AGRICULTURE DECISIONS

Volume 59

July – December 2000

UNITED STATES DEPARTMENT
OF AGRICULTURE

AGRICULTURE DECISIONS

Preface

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Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

AGRICULTURE DECISIONS

Volume 59

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Pages 507 - 833

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

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AGRICULTURAL MARKETING AGREEMENT ACT

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AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISION

In re: RME FARMS, ROGELIO DOMINGO, AND PARADISE PRODUCERS.
00 AMA Docket No. F&V 928-1.
Decision and Order filed December 5, 2000.

Papayas – Papaya marketing order – Motion to dismiss – Handler – Standing – Grower – Failure to state a claim – Timely filing – Equal protection – Fourteenth amendment – Fifth amendment.

The Judicial Officer affirmed the decision by Judge Dorothea A. Baker (ALJ) dismissing the Amended Petition instituted under 7 U.S.C. § 608c(15)(A). The Judicial Officer struck one of the Petitioners, Johnson & Sons, from the Amended Petition based on the Petitioners' admission that Johnson & Sons was not a handler and did not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A). The Judicial Officer found the Amended Petition: (1) failed to address claims that can be raised in a proceeding under 7 U.S.C. § 608c(15)(A); (2) failed to request modification of or exemption from the Papaya Marketing Order; (3) failed to reference specific terms, provisions, interpretations, or applications of the Papaya Marketing Order that are not in accordance with law; (4) failed to allege facts sufficient to support the conclusion that the United States Department of Agriculture (USDA) violated 7 C.F.R. §§ 928.61 and 928.62; (5) failed to allege facts sufficient to support the conclusion that the Papaya Administrative Committee (PAC) violated 7 C.F.R. §§ 928.31(n), 928.61, and 928.62; and (6) failed to set forth the manner in which Petitioners, in their capacities as handlers, were, or could be, affected by any action alleged in the Amended Petition. Moreover, the Judicial Officer rejected Petitioners' contention that USDA and PAC violated the equal protection clause of the 14th Amendment to the United States Constitution. The Judicial Officer stated the 14th Amendment, by its terms, applies to the states and neither the USDA nor the PAC is a state or an instrumentality of a state. The Judicial Officer also rejected Petitioners' contention that the ALJ summarily dismissed many of Petitioners' claims without articulating the bases for the dismissal of the claims.

Gregory Cooper, for Respondent.
Steven D. Strauss, Hilo, Hawaii, for Petitioners.
Initial Decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Procedural History

RME Farms, Rogelio Domingo, Antonio Tagalicud, Nestor Cacho, Virginia Aste, Johnson & Sons, and Paradise Producers instituted this proceeding on February 2, 2000, by filing a Petition to Require Enforcement of Papaya Marketing Order Provisions/Regulations and/or Petition to Exempt Petitioner from the Papaya Marketing Order Provisions/Regulations Until the Papaya Administrative Committee and USDA Enforce the Provisions/Regulations of the Papaya Marketing Order [hereinafter Petition]. RME Farms, Rogelio Domingo, Antonio Tagalicud,

Nestor Cacho, Virginia Aste, Johnson & Sons, and Paradise Producers instituted this proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal order regulating the handling of papayas grown in Hawaii (7 C.F.R. pt. 928) [hereinafter the Papaya Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

On February 28, 2000, Antonio Tagalicud requested permission to withdraw from the proceeding (Letter dated February 28, 2000, from Antonio Tagalicud to Joyce Dawson, Hearing Clerk).

On March 3, 2000, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Motion to Dismiss and Memorandum in Support of Respondent's Motion to Dismiss. Respondent contends the Petition should be dismissed because: (1) the Petition fails to address claims that can properly be raised in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)); (2) the Petition fails to identify any provision, interpretation, or application of the Papaya Marketing Order that is not in accordance with law; (3) the Petition fails to identify any obligation imposed under the Papaya Marketing Order that is not in accordance with law; (4) the Petition fails to demonstrate how any handler, in the capacity of a handler, was, or could be, affected by the actions alleged in the Petition; and (5) the Petition fails to seek modification of, or exemption from, the Papaya Marketing Order. Respondent also requests dismissal of Nestor Cacho, Johnson & Sons, and Virginia Aste because they are not handlers subject to the Papaya Marketing Order with standing to institute a proceeding under 7 U.S.C. § 608c(15)(A). Finally, Respondent requests dismissal of Antonio Tagalicud based on his February 28, 2000, request for permission to withdraw from the proceeding. (Respondent's Memorandum in Support of Respondent's Motion to Dismiss at 1-6.)

On March 31, 2000, RME Farms, Rogelio Domingo, Antonio Tagalicud, Nestor Cacho, Virginia Aste, Johnson & Sons, and Paradise Producers filed Petitioner's [sic] Memorandum in Opposition to Respondent's Motion to Dismiss [hereinafter Petitioners' Opposition]: (1) stating that RME Farms, Rogelio Domingo, Paradise Producers, and Johnson & Sons are grower-handlers with standing to institute a proceeding under 7 U.S.C. § 608c(15)(A); (2) conceding that Nestor Cacho, Virginia Aste, and Johnson & Sons are not handlers subject to the Papaya Marketing Order and do not have standing to institute a proceeding under 7 U.S.C.

§ 608c(15)(A);[1] (3) conceding that Antonio Tagalicud requested permission to withdraw from the proceeding; (4) contending that all the claims in the Petition are claims upon which relief can be granted under 7 U.S.C. § 608c(15)(A); and (5) requesting leave to amend the Petition (Petitioners' Opposition ¶¶ I-III).

On April 19, 2000, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] dismissed the Petition as to Antonio Tagalicud based on his request for permission to withdraw from the proceeding (Antonio Tagalicud Withdraws as Petitioner). The ALJ also found that Nestor Cacho, Virginia Aste, and Johnson & Sons are not handlers with standing to institute a proceeding under 7 U.S.C. § 608c(15)(A) and dismissed the Petition as to Nestor Cacho, Virginia Aste, and Johnson & Sons. Based on her dismissal of Nester Cacho, Virginia Aste, Johnson & Sons, and Antonio Tagalicud, the ALJ amended the caption of the proceeding which had previously been "*In re RME Farms, Rogelio Domingo, Antonio Tagalicud, Nestor Cacho, Virginia Aste, Paradise Producers, and Johnson & Sons*" to read "*In re RME Farms, Rogelio Domingo, and Paradise Producers*." (Dismissal of Petition as to Nestor Cacho, Virginia Aste, and Johnson & Sons.) Moreover, the ALJ concluded that RME Farms, Rogelio Domingo, and Paradise Producers [hereinafter Petitioners] are handlers with standing to maintain a petition under 7 U.S.C. § 608c(15)(A) and provided Petitioners with time within which to amend their Petition to better conform the Petition to the requirements of 7 C.F.R. § 900.52(b) (Status of Motion to Dismiss as to Three Remaining Petitioners).

On May 11, 2000, Petitioners and Johnson & Sons filed Amended Petition to Require Enforcement of Papaya Marketing Order Provisions/Regulations and/or Petition to Exempt Petitioner from the Papaya Marketing Order Provisions/Regulations Until the Papaya Administrative Committee and USDA Enforce the Provisions/Regulations of the Papaya Marketing Order [hereinafter Amended Petition]. Petitioners and Johnson & Sons allege: (1) in March 1998, transgenic papaya seeds were distributed to two growers, Delan Perry and William Julian, almost 2 months before transgenic papaya seeds were distributed to other "member groups" in violation of the Papaya Administrative Committee's transgenic papaya seed distribution plan; (2) the United States Department of Agriculture failed to adequately and fully investigate a conspiracy among Delan Perry, William Julian, and Emerson Llantero, the manager of the Papaya Administrative Committee, to distribute transgenic papaya seeds to Delan Perry and William Julian

[1]RME Farms, Rogelio Domingo, Antonio Tagalicud, Nestor Cacho, Virginia Aste, Johnson & Sons, and Paradise Producers do not explain their inconsistent positions that Johnson & Sons is a grower-handler with standing to institute a proceeding under 7 U.S.C. § 608c(15)(A) and that Johnson & Sons is not a handler and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A).

in March 1998; (3) Petitioners and Johnson & Sons lost a significant amount of money because they were unable to obtain transgenic papaya seeds to produce papayas which they could process as handlers and they were unable to purchase papayas from their growers who were denied transgenic papaya seeds; (4) the preferential distribution of transgenic papaya seeds to Delan Perry and William Julian violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and violates 7 C.F.R. §§ 928.61 and 928.62; (5) the Papaya Administrative Committee is required by 7 C.F.R. § 928.31(n) to adequately investigate compliance with the Papaya Marketing Order; (6) Emerson Llantero withheld transgenic "Sunup" seeds from Petitioners and Johnson & Sons during the period May 1, 1998, through July 1999, in violation of the Papaya Administrative Committee's transgenic papaya seed distribution plan; (7) the United States Department of Agriculture's failure to adequately investigate violations of, and enforce provisions of, the Papaya Administrative Committee's seed distribution plan is arbitrary and capricious and violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; (8) some officers of the Papaya Administrative Committee, including Delan Perry, Loren Machida, Danny Molina, and Ken Kamiya, received state and federal papaya research grants and the receipt of state and federal papaya research grants conflicts with their duties as officers of the Papaya Administrative Committee; (9) Delan Perry and perhaps others violated a United States Department of Agriculture research protocol; (10) the United States Department of Agriculture inadequately investigated and responded to a written complaint by Paradise Producers; (11) Emerson Llantero and perhaps others submitted to the United States Department of Agriculture a fraudulent petition challenging the April 24, 1997, Papaya Administrative Committee nominating election; and (12) the Papaya Administrative Committee operates without proper oversight by the United States Department of Agriculture and the United States Department of Agriculture promotes fundamental inequities in violation of the Fourteenth Amendment to the Constitution of the United States and 7 C.F.R. §§ 928.61 and 928.62 (Amended Pet. ¶¶ 2-16).

