 (1984).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises five issues in its Memorandum of Law in Support of Hogan Distributing, Inc.'s, Appeal (hereinafter RMA). First, Respondent contends that "[a] finding of willfulness is a crucial factual element of any decision that includes as a sanction a bar from employment." (RMA, p. 3.)

I disagree with Respondent's contention. Willfulness is not relevant to the

employment restrictions in section 8(b) of the PACA, (7 U.S.C. § 499h(b)).

In its Complaint instituting this disciplinary proceeding, Complainant requested that "pursuant to [s]ection 8 of the PACA[,] (7 U.S.C. § 499h), the [ALJ] find that [R]espondent has committed wilful, flagrant and repeated violations of [s]ection 2(4) of the PACA[,] (7 U.S.C. § 499b(4)), and order that the license of [R]espondent be revoked." (Complaint, p. 10.) Respondent chose not to renew its license and thereby allowed its license to lapse. After the lapse of Respondent's license, Complainant dropped its request for revocation of Respondent's license, and, instead, requested that the ALJ publish the facts and circumstances of the violations alleged in the Complaint. (Tr. 12; Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, pp. 1-2; Complainant's Reply Brief, p. 6; RMA, p. 1; Complainant's Response to Respondent's Appeal, p. 1.)

Section 8(a) of the PACA, (7 U.S.C. § 499h(a)), provides, in pertinent part, as follows:

(a) Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation. . . .

Section 8(b) of the PACA, (7 U.S.C. § 499h(b)), provides, in pertinent part, as follows:

(b) Except with approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

 . . .
 (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

 . . .

The Secretary may approve such employment . . . after one year following the . . . finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond

in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. . . .

Section 8(a) of the PACA, (7 U.S.C. § 499h(a)), provides that the Secretary may publish the facts and circumstances of a violation of any provision of section 2 of the PACA, (7 U.S.C. § 499b), by any commission merchant, dealer, or broker. Publication of the facts and circumstances of the violation is not dependent upon the Secretary determining that the violation of section 2 of the PACA, (7 U.S.C. § 499b), was willful, flagrant, or repeated. Section 8(b) of the PACA, (7 U.S.C. § 499h(b)), restricts licensees from employing any person, and any person who is or has been responsibly connected with any person, who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2 of the PACA, (7 U.S.C. § 499b). The employment restrictions in section 8(b) of the PACA, (7 U.S.C. § 499h(b)), are not dependent upon a finding that the employee or intended employee willfully violated section 2 of the PACA, (7 U.S.C. § 499b). In addition, since, in the instant proceeding, Complainant is not seeking to withdraw, suspend, revoke, or annul Respondent's license, the willfulness provisions of the Administrative Procedure Act, (5 U.S.C. § 558(c)), are not applicable. *Joe Phillips & Associates, Inc. v. United States Dep't of Agric.*, 923 F.2d 862, 1991 WL 7136, n.9 (9th Cir. 1991), printed in 50 Agric. Dec. 847, 853 n.9 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 993-94 (2d Cir.), cert. denied, 419 U.S. 830 (1974); *In re SWF Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1428 (1992); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980).

Second, Respondent contends that while there is no question that Respondent violated the PACA, there is "no evidence of record" that Respondent's violations of the PACA were willful. (RMA, pp. 2-3.)

As stated above, willfulness is not a prerequisite to the publication of facts and circumstances of violations of 7 U.S.C. § 499b or the applicability of

restrictions on employment provided in 7 U.S.C. § 499h(b). Nonetheless, the record supports a finding that Respondent's violations of 7 U.S.C. § 499b(4) were willful.

Since Respondent violated express requirements of the PACA, (7 U.S.C. § 499b), by failing to make full payment for perishable agricultural commodities promptly, the ALJ's finding of willfulness is correct. *See Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, *supra*, 48 Agric. Dec. at 643-53.

A violation is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Cox v. United States Dep't of Agric.*, *supra*, 925 F.2d at 1105; *Finer Foods Sales Co. v. Block*, *supra*, 708 F.2d at 777-78; *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, *supra*, 491 F.2d at 994; *Goodman v. Benson*, *supra*, 286 F.2d at 900; *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, *supra*, 54 Agric. Dec. at 1378; *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), appeal docketed, No. 95-3552 (8th Cir. Oct. 16, 1995); *In re National Produce Co.*, *supra*, 53 Agric. Dec. at 1625; *In re Samuel S. Napolitano Produce, Inc.*, *supra*, 52 Agric. Dec. at 1612.² *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose,

²The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations would still be willful in view of Respondent's gross neglect of the express provisions of the PACA known by Respondent to require prompt payment.

criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'").

The record establishes and Respondent does not deny that Respondent failed to make full payment of the agreed purchase prices promptly to nine sellers for 224 lots of perishable agricultural commodities in the total amount of \$305,527.05, which Respondent had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period January 1993 through April 1994, a period of 16 months. (Tr. 11; CX 3-13.)

Willfulness is reflected in the length of time during which the violations occurred and the number and amount of violative transactions involved. Respondent knew or should have known that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over a 16-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not, and consequently could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and Respondent's violations were, therefore, willful. *In re The Norinsberg Corp.*, *supra*, 52 Agric. Dec. at 1622; *In re Kornblum & Co.*, *supra*, 52 Agric. Dec. at 1573-74; *In re Full Sail Produce, Inc.*, *supra*, 52 Agric. Dec. at 622; *In re Vic Bernacchi & Sons, Inc.*, *supra*, 51 Agric. Dec. at 1429; *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), aff'd per curiam, 568 F.2d 772 (4th Cir.) (Table), cert. denied, 439 U.S. 819 (1978).

Respondent states that:

The record shows that [Respondent's] failure to pay [its] creditors was a result of circumstances outside [its] control, making it impossible for [Respondent] to satisfy [its] debts in full. But for the occurrence of these events, [Respondent] would have been able to pay [its] creditors promptly as required by the PACA. [Respondent] did not *intend* to be placed in a position where [it] could not satisfy [its] obligations. It

cannot be *careless disregard* for statutory obligations that outside, independent events occur and have a negative impact upon [Respondent].

(RMA, pp. 3-4; emphasis in original.)

The Memorandum of Law in Support of Hogan Distributing, Inc.'s, Appeal does not specify the circumstances that were outside Respondent's control that made it impossible for Respondent to make prompt payment for the full amount of the agreed purchase price of perishable agricultural commodities, as required by 7 U.S.C. § 499b(4). I infer from the record that the circumstances referenced by Respondent are the bankruptcy of two of Respondent's customers, Country Club Foods in the fall of 1992 and a Burger King franchise in January 1993. (Tr. 70-73; Respondent's Closing Memorandum, p. 1.)

I agree with Respondent that it "did not *intend* to be placed in a position where [it] could not satisfy [its] obligations." (RMA, p. 3.) However, Respondent intentionally or in careless disregard of 7 U.S.C. § 499b(4) failed to make full payment promptly to persons who sold perishable agricultural commodities to Respondent. Respondent continued to purchase perishable agricultural commodities for which it did not make full payment promptly long after the events which Respondent contends made it impossible for it to pay for those commodities. If Respondent was going to extend credit to its purchasers, it should have been adequately capitalized or have been able to obtain additional capital to ensure that it could make full payment promptly to persons who sold Respondent perishable agricultural commodities. Sellers of perishable agricultural commodities should not be subjected to the risk resulting from Respondent's undercapitalization or bad debt experience. Respondent's failure to take precautions necessary to ensure that it could make full payment promptly to sellers of perishable agricultural commodities constitutes a willful violation of 7 U.S.C. § 499b(4). See *In re Rudolph John Kafcsak, supra*, 39 Agric. Dec. at 686 (neither a strike nor the failure of others to pay Respondent negates willfulness); *In re Atlantic Produce Co., supra*, 35 Agric. Dec. at 1641-42 (Respondent's difficult financial situation does not negate willfulness); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883 (1975) (Respondent's inability to pay for produce promptly because of financial difficulties does not, of course, negate willfulness); *In re George Steinberg & Son, Inc., supra*, 32 Agric. Dec. at 266 (Respondent's insolvency does not negate willfulness).

Third, Respondent contends that while there is no question that Respondent violated the PACA, and that, under the PACA, sanctions are appropriate if a violation occurs, "the draconian sanctions delivered by Judge Bernstein were an abuse of discretion and clearly outside the scope of recent case law." (RMA, pp. 2-3.)

The ALJ's Order was not an abuse of discretion and was in accord with recent cases.

The Order issued by the ALJ in the instant case, with which I fully agree, provides that "Respondent has committed wilful, flagrant and repeated violations of [s]ection 2 of the [PACA,] (7 U.S.C. § 499b), and the facts and circumstances set forth in this decision shall be published." (Initial Decision and Order, p. 6.) Section 8(a) of the PACA, (7 U.S.C. § 499h(a)), provides that whenever the Secretary determines as provided in 7 U.S.C. § 499f that any commission merchant, dealer, or broker has violated any provision of 7 U.S.C. § 499b, the Secretary may publish the facts and circumstances of the violation. The ALJ clearly was authorized by the PACA to order the publication of the facts and circumstances set forth in the initial decision. Further, the Order issued by the ALJ, based upon the ALJ's findings that: (1) Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices of 224 lots of perishable agricultural commodities in the total amount of \$305,527.05, which Respondent had purchased, received, and accepted in interstate commerce, (Initial Decision and Order, pp. 3-4); and (2) Respondent still owed approximately \$283,201.12 for the produce in question, (Initial Decision and Order, p 4), is consistent with recent cases. *In re Granoff's Wholesale Fruit & Produce, Inc., supra; In re Atlantic Produce Co., supra; In re SWF Produce Co., supra; In re National Produce Co., supra; In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Frank Tambone, Inc., supra*.

Fourth, Respondent contends that the sanction imposed on Respondent is unduly harsh in light of mitigating circumstances and the sanction policy adopted by the Secretary in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3). (RMA, pp. 4-6.)

I agree with Respondent that the Department's sanction policy, as adopted in *In re S.S. Farms Linn County, Inc., supra*, should be applied in the instant case. *S.S. Farms Linn County, Inc.*, in pertinent part, provides:

[T]he sanction in each case will be determined by examining the nature

of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

50 Agric. Dec. at 497.

However, the sanction policy in *In re S.S. Farms Linn County, Inc., supra*, does not alter the doctrine in *In re The Caito Produce Co., supra*. *In re Moreno Bros., supra*, 54 Agric. Dec. at 1442-43. The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time. Where, as in the instant case, Respondent does not have a license, publication of the facts and circumstances of the violation is a substitute for revocation of a license.

Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), over a period of 16 months by failing to make full payment to nine sellers at the agreed purchase prices of 224 lots of perishable agricultural commodities in the total amount of \$305,527.05. Respondent's excuses for its failure to pay (the bankruptcy of two of Respondent's customers) is not sufficient to prevent the publication of the facts and circumstances of its violations of the PACA. Further, this sanction is in accord with the recommendations of the administrative officials charged with the responsibility of achieving the Congressional purpose of the PACA.

Ms. Joan Colson, Auditor, PACA Branch of the Fruit & Vegetable Division of the Agricultural Marketing Service, testified as to the appropriateness of the sanction as follows:

[BY MS. GOOD:]

Q. What is the sanction that Complainant recommends as a result of Respondent's failure to make full payment promptly in this case?

[BY MS. COLSON:]

A. The [D]epartment recommends that a finding be made that Hogan Distributing, Inc.[,] committed willful, repeated and flagrant violations of Section 2[(4)] of the PACA, and asks that those findings be published.

Q. Is there anything unique about the produce industry that makes failures to pay particularly harmful?

A. Yes, the produce industry is very unique because the commodities involved are highly perishable. Because they are perishable, they have to go from growing areas located through the country, to consumers, over a short period of time, in order for the commodities to reach the consumer at the height of its edible appeal.

Because of this short time period, industry members don't always have time to perform extensive credit checks that may be commonplace in other industries. Therefore, the members have to rely a great deal on trust relationship. For example, most transactions involve a shipper and a receiver. The receiver will ask that the shipper ship produce usually worth thousands of dollars across country, on the promise, or on the basis that he will pay for that produce in a prompt manner. The shipper will ship this, and he's usually never even met the other person, but he will ship the produce, trusting in that person will abide by its promise, and pay for it promptly.

On the other hand, the receiver also trusts that the shipper will ship the kind, grade and quality that he contracted to over the phone. This makes the produce industry very unique, in that they trust -- you know, rely on a great deal of trust in each other.

Q. Can you explain please to the administrative law judge the major factors considered in arriving at the sanction recommendation of a finding of willful, repeated and flagrant violations, progressing to publication of that? What were the major factor[s] behind that recommendation?

A. Th[ere] were basically five major factors. The first four involve the violations themselves. In this particular instance, Hogan Distributing, Inc. at the time failed to pay nine sellers approximately

\$305,000 for 224 separate violations of PACA. These violations occurred [over] a 16-month period, from January of '93 through April of 1994. The other major factors considered is the effect that these violations have on the produce industry.

Q. What effect do these violations have on the produce industry?

A. They tend to have a ripple effect through the industry. For example, Hogan Distributing, by failing to pay their shippers, put their shippers in financial harm, because they didn't receive the money for produce that they shipped to them. The shippers in turn failed to pay the grower, who in turn, you know, is having problems paying their bills, also, so the ripple effect travels through the industry from the point of violation.

Q. What effect would the recommended sanction have on the produce industry?

A. In this case, a deterrent effect, since Hogan Distributing isn't operating any more, the violations aren't continuing to date, but the deterrent effect for the rest of the industry is that the Secretary deems these failures to be serious violations of the act, and that consequences for these violations will be taken seriously, and action will be taken against the firms.

Q. Would you please explain your understanding of the role of the Secretary of Agriculture in maintaining the trust relationship that you have testified to, that exists between buyers and sellers in the produce industry?

A. The Secretary's role is to enforce the PACA. He does this evenhandedly, so a level playing field can exist for all industry members. The [S]ecretary issues licenses to fruit and vegetable traders. When he issues them a license, he is making a statement that he has no reason to believe that this firm can't or won't abide by the laws that Congress has set out for them. The [S]ecretary also investigates possible violations of the PACA, and when violations are found, he takes actions against them for these violations.

Q. Have you listened to the testimony submitted by Respondent today?

A. Yes.

Q. Have you examined Respondent's evidence?

A. Yes.

Q. Have you taken this information into account, in the sanction recommendation?

A. Yes.

MS. GOOD: I have no further questions of this witness.

THE COURT: Mr. Johnson?

MR. JOHNSON: I have a few questions, if I may, Your Honor.

THE COURT: Yes.

CROSS EXAMINATION

BY MR. JOHNSON:

Q. What are the alternative sanction recommendations that you could make to the court?

A. Suspension of the license would be the only alternative.

Q. I'm sorry?

A. Suspension of their license.

Q. And what you are recommending to this court now is something other than suspension of the license, right?

A. Right, we are recommending that publication be filed.

Q. How long have you been working at the Department of Agriculture, making these recommendations?

A. Approximately five years.

Q. How many recommendations have you made?

A. I would say at least 90, 100.

Q. And on some occasions, have you recommended a suspension of the license, instead of publication?

A. Yes.

Q. What are the circumstances that would give rise to a recommendation of suspension?

A. If the firm had paid off all the debt prior to the hearing, sometimes we change and ask for a suspension of their license. In some slow pay cases, where they have continued to pay, except they have paid slowly over a period of time, we would recommend suspension.

Q. The effect of suspension would be, I take it, that the license could then be renewed after the suspension period?

A. Well, whatever the suspension period would be, the license wouldn't be in effect for that period of time. Say if it's a 21-day suspension, the firm couldn't operate for 21 days.

Q. Have you recommended suspension in some cases where there has been settlement reached with creditors on a discounted basis?

A. No.

Q. You never have?

A. Not that I can recall.

Q. Have you made recommendation of publication in every case where there's been a settlement reached with creditors?

A. Probably.

Q. Are there any other alternative sanctions that you have recommended to courts?

A. We have recommended suspension, revocation.

Q. And publication?

A. And publication, right.

Q. Just those three?

A. Right. If a license isn't valid any more, then it goes from revocation to publication.

Q. What are the factors that you take into account in recommending publication?

A. Well, the major factors are the ones I stated before. The number of violations, the time period involved, the number of sellers involved, the amount of money involved, the effect that these violations have on the industry.

Tr. 99-105.

Finally, Respondent states that the publication of the facts and circumstances of its violation of 7 U.S.C. § 499b(4) will result in Mr. Dennis Hogan's loss of his current employment with "Alliant Foodservice," and that such loss of employment will result in Mr. Hogan's inability to make payments under two agreements with six of the nine sellers of perishable agricultural commodities who Respondent has failed to pay promptly in full. (RMA, pp. 2, 6.)

Mr. Dennis Hogan is responsibly connected with Respondent, (RMA, p. 4 n.2.) I infer that "Alliant Foodservice" is a licensee under the PACA. Section 8(b) of the PACA provides, in pertinent part, as follows:

(b) Except with approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

. . .
(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title. . . .
.

The Secretary may approve such employment . . . after one year following the . . . finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. . . . The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

Compliance with 7 U.S.C. § 499h(b) will require "Alliant Foodservice" to terminate its employment of Mr. Dennis Hogan prior to the effective date of an Order in which Respondent is found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b. The purported adverse impacts on Mr. Hogan and those who entered into settlement agreements with Mr. Hogan for the partial payment of amounts owed by Respondent to sellers of perishable agricultural commodities are not relevant to this proceeding which is one solely to determine whether Respondent, as a licensee under PACA, violated 7 U.S.C. § 499b(4). *In re Atlantic Produce Co., supra*, 35 Agric. Dec. at 1644. See also *In re King Midas Packing Co., supra*, 34 Agric. Dec. at 1887 (collateral effects on owners and officers of Respondent corporation of an Order issued against Respondent corporation are not a matter of administrative discretion, but are mandated by Congress).

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

Order

Respondent has committed willful, flagrant, and repeated violations of section 2 of the PACA, (7 U.S.C. § 499b), and the facts and circumstances set forth in this decision shall be published.

In re: RUMA FRUIT AND PRODUCE, CO., INC.

PACA Docket No. D-94-565.

Order to Show Cause filed April 24, 1996.

Andrew Y. Stanton, for Complainant.

Stephen P. McCarron, Washington, D.C., for Respondent.

Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding instituted pursuant to the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*) (hereinafter the PACA), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-48), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, (7 C.F.R. §§ 1.130-1.151) (hereinafter the Rules of Practice).

The proceeding was instituted by a Complaint filed on August 25, 1994, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that Ruma Fruit and Produce Co., Inc. (hereinafter Respondent), willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), by employing Mr. Dean W. Hopkins from November 23, 1993, through March 7, 1994, without posting a surety bond meeting the approval of the Secretary. In accordance with section 8(b) of the PACA, the Complaint requested that Respondent's PACA license be suspended for 45 days as a result of Respondent's willful violation of section 8(b) of the PACA.

On September 16, 1994, Respondent filed an Answer in which it denied violating section 8(b) of the PACA and asserted several affirmative defenses. A hearing was held on February 28, 1995, in Boston, Massachusetts, before Administrative Law Judge Dorothea A. Baker (hereinafter ALJ). The ALJ filed an Initial Decision and Order on August 3, 1995, in which the ALJ found that Respondent willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), and suspended Respondent's license for 45 days. On October 4,

1995, Respondent appealed to the Judicial Officer. On October 24, 1995, Complainant filed a Response to Respondent's Appeal Petition, and on October 26, 1995, the case was referred to the Judicial Officer for decision.

On November 15, 1995, the Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424 (1995) (hereinafter PACAA-1995), was approved. Section 11 of the PACAA-1995 amends section 8 of the PACA by adding a new subsection (e) which reads as follows:

(e) ALTERNATIVE CIVIL PENALTIES.--In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 6, [(7 U.S.C. § 499f),] that a commission merchant, dealer, or broker has violated section 2[, (7 U.S.C. § 499b),] or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e).

On April 1, 1996, Respondent filed Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer, in which Respondent requested "the opportunity to demonstrate the applicability of section 11 of the PACAA-1995 to the instant case, despite the fact that the PACAA-1995 was approved after Respondent's alleged violation of 7 U.S.C. § 499h(b) and after the ALJ issued the Initial Decision in the instant case. On April 18, 1996, Complainant filed Complainant's Response to Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer in which Complainant agreed with the Respondent that the Judicial Officer had authority to impose a civil penalty, but opposed the imposition of a civil penalty in the instant case because a 45-day suspension of Respondent's license is appropriate and the imposition of *any* civil penalty would threaten Respondent's payment of its current produce obligations.

On April 22, 1996, Respondent filed Respondent's Reply Regarding Further Briefing/Argument requesting a further evidentiary hearing either before the ALJ or the Judicial Officer regarding the sanction to be imposed

should Respondent be found to have violated 7 U.S.C. § 499h(b).

In *In re Jacobson Produce, Inc.*, 55 Agric. Dec. ____ (Apr. 12, 1996), Complainant, Deputy Director of the Fruit and Vegetable Division of the Agricultural Marketing Service, and Respondent, Jacobson Produce, Inc., filed a joint motion to Modify the Order previously issued in the case¹ which joint motion provided that Jacobson Produce, Inc., could pay a civil penalty of \$90,000 in lieu of a 90-day suspension of its PACA license. The parties in *In re Jacobson Produce, Inc.*, agreed that Jacobson Produce, Inc., would be given the option of a suspension of its license or the payment of a civil penalty equal to \$1,000 per day for each day its license would have been suspended.

Respondent and Complainant shall, within 10 days from the date of service of this Order to Show Cause, file with the hearing clerk any cause showing why I should not impose a sanction against Respondent (if Respondent is found to have violated 7 U.S.C. § 499h(b)) which gives Respondent an option of a suspension of its PACA license or in lieu thereof the payment of a civil penalty equal to \$1,000 per day for each day its license would be suspended if Respondent chooses not to pay a civil penalty.

The issue raised by Respondent in its April 1, 1996, motion can be resolved without recourse to oral argument or further evidentiary hearing. Therefore, Respondent's April 1, 1996, motion for oral argument before the Judicial Officer and Respondent's April 22, 1996, motion for a further evidentiary hearing either before the ALJ or the Judicial Officer are denied.

In re: RUMA FRUIT AND PRODUCE CO., INC.

PACA Docket No. D-94-565.

Decision and Order and Remand Order filed May 16, 1996.

Suspension of license — Civil penalties — Remand order — Employment restrictions — Responsibly connected — Failure to pay reparation award.

The Judicial Officer affirmed Judge Baker's (ALJ) decision suspending Respondent's license for 45 days but remanded the case to determine whether the assessment of a civil penalty in lieu of the 45-day suspension would be appropriate, and if so, the amount of the civil penalty to be assessed. Respondent willfully violated 7 U.S.C. § 499h(b) by employing Dean W. Hopkins (Hopkins) after being notified that Hopkins was ineligible to be employed by or affiliated with

¹*In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728 (1994).

any PACA licensee, without both the Secretary's approval and an approved surety bond, because Hopkins failed to pay a reparation award. The reparation complainant's (Boston Tomato) December 19, 1991, filing of a state court action, involving the same issues set forth in its March 28, 1992, reparation complaint against Hopkins, does not deprive the Secretary of subject matter jurisdiction, where the Department was not made aware of the state court action. Boston Tomato was therefore not compelled to choose remedies; and, both the state court action and the reparation action proceeded to judgment without mention of the other. The reparation order issued prior to the state court order was *res judicata* as to the state court action. The instant PACA disciplinary proceeding was not stayed either by Hopkins' filing a Bankruptcy Petition or by the May 20, 1993, discharge of Hopkins' debt to Boston Tomato. Pursuant to 7 U.S.C. § 499g(d), the reparation order against Hopkins in favor of Boston Tomato was not satisfied until the Secretary was notified on March 11, 1994, and, therefore, employment restrictions on Hopkins remained in effect until March 11, 1994, despite any previous settlement of the reparation award by Hopkins and Boston Tomato. The Secretary has sole authority to enforce the employment bar under 7 U.S.C. § 499h(b); the reparation complainant has no authority to waive the enforcement of the employment bar. The 45-day suspension of Respondent's license is appropriate under the circumstances; however, pursuant to 7 U.S.C. § 499h(e), the case is remanded to the ALJ to determine the propriety of a civil penalty in lieu of a 45-day PACA license suspension.

Andrew Y. Stanton, for Complainant.

Stephen P. McCarron, Washington, D.C., for Respondent.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding instituted pursuant to the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §§ 499a-499s) (hereinafter the PACA), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-48), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice).

The proceeding was instituted by a Complaint filed on August 25, 1994, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that Ruma Fruit and Produce Co., Inc. (hereinafter Respondent), willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), by employing Mr. Dean W. Hopkins from November 23, 1993, through March 7, 1994, without posting a surety bond meeting the approval of the Secretary. In accordance with section 8(b) of the PACA, Complainant informed Respondent in an October 19, 1993, letter, received by Respondent on October 23, 1993, that Respondent would be prohibited from affiliating with Mr. Hopkins after 30 days from the date Respondent received the letter unless Respondent first obtained the required bond. Mr. Hopkins was subject

to employment restrictions because of his failure to pay a reparation award issued against him on June 23, 1992, in the amount of \$51,372.50, plus interest, in favor of Boston Tomato Co., Inc. (hereinafter Boston Tomato). The Complaint requested that Respondent's PACA license be suspended for 45 days as a result of Respondent's willful violation of section 8(b) of the PACA.

On September 16, 1994, Respondent filed an Answer in which it denied violating section 8(b) of the PACA and asserted several affirmative defenses. On February 24, 1995, Respondent filed a Prehearing Memorandum and a hearing was held on February 28, 1995, in Boston, Massachusetts, before Administrative Law Judge Dorothea A. Baker (hereinafter ALJ). Complainant was represented by Andrew Y. Stanton, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent was represented by Stephen P. McCarron, Esquire, McCarron & Associates, Washington, D.C. The ALJ filed an Initial Decision and Order on August 3, 1995, in which the ALJ found that Respondent willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), and suspended Respondent's license for 45 days. On October 4, 1995, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).¹ On October 24, 1995, Complainant filed a Response to Respondent's Appeal Petition, and on October 26, 1995, the case was referred to the Judicial Officer for decision.

Respondent's Appeal Petition (hereinafter RAP) requests reversal of the ALJ's Initial Decision and Order on several grounds. Respondent contends that the ALJ erroneously held that: (1) the Secretary had subject matter jurisdiction over the instant case, (RAP, pp. 1-3); (2) the instant PACA disciplinary proceeding was not stayed by Mr. Hopkins' filing a Bankruptcy Petition or the May 20, 1993, discharge of Mr. Hopkins' debt to Boston Tomato, (RAP, pp. 3-4); (3) there was no agreement between Mr. Hopkins and Boston Tomato to settle the reparation award against Mr. Hopkins in favor of Boston Tomato until March 1994, (RAP, pp. 4-5); (4) pursuant to 7 U.S.C. § 499g(d), the reparation order against Mr. Hopkins in favor of Boston Tomato was not satisfied until the Secretary was notified on March 11, 1994, and, therefore, employment restrictions on Mr. Hopkins remained in effect

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

until March 11, 1994, despite any previous settlement of the reparation award by Mr. Hopkins and Boston Tomato, (RAP, p. 5); (5) the Secretary has sole authority to enforce the employment bar under 7 U.S.C. § 499h(b) and the reparation complainant (Boston Tomato) has no authority to waive the enforcement of the employment bar, (RAP, pp. 5-6); and (6) the 45-day suspension of the Respondent's license is appropriate under the circumstances, (RAP, pp. 6-7). I disagree with Respondent's contention that the ALJ erred and based upon a careful consideration of the record, the Initial Decision and Order is adopted as the final Decision and Order in this case, except that the case is remanded to the ALJ to consider whether the imposition of a civil penalty in lieu of a 45-day suspension of Respondent's license is appropriate, and, if a civil penalty is appropriate, the amount of the civil penalty to be assessed. Changes in the ALJ's Initial Decision and Order are shown by brackets, deletions shown by dots, and minor editorial changes not specified.

Additional conclusions by the Judicial Officer, which explain the purpose and scope of the Remand Order, follow the discussion and conclusions of the ALJ.

**ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION
(AS MODIFIED)**

....

Pertinent Statutory Provisions

(a) Section 1(10) of the PACA:

(10) The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

7 U.S.C. § 499a(10).

(b) Section 7(d) of the PACA:

(d) Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be

suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment. . . .

7 U.S.C. § 499g(d).

(c) Section 8(b) of the PACA:

(b) Except with approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

. . .

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award . . . if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. [The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.]

7 U.S.C. § 499h(b).

(d) Section 525(a) of the Bankruptcy Code:

(a) Except as provided in the Perishable Agricultural

Commodities Act, 1930 (7 U.S.C. 499a-499s) . . . a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a).

Findings of Fact

All requested findings of fact, conclusions, and arguments of the parties have been duly considered and to the extent not adopted herein, such are deemed to be irrelevant, immaterial, and/or not supported by the record as a whole.

1. Respondent, Ruma Fruit and Produce Co., Inc., is a corporation whose business and mailing address is 210 Beacham Street, Everett, Massachusetts 02149. (CX 1.)
2. Pursuant to the licensing provisions of the PACA, license number 911277 was issued to Respondent on June 21, 1991. This license has been renewed annually and is presently in effect. . . . (Tr. 140-41; CX 1.)
3. Mr. Dean W. Hopkins, doing business as Hopkins Fruit Co., is an individual whose PACA license . . . was automatically suspended on July 29, 1992, pursuant to section 7(d) of the PACA, (7 U.S.C. § 499g(d)), for failing to pay a reparation order in the amount of \$51,372.50, plus interest, awarded to Boston Tomato. *Boston Tomato Co., Inc. v. Hopkins Fruit Co.*, PACA Docket No. RD 92-502 (June 23, 1992). (CX 3.)
4. Due to Mr. Hopkins' failure to pay the June 23, 1992, reparation order, he was barred from employment subject to the PACA for 2 years from the date of the order, until June 23, 1994. Mr. Hopkins could be employed subject to the PACA during that period only if his employer posted a bond in

an amount approved by . . . the Secretary, (7 U.S.C. § 499h(b)).

5. During October 1993, Complainant was informed by Bostonia Produce Co., Inc. (hereinafter Bostonia), Chelsea, Massachusetts, that Mr. Hopkins was currently an employee of Respondent. (CX 2, pp. 1[5]; Tr. 30-31.) Complainant then opened a file on Respondent's possible employment of Mr. Hopkins. [(Tr. 29-30.)]

6. On October 19, 1993, Complainant sent Respondent a certified letter, which was received by Respondent on October 23, 1993, stating that since Mr. Hopkins had failed to pay a reparation order, he was barred from employment unless Respondent posted a surety bond in an amount satisfactory to Complainant. The letter requested certain information to enable Complainant to determine the appropriate bond amount. Complainant informed Respondent that, pursuant to section 8(b) of the PACA, [Respondent] could not continue to employ Mr. Hopkins after 30 days from its receipt of the letter unless [Respondent] first obtained the required bond, or Respondent's [PACA] license could be suspended or revoked. (CX 2, pp. 2-4; Tr. 33-34.)

7. After expiration of the 30-day period referred to [in Finding of Fact No. 6], Respondent continued its affiliation with Mr. Hopkins during the period November 23, 1993, through March 7, 1994, without posting a surety bond meeting the approval of the Secretary of Agriculture, in willful violation of section 8(b) of the PACA, (7 U.S.C. § 499h(b)).

8. On November 9, 1993, Mr. Raymond Dexter Thomas, a Marketing Specialist with Complainant's License and Program Review Section, called Respondent's President, Mr. James Ruma. Mr. Thomas reminded Mr. Ruma that November 22, 1993, was the last day Respondent could legally employ Mr. Hopkins, unless Respondent posted a bond meeting the Secretary's approval. (CX 2, p. 1; Tr. [19, 21,] 36-37.)

9. Complainant sent Mr. Ruma a certified letter dated November 10, 1993, which stated clearly that Respondent could not continue to employ Mr. Hopkins after November 22, 1993, without an appropriate bond. The letter warned that any affiliation of Mr. Hopkins [with Respondent] after November 22, 1993, could result in the filing of an administrative action to suspend or revoke Respondent's PACA license. (CX 2, pp. 6-7; Tr. 37-39.)

10. On November 12, 1993, Mr. Ruma called Complainant and spoke with Mr. James E. Bright, Senior Marketing Specialist with Complainant's License and Program Review Section. Mr. Ruma indicated that he had not received Complainant's November 10, 1993, letter. Mr. Bright reminded Mr. Ruma that Mr. Hopkins could not continue to be employed by

Respondent after November 22, 1993. Mr. Ruma said that he would be providing Complainant with information to determine the bond amount as soon as possible. (CX 2, p. 1; Tr.[19, 21,] 39-40.)

11. On November 15, 1993, Complainant received a November 12, 1993, letter from Mr. Ruma in response to questions raised in Complainant's October 19, 1993, letter concerning Respondent's need for a bond. (CX 2, p. 8; Tr. 41.) The letter included the following information:

4. The duties that Mr. Hopkins is conducting with regard to this firm is that of a salesman soliciting new accounts from headquarters.
5. Mr. Hopkins performs his duties directly under the supervision of James A. Ruma.
6. Mr. Ruma is president of Ruma Fruit & Produce Co., Inc.
7. Mr. Hopkins is compensated on a weekly basis at the rate of \$400.00.

12. Michael A. Clancy, Head of Complainant's License and Program Review Section, called Mr. Ruma on November 17, 1993, in response to Respondent's November 12, 1993, letter. Mr. Clancy advised that Complainant had received Mr. Ruma's answers to Complainant's bond questions and would be setting an appropriate bond. Mr. Clancy also stated that November 22, 1993, was the last day that Mr. Hopkins could be legally employed by Respondent. (CX 2, p. 1; Tr. [19,] 41-42.)

13. Toward the end of November 1993, Complainant sent Respondent a letter, signed by Mr. Charles R. Brader, Director of the Fruit and Vegetable Division, in which Complainant set a surety bond amount of \$50,000. (CX 2, pp. 9-11; Tr. 43.) Respondent never posted the \$50,000 bond. (Tr. [43-]44.)

14. On November 30, 1993, an employee of Complainant's License and Program Review Section, Mr. Bernard Bailey, received a telephone call from Bostonia. (CX 2, p. 12; Tr. 44-45.) Mr. Bailey referred the matter to Mr. Clancy, who called Bostonia back and was told that Mr. Hopkins was observed at Respondent's place of business that morning, [November 30, 1993,] selling produce. (CX 2, p. 12; Tr. 46.) Mr. Clancy immediately called Mr. Ruma, who said that Mr. Hopkins was on a leave of absence. (CX 2, p. 12; Tr. 46.) Mr. Clancy told Mr. Ruma that Mr. Hopkins could not have any involvement whatsoever in Respondent's business or an action would be

pursued against Respondent. Mr. Ruma indicated that he understood. (Tr. 46-47.) Bostonia later followed up its telephone complaint with a letter dated December 1, 1993. (CX 2, p. 13; Tr. 47-48.)

15. On January 7, 1994, Complainant sent a certified letter to Respondent stating that Respondent had failed to post the \$50,000 bond which was a prerequisite to Respondent's continued employment of Mr. Hopkins. Complainant advised that it had received reports from the produce industry that Mr. Hopkins was working at Respondent's place of business after November 22, 1993. Complainant again warned Respondent that any affiliation of Mr. Hopkins [with Respondent] after November 22, 1993, without the required bond, could result in an administrative action to suspend or revoke Respondent's PACA license. (CX 2, p. 15; Tr. 4[8]-50.)

16. In none of Complainant's contacts with Mr. Ruma from October 1993 through January 1994, did Mr. Ruma indicate that a settlement agreement had been reached regarding the reparation order issued against Mr. Hopkins in favor of Boston Tomato. (Tr. [37-]38, 40, 42, 47.)

17. On January 25, 1994, Mr. Clancy's secretary received a telephone call from Mr. Dominic Paratore, an attorney representing Boston Tomato, inquiring about the procedure for filing cases. (CX 2, p. 20; Tr. 51.) Mr. Clancy asked Mr. Thomas to respond to Mr. Paratore's inquiry. Mr. Thomas called Mr. Paratore, who advised that Boston Tomato and Mr. Hopkins were trying to "cut a deal" on Mr. Hopkins' unpaid reparation order. (CX 2, p. 20; Tr. 52.) Mr. Paratore did not tell Mr. Thomas that a settlement had actually been reached. (Tr. 52-53.)

18. On February 15, 1994, Complainant sent a letter to Respondent stating that since Respondent had not posted the \$50,000 bond required to employ Mr. Hopkins, Complainant was closing its files and referring the matter to the Regional Office for an investigation into Respondent's possible unlawful employment of Mr. Hopkins. (CX 2, p. 21; Tr. 53-54.)