Petitioners and Johnson & Sons seek: (1) an order requiring the United States Department of Agriculture to investigate the alleged violations of the Papaya Administrative Committee's transgenic papaya seed distribution plan, the Papaya Marketing Order, and state and federal papaya research grants; (2) an order requiring the United States Department of Agriculture to investigate fraud allegedly committed by Emerson Llantero and perhaps others in connection with the petition challenging the April 24, 1997, Papaya Administrative Committee nominating election; (3) an order requiring the United States Department of Agriculture to enforce the Papaya Administrative Committee's transgenic papaya seed distribution

plan, the Papaya Marketing Order, and state and federal papaya research grants; (4) an order requiring the United States Department of Agriculture to redress the alleged fraud committed by Emerson Llantero and perhaps others in connection with the petition challenging the April 24, 1997, Papaya Administrative Committee nominating election; (5) declaratory relief; (6) damages; and (7) reasonable attorney's fees (Amended Pet. ¶ 18).

On June 12, 2000, Respondent filed Respondent's Motion to Dismiss Amended Petition and Memorandum in Support of Respondent's Motion to Dismiss Amended Petition. Respondent: (1) seeks dismissal of Johnson & Sons because it is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A); (2) contends the Amended Petition fails to address claims that can be raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A); (3) contends the Amended Petition fails to reference the specific provision, interpretation, or application of the Papaya Marketing Order that is not in accordance with law; and (4) contends the Amended Petition fails to demonstrate how any handler was, or ever could be, affected by actions alleged in the Amended Petition.

On July 10, 2000, the ALJ issued a Dismissal of Petition as to RME Farms, Rogelio Domingo, and Paradise Producers[2] [hereinafter Initial Decision and Order]: (1) finding Johnson & Sons is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A); (2) striking Johnson & Sons from the Amended Petition; (3) finding the Amended Petition fails to address claims that can be raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A); (4) finding the Amended Petition fails to cite any specific term or provision of the Papaya Marketing Order that is improper, misinterpreted, or misapplied; (5) finding the Amended Petition fails to demonstrate how any handler, in its capacity as a handler, was, or could be, affected by any action alleged in the Amended Petition; and (6) dismissing the Amended Petition.

On July 14, 2000, Petitioners filed Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition. Petitioners: (1) concede Johnson & Sons is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A); (2) contend Petitioners are grower-handlers with standing under 7 U.S.C. § 608c(15)(A); and (3) contend the Amended Petition sufficiently identifies harm to Petitioners resulting from Respondent's failure to comply with the Papaya

[2]On July 11, 2000, the ALJ amended the title of the Dismissal of Petition as to RME Farms, Rogelio Domingo, and Paradise Producers to read "Dismissal of Amended Petition as to RME Farms, Rogelio Domingo, and Paradise Producers" (Addendum).

Marketing Order. On July 19, 2000, the ALJ rejected Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition as not having been timely filed (Untimely Response).

On August 16, 2000, Petitioners appealed to, and requested oral argument before, the Judicial Officer. On September 28, 2000, Respondent filed Respondent's Response to Petitioners' Appeal to the Judicial Officer. On October 12, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision and a ruling on Petitioners' motion for oral argument before the Judicial Officer.

Petitioners' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit pursuant to section 900.65(b)(1) of the Rules of Practice (7 C.F.R. § 900.65(b)(1)), is refused because the issues have been fully briefed by Petitioners and Respondent. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, I affirm the ALJ's Initial Decision and Order striking Johnson & Sons from the Amended Petition and dismissing the Amended Petition.

APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const.

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> . . . .

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the

United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. V, XIV.

5 U.S.C.:

TITLE 5–GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I–THE AGENCIES GENERALLY
CHAPTER 1–ORGANIZATION

§ 101. Executive departments

The Executive departments are:

The Department of State.
The Department of the Treasury.
The Department of Defense.
The Department of Justice.
The Department of the Interior.
The Department of Agriculture.
The Department of Commerce.
The Department of Labor.
The Department of Health and Human Services.
The Department of Housing and Urban Development.
The Department of Transportation.
The Department of Energy.
The Department of Education.
The Department of Veterans Affairs.

. . . .

CHAPTER 5–ADMINISTRATIVE PROCEDURE

. . . .

SUBCHAPTER II–ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter–

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include–

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title–

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix[.]

5 U.S.C. §§ 101, 551(1).

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the

Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. §§ 608c(1), 608c(15)(A).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS), DEPARTMENT OF AGRICULTURE

. . . .

PART 928—PAPAYAS GROWN IN HAWAII

Subpart—Order Regulating Handling

DEFINITIONS

. . . .

§ 928.7 Committee.

Committee means the Papaya Administrative Committee established pursuant to § 928.20.

§ 928.8 Grower.

Grower is synonymous with *producer* and means any person who produces papayas for market, and who has a proprietary interest therein.

§ 928.9 Handler.

Handler is synonymous with *shipper* and means any person (except a common or contract carrier transporting papayas owned by another person) who handles papayas in fresh form or causes papayas to be handled.

§ 928.10 Handle.

Handle or *ship* are synonymous and mean to sell, consign, deliver, or transport papayas or cause papayas to be sold, consigned, delivered, or transported within the production area or between the production area and any point outside thereof: *Provided*, That such term shall not include:

(a) The sale of papayas on the tree;

(b) The transportation of papayas from the location where grown to a packinghouse within the production area for the purpose or having such papayas prepared for market; or

(c) The sale of papayas at retail by a person in his capacity as a retailer.

. . . .

ADMINISTRATIVE BODY

§ 928.20 Establishment and membership.

There is hereby established a Papaya Administrative Committee consisting of 13 members, each of whom shall have an alternate who shall have the same qualifications as the member. Ten of the members and their alternates shall be growers and are referred to as "grower" members of the committee. Seven of the grower members and their alternates shall be producers of papayas in District 1, two grower members and their alternates shall be producers of papayas in District 2, and one grower member and alternate shall be producers of papayas in District 3. No grower organization shall be permitted to have more than three members on the committee. Three of the members and their alternates shall be

representatives of handlers and are referred to as "handler" members of the committee. The three handler members and their alternates shall be selected from the production area at large. No handler organization shall be permitted to have more than one handler member on the committee. The number of grower and handler members and alternates on the committee, and the composition of the committee between growers and handlers may be changed as provided in § 928.31(o). The committee also may be increased by one public member and one alternate public member nominated by the committee and selected by the Secretary. The committee, with the approval of the Secretary, shall prescribe the qualifications of, and the nominating procedure for, the public member and alternate.

§ 928.21 Term of office.

The term of office of each member and alternate member of the committee shall be for two years beginning July 1 and ending on the second succeeding June 30, or such other dates recommended by the committee and established by the Secretary. The consecutive terms of office of a member shall be limited to three 2-year terms. Members and alternate members shall serve in such capacity for the portion of the term of office for which they are selected and have qualified and until their respective successors are selected and have qualified.

. . . .

§ 928.31 Duties.

The committee shall have, among others, the following duties:

. . . .

(n) To investigate compliance with the provisions of this part[.]

. . . .

MISCELLANEOUS PROVISIONS

§ 928.61 Compliance.

Except as provided in this part, no person shall handle papayas, the shipment of which has been prohibited by the Secretary in accordance with

the provisions of this part; and no person shall handle papayas except in conformity with the provisions and the regulations issued under this part.

§ 928.62 Right of the Secretary.

The members of the committee (including successors and alternates), and any agents, employees, or representatives thereof, shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void, except as to acts done in reliance thereon or in accordance therewith prior to such disapproval by the Secretary.