19. On approximately February 27, 1994, in compliance with instructions from her supervisor, Complainant's investigator, Carolyn Shelby, a Marketing Specialist with the Northeast Regional Office, PACA Branch, went to the Boston area to conduct various investigations, including an investigation of Respondent regarding its possible unlawful employment of Mr. Hopkins. (Tr. 71.) Ms. Shelby was also investigating another matter involving Mr. Hopkins and she telephoned his attorney, Mr. Steve Wilchins, regarding the location of the records of Hopkins Fruit Company. [(Tr. 72.)]

20. On Friday afternoon, March 4, 1994, after 2:00 p.m., Mr. Hopkins telephoned Ms. Shelby at her hotel and told her that a settlement with Boston

Tomato was being discussed. Ms. Shelby had left her telephone number with attorney Wilchins. Mr. Hopkins did not say that a settlement had actually been reached. (Tr. [72-]73.)

21. On Monday, March 7, 1994, Ms. Shelby went to Respondent's place of business and spoke to Mr. Ruma. (Tr. 74.) Mr. Ruma stated that Mr. Hopkins was still employed by Respondent. (Tr. 75.) Respondent has stipulated that Mr. Hopkins was a full-time employee during the period November 1993 through March [7,] 1994. (Tr. 82.)

22. In response to Ms. Shelby's request, Mr. Ruma provided her with numerous documents for examination. Mr. Ruma then left the room. When Mr. Ruma returned a short time later, he said that he had just fired Mr. Hopkins. (Tr. 76-77.)

23. Among the documents provided to Ms. Shelby were numerous checks issued by Respondent to Mr. Hopkins on a regular basis from November 26, 1993, through February 25, 1994. These were either checks reflecting Mr. Hopkins' \$400 weekly salary, salary checks less advances, or checks compensating Mr. Hopkins for expenses incurred on behalf of Respondent. (CX 5; Tr. 77-80.)

24. Mr. Ruma provided Ms. Shelby with a 1099 Federal Tax Form for 1993, issued to Mr. Hopkins, indicating that Respondent paid Mr. Hopkins \$4,400 during 1993. (CX 6.) Mr. Ruma explained to Ms. Shelby that the 1099 Form was used because Mr. Hopkins was compensated as an independent contractor, rather than as a salaried employee. (Tr. 80-81.)

25. Mr. Ruma also provided Ms. Shelby with travel expense reports submitted to Respondent by Mr. Hopkins from November 26, 1993, through February 26, 1994, in connection with sales activities performed by Mr. Hopkins on Respondent's behalf. (CX 7; Tr. 81-82.)

26. During the evening of March 7, 1994, Ms. Shelby received a telephone call from Mr. Hopkins and his attorney. At the end of the conversation, Mr. Hopkins told Ms. Shelby that "deals and arrangements were being made regarding a settlement of the reparation complaint" involving Boston Tomato. (Tr. 84[-85].)

27. Ms. Shelby returned to Respondent's place of business on March 8, 1994. While she was there, she asked Mr. Ruma if he would be willing to provide a sworn statement regarding Respondent's employment of Mr. Hopkins. Mr. Ruma agreed to do so and, after Ms. Shelby made several suggestions as to what issues he might want to mention, wrote out a statement in longhand. Mr. Ruma asked Ms. Shelby to return the following day to obtain a typed version, which she did. (CX 8; Tr. 8[6]-88.)

28. During Ms. Shelby's investigation of Respondent, Mr. Ruma told her on several occasions that discussions were occurring or had occurred regarding a settlement of the reparation order in favor of Boston Tomato, but never indicated that a settlement of the reparation order had actually taken place. (Tr. 89.)

29. On the morning of March 10, 1994, Ms. Shelby went to the place of business of Boston Tomato and spoke with Mr. Charles Scimeca, President of [Boston Tomato], in Mr. Scimeca's office. Mr. Scimeca stated that discussions had occurred regarding a possible settlement with Mr. Hopkins. [Mr. Scimeca] said that Mr. Ruma had come to his office to discuss a possible settlement of the reparation order against Mr. Hopkins but that nothing had been entered into. Mr. Scimeca stated that he did not have a signed agreement in his possession. (Tr. 90-91.)

30. In a letter dated March 11, 1994, Mr. Paratore advised Complainant that Boston Tomato wished to withdraw its Complaint against Mr. Hopkins because the parties had reached a payment agreement. (CX 4; Tr. 55-56.) Complainant viewed this letter as indicating that Boston Tomato's reparation order against Mr. Hopkins had been satisfied. (Tr. 56-57.)

31. On March 16, 1994, an agreement was issued between Boston Tomato and Mr. Hopkins signed by Mr. Scimeca, Mr. Hopkins, and Mr. Paratore. The agreement provided that Mr. Hopkins would make weekly payments to Boston Tomato, starting at \$50 per week, for a total payment of \$51,372.50, in consideration for Boston Tomato's withdrawal of its reparation action. (CX 9, pp. 2-5; Tr. 7, 122-23.)

32. At a later date, Ms. Shelby called Mr. Scimeca and asked him if he was happy with his settlement of the reparation order against Mr. Hopkins. (Tr. 94.) Mr. Scimeca stated that he was not happy with the settlement as he thought only approximately \$2,000 had been paid, all of which had gone to his attorney, Mr. Paratore. (Tr. 94.) In actuality, only \$1,000 was ever paid. (CX 9, pp. 6-22.) Mr. Scimeca stated that he had previously told Mr. Paratore that he would not consider the reparation order settled until he had a signed, written agreement on hand, backed by collateral or some kind of security. (Tr. 94.) Mr. Scimeca said he told Mr. Paratore that he was not to contact the Department regarding the reparation order until Mr. Paratore had that signed agreement. (Tr. 95.)

33. Respondent's admitted employment of Mr. Hopkins from November 23, 1993, through March 7, 1994, without posting the \$50,000 surety bond required by the Secretary, was in willful violation of section 8(b) of the PACA, as it was an attempt to circumvent the employment sanctions imposed

on Mr. Hopkins resulting from the reparation order issued against him in favor of Boston Tomato.

Discussion and Conclusions

Respondent, pursuant to section 8(b) of the PACA, (7 U.S.C. § 499h(b)), was prohibited from continuing to employ Mr. Dean W. Hopkins without posting a \$50,000 surety bond starting on November 23, 1993, through March 7, 1994, when Respondent terminated the employment of Mr. Hopkins. (Tr. 76-77.) Complainant notified Respondent in three letters, (CX 2, pp. 2-4, 6-7, 15), and four telephone calls, (CX 2, pp. 1, 12; Tr. 36-37, 39-40, 41-42, 46[-47]), that Respondent was prohibited from employing Mr. Hopkins after November 22, 1993, without posting a bond meeting the approval of the Secretary. Despite Complainant's repeated admonitions not to employ Mr. Hopkins without an appropriate bond, Respondent continued to do so through March 7, 1994. (Answer, ¶ V.) [Respondent's employment of Mr. Hopkins from November 23, 1993, through March 7, 1994, was] in willful violation of section 8(b) of the PACA.

Respondent admits employing Mr. Hopkins after November 22, 1993, through March 7, 1994, but denies that such employment willfully violated the PACA. Respondent also asserts several affirmative defenses. However, none of these affirmative defenses has any legal or factual merit. The facts of this case and applicable law show indisputably that Respondent's admitted employment of Mr. Hopkins after November 22, 1993, through March 7, 1994, willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)).

Mr. Hopkins was under employment restriction due to his failure to pay a reparation order issued against him on June 23, 1992, in the amount of \$51,372.50, plus interest. *Boston Tomato Co., Inc. v. Hopkins Fruit Co., supra*, (CX 3). As a result of Mr. Hopkins' failure to pay the June 23, 1992, reparation order, he was barred from employment subject to the PACA for two years from the date of the [reparation] order, or until June 23, 1994. During the period from June 23, 1992, through June 23, 1994, Mr. Hopkins could be employed subject to the PACA only if his employer posted a bond in an amount approved by the Secretary. (7 U.S.C. § 499h(b).)

The purported November 1993 settlement of the reparation order against Mr. Hopkins did not affect the employment restrictions imposed on Mr. Hopkins resulting from such reparation order.

Respondent claims that it was informed by Mr. Dominic Paratore, the attorney for Boston Tomato, in October or November 1993, that the June 23,

1992, reparation order against Mr. Hopkins had been settled. Therefore, according to Respondent, there was no legal impediment to its continuing employment of Mr. Hopkins. However, section 7(d) of the PACA, (7 U.S.C. § 499g(d)), states, as follows, regarding the suspension of a license for the failure to obey a reparation order:

(d) Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period *until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment.* . . . [Emphasis added.]

Section 7(d) makes it abundantly clear that if a licensee does not pay a reparation order in full after 5 days from the period given in the order for payment, its license is suspended until it shows to the satisfaction of the Secretary that full payment has been made. [Consequently, even if there had been a settlement of the June 23, 1992, reparation order against Mr. Hopkins sometime in October or November 1993, which I do not find, the reparation award remained unpaid for the purposes of the employment bar in 7 U.S.C. § 499h(b) until Mr. Hopkins showed to the satisfaction of the Secretary that Boston Tomato's reparation order against Mr. Hopkins had been satisfied. The record shows that the Secretary was not advised that Boston Tomato's reparation order against Mr. Hopkins had been satisfied until the Secretary received Boston Tomato's letter dated March 11, 1994, stating that Boston Tomato wished to withdraw its Complaint against Mr. Hopkins because the parties had reached a payment agreement. (CX 4; Tr. 55-56.)]

Mr. Hopkins' May 20, 1993, discharge in bankruptcy had no effect on the employment restrictions imposed on him for failing to pay a reparation order.

Respondent claims that Mr. Hopkins' May 20, 1993, discharge in bankruptcy constituted full satisfaction of the June 23, 1992, reparation order issued against him in favor of Boston Tomato, thereby ending all employment restrictions imposed on him under section 8(b) of the PACA, (7 U.S.C. § 499h(b)). Respondent is in error, as is clear from the express language of the Bankruptcy Code and from court rulings that bankruptcy proceedings do not affect actions taken pursuant to the PACA regarding the suspension or

revocation of a license.

Congress, in 1978, specifically amended section 525 of the Bankruptcy Code, (11 U.S.C. § 525), in order to authorize continuation of the Secretary's license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984); *In re Fresh Approach, Inc.*, 49 B.R. 494, 496-98 (N.D. Tex. 1985). In addition, it has repeatedly been held that there is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967), cert. denied, 389 U.S. 835 (1967); *In re Fresh Approach, Inc.*, *supra*, 49 B.R. at 496.

Respondent's unlawful employment of Mr. Hopkins was in willful violation of section 8(b) of the PACA, (7 U.S.C. § 499h(b)). *In re John J. Conforti*, 54 Agric. Dec. [649] (1995)[, aff'd in part & rev'd in part, 69 F.3d 897 (8th Cir. 1995)]; *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680 (1994), appeal withdrawn, No. 94-4218 (2d Cir. June 21, 1995); *In re S.E.L. International Corp.*, 51 Agric. Dec. 1407 (1992); and *In re Tri-County Wholesale Produce Co., Inc.*, 45 Agric. Dec. 286 (1986), aff'd per curiam sub nom. *Tri-County Wholesale Produce v. Department of Agric.*, 822 F.2d 162 (D.C. Cir. 1987).

Respondent maintains that the Secretary lacked subject matter jurisdiction to issue the June 23, 1992, reparation order against Mr. Hopkins because Boston Tomato filed a state court action against Mr. Hopkins on December 19, 1991, involving the same issues set forth in Boston Tomato's March 28, 1992, reparation complaint and thus made an election of remedies which deprived this forum of jurisdiction. (Respondent's Brief, pp. [8]-11.) However, this contention is not legally sustainable.

Section 5(a) of the PACA, (7 U.S.C. § 499e(a)), provides that any commission merchant, dealer, or broker who violates any provision of section 2 of the [PACA] shall be liable to the person injured by the violation. Section 5(b) [of the PACA] provides that:

(b) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of the chapter are in addition to such remedies.

7 U.S.C. § 499e(b).

It has been held that section 5(b) requires a PACA claimant to make an election of remedies as between participation in administrative reparation proceedings or pursuit of a civil suit in state or federal court. *Han Yang Trade Co., Inc. v. A.F. & Sons Produce, Inc.*, 52 Agric. Dec. 765 (1993).

Boston Tomato's March 28, 1992, reparation complaint never mentioned the existence of the state court action. [(RX 2.)] Mr. Hopkins never informed the Department that Boston Tomato had filed a similar action against him in state court. If the existence of the state court action had been revealed in the course of the reparation action, Boston Tomato would have been compelled to make an election of remedies. That did not occur and both actions proceeded to judgment without mention of the other, with the June 23, 1992, reparation order issued over a year before the August 18, 1993, state court judgment. (RX 1, p. 1.) The June 23, 1992, reparation order was thus *res judicata* as to the state court action.

Further, Respondent argues that bankruptcy and discharge of a debt stays enforcement of reparation proceedings and orders and that Mr. Hopkins' May 20, 1993, discharge in bankruptcy constituted full satisfaction of the June 23, 1992, reparation order issued against him in favor of Boston Tomato, thereby ending all employment restrictions imposed on Mr. Hopkins under section 8(b) of the PACA. (Respondent's Brief, pp. 11-12.) However, once Mr. Hopkins failed to pay the June 23, 1992, reparation order within the period allowed for such purpose, the employment restrictions under section 8(b) of the PACA, (7 U.S.C. § 499h(b)), automatically went into effect. Although Mr. Hopkins was discharged in bankruptcy on May 20, 1993, his unpaid reparation award was never satisfied pursuant to section 7(d) of the PACA, (7 U.S.C. § 499g(d)), and his employment restrictions [under section 8(b) of the PACA, (7 U.S.C. § 499h(b))], remained. Therefore, Complainant correctly considered the June 23, 1992, reparation order to be unsatisfied at the time it sent the October 19, 1993, notice to Respondent warning of possible action to be taken due to Respondent's employment of Mr. Hopkins. Mr. Hopkins' bankruptcy filing automatically stayed any attempt by Boston Tomato to enforce the reparation award, but did not alter the fact that Mr. Hopkins failed to pay a properly issued reparation order. As a result of this failure to satisfy the reparation order, the disciplinary action for unlawful employment was proper.

Respondent acknowledges, on brief, that it "employed" Dean W. Hopkins, who had failed to pay a \$51,373 reparation order awarded to Boston Tomato, as a produce salesman in 1993 and 1994, [(Respondent's Brief, p. 1),] but seeks to avoid the consequences of the prohibitions of section 8(b) of the

PACA, (7 U.S.C. § 499h(b)). The prohibited employment was from November 23, 1993, through March 7, 1994, during which time Respondent did not post a surety bond meeting the approval of the Secretary.

Respondent's recitation of events recognizes that the Secretary of Agriculture is empowered to order a licensee to pay reparations to a complaining party if the licensee fails to pay for produce. 7 U.S.C. § 499e. A licensee with an unpaid reparation award, or any person responsibly connected to such a licensee, may not be employed by another licensee for two (2) years from the date of the unpaid reparation order without obtaining approval by the Secretary which is conditioned upon the posting of a surety bond by the employer in an amount determined by the Secretary. 7 U.S.C. § 499h(b)(3).

Respondent does not dispute that when the Department learned in October 1993, that Mr. Hopkins was working for Ruma, the Department notified Ruma by letter that Mr. Hopkins could not be employed unless Ruma obtained approval of the United States Department of Agriculture and posted a bond. In the letter, the Department requested certain information from Ruma to establish the bond amount. The Department also advised Ruma that Mr. Hopkins could not be employed thirty (30) days from receipt of the letter, which was November 22, 1993, unless a bond was posted and approval of the Secretary was obtained, and that continued employment of Mr. Hopkins thereafter, without posting a bond, and, obtaining the United States Department of Agriculture's approval, could result in suspension or revocation of Ruma's PACA license.

Respondent seeks to explain its position around a series of events, between Hopkins and Boston Tomato regarding the debt and satisfaction thereof, which occurred prior to the Department's letter. Mr. Dominic Paratore, the attorney for Boston Tomato, had filed a complaint against Mr. Hopkins in Suffolk County Superior Court in December 1991, on the same debt. (RX 1; Tr. 155.) Mr. Paratore later learned that Mr. Hopkins had filed a Chapter 11 Bankruptcy Petition in 1992, so he discontinued further collection activity. (Tr. 157.) Mr. Paratore discovered that Mr. Hopkins filed a Bankruptcy Petition under Chapter 7 in February 1993, and that the debt to Boston Tomato had been discharged in May 1993. (RX 3; Tr. [162-]65.) Mr. Paratore also learned that Mr. Hopkins' Chapter 11 proceeding had been dismissed, so he requested a default judgment in the state court action, which was entered in August 1993, in favor of Boston Tomato for \$51,372.50. (RX 1, p. 1.)

Later in 1993, Mr. Hopkins and Mr. Paratore discussed Mr. Hopkins'

employment with Ruma so Mr. Hopkins could pay off the debt to Boston Tomato. Mr. Hopkins explained that he could not work for Ruma because the unpaid reparation order in favor of Boston Tomato prohibited him from working for any produce company. However, Mr. Paratore then agreed with Mr. Hopkins and Ruma in October or November 1993, *that Mr. Hopkins would remain employed with Ruma, despite the reparation order*, so Mr. Hopkins could begin paying off the debt to Boston Tomato from his wages. (Tr. 170-71.) Mr. Paratore was said to have agreed to draft the paperwork, which allegedly included notification to the United States Department of Agriculture of this arrangement. [(Tr. 250, 252, 255.)]

Mr. Paratore did not notify the United States Department of Agriculture of the arrangement in 1993. In January 1994, the United States Department of Agriculture sent an inquiry to Ruma because it had received reports that Mr. Hopkins was still working for Ruma and no bond had been posted. [(CX 2, p. 15.)] James Ruma contacted Mr. Paratore, who advised him that he was taking care of the matter. [(Tr. 237, 252-55.)] Mr. Paratore then made contact with the Department on January 25, 1994, about the effect of a settlement with Mr. Hopkins, (CX 2, p. 20), and a few days later, Mr. Paratore sent Mr. Hopkins a written agreement allegedly memorializing the parties' agreement reached in October or November 1993. (CX 9, p. 1.) This alleged agreement was not signed by Mr. Hopkins until March 16, 1994.

In mid-February 1994, the Department sent another letter to Ruma advising that it was still receiving reports that Mr. Hopkins was working for Ruma without a bond and that the matter was being referred to the New Jersey Regional Office for an investigation. (CX 2, p. 21.) Ruma again contacted Mr. Paratore, who advised him he was taking care of the matter.

In March 1994, an investigator from the Department appeared at Ruma's place of business and told James Ruma that Mr. Hopkins should not be working for Ruma and Mr. Hopkins' employment was terminated March 7, 1994. [(Tr. 74-77.)] Mr. Paratore then wrote a letter to the Department withdrawing the reparation order. (CX 4.) Mr. Hopkins resumed working for Ruma, and Ruma began deducting payments each week from Mr. Hopkins' wages and sending the payments to Mr. Paratore until Mr. Hopkins left Ruma's employ in August 1994. (CX 9, pp. 6-22.)

Notwithstanding the aforesaid series of events, Respondent argues that the Secretary cannot enforce a reparation order on a debt that has been settled, referring to an alleged settlement of the reparation order between Mr. Hopkins and Boston Tomato in October or November 1993. (Respondent's Brief, pp. 6[-8].)

Respondent has a profound misunderstanding of the nature of the disciplinary action brought herein. Complainant did not bring this action to enforce the reparation order, as the only way a reparation order may be enforced is if the prevailing party initiates a proceeding in the proper United States district court. (7 U.S.C. § 499g(b).) [The instant case is not an action to enforce a reparation order, but, instead, is] a disciplinary action filed against Respondent for willfully failing to comply with section 8(b) of the PACA by unlawfully employing Mr. Hopkins after Complainant notified Respondent in writing that such employment was prohibited unless Respondent obtained a proper bond.

The enforcement of the employment bar is solely the responsibility of the Secretary, pursuant to section 8(b) of the PACA which[, in pertinent part,] specifically provides:

(b) Except with approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

....

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award . . . if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. . . .

7 U.S.C. § 499h(b).

Section 1(9)[, in pertinent part,] states:

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as . . . (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. . . .

7 U.S.C. § 499a(9).

Section 1(10) provides:

(10) The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

7 U.S.C. § 499a(10).

It has been held that "[t]he word 'any' is a broad and comprehensive term . . . that includes *all* kinds of affiliation -- whether minimum or maximum; whether deliberate or not." *In re Tri-County Wholesale Produce Co., supra*, 45 Agric. Dec. at 304.

Accordingly, Respondent's statement that "[i]nstead of moving to enforce the employment bar, Paratore, the lawyer for Boston Tomato, sought to obtain payment on the debt from the salary that Hopkins would earn from Ruma. That being the case, Boston Tomato waived the employment bar [on Hopkins] and agreed that the order was satisfied," [(Respondent's Brief, p. 6),] evidences an incorrect perception of the law. Boston Tomato had absolutely no legal authority to "move to enforce the employment bar" nor could it have "waived the employment bar."

Respondent's argument that the employment bar ceases once there is a settlement of a reparation order, whether or not the Secretary is notified, (Respondent's Brief, p. 8), is immaterial, as the evidence shows that there was no settlement of the reparation order in this case until March 1994. However, Respondent's claim that notification of the Secretary is not required is incorrect. Section 7(d) of the PACA, (7 U.S.C. § 499g(d)), states that if a licensee does not pay a reparation order in full after 5 days from the period given in the order for payment, its license is suspended "until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment."

Complainant's witness, Michael A. Clancy, Head of the License and Program Review Section, testified that the Secretary considers a reparation order paid in full when he receives notice that the award has been satisfied. (Tr. 62.) As Complainant was not notified that the reparation order against Mr. Hopkins had been satisfied until Complainant received Mr. Paratore's March 11, 1994, letter, [(CX 4,)] the employment restrictions on Mr. Hopkins remained in effect until that time.

Respondent contends that license suspension is not an appropriate sanction because:

Ruma would be shut down for being caught in the middle of a misunderstanding between the Department and Boston Tomato. Now add the facts that Ruma has an unblemished record of 95 years in the produce business, a fine reputation in the produce industry, that nothing adverse happened during Hopkins' employment, and that the reparation award was partially satisfied due to Ruma's efforts. To close Ruma down for even one (1) hour under these circumstances would be unconscionable [sic].

[(Respondent's Brief, p. 12.)]

The Judicial Officer of the Department is the final deciding authority in cases of this nature. He has indicated that he accords deference to the recommendation of the administrative officials. In the instant case, Complainant asks for a 45-day suspension of Respondent's PACA license.

The Judicial Officer's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991):

The sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Complainant's sanction witness, Jane E. Servais, Head of the Trade Practice Section, gave testimony at the hearing concerning the need for a 45-day suspension. (Tr. 119-49, 257-69.) Ms. Servais testified that Complainant considered Mr. Hopkins' duties with Respondent, the amount of potential

harm to the produce industry that could occur as a result of Mr. Hopkins' unlawful employment, the size of Respondent's business, Respondent's business reputation, and the fact that there were no other types of violations committed by Respondent. (Tr. 125.)

Respondent's argument that there were no adverse consequences as a result of Mr. Hopkins' employment with Ruma from November 22, 1993, through March 7, 1994, is untenable.

Ms. Servais' statement that the unlawful employment of Mr. Hopkins posed a risk to the perishable agricultural commodities industry which Congress intended be mitigated by the posting of a bond is strongly supported by the opinion of the Judicial Officer in *In re Tri-County Wholesale Produce Co., supra*:

[I]t is clear that Congress regarded a person who fails to pay a reparation award as a defiled person who is likely to contaminate any licensee whose business operations he becomes affiliated with in any manner, with or without compensation, including ownership or self-employment. Congress prohibited any affiliation (with or without compensation) of such a defiled person with a licensee unless (i) the affiliation is approved by the Secretary, and (ii) the licensee furnishes a bond in form and amount satisfactory to the Secretary. [(45 Agric. Dec. at 297).]

The reason for the bonding requirement is briefly summarized herein and is more fully stated by the Judicial Officer in *In re John J. Conforti, supra*, 54 Agric. Dec. at 662-66, of which the following are some excerpts.

[EXCERPT FROM CONFORTI²]

The Perishable Agricultural Commodities Act, as originally enacted in

[²The excerpts from *In re John J. Conforti, supra*, state that section 8(b) of the PACA was amended in 1962 to contain the provisions currently in effect. Since *Conforti* was issued, February 28, 1995, section 8(b) has been amended to add a new sentence at the end of the section which reads as follows: "The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection." (See Perishable Agricultural Commodities Act Amendments of 1995, § 12(b), Pub. L. No. 104-48, 109 Stat. 424, 431 (1995).)]

1930, contained no provisions restricting the employment of a person whose license was suspended or revoked, or who failed to pay a reparation award. The first employment restrictions were added by an amendment adding section 8(b), approved August 20, 1937, which prohibited the employment "in a responsible position" of a person whose license was revoked or who was responsibly connected with a firm whose license was revoked. After 1 year following the revocation, such employment was permissible if a satisfactory bond was filed. The 1937 amendment provided (50 Stat. 725, 730 (1937) (emphasis added)):

(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ *in any responsible position* any individual whose license was revoked or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked. Employment of such individual by a licensee *in any responsible position* after one year following the revocation of any such license shall be conditioned upon the filing by the employing licensee of a bond, in such reasonable sum as may be fixed by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act[.]

In 1956, the employment restriction was made applicable to a person whose license is suspended, or who was responsibly connected with a firm whose license is under suspension. The 1956 amendment to section 8(b) of the Act is as follows (70 Stat. 726, 727 (1956) (emphasis added)):

(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ *in any responsible position* any individual whose license has been revoked or is under suspension or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension. Employment of an individual whose license has been revoked or is under suspension for failure to pay a reparation award or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension for

failure to pay a reparation award after one year following the revocation or suspension of any such license may be permitted by the Secretary upon the filing by the employing licensee of a bond, of such nature and amount as may be determined by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act[.]

Since the Act had previously been amended in 1934 to provide for the automatic suspension of the license of a licensee who failed to pay a reparation award or file an appeal for judicial review (48 Stat. 584, 588 (1934); 7 U.S.C. § 499g(d)), the 1956 amendment made the Act more restrictive than the 1937 amendment, discussed above, as to the employment of a person who had not paid a reparation award.

The legislative history of the 1956 amendatory legislation states (S. REP. NO. 2507, 84th Cong., 2d Sess. 4 (1956) (emphasis added)):

Section 8(b) would authorize the Secretary to suspend the license of a person who employs *in any responsible position* an individual whose license is under suspension. In effect, this would place restrictions on suspended licensees comparable to those now in effect for revocations, and it would serve to eliminate the effectiveness of dummy organizations and other such devices that might be set up to circumvent the suspension penalty.

In 1962, section 8(b) of the Act was amended to contain the provisions currently in effect, which are set forth above (76 Stat. 673 , 675-76 (1962); 7 U.S.C. § 499h(b)). The 1962 amendment makes the Act much harsher, in one respect, with regard to the employment of a person who fails to pay a reparation award. Under the 1962 amendment, such a person cannot be employed in any capacity, without a bond, whereas the previous restrictions were applicable only to employment "in any responsible position." Moreover, at the same time that the employment restrictions were made harsher, in this respect, the definitions of "employ" and "employment," discussed above, were added, defining employment as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment." (7 U.S.C. § 499a(10).)⁸

⁸In another respect, the 1962 amendment relaxed the employment

restrictions as to a person who failed to pay a reparation award since it eliminated the 1-year waiting period.

The legislative history of the 1962 amendatory legislation, which enacted the provisions of section 8(b) currently in effect, states (H.R. REP. NO. 1546, 87th Cong., 2d Sess. 8 (1962) (emphasis added)):

Section 11 amends section 8(b) of the act to clarify and make more effective the provisions of the act with respect to employment by licensees of persons who have been found to have violated the act or failed to pay reparation awards under the act, as well as persons responsibly connected with such persons. It prohibits the employment of these persons by a licensee without the approval of the Secretary and prescribes standards with respect to the conditions for such approval, authorizing the approval of such employment upon the furnishing and maintaining of a surety bond satisfactory to the Secretary as assurance that the licensee's business will be conducted in conformance with the act and all reparation awards paid. Employment under such conditions may be approved, with respect to unpaid reparation awards, at any time and, with respect to persons found guilty of flagrant or repeated violations of the act, after 1 year, with authority in the Secretary to approve employment of the latter persons without a surety bond after the expiration of 2 years. It is further provided that the Secretary may increase the amount of bond required and that failure to comply with his order in that regard shall result in automatic termination of approval. Any licensee hiring a person without the approval of the Secretary in violation of this provision, after notice and opportunity for hearing, may have his license suspended or revoked. *At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee.* Under the present provisions of the act the restrictions against employment are directed specifically to persons whose licenses had been revoked or suspended and persons responsibly connected therewith. The bill extends such restrictions to persons whose licenses could have been revoked or suspended if they had active licenses. As amended, section 8(b) would prohibit employment of

persons covered by it unless such employment is approved by the Secretary; whereas at present it prohibits such employment only after notice by the Secretary.

The court in *Siegel v. Lyng*, 851 F.2d 412, 415-16 (D.C. Cir. 1988), recognized the expanded scope of the employment restriction by virtue of the 1962 amendments, as follows:

Not only is section 499h(b)'s employment bar phrased as an absolute, but also the Act elsewhere defines employment as "*any affiliation* of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment." 7 U.S.C. § 499a(10) (emphasis added). This Court in *Quinn* explicitly remarked that Congress had approved a "clear and equitable' rule that denied him [PACA violator] any employment, for the pertinent period, rather than require a new determination of precisely which positions were closed." 510 F.2d at 756 (emphasis added) (footnote omitted).

Indeed, Congress amended the Act in 1963 precisely to clarify this comprehensive bar. Immediately prior to the 1962 amendments, the Secretary was authorized to sanction licensees only when these employers hired a violator (or responsibly connected person) for a "responsible position." Because this determination proved difficult to administer, the qualification was deleted altogether in 1962. Congress explained the deletion with statements that prove an intent to incorporate an expansive employment bar. The House Committee on Agriculture, for example, stated:

At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee.

H.R. REP. NO. 1546, 87th Cong., 2d Sess. 8 (1962).

From the foregoing, it is clear that Congress regarded a person whose license has been revoked or who fails to pay a reparation award as a tainted person who is likely to contaminate any licensee whose business operations he

or she becomes affiliated with in any manner, with or without compensation. Congress prohibited any affiliation (with or without compensation) of such a tainted person with a licensee unless (i) the affiliation is approved by the Secretary, and (ii) the licensee furnishes a bond in form and amount satisfactory to the Secretary.

[END OF CONFORTI EXCERPT]

The evidence here shows that Mr. Hopkins was affiliated with the business operations of Respondent, thereby constituting "employment," within the meaning of the [PACA], without the posting of an appropriate bond.

Ms. Servais also considered mitigating factors such as the fact that Respondent has been in business for a long period of time without committing other PACA violations. (Tr. 269.) Accordingly, the recommended sanction in this case is much less severe than sanctions imposed in prior decisions involving the unlawful employment of an individual without posting the required bond. *In re John J. Conforti, supra* (90-day suspension reduced on appeal to 30 days); *In re DiCarlo Distributors, Inc., supra* (revocation); *In re S.E.L. International Corp., supra* (revocation); *In re Tri-County Wholesale Produce Co., supra* (revocation).

Respondent Ruma was notified and warned several times that it should not employ Mr. Hopkins without posting a bond which met the approval of the Department. Respondent chose to ignore these admonitions. Considering all relevant circumstances, Complainant's recommended sanction in this case, [a 45-day suspension of Respondent's PACA license,] is appropriate to achieve the purposes of the [PACA]. [Nonetheless, as discussed below, the case is remanded to determine whether assessing Respondent a civil penalty in lieu of a 45-day suspension of Respondent's PACA license would also achieve the purposes of the PACA, and, if the assessment of a civil penalty is appropriate, the appropriate amount of the civil penalty.]

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

On November 15, 1995, the Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424 (1995) (hereinafter PACAA-1995), was approved. Section 11 of the PACAA-1995 amends section 8 of the PACA by adding a new subsection (e) which reads as follows:

- (e) ALTERNATIVE CIVIL PENALTIES.--In lieu of suspending

or revoking a license under this section when the Secretary determines, as provided by section 6, [(7 U.S.C. § 499f),] that a commission merchant, dealer, or broker has violated section 2[,(7 U.S.C. § 499b),] or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e).

On April 1, 1996, Respondent filed Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer, in which Respondent requested "the opportunity to demonstrate the applicability of" section 11 of the PACAA-1995 to the instant case, despite the fact that the PACAA-1995 was approved after Respondent's alleged violation of 7 U.S.C. § 499h(b) and after the ALJ issued the Initial Decision and Order in the instant case. On April 18, 1996, Complainant filed Complainant's Response to Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer (hereinafter CRRM) in which Complainant agreed with the Respondent that the Judicial Officer had authority to impose a civil penalty, but opposed the imposition of a civil penalty in the instant case because a 45-day suspension of Respondent's license is appropriate and "Complainant has reason to believe that [R]espondent's financial condition is very insecure, and that the imposition of any civil penalty would threaten [R]espondent's payment of its current produce obligations." (CRRM, p. 1.)

On April 22, 1996, Respondent filed Respondent's Reply Regarding Further Briefing/Argument requesting a further evidentiary hearing either before the ALJ or the Judicial Officer regarding the sanction to be imposed should Respondent be found to have violated 7 U.S.C. § 499h(b).

In *In re Jacobson Produce, Inc.*, 55 Agric. Dec. ____ (Apr. 12, 1996), I modified an Order previously issued in the case³ in accordance with a joint

³*In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728 (1994), appeal docketed, No. 94-4118 (2d Cir. July 14, 1994).

motion filed by Complainant, Deputy Director of the Fruit and Vegetable Division of the Agricultural Marketing Service, and Respondent, Jacobson Produce, Inc. The Modified Order and Order Lifting Stay provides, in part, that "Respondent [Jacobson Produce, Inc.] shall pay . . . a civil penalty in the amount of \$90,000 . . . In the event Respondent fails to pay, and the PACA Branch fails to receive, said amount on or before April 15, 1996, a 90-day suspension of Respondent's PACA license will take effect on April 16, 1996."

On April 24, 1996, I issued an Order to Show Cause denying Respondent's April 1, 1996, motion for oral argument and Respondent's April 22, 1996, motion for a further evidentiary hearing. The Order to Show Cause also provides that:

Respondent and Complainant shall, within 10 days from the date of service of [the] Order to Show Cause, file with the hearing clerk any cause showing why I should not impose a sanction against Respondent (if Respondent is found to have violated 7 U.S.C. § 499h(b)) which gives Respondent an option of a suspension of its PACA license or in lieu thereof the payment of a civil penalty equal to \$1,000 per day for each day its license would be suspended if Respondent chooses not to pay a civil penalty.

Complainant filed Complainant's Response to Order to Show Cause (hereinafter CR) on May 2, 1996, opposing the imposition of a civil penalty based upon Complainant's belief that "the only appropriate sanction in this case is [a] 45[-]day suspension of [Respondent's license]" and Complainant's "reason to believe that [R]espondent's financial condition is very insecure and that imposition of any civil penalty would threaten [R]espondent's payment of its current produce obligations." (CR, p. 2.) However, Complainant neither provides the reason it believes an insecure financial condition applies, nor does Complainant define what Complainant means by "current produce obligations." Moreover, Complainant avers that, if a civil penalty is to receive any consideration, the record should be reopened to provide for a thorough analysis of Respondent's financial circumstances and only if Respondent is found to be financially stable should the imposition of a civil penalty be considered. (CR, pp. 2-3.) However, I find Complainant's position perplexing because the new civil penalty authority requires neither an analysis of financial circumstances nor a finding that a Respondent is financially stable prior to the assessment of a civil penalty in lieu of a suspension or revocation.

Complainant further states that, in accordance with section 8(e) of the

PACA, (7 U.S.C. § 499h(e)), the size of Respondent's business, the number of Respondent's employees, and the seriousness, nature, and amount of violation must be taken into account. (CR, p. 3.)

Respondent filed Respondent's Reply to Show Cause Order (hereinafter RR) on May 7, 1996, opposing the imposition of any sanction, but stating that, if any sanction is imposed, it should be a civil monetary penalty. (RR, p. 1.) Respondent further states that, in accordance with section 8(e) of the PACA, (7 U.S.C. § 499h(e)), the size of Respondent's business, the number of Respondent's employees, and the seriousness, nature, and amount of violation must be taken into account. (RR, pp. 1-3.) Respondent contends that using the *Jacobson* case as a template, the civil penalty imposed upon Respondent should be \$40 for each day that it would otherwise have had its license suspended minus an unspecified amount based upon the fact that Respondent's alleged violation is much less serious than the violations found in *Jacobson*. (RR, pp. 4-5.)

Respondent further states that, if a civil penalty such as that set forth in Respondent's Reply to Show Cause Order is not imposed, a hearing should be held regarding the issue of imposing a civil penalty. (RR, p. 5.)