7 C.F.R. §§ 928.7, .8, .9, .10, .20, .21, .31(n), .61, .62.

Johnson & Sons

A handler subject to the Papaya Marketing Order may file a written petition with the Secretary of Agriculture stating the Papaya Marketing Order or any provision of the Papaya Marketing Order or any obligation imposed in connection with the Papaya Marketing Order is not in accordance with law and requesting modification of the Papaya Marketing Order or exemption from the Papaya Marketing Order. (See 7 U.S.C. § 608c(15)(A).) It is well settled under the AMAA and the Rules of Practice that only a handler has standing to file a petition under 7 U.S.C. § 608c(15)(A).[3]

Petitioners concede that Johnson & Sons is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A) (Petitioners' Opposition ¶ II(A); Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition ¶¶ I(1), II(1)). Despite Petitioners' admission that Johnson & Sons is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A), Petitioners inexplicably identify Johnson & Sons as one of the Petitioners in the Amended Petition (Amended Pet. ¶ I(m)-(p)). Based on Petitioners' admission that Johnson & Sons is not a handler subject to the Papaya

[3] *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1091 (1997); *In re Kent Cheese Co.*, 43 Agric. Dec. 34, 36 (1984); *In re M&R Tomato Distribs., Inc.*, 41 Agric. Dec. 33 (1982); *In re Sequoia Orange Co.*, 40 Agric. Dec. 1908 (1981).

Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A), I strike Johnson & Sons from the Amended Petition.

Dismissal of Amended Petition

Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) provides that a handler subject to an order may file with the Secretary of Agriculture a written petition stating that the order or any provision of the order or any obligation imposed in connection with the order is not in accordance with law and requesting modification of the order or exemption from the order. Section 900.52(b) of the Rules of Practice specifies the required contents of a petition filed under 7 U.S.C. § 608c(15)(A), as follows:

§ 900.52 Institution of proceeding.

. . . .

(b) *Contents of petition*. A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the order, or the interpretation or application thereof, which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the order, or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant; [and]

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts

> stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

7 C.F.R. § 900.52(b).

The Amended Petition: (1) fails to address claims that can be raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A); (2) fails to request modification of or exemption from the Papaya Marketing Order; (3) fails to reference specific terms, provisions, interpretations, or applications of the Papaya Marketing Order that are not in accordance with law; (4) fails to allege facts sufficient to support the conclusion that the United States Department of Agriculture violated 7 C.F.R. §§ 928.61 and 928.62; (5) fails to allege facts sufficient to support the conclusion that the Papaya Administrative Committee violated 7 C.F.R. §§ 928.31(n), 928.61, and 928.62; and (6) fails to set forth the manner in which Petitioners, in their capacities as handlers, were, or could be, affected by any action alleged in the Amended Petition. Moreover, as a matter of law, neither the United States Department of Agriculture nor the Papaya Administrative Committee could have violated the Fourteenth Amendment to the Constitution of the United States, as alleged in the Amended Petition.

Petitioners make three claims in their Amended Petition. First, Petitioners allege that on or about September 1997, the Papaya Administrative Committee adopted a plan for the distribution of transgenic papaya seeds among growers registered with the Papaya Administrative Committee (Amended Pet. ¶ 3). Petitioners allege that, instead of complying with the Papaya Administrative Committee's transgenic papaya seed distribution plan, the University of Hawaii distributed transgenic papaya seeds to Delan Perry and William Julian in March 1998, almost 2 months before transgenic papaya seeds were made available to "other member groups" (Amended Pet. ¶ 4; Declaration of Michael Durkan ¶ 8 attached to Amended Pet.). Petitioners allege they were injured by the University of Hawaii's March 1998 distribution of transgenic papaya seeds to Delan Perry and William Julian because Petitioners were unable to obtain seeds to produce papayas and unable to purchase papayas from their growers, who were denied transgenic papaya seeds. Petitioners contend the March 1998 distribution of transgenic papaya seeds to Delan Perry and William Julian denied Petitioners their right to equal protection of the law under the Fourteenth Amendment to the Constitution of the United States and violated sections 928.61 and 928.62 of the Papaya Marketing Order (7 C.F.R. §§ 928.61, .62). Petitioners also contend the Papaya Administrative Committee's failure to adequately investigate compliance with the Papaya Marketing Order violates section 928.31(n) of the Papaya Marketing Order (7 C.F.R. § 928.31(n)). (Amended Pet. ¶ 5.)

Actions instituted under 7 U.S.C. § 608c(15)(A) are handler actions designed to challenge provisions or obligations of an order that affect handlers. Petitioners are required by 7 C.F.R. § 900.52(b)(3) to set forth in the Amended Petition the manner in which they claim to be affected, as handlers, by the alleged unfair distribution of papaya seeds.

Growers are in a business distinct from that of handlers. Growers produce papayas, and generally, handlers sell, consign, deliver, or transport papayas from the packinghouse into commerce. (See 7 C.F.R. §§ 928.8, .9, .10.) From the handler's perspective, the identity of the grower supplying papayas to the handler is irrelevant. If one grower can obtain papaya seeds and can supply papayas, and another cannot, there is no effect on the handler.

Petitioners allege the unfair distribution of transgenic papaya seeds hurt them as handlers because the growers with whom they do business did not receive transgenic papaya seeds (Amended Pet. ¶ 5). However, the Papaya Marketing Order does not require handlers to purchase papayas from particular growers. Handlers are free to purchase papayas from any grower. If growers from whom Petitioners buy papayas have no papayas for sale because these growers are unable to obtain papaya seeds, Petitioners are free under the Papaya Marketing Order to purchase papayas from other growers. Thus, the distribution of transgenic papaya seeds to growers had no effect on Petitioners in their capacities as handlers, and Petitioners' claims regarding the distribution of papaya seeds to growers are not claims that can be properly raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A).

Moreover, none of the provisions of the Papaya Marketing Order allegedly violated by the United States Department of Agriculture (7 C.F.R. §§ 928.61, .62) and the Papaya Administrative Committee (7 C.F.R. §§ 928.31(n), .61, .62) impose limitations on, or even relate to, the distribution of transgenic papaya seeds. Section 928.61 of the Papaya Marketing Order (7 C.F.R. § 928.61) prohibits persons from handling papayas, except as provided in 7 C.F.R. pt. 928. Section 928.62 of the Papaya Marketing Order (7 C.F.R. § 928.62) authorizes the Secretary of Agriculture to remove or suspend Papaya Administrative Committee members, agents, employees, and representatives and to disapprove Papaya Administrative Committee regulations, decisions, determinations, and acts. Section 928.31(n) of the Papaya Marketing Order (7 C.F.R. § 928.31(n)) states that the Papaya Administrative Committee has the duty to investigate compliance with the Papaya Marketing Order. Therefore, even if I found that the University of Hawaii distributed transgenic papaya seeds to Delan Perry and William Julian almost 2 months before transgenic papaya seeds were made available to "other member groups," I would not conclude the Papaya Administrative Committee violated

7 C.F.R. §§ 928.31(n), 928.61, and 928.62 and the United States Department of Agriculture violated 7 C.F.R. §§ 928.61 and 928.62, as alleged in the Amended Petition.

Further still, the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by its terms is applicable to the states, not to the federal government. Neither the Papaya Administrative Committee nor the United States Department of Agriculture is a state or an instrumentality of a state. (See 5 U.S.C. §§ 101, 551(1); 7 C.F.R. §§ 928.7, .20.) Therefore, as a matter of law, neither the Papaya Administrative Committee nor the United States Department of Agriculture could have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, as alleged in the Amended Petition.[4]

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[4]While the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the Fifth Amendment, which is applicable to the federal government, contains an equal protection component. (*See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (holding the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (stating the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's approach to Fifth Amendment equal protection claims has been precisely the same as the Court's approach to equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; the Court's approach to Fifth Amendment equal protection claims has always been precisely the same as the Court's approach to equal protection claims under the Fourteenth Amendment).)

Petitioners allege the University of Hawaii distributed transgenic papaya seeds to Delan Perry and William Julian in March 1998 (Declaration of Michael Durkan ¶ 8 attached to Amended Pet.). Petitioners do not allege that either the United States Department of Agriculture or the Papaya Administrative Committee distributed transgenic papaya seeds to Delan Perry and William Julian in March 1998. Instead, Petitioners allege the Papaya Administrative Committee was not issued the patent license necessary to distribute transgenic papaya seeds until April 1998 and transgenic papaya seeds were made available to all growers no later than May 1998 (Amended Pet. ¶ 4; Declaration of Michael Durkan ¶ 4 attached to Amended Pet.). Although Petitioners allege that the United States Department of Agriculture and the Papaya Administrative Committee violated Petitioners' right to equal protection of the law, I find no nexus to any United States Department of Agriculture or the Papaya Administrative

(continued...)

Petitioners also allege Emerson Llantero withheld "Sunup" seeds from Petitioners during the period May 1, 1998, through July 1999 (Amended Pet. ¶ 9). However, Michael Durkan, owner of Paradise Producers, states he obtained and planted "Sunup" seeds prior to May 15, 1998 (Declaration of Michael Durkan ¶ 5 attached to Amended Pet.). Ernesto Tagalicud, d/b/a RME Farms, states he did not request "Sunup" seeds until July 15, 1999. Emerson Llantero offered Ernesto Tagalicud the requested "Sunup" seeds on July 29, 1999, and in August 1999, Ernesto Tagalicud received the quantity of "Sunup" seeds he requested. (Declaration of Ernesto Tagalicud ¶¶ 5-6 attached to Amended Pet.) The declarations attached to the Amended Petition indicate that Petitioners were not denied equal protection of the law or adversely affected by the timing of the Papaya Administrative Committee's distribution of "Sunup" seeds.