On May 9, 1996, I conducted a conference call with counsel for Complainant and Respondent to discuss the need for and the scope of any Remand Order. During the conference call, Complainant continued to maintain that Respondent's financial circumstances and financial stability are relevant to the consideration of the assessment of a civil penalty and may affect the sanction recommendation of the administrative officials charged with the responsibility for achieving the congressional purpose of the PACA.

I agree with Complainant and Respondent that the Secretary has authority assess a civil penalty in lieu of a suspension or revocation of Respondent's license. I agree with Complainant that a 45-day suspension of Respondent's PACA license is appropriate. However, I also agree with Respondent that assessment of a civil penalty in lieu of a 45-day suspension should be considered. Section 11 of the PACAA-1995 amended section 8 of the PACA to specifically provide for the assessment of a civil penalty for violations of section 2 or section 8(b) of the PACA in lieu of suspension or revocation of a PACA license. The legislative history of the PACAA-1995, in relevant part, states:

Section 11—Imposition of civil penalty in lieu of suspension or revocation

Section 11 authorizes USDA to assess civil monetary penalties not

to exceed \$2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 207, 104th Cong., 1st Sess. 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the hearing conducted on 1995 legislation to amend the PACA, (H.R. 1103):

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

....
MR. BISHOP. You want flexibility in the assessment of fees?

....
[MR. HATAMIYA.] Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the hearing:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

I find that the record in this case is not sufficient to determine whether the assessment of a civil penalty in lieu of the 45-day suspension of Respondent's license would be appropriate, and, if assessment of a civil penalty is appropriate, the amount of the civil penalty to be assessed.

Section 8(e) of the PACA, (7 U.S.C. § 499h(e)), provides that, before a civil penalty may be assessed, due consideration must be given to the size of Respondent's business, the number of Respondent's employees, and the seriousness, nature, and amount of the violation. I find that the record is sufficient with respect to the seriousness, nature, and amount of Respondent's violation, but that it is not sufficient with respect to the size of Respondent's business and the number of Respondent's employees.

Therefore, this case is remanded to the ALJ for the limited purpose of determining the appropriateness of the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's license, and, if the ALJ finds that assessment of a civil penalty is appropriate, the amount of the civil penalty to be assessed. The ALJ shall take evidence regarding the size of Respondent's business, the number of Respondent's employees, the sanction

recommendations of at least one administrative official charged with the responsibility for achieving the congressional purpose of the PACA, and any other evidence the ALJ believes necessary to assist her determination regarding the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's license, and issue an Order in accordance with her findings.

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

Order

I

This proceeding is hereby remanded to the ALJ for a determination as to whether to suspend Respondent's license or to assess Respondent a civil penalty in lieu of a license suspension.

II

The license of Respondent, Ruma Fruit and Produce Co., Inc., is hereby suspended for 45 days, unless on remand the ALJ assesses a civil penalty in lieu of the 45-day suspension.

III

The ALJ shall issue an Order suspending Respondent's license for 45 days or, in lieu of the 45-day suspension, assessing Respondent a civil penalty.

PERISHABLE AGRICULTURAL COMMODITIES ACT**REPARATION DECISIONS**

DANIEL P. CROWLEY and MICHAEL D. CROWLEY d/b/a SHAMROCK FARMS of CALIFORNIA v. CALFLO PRODUCE, INC.

PACA Docket No. R-94-174.

Decision and Order filed May 16, 1996.

Acceptance of Rejection - meaningless where rejection effective.

Rejection - title reverts to seller where effective.

Rejection - Duties of Receiver After - obligation to resell.

Burden of Proof - Rejected Goods - upon seller to prove contract warranty inapplicable, and absence of agent or place of business in market of rejection.

Where buyer made an effective rejection of load of strawberries the title automatically reverted to seller, and seller had burden of proving contractual warranty inapplicable. Seller's refusal to accept rejection was meaningless, and seller had a primary duty to dispose of goods. Where seller did not dispose of goods, buyer's duty to dispose of goods was contingent upon seller having no agent or place of business in market of rejection, and burden of proof was on seller to establish that it had no such agent or place of business. However, where buyer assumed duty of resale, it was assumed that duty did rest on buyer, but buyer was held only to good faith standards in making resale.

George S. Whitten, Presiding Officer.

Thomas R. Oliveri, Newport Beach, CA, for Complainant.

Lawrence H. Meuers, Naples, Florida, for Respondent.

Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$9,199.50 in connection with a transaction in interstate commerce involving one truckload of strawberries.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Respondent's answer included a counterclaim for damages "in excess of \$1,500.00" arising out of the same transaction as that covered by the complaint. Complainant did not file a reply to the counterclaim.

The amount claimed in the formal complaint does not exceed \$15,000.00,

and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Complainant also filed a brief.

Findings of Fact

1. Complainant is a partnership composed of Daniel P. Crowley and Michael D. Crowley, doing business as Shamrock Farms of California, whose address is P. O. Box 58, Watsonville, California. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Calflo Produce, Inc., is a corporation whose address is 1284 West Main Street, Santa Maria, California. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about May 21, 1993, complainant sold to respondent, and shipped from Watsonville, California, to respondent's customer in Ft. Worth, Texas, one truck load of strawberries, consisting of 2,688 flats, each flat containing 12 dry pint baskets, at a price of \$6.00 per flat, plus \$644.00 for Tectrol, and \$23.50 for a temperature recorder, or a total of \$16,795.50, f.o.b.

4. The truck load of strawberries arrived at the place of business of respondent's customer, Albertson's, in Ft. Worth, Texas, on May 24, 1993, and was rejected by respondent's customer. Respondent promptly rejected the load of strawberries to complainant. Complainant informed respondent that it was "not accepting any rejection" and requested that respondent secure an inspection of the strawberries. A federal inspection was performed at the place of business of respondent's customer at 12:30 p.m. on May 24, 1993, while the strawberries were still loaded on the truck with the doors open. The inspection revealed in relevant part as follows:

¹Effective November 15, 1995, the threshold amount necessary for hearings in reparation actions was raised to \$30,000 by Public Law 104-48.

LOT	TEMPERATURES	PRODUCE	BRAND/MARKING	ORIGIN	LOT ID	NUMBER OF CONTAINERS	INSP. COUNT
A	39 to 44 *F	Strawberries	"Short Cake" 12 Dry Pint Baskets	CA		2688 flats	N

LOT	AVERAGE DEFECTS	including SER DAM	Including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	02	% 02	%	%Bruising	Calyxes fresh & green. Decay is in moderate stages.
	06	% 06	%	%Decay (0-28%)	
	08	% 08	%	%Checksum	

GRADE:

REMARKS: Restricted to all layers of 8 accessible pallets nearest rear trailer doors.

5. Respondent contacted complainant by phone and it was agreed that the berries needed to be sold as quickly as possible. With complainant's approval the berries were given to Market Dist. in Dallas on an open basis, with the understanding that they had a sale of the berries at \$4.00 per flat. J.M. Wholesale Produce Dist. purchased the berries for \$4.00 per flat, and resold them to W.W. Rodgers & Sons in Dallas, Texas for the same price.

6. On the following day, at 9:10 a.m., the load was inspected again during the process of unloading at the place of business of W.W. Rodgers & Sons, in Dallas, Texas. This inspection showed temperatures of 38 to 41 degrees, 1 percent quality defects in the form of misshapen berries, 6 percent bruising (with a range of 0 to 15 percent), and 6 percent decay (with a range of 0 to 18 percent). It was noted that the berries failed "to grade U.S. No. 1 only account condition defects."

7. An informal complaint was filed on August 17, 1993, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brings this action to recover the balance of the purchase price of a load of strawberries sold and shipped to respondent. Respondent asserts that the load was in such condition on arrival as to show that the contract had been breached, that the load was promptly rejected, and that complainant refused to accept the rejection. Respondent maintains that complainant agreed to the disposition of the load, and to the amount realized from such

disposition. Respondent also contends that it overpaid complainant, and that complainant's breach of contract, coupled with respondent's overpayment, resulted in damages to respondent in excess of \$1,500.00, which respondent seeks to recover in its counterclaim.

It is clear that respondent made a timely rejection of the strawberries. The Regulations give a buyer eight hours after notice of arrival of a truck shipment, and the produce is made accessible for inspection, in which to effect a rejection.² Notice of rejection must be in clear and unmistakable terms.³ Such notice was given in this case, and indeed complainant admits that it received notice of rejection. Thus respondent's rejection was procedurally effective.⁴

Once a buyer has made a procedurally effective rejection title to the goods automatically reverts to the seller.⁵ Thereupon a seller must take possession of the goods even if the rejection was substantively wrongful.⁶ It is therefore meaningless for a seller to state that it refuses to accept an effective rejection.⁷ In addition, following an effective rejection the seller has the burden of proving by a preponderance of the evidence that the rejection was

²7 C.F.R. §§ 46.2(bb) and (cc)(2).

³*Farm Market Service, Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429 (1983).

⁴*See Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Cooperative Association, Inc.*, 38 Agric. Dec. 101 (1979). *See also J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code.* § 7-3. and § 8-3 at p. 264 (1972).

⁵The Uniform Commercial Code makes a distinction between procedurally effective and substantively wrongful rejections. Subsection 4 of UCC § 2 - 401 provides:

A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale". (emphasis supplied)

Thus it has been held that where there was a wrongful but procedurally effective rejection title to the goods was vested in the seller. *Bruce Church, Inc. v. Tested Best Foods Division of Kane-Miller Corp. and/or Frank C. Crispo, Inc.*, 28 Agric. Dec. 377 (1969).

⁶*Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535 (1982); *Produce Brokers & Distributors, Inc. v. Monsour's, Inc.*, 36 Agric. Dec. 2022 (1977).

⁷*Cal/Mex Distributors, Inc. v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1113 (1987).

substantively wrongful.⁸ This extends to the duty of proving, if necessary in the case of an f.o.b. sale, that transportation services and conditions were abnormal so as to make the warranty of suitable shipping condition inapplicable.⁹

The strawberries were sold on an f.o.b. basis. The Regulations,¹⁰ in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,¹¹ in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations.¹² Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of

⁸*Bud Antle v. J. M. Fields*, 38 Agric. Dec. 844 (1979); *Heggeblade-Marguleas-Tenneco v. Fisher Foods*, 33 Agric. Dec. 1443 (1974).

⁹*Sunset Strawberry Growers v. Luna Co., Inc.*, 46 Agric. Dec. 1701 (1987).

¹⁰7 C.F.R. § 46.43(i).

¹¹7 C.F.R. § 46.43(j).

¹²See *Williston, Sales* § 245 (rev. ed. 1948).

the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery.¹³ This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination.¹⁴ If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.¹⁵

The warranty of suitable shipping condition is made applicable only when transportation services and conditions are normal. In this case complainant has asserted that transportation temperatures were shown to be abnormal by the arrival temperatures disclosed by the two federal inspections. However, respondent submitted copies of temperature recorder tapes covering the load which show temperatures throughout the transit period of 30 degrees. The short period between arrival and inspection during which the truck reportedly sat with the doors open would not, in our opinion, account for the excessive decay found in the load. We find that complainant has not met its burden of proving that transportation services or conditions were abnormal. In addition,

¹³See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

¹⁴As an illustration, the United States Standards for Grades of Lettuce (7 C.F.R. § 51.2510 *et seq.*) allow lettuce to grade U.S. No. 1 with 1 percent decay at shipping point or 3 percent decay at destination. The good delivery standards, however, allow an additional "2 percent decay . . . in excess of the destination tolerances provided . . . in the U.S. Standards for Grades of Lettuce." Thus lettuce sold as U.S. No. 1, f.o.b., could have 4 percent decay at destination and therefore fail to grade U.S. No. 1, but nevertheless make good delivery since the amount of decay would not exceed the total of 5 percent allowed by the good delivery standards. Of course, in the case of other commodities for which specific good delivery standards have not been promulgated, the concept of good delivery allows a similar expansion of any destination grade tolerances under the judicial determination of good delivery. See cases cited at note 12, *supra*.

¹⁵See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

complainant has failed to prove by a preponderance of the evidence that the rejection by respondent was in any way wrongful.

Respondent's Mike Pierce claimed in a letter made a part of the Department's report of investigation that during the time between the two inspections:

With responsibility for the condition of the strawberries still in dispute . . . , both parties agreed that the strawberries needed to be sold as quickly as possible. It was decided to move them to Market Dist. in Dallas, Texas on an open basis. The only concrete order was from J.M. Wholesale Produce Dist. of Fort Worth who offered \$4.00 delivered per flat. I called Shamrock with this offer and clearly and concisely explained that this offer was for \$4.00 delivered, not \$4.00 F.O.B. Shamrock agreed to this offer and the load was sold to J.M. Wholesale per said agreement.

Complainant's version of these events is stated in the answering statement of its salesman, Mike Crowley:

After additional phone calls transpired between myself and Mr. Pierce, I finally acquiesced and agreed to settle the entire file on the basis of \$4.00 per carton FOB back to me. . . .

Apparently, now, Calflo is reneging on the agreement which they entered into with me whereby settling this file based on \$4.00 FOB or \$2.00 per carton adjustment. Now they are saying that the \$4.00 per carton also takes into consideration the freight charges. . . .

Thus, in these statements, and elsewhere in the record, complainant insists that the \$4.00 price was a delivered price, and respondent insists that it was an f.o.b. price. The testimonial evidence is evenly divided on this point, and we think the question is decided by a consideration of the status of the parties.

The Uniform Commercial Code, section 2-603, provides in relevant part as follows:

(1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence

of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

According to the Official Comments:

The limitations on the buyer's duty to resell under section (1) of 2-603 are to be liberally construed. The buyer's duty to resell under this section arises from commercial necessity and thus is present only when the seller has "no agent or place of business at the market of rejection".¹⁶

The seller would thus normally have the burden of proving by a preponderance of the evidence that it had no agent or place of business at the market of rejection before the duty of resale would be placed upon the buyer. However, here it is clear that respondent assumed this duty, and we will therefore assume that complainant had no such agent or place of business in the Dallas - Fort Worth area. As we stated earlier, following the effective rejection complainant had title to the strawberries, and under section 2-603 respondent was acting as complainant's agent in their disposition. However, the type of agency here enforced upon respondent is restricted. Respondent is only required to act in good faith. Good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.¹⁷ Respondent's sale of the berries appears to us

¹⁶Official Comment 2 to UCC § 2-603.

¹⁷UCC § 2-103(b).

to meet these requirements. Furthermore section 2-603 specifically provides that a buyer in such position is entitled to all expenses. In this case the receiver, Albertson's, paid the freight, and billed respondent for such freight, which respondent paid. Complainant appears to view the negotiations that took place after the rejection as though the strawberries belonged to respondent, and as if complainant were negotiating a new price at which the berries were to be sold to respondent. However, the berries belonged to complainant, and respondent was not purchasing the berries but acting as complainant's agent in effectuating their sale. It seems unlikely to us that respondent would report to complainant that the resale of the strawberries was for an f.o.b. price when this would result in respondent bearing the cost of freight on goods that belonged to complainant. We conclude that respondent reported to complainant that the berries were resold at a price of \$4.00, from which it was intended that freight and other expenses would be deducted.

Respondent was entitled to a commission on the disposition of complainant's goods. Respondent requests 15 percent of the gross sale price of \$10,752.00, or \$1,612.80, which comports with the customary commission in the trade, and which we will allow. In addition respondent incurred inspection fees in the total amount of \$134.00, and freight amounted to \$2,150.00. These amounts deducted from the \$10,752.00 sale price leave a net amount of \$6,855.20. Since respondent actually paid complainant \$7,596.00 it is entitled to a credit of \$740.80.

Respondent also asserts that it is entitled to damages. We concur. Complainant and respondent were not negotiating a settlement between themselves, because respondent did not have title to the goods. Where a buyer rightfully rejects it may recover damages for non-delivery.¹⁸ The Uniform Commercial Code, section 2-713, provides:

- (1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

¹⁸UCC § 2-711(1)(b).

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

Respondent did not submit any evidence as to market prices. However, respondent did submit a copy of its invoice on the subject berries covering its original resale to Albertson's. This invoice shows that respondent had the berries resold at \$6.40 f.o.b. We will use this figure as the market price of the berries if they had been as warranted. The original contract price, including Tectrol and temperature reorder, was \$6.25, or \$16,795.50 for the load. This amount deducted from the \$17,203.20 that we have determined to have been the market value of the load if it had been as warranted results in damages in the amount of \$407.70. The total which we have found due from complainant to respondent on respondent's counterclaim is \$1,148.50. Complainant's failure to pay respondent this amount is a violation of section 2 of the Act. The complaint should be dismissed.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.¹⁹ Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.²⁰ We have determined that a reasonable rate is 10 percent per annum.

Order

The complaint is dismissed.

Within 30 days from the date of this order complainant shall pay to respondent, as reparation, \$1,148.50, with interest thereon at the rate of 10% per annum from June 1, 1993, until paid.

Copies of this order shall be served upon the parties.

¹⁹*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

²⁰See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

**PEE DEE PRODUCE CO-OP v. SUN VALLEY of the CAROLINAS, INC.
PACA DOCKET NO. R-94-292.**

Decision and Order filed June 3, 1996.

Prerequisites establishing a produce cooperative's standing to initiate a reparation complaint on behalf of individual farmers against a respondent who acts as a growers' agent.

Complainant, a produce cooperative, filed a reparation case on behalf of its farmer members and some non-member farmers whose produce was sold by respondent, a growers' agent. Complainant failed to prove that the individual farmers effectively assigned their rights authorizing complainant to initiate a reparation complaint on their behalf. Complainant was only able to prove that an effective assignment took place in reference to one non-member farmer and three farmer members who represented complainant at the oral hearing. As to the remaining individual farmers who did not effectively assign their rights to complainant, complainant has the burden of proving that it possesses the requisite standing to file a reparation action on behalf of those individual farmers.

The prerequisites, set forth by the United States Supreme Court in *Warth v. Seldin*, 422 U.S. 490 (1975) and later in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977), require that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Complainant failed to prove that it satisfied all of the requirements as to the individual farmers (members and non-members) necessary to establish its associational standing to initiate a reparation complaint on behalf of those who had not effectively assigned their rights to complainant.

Kimberly D. Hart, Presiding Officer.

Eugene P. Warr, Jr., Darlington, SC, for Complainant.

John Chandler, Fort Pierce, FL, for Respondent.

Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely informal complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$35,079.19 in connection with sales proceeds earned from the sale of various produce, all being perishable agricultural commodities, in interstate commerce. A PACA audit was performed at the request of complainant at the business establishments of respondent and respondent's broker, American Growers in 1994. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal

complaint was served upon respondent, which filed an answer thereto, denying the allegations of the complaint and asserting a counterclaim. The counterclaim was served on complainant. Complainant filed a response to the counterclaim which was served upon respondent.