Second, Petitioners allege that, over the past 3 years, some officers of the Papaya Administrative Committee including, Delan Perry, Loren Machida, Danny Molina, and Ken Kamiya, received state and federal papaya research grants and the receipt of state and federal papaya research grants conflicts with their duties as officers of the Papaya Administrative Committee. Petitioners allege the Papaya Administrative Committee and the Agricultural Marketing Service, United States Department of Agriculture, "had input into and control over such research projects." Petitioners also allege Delan Perry sells papayas from a field covered by a papaya research grant in violation of the United States Department of Agriculture's "research protocol which requires a clear, noncommercial, funded proposal of extended duration." Petitioners further allege the United States Department of Agriculture inadequately investigated and responded to Paradise Producers' written complaint to a United States Department of Agriculture representative. (Amended Pet. ¶ 14.)

With respect to Petitioners' second claim, Petitioners fail to identify any provision of the Papaya Marketing Order or any obligation imposed in connection with the Papaya Marketing Order which is not in accordance with law and fail to request modification of or exemption from a provision of the Papaya Marketing Order, as required by 7 U.S.C. § 608c(15)(A). Further, Petitioners fail to specify the interpretation or application of the Papaya Marketing Order to which they

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[4](...continued)
Committee conduct that could give rise to an equal protection inquiry. Therefore, even if Petitioners had alleged that the United States Department of Agriculture and the Papaya Administrative Committee violated the equal protection component of the Fifth Amendment to the Constitution of the United States, I would dismiss Petitioners' claim that the United States Department of Agriculture and the Papaya Administrative Committee violated the equal protection component of the Fifth Amendment to the Constitution of the United States.

object, as required by 7 C.F.R. § 900.52(b)(2).

Moreover, Petitioners declare that growers, not handlers, received the state and federal papaya research grants (Declaration of Ernesto Tagalicud ¶ 4, Ex. 1, and Ex. 2 attached to Amended Pet.). The Amended Petition fails to allege that Petitioners, in their capacities as handlers, were, or could be, affected by the state and federal papaya research grants made to growers. Therefore, Petitioners' claims regarding state and federal research grants to growers are not claims that can be properly raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A).

Third, Petitioners allege that Emerson Llantero and perhaps others submitted to the United States Department of Agriculture a fraudulent petition challenging the April 24, 1997, Papaya Administrative Committee nominating election. Specifically, Petitioners allege that Emerson Llantero and perhaps others reproduced Emeliana Delima's signature.[5] (Amended Pet. ¶ 15.)

Petitioners' allegation that Emerson Llantero and perhaps others committed fraud in connection with a petition challenging the April 24, 1997, Papaya Administrative Committee nominating election is not a claim that can be properly raised under 7 U.S.C. § 608c(15)(A). Petitioners fail to identify any provision of the Papaya Marketing Order or any obligation imposed in connection with the Papaya Marketing Order which is not in accordance with law and fail to request modification of or exemption from a provision of the Papaya Marketing Order, as required by 7 U.S.C. § 608c(15)(A). Further, Petitioners fail to specify the interpretation or application of the Papaya Marketing Order to which they object, as required by 7 C.F.R. § 900.52(b)(2).

Moreover, the term of office of those elected to the Papaya Administrative Committee in 1997 expired in 1999. (See 7 C.F.R. § 928.21.) Therefore, the issue of fraud by Emerson Llantero and perhaps others in connection with a petition challenging the April 24, 1997, Papaya Administrative Committee nominating election is moot.

Further still, Respondent attached a copy of the allegedly fraudulent petition to Respondent's Motion to Dismiss Amended Petition. The petition indicates that the April 24, 1997, nominating election was a grower election and the allegedly fraudulent petition is a grower petition, as follows:

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[5]Petitioners state "[a]ccording to the accompanying Declaration of Emeliana Delima, she never signed [the] petition" challenging the April 24, 1997, Papaya Administrative Committee nominating election (Amended Pet. ¶ 15). The record does not contain a Declaration by Emeliana Delima attached to the Amended Petition.

May 6, 1997

Mr. Martin Engeler
USDA Ag. Marketing Service
Fruit and Vegetable Division
California Marketing Field Office
2202 Monterey Street, #102B
Fresno, CA 93721

Dear Mr. Engeler,

We, the undersigned papaya farmers, wish to express our concerns about the just-completed election of Big Island Growers Nomination. The election campaigns of some of the candidates were so rife with misinformation, innuendo and threats that the integrity of the entire PAC has been seriously compromised. Therefore, we ask that the just held elections be annulled and that new elections be scheduled as soon as possible. The new election should be carefully monitored to prevent the irregularities which plagued the just completed elections. To do otherwise may well lead to demise of the PAC.

Respondent's Motion to Dismiss Amended Petition, Attach. D.

None of the signatures on the allegedly fraudulent petition appear to be those of Petitioners. Moreover, Petitioners describe the petition as a "forged grower [p]etition" in Petitioners' Petition of Appeal of Decision and Order Granting Respondent's Motion to Dismiss Amended Petition [hereinafter Appeal Petition] (Appeal Pet. at 3). Thus, I conclude the election was a grower election and the allegedly fraudulent petition challenging the grower election is a grower petition. Under these circumstances, the allegedly fraudulent petition could not be the basis for a handler petition under 7 U.S.C. § 608c(15)(A).

Petitioners further allege that on September 23, 1999, one of the Petitioners notified Terri Vawter, a United States Department of Agriculture representative, of Emerson Llantero's fraud and the United States Department of Agriculture declined to fully and adequately investigate Emerson Llantero's fraudulent act. Petitioners allege the United States Department of Agriculture's failure to fully and adequately investigate Emerson Llantero's fraudulent act violates the Fourteenth Amendment to the Constitution of the United States and sections 928.61 and 928.62 of the Papaya Marketing Order (7 C.F.R. §§ 928.61, .62). (Amended Pet. ¶¶ 15, 16.)

Even if I found that the United States Department of Agriculture failed to

conduct a full and adequate investigation of the allegation that Emerson Llantero fraudulently reproduced Emeliana Delima's signature, that finding would not cause me to conclude that the United States Department of Agriculture violated the Fourteenth Amendment to the Constitution of the United States and sections 928.61 and 928.62 of the Papaya Marketing Order (7 C.F.R. §§ 928.61, .62), as alleged in the Amended Petition.

The United States Department of Agriculture is not a state or an instrumentality of a state. (See 5 U.S.C. §§ 101, 551(1).) Thus, the United States Department of Agriculture's alleged failure to fully and adequately investigate the allegation that Emerson Llantero fraudulently reproduced Emeliana Delima's signature is not state action which deprives a person of life, liberty, or property without due process of law and is not state action which denies a person within the jurisdiction of the state equal protection of the laws. Further, the United States Department of Agriculture's alleged failure to fully and adequately investigate the allegation that Emerson Llantero fraudulently reproduced Emeliana Delima's signature does not in any other way relate to the Fourteenth Amendment to the Constitution of the United States.

Moreover, the United States Department of Agriculture's alleged failure to fully and adequately investigate the allegation that Emerson Llantero fraudulently reproduced Emeliana Delima's signature does not violate, or relate in any way to, 7 C.F.R. § 928.61 or 7 C.F.R. § 928.62. Section 928.61 of the Papaya Marketing Order (7 C.F.R. § 928.61) prohibits persons from handling papayas, except as provided in 7 C.F.R. pt. 928. Section 928.62 of the Papaya Marketing Order (7 C.F.R. § 928.62) authorizes the Secretary of Agriculture to remove Papaya Administrative Committee members, agents, employees, and representatives and to disapprove Papaya Administrative Committee regulations, decisions, determinations, and acts. Thus, the United States Department of Agriculture's alleged failure to fully and adequately investigate the allegation that Emerson Llantero fraudulently reproduced Emeliana Delima's signature does not violate 7 C.F.R. § 928.61 and 7 C.F.R. § 928.62, as alleged in the Amended Petition.

Petitioners' Appeal Petition

Petitioners raise four issues in Petitioners' Appeal Petition. First, Petitioners contend the ALJ erroneously found that Petitioners did not timely file Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition (Appeal Pet. at 1).

Section 900.52(c)(1) of the Rules Practice (7 C.F.R. § 900.52(c)(1)) provides that the opposition to a motion to dismiss must be filed with the Hearing Clerk not later than 20 days after the service of the motion to dismiss upon the petitioner. On

June 20, 2000, the Hearing Clerk served Petitioners with Respondent's Motion to Dismiss Amended Petition and Memorandum in Support of Respondent's Motion to Dismiss Amended Petition.[6] Therefore, in accordance with 7 C.F.R. § 900.52(c)(1), Petitioners were required to file Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition with the Hearing Clerk no later than July 10, 2000.