Since the amount claimed as damages exceeds \$15,000.00 and the respondent requested an oral hearing, an oral hearing was held in accordance with section 47.15 of the Rules of Practice (7 C.F.R. § 47.15).¹ The hearing was held on April 13, 1995, in Palm Beach, Florida before Kimberly D. Hart, Presiding Officer. The complainant was *pro se* and the respondent was represented by John Chandler, Esq. located in Fort Pierce, Florida.

Complainant introduced eight exhibits into evidence and respondent introduced three exhibits into evidence. All documents contained in the report of investigation including the audit results are automatically considered as being in evidence. After the hearing, the parties were afforded the opportunity to file proposed findings of fact and conclusions of law as well as briefs in support thereof and claims for fees and expenses. The Department received proposed findings of fact and conclusions of law accompanied by briefs in support thereof from both parties by the agreed upon deadline date. Only complainant filed a timely claim for fees and expenses. Copies of all pertinent documents were served upon each party in accordance with the Rules of Practice.

Findings of Fact

1. Complainant, Pee Dee Produce Co-op, is a corporation whose mailing address is 2513 Lucas Street, Florence, South Carolina 29501.
2. Respondent, Sun Valley of Carolina's, Inc., is a corporation whose mailing address is P.O. Box 2291, Fort Pierce, Florida 34947. At the time of transactions alleged herein, respondent was licensed under the Act.
3. Complainant, on or about April 20, 1992, entered into a contract with respondent to lease its packing house facility to respondent in exchange for rent to be paid to complainant for said lease. The contract set forth all of the particulars of the monies to be paid by respondent including the following language:

¹The statutory threshold amount for an oral hearing was raised from \$15,000 to \$30,000 effective November 15, 1995 by Public Law 104-48.

. . . Sun Valley further agrees to collect five percent (5%) from sales from members and ten percent (10%) from non-members as a co-op processing fee which is packed in house or field packed and pay this to Pee Dee Co-op for Pee Dee Co-op to pay its debts and to use for programs of the co-op.

. . . Sun Valley represents to Pee Dee Co-op that packing charges for "in house" packing in the 1992 season shall be \$2.75 for all 1^{1/9} cartons plus processing fee of five percent sales (5%) sales for co-op members. A charge of \$2.25 for smaller cartons. For non-members of the co-op the charge will be \$2.75 plus processing fee of ten percent (10%) of sales. On cartons or boxes which are field packed, a handling charge of fifty cents (\$.50) shall be made on 1^{1/9} cartons and thirty cents (\$.30) on smaller cartons.

A brokerage charge of 9.5% shall be made on all sales whether "in house" or field packed. Sun Valley will provide harvest money to each member weekly based on pack out. The brokerage fee of 9.5% for the 1992 season will include a field man, USDA Government Inspector, a line grader and broker. The brokerage fee will be negotiated annually. After 45 days of operation Sun Valley plans to run a cost analysis of packing costs and may adjust charges, not to exceed thirty-five cents (\$.35) per carton if this is necessary to operate profitably. Any adjustment will be done with full notice to Pee Dee Co-op and its members with documentation and the adjusted price must be within industry averages.

4. Complainant negotiated with respondent on behalf of area growers, some who were members of the cooperative and some non-members, to reach an agreement by which the respondent would act as sales agent to assist in selling the growers' produce for the 1992 crop season. Respondent thereafter employed the services of American Growers to act as its broker in marketing and selling the growers' produce. Complainant (cooperative) and the growers who sold produce through respondent during the 1992 crop season were dissatisfied with the co-op fees and sales returns remitted by respondent. Complainant alleges that respondent had failed to accurately and truly account to the growers for the disposition of the produce which affected the total sales returns and the co-op fees. The cooperative association is seeking to recover the co-op fees due to it by respondent and the sales returns still owed to the

growers by respondent.

5. Respondent has failed to pay complainant or the growers the sums of money alleged to be due and owing.

6. An informal complaint was filed on October 26, 1992 which is within nine months from when the cause of action accrued.

Conclusions

Complainant states that it is a cooperative formed primarily to organize growers in the South Carolina area and encourage them to diversify crop production so as not to rely on tobacco as their sole crop. Complainant states that it is incorporated in the state of South Carolina and as such is run on a day to day basis by a board of directors who are members themselves. It appears from the overall testimony provided that the cooperative encountered financial difficulties and decided to solicit produce operations to lease its packing facility to pay off debts of the cooperative. At the same time, complainant proposed to solicit area growers, some who were members of the cooperative and some who were non-members, to produce certain quantities of crops that would be handled through the packing facility by respondent.

The cooperative had a two-fold objective in soliciting the area farmers. One goal was to create business for the packing facility by encouraging crop production that would be handled by respondent through the packing facility. This would create more incentive for respondent to operate the facility and the cooperative would generate money from the rent payments to pay its debts. The second objective was to encourage the farmers to diversify their crop production in order to get the greatest returns for their farming efforts with respondent's assistance. The testimony indicates that there were several initial meetings between complainant, respondent and the growers to familiarize the growers with respondent's operation. Sometime thereafter, complainant and respondent contracted for the lease of the packing house facility. Apparently, the complainant and respondent were also in the process of negotiating with the growers who had agreed to grow certain crops to be packed at complainant's facility and sold by respondent. It was complainant who verbally negotiated with respondent on behalf of the growers regarding the specific details. There was no written agreement between the growers and respondent regarding the contractual obligations and duties of the parties for the 1992 season.

The only written evidence submitted that deals with these issues is a statement of company policy issued by respondent to the cooperative and

growers. This statement does not constitute a contract. In addition, the only mention in the "lease agreement" entered into between complainant and respondent regarding the sale of produce is in relation to the packing charges, field charges and brokerage fees to be charged by respondent in operating the packing house facility and the co-op fees to be paid to the cooperative.

Neither complainant nor respondent have submitted a complete listing of the growers who initially agreed to participate in the venture. The testimony provided at the hearing indicates that there were some growers who initially agreed to participate but who failed to produce the type and quantity of produce that they committed to providing to respondent. Respondent has provided a list of the growers for whom it has a record of selling produce. Mr. Chaplin, one of complainant's representatives who appeared at the hearing, testified that there were twenty-nine (29) members of the cooperative but only sixteen (16) who participated in the venture with respondent. There was no number given by complainant as to the total number of non-members who participated. Respondent's accounting shows twenty-one (21) growers participating in the venture. We cannot say with any certainty that all the participants have been accounted for in respondent's records.

The overall testimony persuades us that the cooperative was not involved with the marketing or sale of the growers' produce except to the extent that some of the officers of the corporation were also selling their own produce through respondent. The cooperative did not take title to any of the produce on behalf of the growers nor was it responsible for accounting to the growers for anything related to the sales. The testimony also persuades us that the growers dealt solely with the respondent regarding their individual produce. Ms. Calandro testified that respondent issued checks for the harvest advances and sale returns directly to the individual growers (Tr. at 145, 166, 179, 197, 201). The only money that was to be paid directly to the cooperative were the leasing fees and co-op fees that were computed as a percentage of the growers' sales returns.

In October 1992, complainant filed an informal complaint against respondent alleging that respondent failed to truly and accurately account to the growers for their produce and failed to accurately remit net proceeds in conjunction with those sales. As a result of this informal complaint, an audit was performed at the businesses of respondent, Sun Valley, and respondent's broker, American Growers, who actually sold the growers' produce. The audit results found that an adjusted amount of \$35,079.19 was due to the growers and of that amount, \$3,646.56 was due to the complainant for co-op fees. In addition, the audit found that American Growers underpaid respondent by

\$1,408.69 that would also be due to the growers. Of that \$1,408.69, \$84.87 would be due to the co-op as co-op fees.

The audit revealed that respondent's recordkeeping was in violation of the Act and regulations. For example, the auditor noted that there were major discrepancies between the amount of produce received versus the amount of produce sold as well as in the manner in which respondent accounted for the sales proceeds. Based on the audit results, complainant filed a formal complaint in April 1994, seeking to recover the \$35,079.19 from respondent on behalf of the growers and the cooperative.

Respondent filed an answer to the formal complaint on June 10, 1994, in which it raised an affirmative defense that the contract between complainant and respondent only provided for payments to the cooperative based upon five (5%) percent of sales collected from members and ten (10%) percent of sales collected from non-members and that complainant seeks to recover amounts due to the growers (members and non-members). Respondent alleges that neither the members nor the non-members have been made parties to the complaint nor has the cooperative been empowered by the contract to recover those funds alleged to be due to the growers. Therefore, it is respondent's contention that complainant does not possess the requisite standing to file a reparation complaint to recover monies due to individual growers whether members or non-members of the cooperative.

The complainant filed an answer to the counterclaim but did not address the lack of standing allegation asserted as an affirmative defense. The hearing took place on April 13, 1995, in Palm Beach, Florida. While respondent has raised the issue of standing in its affirmative defense, it is complainant who bears the burden of proving that it possesses the requisite standing to bring the reparation complaint. Standing is a fundamental requirement and must be established at the outset where contested in order for complainant to continue with the action.

Respondent asserts that the cooperative can only recover monies which may be due to them in the form of co-op fees. Respondent contends that it dealt with the members and non-members separate and apart from its dealings with the cooperative. Respondent also alleges that the individual growers are not parties to the contract and therefore complainant does not have standing to sue on behalf of those growers unless it has obtained some assignment of rights from the growers vesting complainant with the authority to act on their behalf or names them as parties to the complaint.

Respondent stated its concern that should reparation be awarded to complainant on behalf of the growers without the requisite proof of standing

or assignment of rights, it has no guarantee that the money would be paid to the growers by the cooperative. Respondent does not want to subject itself to duplicative litigation by the growers if for some reason the cooperative does not pay the growers the portion of the award to which they are entitled. Respondent states that only a portion of the growers are entitled to additional money from respondent and in fact some growers owe respondent money because of harvest advances. Respondent contends that complainant could have dealt with the standing problem quite simply by obtaining written assignments and/or joining the individual growers as parties to the complaint.

Complainant's representatives also provided testimony on the standing issue. The crux of the witnesses' testimony is that a meeting was held with the members of the cooperative who had disagreed with the sales proceeds returned by respondent for their particular produce and that all members verbally agreed at that time to allow the cooperative to represent their interests rather than filing individual claims with PACA (Tr. at 15-17). However, the testimony was conflicting as to which members were present at the meeting, whether the non-members were included in this meeting, which members and non-members present at the meeting actually voiced dissatisfaction with their sales proceeds and wished to pursue a reparation complaint (Tr. at 15-17). It is complainant's contention that the verbal vote taken at this meeting constitutes sufficient evidence that an effective assignment of rights took place.

Complainant has provided no written evidence showing which growers were to be represented by the cooperative or that the verbal assignment of rights took place. Complainant's testimony alone without any documentation to support it is insufficient to persuade us that any assignment of rights took place. The only grower who provided a written assignment of his rights was Garner Rabon. It appears that Mr. Rabon had previously filed a complaint with PACA in his individual capacity to recover monies alleged to be due him. On December 18, 1992, the Department sent a letter to Mr. Rabon informing him that a letter had been received by Mr. Phillip Byrd on behalf of complainant stating that Mr. Rabon desired to drop his individual complaint and join the complaint filed by the complainant. The letter instructed Mr. Rabon that it was necessary to confirm that Mr. Byrd's letter was in accordance with Mr. Rabon's intent before closing the file. Mr. Rabon was told to submit a statement by January 1993 requesting that his file be closed if that was his intent. (Cx-1). Mr. Rabon submitted a statement to the Department requesting that his file be closed and assigning his rights to the cooperative. In addition, the representatives of the cooperative, Mr. Byrd, Mr.

Chaplin and Mr. Gaskins, are on the board of directors of the cooperative and members who sold produce through respondent except Mr. Gaskins who says that he was not a member of the cooperative (Tr. at 205). All three persons indicated that they also wanted to assign their individual claims to the cooperative for recovery of damages on their behalf.

Article III of the Constitution of the United States sets forth requirements for determining if a party possesses the requisite standing to initiate a suit against a party in federal court. If complainant cannot establish standing in this case, it cannot proceed in this reparation case on behalf of the growers except for Garner Rabon. There is no doubt that the cooperative has standing to initiate a reparation complaint against respondent to recover money alleged to be due to the cooperative pursuant to the parties' contract.

The Perishable Agricultural Commodities Act (PACA) was enacted by Congress in 1932 thereby making it a federal statute enforced by the Secretary of the U.S. Department of Agriculture. Pursuant to that statute, complainant filed a formal complaint seeking reparation from respondent based on an alleged violation of section 2(4) of the Act on respondent's part. Section 2(4) of the Act states in pertinent part:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce -

(4) For any commission merchant, dealer or broker to . . . fail or refuse to truly and correctly to account and make full payment promptly in any respect of any transaction in any such commodity to the person with whom such transaction is had. . . .

Section 5(a) of the Act provides that:

(a) If any commission merchant, dealer, or broker violates any provision of section 2 of this act he shall be liable to the person or persons injured thereby for full amount of damages sustained in consequence of such violation.

Section 5(a) of the Act authorizes the Secretary to award reparation to an injured party for a violation of the Act by a commission merchant, dealer or broker. Since the alleged violation is federal in nature, we must look to federal law to determine if standing exists for the cooperative (complainant) to assert an action on behalf of the individual growers (members and non-

members).

"Article III of the Constitution states that judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . ." *Warth v. Seldin*, 422 U.S. 490 (1975), citing *Linda R. D. v. Richard D.*, 410 U.S. 617 (1973). It is clear from Article III that standing implies justiciability that is defined as "a matter appropriate for court review," or that there is some case or controversy.

Therefore, the threshold standing question in regard to justiciability is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth*, 422 U.S. at 499 citing *Baker v. Carr*, 369 U.S. 186 (1962). Apart from the minimum constitutional mandate, the Supreme Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers.

"First, the Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone does not warrant exercise of jurisdiction." *Warth*, 422 U.S. at 499.² "Second, even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* at 499.³

The Supreme Court also acknowledges that "Congress may create statutes, the invasion of which creates standing." "In those cases, the standing question is still whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* at 500. The Court acknowledges that "some circumstances will present countervailing considerations that may outweigh the reluctance to exercise judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." See, e.g., *United States v. Raines*, 362 U.S.

²See, e.g., *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974).

³See, e.g., *Tileston v. Ullman*, 318 U.S. 44 (1943); *United States v. Raines*, 362 U.S. 17 (1960).

17 (1960). Even when there are countervailing concerns, Article III's requirement of case or controversy is still applicable.

The Supreme Court has also determined that an association may have standing solely as the representative of its members whether or not it alleges injury to itself. See, e.g., *National Motor Freight Ass'n v. United States*, 372 U.S. 246 (1963). "The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy." *Warth*, 422 U.S. at 511; See also *Sierra Club v. Morton*, 405 U.S. 727 (1972). The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. *Sierra Club*, 405 U.S. at 734-741.

"So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. *Warth*, 422 U.S. at 511. The prerequisites of associational standing were later affirmed by the Supreme Court in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977). In *Hunt*, the Supreme Court stated that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

The Supreme Court in *Warth* also established that the question of whether an association has standing to sue on behalf of its members must be dependent in substantial measure on the nature of the relief sought. *Id.* at 515. In addressing the subject, the Supreme Court stated:

If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

In the process of holding that the plaintiff association in *Warth* lacked standing, the Supreme Court reasoned:

The present case, however, differs significantly as here an association seeks relief in damages for alleged injuries to its members. Home Builders alleges no monetary injury to itself, nor any assignment of the damages claims of its members. No award therefore can be made to the association as such. Moreover, in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit and Home Builders has no standing to claim damages on his behalf.

There have been other federal cases in which associations have alleged standing to sue on behalf of its members for damages. The rulings in those cases have been consistent with principle set forth in the *Warth* case that relief for damages to members injured to different degrees requires individualized participation from the individual members in order to determine the nature and extent of the injury. See, e.g., *Hunt, supra*; *Dalworth Oil Co., Inc. v. Fina Oil & Chemical Co.*, 758 F. Supp. 410 (1991).

We now turn to the present case to determine if the complainant has standing to bring a suit on behalf of the growers who sold through respondent by employing the prerequisites set forth by the Supreme Court. In this instance, we have a federal statute enacted by Congress enabling persons to initiate a reparation action against a commission merchant, broker or dealer alleging a violation of section 2 of the Act thereby warranting reparation for its damages suffered as a consequence of that violation. The PACA does not require that the complainant (plaintiff) be licensed under the Act or subject to license under the Act in order to file a reparation complaint as long as the respondent (defendant) is a licensee or operating subject to the Act during the relevant time period.

In accordance with the *Sierra Club* decision, the cooperative must allege that its members or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought the suit. In the present case, the cooperative is alleging that some of its members and non-members are suffering from immediate monetary injury due to the fact that respondent has not properly accounted to them for their produce or properly remitted the proceeds from the sale of their produce in violation of section 2 of the Act.

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The cooperative is also alleging that it is suffering immediate monetary injury as a consequence of respondent's failure to account and remit properly to the members and non-members which has resulted in it receiving less co-op proceeds than it was entitled to receive under the parties' contract. We find that the members as well as the non-members would be entitled to initiate separate reparation actions against respondent to recover monies allegedly owed to them by respondent resulting from the sale of their produce providing that they meet the statutory time period for filing such actions. We find that the cooperative satisfies the first prerequisite for standing as it applies to both members and non-members.

We now look to the second prerequisite which is whether the interests that the cooperative seeks to protect are germane to the organization's purpose. Even though we concede that the cooperative's initiating suit on behalf of its members seeks to protect interests germane to the cooperative's purpose, we cannot concede that the cooperative's initiating a suit on behalf of non-members seeks to protect interests germane to the cooperative's purpose. There is a distinct difference between a cooperative bringing suit on behalf of its members and a cooperative bringing suit on behalf of non-members. A cooperative is generally formed for the benefit of its members and governed by those who are members of the cooperative. Those persons who choose to participate in a cooperative acquire an economic stake in the cooperative by virtue of their financial contributions to the cooperative which consequently gives them a vote as to the manner in which the cooperative is operated. Therefore, the cooperative has an important task of promoting the best interests of its membership group which would be in keeping with the organization's purpose. The cooperative has shown a direct link between itself and its members.

However, the same is not true for non-members who have no economic stake or voting power within the cooperative. The only connection these non-members have to the cooperative is that they were solicited by the cooperative to grow and harvest produce to be handled by the packing facility and sold by respondent on their behalf. The evidence shows that all of the growers, members and non-members alike, dealt solely with respondent in the packing, marketing and sale of their produce. The growers (members and non-members) were given harvest advances and paid sales proceeds by respondent with no money passing through the cooperative.