Section 900.69(d) of the Rules of the Practice provides that the effective date of filing any document, other than a petition filed pursuant to 7 C.F.R. § 900.52, is the date the document is postmarked or the date the document is received by the Hearing Clerk, as follows:

> **§ 900.69 Filing; service; extensions of time; effective date of filing; and computation of time.**
>
> . . . .
>
> (d) *Effective date of filing*. Any document or paper, except a petition filed pursuant to § 900.52, required or authorized under these rules to be filed shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk. Any petition filed under § 900.52 shall be deemed to be filed when it is received by the hearing clerk.

7 C.F.R. § 900.69(d).

Therefore, Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition was required to be received by the Hearing Clerk or to be postmarked no later than July 10, 2000, in order to be timely filed.

The Hearing Clerk received Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition on July 14, 2000, 4 days after Petitioners were required to file Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition. The record does not include any postmarked envelope in which Petitioners mailed Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition. Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition is dated July 7, 2000; Petitioners' letter accompanying Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition is dated July 7, 2000; Petitioners state they mailed Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition "via first class United States mail July 7, 200[0]"; and the Hearing Clerk stated the envelope containing

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[6]See Domestic Return Receipt for Article Number P368327729.

Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition was not retained (Appeal Pet. at 1; Respondent's Response to Petitioners' Appeal to the Judicial Officer at 1 n.1). Under these circumstances, I infer that Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition was postmarked July 7, 2000. Therefore, I find that Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition was timely filed.

However, I do not remand the proceeding to the ALJ for consideration of Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition. The ALJ considered Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition and concluded that, "even if it had been timely filed, the contents thereof would not have been sufficient to alter my Decision of July 10, 2000, that the Amended Petition should be dismissed." (Untimely Response.) Therefore, a remand of the proceeding to the ALJ for consideration of Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition would have no effect on the disposition of this proceeding.

Second, Petitioners contend the Amended Petition identified specific terms and provisions of the Papaya Marketing Order that were misapplied. Specifically, Petitioners state:

> The Amended petition avers, in part, however, that certain preferential treatment was inadequately investigated and that such "preferential treatment violates the equal protection clause of the Fourteenth Amendment, U.S. Constitution, 7 C.F.R. § 928.61 and 7 C.F.R. § 928.62. Pursuant to § 928.31(n) of the Marketing Order, the committee is required to adequately investigate compliance with the provisions of the Marketing Order." Amended Petition ¶ 5. Accordingly, the Judge's Decision is in error.

Appeal Pet. at 1.

Petitioners did allege in the Amended Petition that the United States Department of Agriculture and the Papaya Administrative Committee violated the Fourteenth Amendment to the Constitution of the United States, 7 C.F.R. § 928.61, and 7 C.F.R. § 928.62, and the Papaya Administrative Committee violated 7 C.F.R. § 928.31(n). However, as discussed in this Decision and Order, *supra*, as a matter of law, neither the United States Department of Agriculture nor the Papaya Administrative Committee could have violated the Fourteenth Amendment to the Constitution of the United States. Further, the Amended Petition does not allege facts sufficient to conclude that the United States Department of Agriculture

violated 7 C.F.R. §§ 928.61 or 928.62. Further still, the Amended Petition does not allege facts sufficient to conclude that the Papaya Administrative Committee violated 7 C.F.R. §§ 928.31(n), 928.61, or 928.62. Therefore, I agree with the ALJ's Initial Decision and Order in which she dismissed the Amended Petition.

Third, Petitioners contend they alleged an adequate basis for equal protection violations by the United States Department of Agriculture and the Papaya Administrative Committee. Petitioners contend the ALJ erroneously stated that the allegation of unequal seed distribution related solely to the State of Hawaii and cannot be raised in a proceeding under 7 U.S.C. § 608c(15)(A) and the ALJ erroneously ignored evidence that the seed distribution by the University of Hawaii violated the Papaya Administrative Committee's papaya seed distribution plan. Petitioners contend the Papaya Administrative Committee and the United States Department of Agriculture are obligated to ensure that the papaya seed distribution plan is fairly administered and the ALJ cannot properly countenance the Papaya Administrative Committee's and the United States Department of Agriculture's failure to correct constitutional violations simply because the State of Hawaii committed the violations. (Appeal Pet. at 2.)

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States by its terms is applicable to the states and is not applicable to the federal government. Neither the Papaya Administrative Committee nor the United States Department of Agriculture is a state or an instrumentality of a state. (See 5 U.S.C. §§ 101, 551(1); 7 C.F.R. §§ 928.7, .20.) Therefore, as a matter of law, neither the Papaya Administrative Committee nor the United States Department of Agriculture could have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, as alleged in the Amended Petition.

Moreover, I agree with the ALJ that Petitioners allege that the University of Hawaii, a state agency,[7] distributed transgenic papaya seeds to two growers, Delan Perry and William Julian, in March 1998. Therefore, Petitioners' claims regarding the distribution of transgenic papaya seeds in March 1998, relate solely to the State of Hawaii. Further still, as discussed in this Decision and Order, *supra*, the distribution of papaya seeds to growers affects growers, not handlers. Therefore, Petitioners' claims regarding the distribution of papaya seeds to growers are not claims that can be properly raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A).

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[7] *Partington v. Gedan*, 961 F.2d 852, 865 (9th Cir.), *cert. denied*, 506 U.S. 999 (1992); *Hall v. State of Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986); *Anthony v. Cleveland*, 355 F. Supp. 789, 790 (D. Haw. 1973).

Fourth, Petitioners contend the ALJ's Initial Decision and Order summarily rejected Petitioners' "remaining claims." Petitioners assert that because of the ALJ's summary rejection of Petitioners' "remaining claims," Petitioners are at a loss to determine the basis for the ALJ's Initial Decision and Order with respect to these "remaining claims." (Appeal Pet. at 3.)

The ALJ is required to include in the Initial Decision and Order a statement of the basis for her rejection of Petitioners' claims. (See 5 U.S.C. § 557(c).) The ALJ states Respondent's Memorandum in Support of Respondent's Motion to Dismiss Amended Petition sets forth "good and sufficient reason why the Amended Petition should be dismissed. Said reasons are incorporated herein." (Initial Decision and Order at 2.) Thus, the ALJ identified the bases for her order dismissing the Amended Petition as being identical to the reasons for Respondent's contention that the Amended Petition should be dismissed. I agree with the ALJ that Respondent's Memorandum in Support of Respondent's Motion to Dismiss Amended Petition sets forth reasons for Respondent's contention that the Amended Petition should be dismissed. Therefore, based on the ALJ's incorporation into the Initial Decision and Order of Respondent's reasons for contending that the Amended Petition should be dismissed, I disagree with Petitioners' contentions that the ALJ failed to set forth the bases for her rejection of Petitioners' "remaining claims" and that the ALJ summarily rejected Petitioners' "remaining claims."

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

Order

Petitioners' Amended Petition filed May 11, 2000, is dismissed.

_____

ANIMAL WELFARE ACT

COURT DECISIONS

JUDIE HANSEN v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 99-2640.
Filed July 24, 2000.

(Cite as 121 F.3d 1342, 2000 WL 1010575 (8th Cir. 2000)).

United States Court of Appeals
Eighth Circuit

Before Loken, Fagg, and Hansen, Circuit Judges.
PER CURIAM.

Judie Hansen petitions for review of a final decision of the Secretary of the United States Department of Agriculture. Because we have no jurisdiction over the matter, we dismiss the petition.

On March 15, 1999, the Secretary denied Hansen's motion for reconsideration of a prior decision finding that she had committed various violations of the Animal Welfare Act and related regulations and standards, and assessing penalties. Hansen filed her petition for review in this court on June 22, 1999, well after the sixty-day time limit for filing such a petition. See 7 U.S.C. § 2149(c). This time limit is mandatory and jurisdictional, and therefore we lack jurisdiction to hear her untimely appeal. See *United States Dep't of Agric. v. Kelly*, 38 F.3d 999, 1003 (8th Cir. 1994) (timeliness of appeal from administrative order is jurisdictional requirement that cannot be modified or waived).

Accordingly, we dismiss Hansen's petition.

FRED HODGINS, JANICE HODGINS, HODGINS KENNELS, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 97-3899.
Filed Nov. 20, 2000.

(Cite as 238 F.3d 421, 2000 WL 1785733 (6th Cir. 2000)).

Animal welfare – Willful – Substantial evidence – Fourth Amendment – Search – Adequacy of complaint – Notice – Fifth Amendment.

The Hodgins sought judicial review of an order by the Judicial Officer assessing the Hodgins a $13,500 civil penalty and suspending the Hodgins' Animal Welfare Act (AWA) license for violations of the AWA and the regulations and standards issued under the AWA. The United States Court of Appeals for the Sixth Circuit vacated the Judicial Officer's decision and remanded the proceeding to the Judicial Officer for further proceedings. The Court reversed the Judicial Officer's decision that the Hodgins' violations were willful and held that a number of the violations found by the Judicial Officer were not supported by substantial evidence. Further, the Court held that the violations which were supported by substantial evidence were minor warranting at most a small civil penalty. The Court rejected the Hodgins' contention that repeated warrantless inspections by APHIS inspectors violated the Fourth Amendment prohibition against unreasonable searches. The Court also rejected the Hodgins' contention that they were denied the right to cross-examine one of the USDA witnesses. The Court found that, while the complaint filed in the administrative proceeding could have been drafted more clearly, it provided the Hodgins sufficient notice of the matters of fact and law asserted as required by the due process clause of the Fifth Amendment and 5 U.S.C. § 554(b)(3).