The cooperative never took title to any of the produce nor did it participate in the sale of the produce on behalf of any of the growers. The only money received by the cooperative from respondent was co-op fees that

were paid directly to the cooperative by respondent. The cooperative was not integrally involved with the growers or respondent in the marketing and sales operations and as such maintained no records in regard to the manner in which the produce was packed, marketed or sold by respondent. The link between the cooperative and non-members is tenuous at best.

We, therefore, cannot conclude that the non-members' interests sought to be protected by the cooperative are germane to the organization's purpose. The cooperative's principal purpose is to promote the best interests of its membership base which does not include non-members.

The third prerequisite which complainant must satisfy to establish associational standing is a showing that the individual participation of the injured parties is not required to fully adjudicate the matter when taking into consideration the claim and the relief requested. In consideration of the nature of the claim and relief requested, we find that the individual participation of all of the injured parties, members and non-members alike, is required to fully adjudicate the matter.

After review of the relevant documentation in evidence, we are persuaded that the damages alleged to have been suffered by the individual growers are not common to the entire membership nor shared by all of the members in equal degree. We cannot even compare the non-members to the entire membership group since to do so would be comparing "apples to oranges" *per se*. As to the members, the damages alleged to have been suffered are not common to the entire membership nor shared by all of the members in equal degree. Complainant itself does not allege that all of the members of the cooperative suffered injury or that the members who have suffered injury have done so in equal degree. In fact, the evidence shows that only certain growers may be entitled to damages based on respondent's violations and those damages may differ according the quantity and quality of the produce involved with each members.

This is not a case where the parties are requesting injunctive or declaratory action but instead are seeking to recover monetary damages. Fair adjudication of this matter requires individualized proof from each grower, member and non-member, as to the nature and extent of its monetary damages. It is complainant's burden to prove its allegations and resulting damages by a preponderance of the evidence. Complainant has not submitted sufficient documentation from either the members or the non-members to present such individualized proof of damages. We have reviewed the evidence submitted by both parties at the hearing and find that we are unable to determine the extent of damages incurred by the affected growers due to the

inconsistencies contained in the documents.

Complainant has submitted very little evidence to prove its allegations and instead relies heavily on the PACA audit as a basis for its proof of damages. Complainant's evidence was not presented in any orderly or coherent fashion at the hearing. We find respondent's evidence to be unreliable since we are aware that respondent maintained its records in such a manner that it is unable to fully account for all of the growers' produce much less the sales proceeds.

In addition, there are several problems with the PACA audit results that prevent us from adopting the results as indicative of the damages incurred by the growers. The PACA auditor revealed severe discrepancies in respondent's records and the records of its broker, American Grower, in terms of the amount of produce received by respondent and the amount of produce recorded as being sold.

Basically, respondent received more produce from the growers than it recorded as being sold. Respondent has no reasonable explanation for this discrepancy and has expressed no sense of responsibility to account to the growers for the "lost" produce. Respondent seeks to place the blame for this lack of accurate accounting solely with American Growers (Tr. at 213-260). However, respondent, not American Growers, is answerable to its principals, the growers.

Ms. Calandro, president of respondent, testified that it was the growers who actually hired American Growers to sell the produce and as such they should have been in contact with American Growers to obtain information as to their produce (Tr. at 218). However, the evidence established that it was respondent that hired American Growers and in doing so has responsibility for actions taken by American Growers with respect to the growers' produce. Respondent attempts to abdicate its responsibilities to these growers. The PACA audit also revealed that respondent granted authority to American Growers which had not been granted to it by complainant. Again, respondent alleges that since American Growers failed to accurately account to it, it was relieved of any obligation to account to the growers. Ms. Calandro testified that she felt that the growers took the risk that their produce may be disposed of improperly without the requisite accounting (Tr. at 213-260).

We will not allow respondent to abdicate its responsibilities to the growers by attempting to place those responsibilities with American Growers. It is not the grower who takes the risk that the broker will act irresponsibly in selling its produce but the sales agent who ultimately must account to the grower. The respondent bears the consequences of its agent's failure to act responsibly.

as well as its own failure to adhere to the regulations and Act in its capacity as a sales agent. After review of the evidence, we conclude that respondent violated section 2(4) of the Act by failing to truly and correctly account to the growers for the disposition of their produce and failing to pay promptly the proceeds due to those growers. In addition, respondent has violated several provisions of the regulations as set forth below.

Section 46.32(b) of the Regulations (7 C.F.R. §46.32(b)) states in pertinent part:

A growers' agent whose operations include such services as the lanting, harvesting, grading, packing, furnishing of containers or other supplies, storing, selling or distributing produce for or on behalf of growers shall prepare and maintain complete records on all transactions in sufficient detail as to be readily understood and audited. Agents must be in a position to render to the growers accurate and detailed accountings covering all aspects of their handling of the produce. Agents shall maintain a record of all produce received in the form of a book (preferably a bound book) with numbered pages or comparable business record, showing for each lot, the date received, quantity, the kind of produce and the name and address of the grower. A lot number or other positive means of identification shall be assigned to each lot in order to segregate the various lots of produce received from different growers for similar produce being handled at the same time. Each lot shall be so identified and segregated throughout all operations conducted by the agent, including the sale or other disposition of the produce. . . . The agent shall prepare and maintain full and complete records on all details of such distribution to provide supporting evidence for the accounting.

The audit results were that respondent failed to maintain complete records that accounted for the ultimate disposition of the produce. Respondent did not maintain a complete record of all produce received by the growers as prescribed by the regulations. In addition, respondent failed to assign lot numbers to all of the produce received by the growers as a means for identifying and segregating the produce.

These deficiencies are made obvious by the fact that the auditor was unable to trace all of the growers' produce received by respondent after a review of respondent's records and American Grower's records. The responsibilities and obligations remain with the agent throughout the course

of the grower/agent relationship. Section 46.30 of the regulations (7 C.F.R. § 46.30) states that an agent only has that authority that has been granted to it by the growers. In the present case, the PACA audit found that respondent granted authority to the broker, American Grower which had not been granted to it by the growers. For example, respondent granted American Growers the authority to dump produce without sufficient justification and grant unilateral adjustments/credits to customers. Respondent exceeded the bounds of its authority as a sales agent. Section 46.23 of the regulations (7 C.F.R. § 46.23) states that there is reasonable cause for destroying produce that has been found to have no commercial value but when produce is being handled for or on behalf of another person, the agent is responsible for obtaining the necessary proof that the produce has no commercial value when more than five percent of a shipment is being dumped or destroyed. The PACA audit found that American Growers dumped or destroyed produce without obtaining the necessary documentation to justify the dumping in violation of this provision. Respondent must bear the consequences of American Grower's actions since the regulations squarely place the responsibility with the agent for ensuring that actions taken are in accord with the requirements of the Act.

The PACA audit discovered that respondent was not granted the authority to allow American Growers to dump produce without supplying documentation to justify those actions. Even if American Growers took actions that were against the instructions of respondent, respondent is still ultimately responsible for accounting to the growers for their produce. American Growers was acting on behalf of respondent but had no contractual obligation to the growers. The audit also found that respondent had recordkeeping discrepancies that were in violation of section 46.14 of the regulations (7 C.F.R. § 46.14).

We have independently reviewed the findings of the PACA audit with regard to the violations committed by respondent, taking into account the testimony provided by the parties at the hearing. It is our finding that the PACA audit results with respect to the manner in which respondent handled the growers produce are accurate and are adopted as finding for purposes of concluding that respondent did in fact violate section 2(4) of the Act and several provisions of the regulations as set forth above.

Although we feel that respondent violated the Act and regulations with respect to its handling of the growers' produce, there remains an obstacle that prevents us utilizing the results of the PACA audit to determine the extent of damages suffered by the individual growers as a result of those violations.

The PACA auditor was unable to determine the amounts due to each individual grower since American Growers did not segregate the produce by grower and its records were not maintained by individual grower. Respondent's records do not clear up the discrepancies since we find those records to be inaccurate and unreliable for reasons stated above.

We have made several attempts to independently determine damages for the individual growers and find it to be impossible to reconcile American Growers' records with complainant and respondent's records. Even if it were possible to reconcile the evidence coherently, we cannot ignore that any determination would be speculation due to the fact that we have no way of determining the amount of produce that was actually received by respondent from the growers. None of the evidence submitted by the parties adequately addresses this problem.

Under these circumstances, the individual grower is the best party to present this type of evidence as to its own produce. It is the individual grower who is in the best position to present the most accurate evidence as to the amount of produce entrusted to respondent, the sales proceeds returned, the applicable deductions taken for handling, freight, and box charges, the harvest advances given by respondent as well as the amounts alleged to be unpaid and owing by respondent. Complainant has not shown that it can overcome these obstacles in order to adequately represent the growers', members' and non-members' claims.

Based on the foregoing, we conclude that the complainant has not satisfied the third prerequisite for establishing associational standing for the members or the non-members. The third prerequisite is that the complainant must show that the individual participation of the injured parties is not required to fully adjudicate the matter when taking into consideration the claim and the relief requested. We find that complainant has not satisfied all of the prerequisites for establishing associational standing thereby entitling it to pursue a reparation complaint on behalf of members and non-members who sold through produce through respondent. Therefore, complainant cannot be allowed to pursue the members' or the non-members' claims in this reparation case.

We must now address the issue of Garner Rabon, a non-member, who assigned his interests in writing so that the cooperative could pursue its interests in this reparation case. While we have previously concluded that the cooperative does not have associational standing to pursue the interests of the non-members, Mr. Rabon is in a unique position because there is proof that he did assign his interest to the cooperative. Mr. Rabon had previously filed

a reparation complaint against respondent but later withdrew that complaint.

As to Mr. Rabon, the cooperative can pursue his interests in this case but still carries the burden of proving a violation of the Act by respondent and resulting damages to Mr. Rabon as a result of the violation. We have reviewed the evidence submitted and encounter the same problems as with the other growers. First, the PACA audit does not provide sufficient guidance because there is no way to segregate Mr. Rabon's produce and sale proceeds. Complainant has not supplied us with any other evidence by which to determine the amount of produce supplied by Mr. Rabon, or the amount of produce sold by American Growers. We do have records from respondent regarding its accountings that present problems in terms of accuracy. Complainant has not set forth any indication of the extent to which it feels Mr. Rabon has been injured.

We have checked the Department's records to ascertain if it is still in possession of the documents filed by Mr. Rabon. We have discovered that the documentation was forwarded to the Federal Records Center for storage and subsequently destroyed two years after the informal complaint was closed. Accordingly, the documentation submitted by Mr. Rabon was destroyed in 1995 in accordance with the PACA Branch's records retention schedule. However, we will stay this proceeding for a period not to exceed sixty (60) days from the date of this order as it relates to Mr. Rabon's claim in order to afford complainant the opportunity to resubmit Mr. Rabon's documents to the PACA Branch, if it chooses to do so, in order to determine the extent of his individual damages.

As to the issue of Mr. Byrd, Mr. Chaplin and Mr. Gaskins, all of whom have assigned their rights to complainant⁴, we must determine if complainant has submitted sufficient evidence to carry its burden of proving the extent of their damages. All three were members of the cooperative and claim to have sold produce through respondent. These persons were present at the hearing and thus in the best position to represent their own interests. Although we think ample evidence exists to show a violation on respondent's part, none of the parties was able to provide a reasonable means by which to determine their damages. Complainant submitted no evidence other than copies from a receiving book that purports to show the produce which respondent did not account for and which was not taken into account by the PACA auditor.

⁴Mr. Byrd, Mr. Chaplin and Mr. Gaskins represented to the Presiding Officer at the hearing that each one wished to assign their right to pursue a claim against respondent to complainant.

However, complainant has not provided any evidence as to the exact amounts of produce supplied by each person or the specific disagreements that it had with respondent's methods of accounting.

We cannot use respondent's accounting as a basis for determining damages since those records are unreliable and incomplete. For instance, Mr. Chaplin asserts that respondent sold its produce yet respondent's records do not list Mr. Chaplin as a grower. Mr. Chaplin asserts that he supplied produce in conjunction with Mr. Tedder who is listed on respondent's accounting sheet (Tr. at 161, 244-248). We have reviewed the files submitted by respondent which are arranged by grower. There is no file for Chaplin/Tedder but there is a file for Tedder. Ms. Calandro stated that she kept a separate cash file for the Chaplin/Tedder account which was not included in the evidence submitted (Tr. at 257). We cannot say with any certainty that the produce accounted for in respondent's file includes Mr. Chaplin's produce.

We cannot use the PACA audit results to determine the damages for any of the three growers since there is no way to determine which portion of the \$35,000.00, if any, was due to those persons. In addition, we cannot determine if the records submitted by complainant to account for the missing produce actually was not taken into consideration by the PACA auditor. We simply cannot engage in speculation in determining damages.

Therefore, we conclude that complainant has not met its burden of proving the extent of damages incurred by Mr. Byrd, Mr. Chaplin and Mr. Gaskins as a result of respondent's violations. Accordingly, we cannot grant recovery to complainant on behalf of these individuals. The complaint as it relates to Mr. Byrd, Mr. Chaplin and Mr. Gaskins is hereby dismissed against respondent.

Respondent has alleged that Mr. Byrd owes it \$651.51 according to its accounting records. Since we have previously determined that the records submitted by respondent are unreliable and incomplete, we will certainly not rely on it to grant respondent any recovery from this particular individual. Therefore, we conclude that respondent has not carried the burden of proving that Mr. Byrd owes it any amount of money based on harvest advances. Respondent has not specifically alleged that Mr. Chaplin or Mr. Gaskins owe any money to it for harvest advances so we need not address the issue in relation to these growers. Respondent's request for set-off as it relates to these three growers is hereby denied,

The only issue left for resolution is whether the respondent is liable to complainant for any further co-op fees than have been previously remitted by complainant. As stated previously, the co-op fees were computed from the sales proceeds generated from the individual growers. The co-op was to

receive 5% of the sales proceeds from its members and 10% of the sales proceeds from the non-members. The complainant has not specified the amount of co-op fees alleged to be owed to it. The PACA audit found that the cooperative was due at least \$3,731.43 in co-op fees based on the \$36,487.88 found to be owing to the growers. However, we cannot base recovery on the PACA audit since it is first necessary to conclude that the figures contained in the audit are an adequate representation of the amounts due to the growers.

Our previous discussion sets forth our determination that the cooperative cannot represent the growers' interests in this proceeding due to lack of standing. Accordingly, we cannot make a determination that the respondent owes the growers the amount found in the audit. However, respondent's answer admits to owing the cooperative \$2,825.50 in co-op fees after taking into account a previous payment made to the cooperative amounting to \$238.60. Therefore, based on respondent's own admission, we find that respondent is liable to complainant in the amount of \$2,825.50 in co-op fees.

Complainant has also alleged that respondent increased its packing charges without providing proper notice to the cooperative and without obtaining approval to increase the charges. The contract states:

After 45 days of operation Sun Valley plans to run a cost analysis of packing costs and may adjust charges not to exceed thirty-five cents (\$.35) per carton if this is necessary to operate profitably. Any adjustment will be done with full notice to Pee Dee Co-op and its members with documentation and the adjusted price must be within industry averages.

Respondent contends that the contract did not require them to give complainant 45 days advance notice that the charges may be increased nor was it required to obtain the approval of complainant prior to increasing the charges. There was a great deal of testimony on this issue (See Tr. at p. 99-125).

Complainant admits that there is no provision requiring that it be given 45 days advance notice of the increase although it is of the opinion that the contract implies that it will be given advance notice. Complainant also concedes that the contract does not specifically require its approval prior to increasing the charges although it feels that approval is implied. None of the representatives could provide definite testimony as to whether board of directors and the members received copies of the packing charge increases.

Mr. Byrd and Mr. Chaplin testified that neither could recall receiving the information. Mr. Gaskins testified that he does not believe that he was a member at that point in time such that he would not have received a copy (Tr. at 99-125).

Neither of the three representatives testified with any degree of certainty that the other board members and members did not receive copies of the packing charge increases. They can only speak for themselves which is not sufficient for evidentiary purposes since it does not establish that notice was not provided in accordance with the contract.

The complainant was responsible for drafting the contract and as such could have specifically provided for those provisions that it seeks to impose by implication. Complainant chose not to do so and cannot complain about it now. Complainant cannot produce any evidence to show that the increases imposed by respondent were not within the industry averages as required by the contract. We find that the contract does require full notice to the cooperative of increases in packing charges but does not require respondent to obtain approval prior to increasing the packing charges.

In addition, we are persuaded that notice of those increased charges were provided to the cooperative and the members in accordance with the contractual provision. We find no evidence to show that respondent increased its packing charges beyond the industry averages since we have no industry averages in evidence to compare with respondent's packing charges. Complainant has not carried the burden of proving that respondent increased its packing charges beyond industry averages and without obtaining approval from cooperative prior to increased those charges.

Respondent raised a side issue which we find necessary to address. Respondent alleges that the contract between complainant and respondent was not valid due to the fact that there was a contractual provision which required complainant to obtain approval of the contract in its entirety by the Pee Dee Regional Development Center. Respondent contends that such approval was never obtained and complainant does not deny that it did not obtain any written approval from Pee Dee Regional Development Center (Tr. at 96-99).

We have reviewed the pertinent contractual provision and there is no language which states that the validity of the contract is conditioned upon obtaining this approval. Therefore, we conclude that the fact that complainant has not shown that it obtained such approval does not invalidate the contract between the parties.

To sum up the conclusions reached in this decision, we find the following:

- 1) Complainant, in its capacity as a cooperative, has not satisfied the prerequisites set forth by the Supreme Court for establishing associational standing to initiate a reparation case on behalf of members and non-members who sold produce through respondent;
- 2) Complainant has not obtained effective written assignment of rights from any of the members or non-members involved except Garner Rabon such that it can pursue a reparation complaint against respondent on behalf of those persons;
- 3) Respondent violated section 2(4) of the Act and the applicable regulations pertaining to growers' agents and the dumping of produce;
- 4) Complainant does have the right to pursue the claim of Garner Rabon who effectively assigned his rights to complainant;
- 5) The proceeding will be stayed only as to Mr. Rabon for a period not to exceed sixty (60) days from the date of the order in order to allow complainant to resubmit Mr. Rabon's documentation regarding his individual claim to determine if it is possible to determine more accurately the extent of his damages as a result of respondent's violations;
- 6) Mr. Byrd, Mr. Chaplin and Mr. Gaskins have provided sufficient evidence to show that they have assigned their claims to complainant to pursue in the reparation case;
- 7) Complainant has not carried the burden of proving the extent of damages suffered by either of these three individuals ;
- 8) Respondent has not carried the burden of proving that it is entitled to recover sums of monies alleged to be owing from Mr. Byrd, Mr. Chaplin or Mr. Gaskins based on its allegation that these individuals were provided with harvest advances which were not repaid;
- 9) Respondent has admitted to owing the cooperative \$2,825.50 in co-op fees and thus is liable to complainant for this amount;
- 10) Complainant has not proven that respondent improperly increased

its packing charges in violation of the terms of the parties' contract; and

- 11) Respondent has not proven that complainant's failure to obtain approval of the contract from Pee Dee Regional Development Center rendered the parties' contract invalid.