United States Court of Appeals
Sixth Circuit

Before: **NELSON**, **MOORE**, and **CLAY**, Circuit Judges.

DAVID A. NELSON, Circuit Judge.

Fred and Janice Hodgins own and operate Hodgins Kennels, a business that sells animals (mostly dogs and cats) to research facilities. Hodgins Kennels is subject to the Animal Welfare Act, 7 U.S.C. §§ 2131-2159, to the regulations adopted thereunder, see 9 C.F.R. §§ 1.1-3.142, and to supervisory inspections by the Animal and Plant Health Inspection Service (APHIS), an arm of the United States Department of Agriculture.

On March 22, 1995, following a series of inspections that allegedly uncovered numerous infractions of the law at Hodgins Kennels, APHIS initiated an administrative disciplinary proceeding. On May 31, 1996, following lengthy hearings, an administrative law judge issued an initial decision and order imposing a $16,000 fine on Fred and Janice Hodgins and ordering them to cease all violations

of the Animal Welfare Act and its regulations. An administrative appeal followed.

In due course a judicial officer of the Agriculture Department issued an opinion that reversed a few of the ALJ's findings but largely adopted the initial decision and order. *In re Hodgins*, 56 Agric. Dec. 1242, 1997 WL 392606 (U.S.D.A. July 11, 1997). The judicial officer assessed a fine of $13,500, suspended the Hodgins' license under the Animal Welfare Act for 14 days, and ordered that the license be reinstated only if APHIS declared itself satisfied that no violations continued to exist. The judicial officer stayed his decision pending review by this court. *In re Hodgins*, 56 Agric. Dec. 1372, 1997 WL 577544 (U.S.D.A. Aug. 11, 1997).

The Hodgins have filed a petition for review, and the matter has been briefed and argued. For the reasons set forth below, we shall grant the petition and vacate the challenged decision. The suspension of the license was clearly improper, in our judgment, and we conclude that most, if not all, of the fine was improper as well.

I

Congress enacted the Animal Welfare Act with three purposes in mind:

> "(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
>
> "(2) to assure the humane treatment of animals during transportation in commerce; and
>
> "(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen." 7 U.S.C. § 2131 (1994).

The United States Department of Agriculture is authorized to "promulgate humane standards and recordkeeping requirements governing the purchase, handling, or sale of animals . . . by dealers, research facilities, and exhibitors," 7 U.S.C. § 2142 (1994), and dealers are prohibited from selling animals to research facilities without first having obtained a license from the Secretary of Agriculture. 7 U.S.C. § 2134 (1994). The Secretary has promulgated extensive regulations governing the operations of animal dealers. 9 C.F.R. §§ 1.1 - 3.142.

For purposes of the Animal Welfare Act, a "dealer" is defined broadly as

> "any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates

> the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching testing, experimentation, exhibition, or for use as a pet . . . . This term does not include: A retail pet store . . . unless such store sells any animals to a research facility . . . ." 9 C.F.R. § 1.1.

There are three sub-categories of animal dealers: Class A,[1] Class B, and Class C.[2] Most relevant to this case, Class B dealers are defined as those who meet "the definition of a 'dealer' (§ 1.1), and whose business includes the purchase and/or resale of any animal." 9 C.F.R. § 1.1. Class B dealers thus include those who buy animals and sell them to research facilities.

The Hodgins have operated Hodgins Kennels since 1960, and Hodgins Kennels, Inc., has held a Class B dealer license since 1966, the year the Animal Welfare Act was enacted. As a licensee under the Animal Welfare Act, Hodgins Kennels is required to submit to inspections "at least once each year," and more often if "follow-up inspections" are necessary to check up on "deficiencies or deviations from the standards." 7 U.S.C. § 2146(a) (1994). As required by 9 C.F.R. § 2.2, APHIS provides Hodgins Kennels with a copy of all applicable regulations and standards at the time of each application for an annual license renewal.

The business of Hodgins Kennels entails obtaining small animals (mostly dogs and cats, but occasionally goats, pigs, sheep, rabbits, and calves) from local animal shelters. The animals, not having been adopted, would otherwise be euthanized. After a waiting period of approximately six weeks to monitor health and provide any necessary veterinary treatment, Hodgins Kennels sells the animals to research facilities. The research facilities demand healthy animals and return any unhealthy animals to Hodgins for a refund or replacement. In testimony before the ALJ, Mr. Hodgins explained that it is in his interest to ensure that all his animals are healthy when sold – and in point of fact, he said, his animals are virtually never rejected by research facilities for poor health. In 1994 Hodgins Kennels sold an average of 92 animals per week to research facilities, and had to euthanize an average of six animals per week because they were too ill to be used for research.

From November of 1993 to November of 1994 (the time most relevant to this case), Hodgins Kennels had two locations: a facility on Lange Road in Howell,

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[1]Class A dealers are those who deal only in animals "bred and raised on the premises." 9 C.F.R. § 1.1.

[2]Class C dealers are those "whose business involves the showing or displaying of animals to the public." 9 C.F.R. § 1.1.

Michigan, and a facility on Judd Road in Fowlerville, Michigan. (The latter facility was closed in February of 1995.)

Two veterinarians have provided care for the animals at Hodgins Kennels during the past 30 years or so: Dr. Kenneth Johnson and Dr. Henry Vaupel. Dr. Johnson testified that he had been in veterinary practice for some 25 years at the time of the alleged Hodgins violations, and that he had served as a representative of the Michigan Veterinary Medical Association. Dr. Vaupel had been in veterinary practice for around 23 years, and he was an associate clinical professor of veterinary medicine at Michigan State University. Both veterinarians were and are highly qualified practitioners.

Mr. Hodgins testified that the attending veterinarian normally conducts a "walk-through" of the kennels once a week; Dr. Johnson confirmed that his visits were usually on a weekly basis. An APHIS inspector testified that of the 100 facilities he has inspected, no other animal dealer had its attending veterinarian visit as often as Hodgins Kennels did.

Carl Lalonde, an animal care inspector with APHIS, inspected Hodgins Kennels in January of 1993. He found the kennels in compliance with the Animal Welfare Act and the regulations thereunder, except for an alleged failure to keep 18 cats for the required holding period. This matter was referred to Dr. Joseph Walker, the head of the APHIS Northeast Sector, and in November of 1993 Dr. Walker directed a senior APHIS investigator named Thomas Rippy to investigate further. Mr. Rippy found that a "couple of cats" had been disposed of before the requisite holding period. He also testified that the matter had been "largely corrected." The alleged violation was not pursued any further and was not included in the APHIS complaint that underlies the case before us here.

The complaint is based on a series of inspections that took place from November of 1993 to November of 1994. On Nov. 16, 1993, Dr. Lisa Dellar (who had inspected Hodgins Kennels since 1988) and a Mr. Kovach conducted an inspection in which they cited 23 alleged violations relating to housekeeping, veterinary care, recordkeeping, identification of animals, and cleaning. (The details of these and the other citations will be discussed later in this opinion.). According to testimony by Tammi Longhi, a daughter and employee of Fred and Janice Hodgins,[3] Dr. Dellar exhibited a changed attitude at the time of this inspection. According to Ms. Longhi, Dr. Dellar had become "not as friendly," she "wasn't very talkative," she was "just very short," she "didn't really explain a lot what she was doing."

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[3]Ms. Longhi played a prominent role in the proceeding that led to our opinion in *Longhi v. APHIS*, 165 F.3d 1057 (6th Cir. 1999).

A second inspection took place on Jan. 18, 1994, a day on which the temperature approached a record-breaking 16 to 20 degrees below zero. Dr. Dellar and Mr. Kovach were joined this time by a third inspector, Dr. Norma Jean Harlan. Mr. Kovach testified that it was not "normal" to have three inspectors and that this was the only time he had ever seen three inspectors at one location. There was conflicting testimony as to how it came about that there were three inspectors on this occasion, rather than the customary one or two.

The Jan. 18, 1994, inspection disclosed 22 alleged violations of the Animal Welfare Act and its regulations. Mr. Kovach took photographs to support the allegations.

The third relevant inspection was conducted on March 1, 1994, by Dr. Dellar and Dr. Harlan. Dr. Dellar took photographs, and 18 alleged violations were reported.

The fourth inspection was conducted a month later, on April 5, 1994. On this occasion Dr. Dellar and Dr. Harlan were accompanied by Mr. Rippy, who took photographs. This inspection turned up 15 alleged violations. Mr. Rippy testified that Ms. Longhi was quite upset throughout the inspection; she thought having three inspectors was harassment.

The fifth inspection was conducted on May 10, 1994, by Drs. Dellar and Harlan, along with Mr. Rippy. The latter who again took photographs. Hodgins Kennels was cited for 10 more violations.

The sixth inspection was conducted on June 23, 1994, by Drs. Dellar and Harlan and Mr. Rippy. The Hodgins and Ms. Longhi were again upset by what they perceived as harassment. The inspection cited the kennels for 12 more violations.

The seventh inspection was conducted on September 13, 1994, by Dr. Dellar and Harlan, this time accompanied by a Don Castner (Mr. Rippy was unavailable) who took photographs. Fifteen alleged violations were cited.

The eighth and final inspection relevant to this suit was conducted on November 22, 1994, by Dr. Dellar and Dr. Peter Kirsten. This time the alleged violations totaled nine.

Dr. Joseph Walker, the APHIS head for the Northeast Sector, directed Dr. Dellar's superior, Dr. Ellen Magid, to accompany Dr. Dellar on an inspection to "be sure that what we were doing was true and correct" and to "judge what was happening at the facility." Dr. Magid inspected Hodgins Kennels in May of 1995, and she reported to Dr. Walker "that Hodgins Kennels was fairly close to coming into compliance" and that she "thought that with a little effort that they would be in compliance with our regulations."

II

The Hodgins assert nine grounds for relief, some of which will be combined here for purposes of analysis. First, the Hodgins argue that the repeated inspections violated their rights under the Fourth Amendment. Second, they argue that the findings of violations are not supported by substantial evidence. Third, they argue that as to each alleged violation the USDA failed to provide written warnings and a chance to demonstrate compliance as required by 5 U.S.C. § 558(c), or alternatively, that the judicial officer erred in finding the violations willful. Fourth, they argue that their due process rights were violated by the agency's alleged refusal to specify the claims being asserted, the ALJ's refusal to let the Hodgins call Dr. Walker as a witness or present a tape of his statements, the ALJ's refusal to allow detailed cross-examination of the APHIS veterinarians who reported the violations, and the refusal to allow evidence of undue influence on the part of animal rights activists.

A. The Fourth Amendment

The Hodgins contend that the repeated searches by APHIS inspectors violated the Fourth Amendment prohibition against "unreasonable" searches. As the Supreme Court has recognized, this prohibition applies with respect to commercial premises, see *See v. City of Seattle*, 387 U.S. 541, 543 (1967), and provides a measure of protection against administrative inspections that are intended to enforce regulatory statutes. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978).

Under what has come to be called the Colonnade-Biswell doctrine (a name derived from *Colonnade Corp. v. United States*, 397 U.S. 72 (1970) and *United States v. Biswell*, 406 U.S. 311 (1972)), the presence of a "long tradition of close government supervision" in "closely regulated" industries results in a "reduced expectation of privacy." *New York v. Burger*, 482 U.S. 691, 701, 702 (1987). The warrant and probable-cause requirements that must normally be met to satisfy the dictates of the Fourth Amendment "have lessened application in this context." *Id.* at 702. Thus, "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." *Id.*

It seems clear enough that the research animal business qualifies as one that is closely regulated. See *Benigni v. Maas*, No. 93-2134, 1993 U.S. App. LEXIS 31629, at *6 (8th Cir. 1993). Even in a closely-regulated industry, however, the government does not have an automatic free pass to search private premises. A

warrantless inspection must still satisfy three criteria: "First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." *Burger*, 482 U.S. at 702. Second, the warrantless inspections "must be 'necessary to further [the] regulatory scheme."' *Id.* (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)). Third, "'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provide a constitutionally adequate substitute for a warrant.' * * * In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.* (quoting *Donovan*, 452 U.S. at 600). "In addition, in defining how a statute limits the discretion of the inspectors, . . . it must be 'carefully limited in time, place, and scope."' *Id.* (quoting *United States v. Biswell*, 406 U.S. at 315).

As to the first criterion, the substantial governmental interest served by the Animal Welfare Act is to prevent the abuse of research animals and to protect against interstate schemes to steal pets for sale to research facilities. Other courts have found this to be a substantial interest for purposes of the Colonnade-Biswell doctrine, see, e.g., *Benigni v. Maas*, No. 93-2134, 1993 U.S. App. LEXIS 31629, at *6 (8th Cir. 1993), and we agree with that determination.

The second criterion – the necessity for warrantless inspections – may be more difficult to satisfy. To meet this criterion the agency must show a need for "surprise." *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316-17 (1978). The Supreme Court has found such necessity in cases involving automobile junkyards, see *New York v. Burger*, 482 U.S. 691 (1987), and firearms dealers, see *United States v. Biswell*, 406 U.S. 311 (1972). Because stolen autos can be processed through a junkyard very quickly, it is important for junkyard inspections to be unannounced – "surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all." *Burger*, 482 U.S. at 710; *cf. United States v. Branson*, 21 F.3d 113, 117 (6th Cir. 1994) (finding a similar necessity for inspecting used auto parts dealers); *United States v. Dominguez-Prieto*, 923 F.2d 464, 468-69 (6th Cir. 1991) (finding a similar necessity for inspecting motor carriers). In *Biswell* the Court contrasted the case before it (involving interstate trafficking in illegal firearms) with an earlier case where surprise was determined to be unnecessary:

> "In *See v. City of Seattle*, 387 U.S. 541 (1967), the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short

time. Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue. We expressly refrained in that case from questioning a warrantless regulatory search such as that authorized by § 923 of the Gun Control Act. Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." *Biswell*, 406 U.S. at 316.

In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the Court rejected an argument that the Secretary of Labor had the authority to conduct warrantless searches of any business subject to the Occupational Safety and Health Act. The Court reasoned as follows:

"The Secretary submits that warrantless inspections are essential to the proper enforcement of OSHA because they afford the opportunity to inspect without prior notice and hence to preserve the advantages of surprise. While the dangerous conditions outlawed by the Act include structural defects that cannot be quickly hidden or remedied, the Act also regulates a myriad of safety details that may be amenable to speedy alteration or disguise. The risk is that during the interval between an inspector's initial request to search a plant and his procuring a warrant following the owner's refusal of permission, violations of this latter type could be corrected and thus escape the inspector's notice. To the suggestion that warrants may be issued ex parte and executed without delay and without prior notice, thereby preserving the element of surprise, the Secretary expresses concern for the administrative strain that would be experienced by the inspection system, and by the courts, should ex parte warrants issued in advance become standard practice.

"We are unconvinced, however, that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective. In the first place, the great majority of businessmen can be expected in normal course to consent to inspection without warrant; the Secretary has not brought to this Court's attention any widespread pattern of refusal. In those cases where an owner does insist on a warrant, the Secretary argues

> that inspection efficiency will be impeded by the advance notice and delay. . . . [It is not] immediately apparent why the advantages of surprise would be lost if, after being refused entry, procedures were available for the Secretary to seek an ex parte warrant and to reappear at the premises without further notice to the establishment being inspected." *Id.* at 316-20 (footnotes omitted); see also *McLaughlin v. Kings Island*, 849 F.2d 990 (6th Cir. 1988) (disallowing warrantless searches by OSHA).

The above cases suggest that for warrantless searches to be justifiable under a regulatory scheme, the object of the search must be something that can be quickly hidden, moved, disguised, or altered beyond recognition, so that only a surprise inspection could be expected to catch the violations. On the other hand, if a regulation is similar to a building code (as in *See v. Seattle*), where violations will be harder to conceal, the need for surprise will be less pressing, and warrantless searches will more likely be unconstitutional.

The purposes served by the Animal Welfare Act are such as to present a need for surprise inspections. Stolen animals, for example, like stolen cars, can be moved or disposed of quickly. Dirty cages could be cleaned, improperly-treated animals euthanized or hidden, and records falsified in short order should a search be announced ahead of time. The inspections undertaken pursuant to the Animal Welfare Act thus seem to meet the second of the *Burger* criteria.

As for the third criterion, the owners of animal dealerships licensed under the Animal Welfare Act are certainly put on notice that their premises will be subject to inspection "at least once each year" and that there may be "follow-up inspections" if violations are found. 7 U.S.C. § 2146(a) (1994). The Secretary of the Department of Agriculture is authorized to "make such investigations or inspections as he deems necessary," and "at all reasonable times" is allowed to have "access to the places of business and the facilities, animals, and those records required to be kept. . . ." *Id.* Moreover, the USDA regulations limit the time, place, and scope of the inspections as follows:

> "§ 2.126 Access and inspection of records and property.
>
> "(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:
>
> (1) To enter its place of business;

> (2) To examine records required to be kept by the Act and the regulations in this part;
>
> (3) To make copies of the records;
>
> (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
>
> (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.
>
> "(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier." 9 C.F.R. § 2.126 (2000); *cf. Burger*, 482 U.S. at 711 (noting with approval that the inspections authorized were limited to "regular and usual business hours").

Since the inspections as authorized meet the three criteria laid down in *Burger*, we conclude that the regulatory authorization for warrantless searches is not, on its face, in violation of the Fourth Amendment. But this does not end our inquiry. The Hodgins go on to argue that the regulations were applied to them in a manner violative of the Fourth Amendment. In this connection they assert that the inspectors had "no reasonable basis for such frequent and lengthy inspections," because the "violations at Petitioners' kennel were no different in number and in character than would be expected at any facility of its size." They cite a Seventh Circuit decision suggesting that a warrant may be required if "an individual begins to receive distinctive treatment without apparent justification (such as more inspections than the regular schedule would indicate)." *Id.* at 13 (quoting *Lesser v. Espy*, 34 F.3d 1301, 1309 (7th Cir. 1994)).