Respondent's failure to pay the \$2,825.50 to complainant is a violation of section 2 for which reparation should be awarded. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award. See *Perl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 28 Agric. Dec. 66 (1963).

Complainant filed a claim for fees and expenses incurred in connection with the oral hearing. Fees and expenses in hearing cases will be awarded to the extent they are reasonable. *Pinto Bros. v. F. J. Bolestrieri Co.*, 38 Agric. Dec. 269 (1979); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989). Normally, the prevailing party is the party in whose favor a judgment is entered even if the party does not recover its entire claim. *Bill Offutt v. Berry*, 37 Agric. Dec. 1218 (1978); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989). However, recent case precedent dictates that in instances where a respondent successfully defends against a large portion of the claim and an award is issued in favor of the complainant, the respondent is deemed to be the prevailing party. See *M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596 (1990) in which an award was issued in favor of the complainant but the respondent defended successfully against \$75,342.81 of complainant's \$79,521.73 claim which made respondent the prevailing party.

In the present case, an award for \$2,825.50 is being issued in favor of complainant but respondent has successfully defended against \$32,253.69 of the original claim of \$35,079.19. Therefore, we must conclude that respondent is the prevailing party in this case. Respondent failed to submit a timely claim

for fees and expenses therefore none can be granted.

If a determination is made at a later date that Garner Rabon is entitled to a specific sum of damages based on respondent's violations that significantly exceeds the award in this case, we reserve the right to revisit the issue of complainant's claim for fees and expenses.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$2,825.50, with interest thereon at the rate of 10 percent per annum, from October 1, 1993, until paid.

The proceeding is hereby stayed for a period of sixty (60) days in relation to Garner Rabon until such time as a determination can be made as to proof of his damages.

Copies of this order are to be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT**MISCELLANEOUS ORDERS**

In re: POTATO SALES CO., INC., TSL TRADING, INC., d/b/a SL INTERNATIONAL, AND EVER JUSTICE CORPORATION.

PACA Docket No. D-93-513.

Order Denying Petition to Reopen Hearing to Take Further Evidence as to Potato Sales Co., Inc., filed January 19, 1996.

Andrew Y. Stanton, for Complainant.

Steven J. Vining, Los Angeles, CA, for Respondent.

Order issued by Michael J. Stewart, Acting Judicial Officer.

Respondent Potato Sales Co., Inc., cites the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, section 1.146(a), for authority to reopen the hearing to take further evidence. However, the pertinent section of the Secretary's Rules of Practice, section 1.146(a)(2) (7 C.F.R. § 1.146(a)(2)), reads in pertinent part, as follows:

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer.

The Judicial Officer's Decision and Order herein was issued on September 21, 1995, but, Respondent's petition was filed on November 17, 1995. Therefore, this petition is untimely, and must be denied for not conforming to the Rules of Practice.

Moreover, even if timely filed, the petition would be denied because the petition states no valid basis for reopening the hearing. First, Respondent's argument that settlement negotiations were "improperly" stopped erroneously assumes that Complainant's counsel *must* negotiate settlement whenever Respondent demands it. No authority is cited for such a position; moreover, there is no such authority. Second, as Complainant points out in its "Opposition to the Petition to Reopen the Hearing Filed by Respondent Potato Sales Co., Inc.," page 2 (Jan. 11, 1996), the Rules of Practice require "a good reason why such evidence was not adduced at the hearing." I find that Respondent provides no good reason why this matter could not have been raised during the hearing.

Respondent's petition is denied.

**In re: JACOBSON PRODUCE, INC., AND GEORGE SAER, d/b/a G.W.
"GEORGIE" SAER CO.**
PACA Docket No. D-92-555.
Modified Order and Order Lifting Stay filed April 12, 1996.

Andrew Y. Stanton, for Complainant.
Leonard Kreinces, Great Neck, NY, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

The Order previously entered in this case¹ is modified in accordance with the Joint Motion to Modify Order filed on April 12, 1996, by Complainant and Jacobson Produce, Inc., (hereinafter Respondent), as follows:

Respondent shall pay by certified check or money order a civil penalty in the amount of \$90,000, payable to the United States Treasury. In the event Respondent fails to pay, and the PACA Branch fails to receive, said amount on or before April 15, 1996, a 90-day suspension of Respondent's PACA license will take effect on April 16, 1996.

The Stay Order issued in this case pending the outcome of proceedings for judicial review, 53 Agric. Dec. 760 (1994), is hereby lifted.

This Order shall take effect immediately.

In re: DONALD BECK.
PACA APP Docket No. 96-01.
Dismissal filed June 6, 1996.

Andrew Stanton, for Complainant.
Bart M. Botta, Newport Beach, CA, for Respondent.
Dismissal issued by Victor W. Palmer, Chief Administrative Law Judge.

The Agency in this proceeding, the PACA Branch, Fruit and Vegetable Division, has advised that the Chief's September 25, 1995, determination has been withdrawn.

Therefore, there is no need for this proceeding to continue and it is hereby dismissed.

¹*In re Jacobson Produce, Inc.*, (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728 (1994).

**In re: DENNIS YOUNG.
PACA APP Docket No. 96-03.
Order Dismissing Petition filed July 2, 1996.**

Kimberly Hart, for Complainant.

Respondent, Pro se.

Order Dismissing Petition filed July 2, 1996.

Dismissal issued by James W. Hunt, Administrative Law Judge.

On August 1, 1995, the agency in this proceeding, PACA Branch, Fruit and Vegetable Division, made the determination that the petitioner, Dennis Young, was responsibly connected with O & J Produce Corporation, which was a firm found to have engaged in willful, repeated, and flagrant violations of the PACA.

On April 23, 1996, petitioner filed a petition for review of the agency's determination, contending that he was not responsibly connected with O & J Produce Corporation.

On June 28, 1996, the agency filed a motion to dismiss the proceeding on the ground that it had withdrawn its determination that petitioner was responsibly connected with O & J Produce Corporation.

Accordingly, as there is no determination that petitioner was responsibly connected with O & J Produce Corporation, his petition for review is dismissed.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

TSAO-HSIU C. LIN and TU-CHIN "JOSEPH" LIN, d/b/a GROW FOODS, CO. and K F FARM, INC.

PACA Docket No. D-94-517.

Decision and Order as to Tsao-Hsiu C. Lin d/b/a Grow Foods, Co. and Order of Dismissal as to Tu-Chin "Joseph" Lin filed August 21, 1995.

Failure to file an answer - Failure to pay annual renewal fee - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

John Vos, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint originally filed on January 3, 1994, and amended on December 14, 1994, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that Tsao-Hsiu C. Lin and Tu-Chin "Joseph" Lin doing business as Grow Foods, Co., during the period November 1991 through November 1992, failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$172,150.90 for 62 lots of perishable agricultural commodities, which were purchased, received, and accepted in interstate commerce.

A copy of the complaint was served upon the respondents. Tsao-Hsiu C. Lin and Grow Foods Co., failed to file an answer within the time provided by the Rules of Practice. Tu-Chin "Joseph" Lin filed an answer. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order against Tsao-Hsiu C. Lin, doing business as Grow Foods, Co., the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Tsao-Hsiu C. Lin doing business as Grow Foods, Co., is an individual. The business address of Tsao-Hsiu C. Lin doing business as Grow Foods, Co., is 21 Howard Street, New York, New York 10013 and/or 60 Delancy Street, New York 10013 and/or 60 Delancy Street, New York, New York 10002 and the mailing address is 41-44 76th Street, S.e., Elmhurst, New York 11373. Tsao-Hsiu C. Lin doing business as Grow Foods, Co., has never been licensed under the PACA.

2. PACA License number 890755 was issued to Grow Foods Corp., on February 24, 1989. This license terminated on February 24, 1993, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when this corporation failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph three of the amended Complaint and Notice to Show Cause, Tsao-Hsiu C. Lin doing business as Grow Foods, Co., during the period November 1991 through November 1992, failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$172,150.90 for 62 lots of perishable agricultural commodities, which were purchased, received, and accepted in interstate commerce.

Conclusions

The failure of Tsao-Hsiu Cc. Lin doing business as Grow Foods, Co., to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Tsao-Hsiu C. Lin doing business as Grow Foods, Co., has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

Based on the request of complainant, the complaint against Tu-Chin "Joseph" Lin is dismissed.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final February 12, 1996.-Editor]

In re: JODECO, INC.

PACA Docket No. D-94-561.

Decision and Order filed January 30, 1996.

Failure to file an answer - Failure to pay required annual license fee - Failure to make full payment promptly - Willful, repeated, and flagrant violations - Publication.

Joann Waterfield, for Complainant.

Respondent. Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on August 1, 1994, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February 1994 through April 1994, respondent purchased, received, and accepted, in interstate and foreign commerce, from 12 sellers, 50 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$318,707.17.

A copy of the complaint was served upon respondent August 5, 1994, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, JoDeco, Inc., is a corporation, organized and existing under the laws of the State of Ohio. Its business mailing address is Ohio Food Terminal Market, Units 29-31, 4000 Orange Avenue, Cleveland, Ohio 44115.
2. Pursuant to the licensing provisions of the Act, license number 801157 was issued to respondent on June 17, 1980. This license was renewed annually, but terminated on June 17, 1994, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.
3. As more fully set forth in paragraph III of the complaint, during the period February through April 1994, respondent purchased, received, and accepted in interstate and foreign commerce, from 12 sellers, 50 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$318,707.17.

Conclusions

Respondent's failure to make full payment promptly with respect to the 50 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final March 28, 1996.-Editor]

In re: MOUNTAIN WHOLESALE PRODUCE COMPANY.
PACA Docket No. D-95-521.
Decision and Order filed March 7, 1996.

Failure to make full payment promptly - Failure to pay required annual license renewal fee - Willful, repeated and flagrant violations - Publication.

Joann Waterfield, for Complainant.

Respondent. Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on April 21, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January 1994 through July 1994, respondent purchased, received, and accepted, in interstate and foreign commerce, from 17 sellers, 69 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$152,625.63.

A copy of the complaint was served upon respondent May 9, 1995, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Mountain Wholesale Produce Company, is a partnership consisting of Richard J. McPartland, Jr. and Dennis S. Bronson, organized and existing under the laws of the State of California. Its mailing and business address is 3141 E. 12th Street, Los Angeles, California 90023.

2. Pursuant to the licensing provisions of the Acct, license number 880452 was issued to respondent on December 28, 1987. This license was renewed annually, but terminated on December 28, 1994, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period January 1994 through July 1994, respondent purchased, received, and accepted in interstate and foreign commerce, from 17 sellers, 69 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$152,625.63.

Conclusions

Respondent's failures to make full payment promptly with respect to the 69 transactions set forth in Finding of Fact No. 3, above, constitute willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final May 8, 1996.-Editor]

**In re: LARRY DANIEL DAVIS d/b/a PHOENIX TRADING COMPANY
and/or PHOENIX DISTRIBUTING COMPANY.
PACA Docket No. D-95-523.
Decision and Order filed March 14, 1996.**

Failure to file an answer - Respondent not licensed under PACA - Failure to make full payment promptly - Willful, repeated and flagrant violations - Publication.

Jane McCavitt, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "PACA", instituted by a complaint filed on May 16, 1995, by the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June 24, 1993 through June 27, 1994, respondent purchased, received, and accepted, in interstate and foreign commerce, from three sellers, 75 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$394,735.40.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Larry Daniel Davis, doing business as Phoenix Trading Company and/or Phoenix Distributing Company, is an individual, whose business address is 1430 S. Monroe Street, Baltimore, Maryland 21203. Respondent's business mailing address is P. O. Box 2335, Baltimore, Maryland 21203.

2. Respondent is not and has never been licensed under the PACA. Respondent, however, at all times pertinent herein, has conducted business subject to the PACA.

3. As more fully set forth in paragraph 5 of the complaint, during the period June 24, 1993 through June 27, 1994, respondent purchased, received, and accepted, in interstate and foreign commerce, from three sellers, 75 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$394,735.40.

Conclusions

Respondent's failure to make full payment promptly with respect to the 75 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the PACA (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final May 15, 1996.-Editor]

In re: FRED P. STASART d/b/a PRIMO PRODUCE.

PACA Docket No. D-96-503.

Decision and Order filed February 5, 1996.

Failure to file an answer - Respondent not licensed under PACA - Failure to pay required annual license renewal fee - Failure to make full payment promptly - Willful, repeated and flagrant violations - Publication.

Kimberly Hart, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on October 12, 1995,

by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of February through March 1995, Respondent purchased, received and accepted, in interstate and foreign commerce from 23 sellers, 112 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$1,034,475.99. It is also alleged that respondent subsequently resold the same produce at prices far below market value.

A copy of the Complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Fred P. Stasart, is an individual, doing business as Primo Produce whose mailing address is 1104 Lawrence Street, Los Angeles, California 90021. Respondent's mailing address is P. O. Box 21381, Los Angeles, California 90021.

2. Respondent has never been licensed under the PACA. However, at all times material, he operated subject to licensing under the PACA.

3. Primo Produce, a partnership composed of Fred P. and Loren A. Stassart was issued PACA license number 891128 on April 27, 1989. This license terminated on April 27, 1995, when the partnership failed to pay the required annual renewal fee.

4. As more fully set forth in paragraph 3 of the complaint, during the period of February through March 1995, Respondent purchased, received and accepted, in interstate and foreign commerce from 23 sellers, 112 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$1,034,475.99. Respondent subsequently resold the same produce at prices far below market value.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for

which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 16, 1996.-Editor]

In re: MOORESTOWN PRODUCE, INC. a/t/a BUCKS COUNTY PRODUCE.
PACA Docket No. D-96-512.
Decision and Order filed April 17, 1996.

Failure to file an answer - Failure to pay required annual license renewal fee - Failure to make full payment promptly - Willful, repeated and flagrant violations - Publication.

Jane McCavitt, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on January 23, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of December 1994 through February 1995,

respondent purchased, received and accepted, in interstate commerce from 23 sellers, 101 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$526,239.53.

A copy of the Complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Moorestown Produce, Inc., also trading as Bucks County Produce, is a corporation organized and existing under the laws of the State of New Jersey. Its business mailing address is 400 Hartford Road, Moorestown, New Jersey 08057 and its mailing address is P. O. Box 555, Moorestown, New Jersey 08057.

2. Respondent was issued PACA license number 89059 on January 25, 1989. This license terminated pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), on January 25, 1995, when it failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, during the period of December 1994 through February 1995, Respondent purchased, received and accepted, in interstate commerce from 23 sellers, 101 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$526,239.53.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall

be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 29, 1996.-Editor]

In re: PHILIP R. WELLER, d/b/a POTATOES PLUS.

PACA Docket No. D-96-507.

Decision and Order filed April 4, 2996.

Failure to file an answer - Failure to pay required annual license renewal fee - Failure to satisfy reparation award - Failure to make full payment promptly - Willful, repeated and flagrant violations - Publication.

Barbara Good, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on November 7, 1995, by the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of May 2993 through January 1995, respondent purchased, received and accepted, in interstate commerce, from 7 sellers, 44 lots of potatoes, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$239,966.73.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Philip R. Weller, is an individual, doing business as Potatoes Plus. His business mailing address is Post Office Box 2432, Youngstown, Ohio 44509. His home address is (b) (6).
2. Pursuant to the licensing provisions of PACA, license number 921680 was issued to respondent on August 21, 1992. This license terminated on August 21, 1995, when respondent failed to pay the required annual renewal fee. Furthermore, his license previously had been suspended as of December 7, 1994, pursuant to Section 7(d) of the PACA (7 U.S.C. § 499d (a)) when he failed to satisfy a reparation award.

3. As more fully set forth in paragraph 3 of the complaint, during the period May 1993 through January 1995, respondent purchased, received and accepted, in interstate commerce, from 7 sellers, 44 lots of potatoes, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the amount of \$239,966.73.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 31, 1995.-Editor]

In re: A.F. BUSINESS BROKERAGE, INC.
PACA Docket No. D-96-510.
Decision and Order filed May 3, 1996.

Failure to deny material allegations - Failure to pay required annual license renewal fee - Failure to make full payment promptly - Repeated and flagrant violations - Publication.

Denise Hansberry, for Complainant.

Respondent. Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*), hereinafter referred to as the "Act", instituted by a complaint filed on December 12, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period of December 1993 through January 1995, respondent purchased, received and accepted, in interstate commerce, from 16 sellers, 68 lots of potatoes, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$337,887.08.

A copy of the complaint was served upon respondent. On January 2, 1996, respondent filed a letter in answer to the complaint in which it admitted certain allegations contained in the complaint and is deemed to have admitted the remaining material allegations of the complaint due to its failure to deny or to address these allegations pursuant to section 1.136 of the Rules of Practice (7 C.F.R. §1.136). As the admissions respondent has made in its answer substantiate the complainant's allegations that respondent failed to make prompt payment for produce it purchased, received, and accepted in interstate commerce, complainant's motion is granted. Therefore, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1. A.F. Business Brokerage, Inc. (hereinafter "respondent"), is a corporation organized and existing under the laws of the State of Massachusetts. Its business mailing address is P.O. Box 265, Worthington, Massachusetts 01098.

2. Pursuant to the licensing provision of the Act, license number 931048

was issued to respondent on April 22, 1993. This license was terminated on April 22, 1995, pursuant to Section 4(a) of the PACA (7 U.S.C. §499B(a)), when respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, during the period December 1993 through January 1995, respondent purchased, received and accepted in interstate commerce, from 16 sellers, 68 lots of potatoes, all being perishable agriculture commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$337,887.08.

Conclusions

Respondent's failure to make full payment promptly with respect to the 68 transactions set forth in Finding of Fact No. 3, above, constitute repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final June 12, 1996.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

Double B Quality Produce, Inc. PACA Docket No. D-95-518. 1/29/96.

Coexport International, Inc. PACA Docket No. D-95-535. 4/19/96.

Sun Valley Produce, Inc. PACA Docket No. D-95-512. 4/26/96.

Josephine D. Nichols d/b/a Red Bird Produce Co. and Red Bird Produce Co., a partnership composed of Josephine D. Nichols and William R. Nichols. PACA Docket Nos. D-94-569 and D-95-536. 5/17/96.

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