The Animal Welfare Act, however, makes no exception for violations that are routine; rather, the statute provides that if there are "deficiencies or deviations from the standards," then the Secretary "*shall* conduct such follow- up inspections as may be necessary until all deficiencies or deviations from such standards are corrected." 7 U.S.C. § 2146(a) (1994) (emphasis added). The first relevant inspection, that of November 16, 1993, found 23 alleged violations of the USDA regulations; therefore, the Department was required (as far as it knew at the time) to conduct

follow-up inspections.[4]

Even if the Fourth Amendment forbade administrative searches such as those visited upon the Hodgins, the "good faith" exception would likely apply. The Supreme Court has held "that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police who acted in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, even if the statute is subsequently found to be an unconstitutional violation of the Fourth Amendment." *United States v. Bell*, Nos. 93-5933, 93-5952, 1994 U.S. App. LEXIS 17359, at *19 (6th Cir. 1994) (citing *Illinois v. Krull*, 480 U.S. 340, 349-53 (1987)). This "good faith exception" would presumably apply to the evidence collected by the Agriculture Department inspectors in this case, because at the time of the searches the inspectors had no reason to think that they were violating the Fourth Amendment.

B. The Violations

We review administrative decisions of the sort at issue here to determine if the findings on which they are based are supported by "substantial evidence." 5 U.S.C. § 706(2)(E). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). We shall begin this part of our analysis by considering the judicial officer's decision to reverse a portion of the initial decision and order in which the ALJ found that the offenses were not committed willfully.

1. Willfulness and 5 U.S.C. § 558(c)

The Administrative Procedure Act says that unless a violation is an act of "willfulness," or poses a risk to "public health, interest, or safety,"[5] a license may

[4]The Hodgins cite testimony by Mr. Rippy suggesting that some of the violations cited were so minor that they might not have been cited at other facilities. Mr. Rippy, however, did not participate in inspecting Hodgins Kennels until April 5, 1994, the fourth inspection relevant to this case. Mr. Rippy's testimony is thus not strictly relevant to the repetition issue.

[5]The phrase "public health, interest, or safety" in 5 U.S.C. S 558(c)(2) is rarely invoked in license suspension cases. As one court put it, this exception is "directed to unusual, emergency, situations," *Air North America v. Department of Transportation*, 937 F.2d 1427, 1437 (9th Cir. 1991), of which an example might be pilots' licenses. See, *e.g.*, *Greenwood v. Federal Aviation Administration*, 28 F.3d 971 (9th Cir. 1994). Accordingly, we proceed with the assumption that none of the conditions at (continued...)

be suspended "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)(1994). The Department of Agriculture's own procedural regulations require that unless there is willfulness, the "Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder." 7 C.F.R. § 1.133(b).

The statute and the regulations are thus intended to encourage non-judicial resolution of disputes by giving a non-willful violator both a written warning and a chance to mend his ways. Such a violator's license may not be suspended unless these conditions are met.

Here the ALJ, in his initial decision, declined to find that any of the violations was willful; in the ALJ's words, it was "not shown that the violations were committed intentionally, deliberately or in careless disregard of the Act." The judicial officer decided otherwise, concluding that all of the Hodgins' violations were willful because (a) the actions were intentional and (b) some of the violations were observed again at later inspections. *In re Hodgins*, 1997 392606 at *67.

The judicial officer misapplied the Sixth Circuit's standard for willfulness. Under our standard the term "willful" applies only to an "action knowingly taken by one subject to the statutory provisions in disregard of the action's legality. . . ." *Volpe Vito, Inc. v. USDA*, No. 97-3603, 1999 WL 16562, at *2 (6th Cir. Jan. 7, 1999).[6] Actions taken in reckless disregard of statutory provisions may also be "willful." See *United States v. Illinois Cent. Ry.*, 303 U.S. 239, 242-43 (1938) (one who "intentionally disregards the statute or is plainly indifferent to its requirements" acts willfully) (quotation omitted); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961) (one who "acts with careless disregard of statutory requirements" acts

[5](...continued)
Hodgins Kennels presented any danger to the public health, and that the willfulness exception to 5 U.S.C. § 558(c)(2) will be most pertinent.

[6]Some circuits use an even more stringent test. The Tenth Circuit, for example, specifically disagrees with the "careless disregard" concept of willfulness, defining the term instead as "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." *Murphy v. Drug Enforcement Administration*, No. 96-9507, 1997 WL 196603, at *5 (10th Cir. 1997); see also *Hutto Stockyard, Inc. v. United States Dep't of Agriculture*, 903 F.2d 299, 304 (4th Cir. 1990).

willfully); see also *Volpe Vito, Inc. v. USDA*, No. 97-3603, 1999 WL 16562, at *2 (6th Cir. Jan. 7, 1999) (animal park's proffered mitigation does "not make its actions less deliberate, intentional, or reckless). See generally *JACOB A. STEIN et al.*, ADMINISTRATIVE LAW § 41.06[3] (2000) (stating the generally accepted test for willful behavior under the Administrative Procedure Act is whether an action "was committed intentionally" or "was done in disregard of lawful requirements" and also noting that "gross neglect of a known duty will also constitute willfulness").

The judicial officer penalized the Hodgins for several violations that were immediately corrected at the time of inspection. In this connection the judicial officer stated:

> "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. . . . 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 does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation." *In re Hodgins*, 1997 WL 392606, at *22 (quoting *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996)).

This statement of the law is difficult to reconcile with the Administrative Procedure Act, which provides that a license can be suspended for a non-willful violation *only* if the violator is given written notice *and* an "opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c). The opportunity to demonstrate or achieve compliance would be meaningless if a violation that was immediately corrected could be punished just as if it had never been corrected at all.

The proper rule, we believe, is this: Unless it is shown with respect to a specific violation either (a) that the violation was the product of knowing disregard of the action's legality or (b) that the alleged violator was given a written warning and a chance to demonstrate or achieve compliance, the violation cannot justify a license suspension or similar penalty. This is a principle to which we shall have occasion to turn repeatedly in the discussion that follows.

The question of willfulness is one that must be addressed separately with respect to each specific violation. A blanket finding of willfulness, on the record before us, is simply not tenable. And because the judicial officer reversed the ALJ as to a determination of fact, we must "examine the record with greater care." *Tel Data Corp. v. National Labor Relations Bd.*, 90 F.3d 1195, 1198 (6th Cir. 1996); see also

National Labor Relations Board v. Brown-Graves Lumber Co., 949 F.2d 194, 196-97 (6th Cir. 1991) ("The 'substantialness' of a Board conclusion may be diminished . . . when the administrative law judge has drawn different conclusions."); *Litton Microwave Cooking Products Division v. National Labor Relations Bd.*, 868 F.2d 854, 857 (6th Cir. 1989) ("Although the board is free to find facts and to draw inferences different from those of the administrative law judge, a 'reviewing court has an obligation to examine more carefully the evidence in cases where a conflict exists'") (quoting *Pease Co. v. National Labor Relations Bd.*, 666 F.2d 1044, 1047-48 (6th Cir. 1981)).

2. The Reliability of the Inspection Reports

The Hodgins argue that the inspection reports are unreliable for several reasons.

First, they say, the reports should be disregarded because they were prepared for litigation purposes after Hodgins Kennels had been "chosen for selective enforcement." In this connection they cite a Fifth Circuit case, *Young v. United States Dep't of Agriculture*, 53 F.3d 728 (5th Cir. 1995), where the court disallowed certain reports prepared solely for litigation purposes. This circuit, however, has held that inspection reports are not *per se* excludable "if the inspection reports . . . were promptly prepared after all inspections, regardless whether violations were found or litigation was anticipated." *Volpe Vito, Inc. v. United States Dep't of Agriculture*, No. 97-3603, 1999 U.S. App. LEXIS 241, at *5 (6th Cir. 1999). Although there may well be reason to suspect selective prosecution here, we do not think that this alone makes the reports so inherently unreliable as to be excludable on that basis.

The Hodgins further maintain that the reports record only one side of the story. For example, the Hodgins point to testimony in which Dr. Dellar admits that her citations for inadequate veterinary care often failed to mention that the animals in question were in fact being treated with antibiotics at the time of the inspection. One-sidedness is not normally a basis for exclusion, but this is undoubtedly a factor to be considered as we analyze the substantiality of the evidence offered in support of specific findings of violations.

The Hodgins also argue that the reports are hearsay because, in many instances, the inspectors had no independent recollection of the facts being reported. Hodgins' brief at 8. Even if these reports did not come within the past-recollection-recorded exception to the hearsay rule, however, they would still be generally admissible. The Administrative Procedure Act allows the admission of "any oral or documentary evidence." 5 U.S.C. § 556(d). Based on this, we have held that "[p]rovided it is relevant and material, hearsay is admissible in administrative

proceeding[s] . . . ." *Bobo v. United States Dep't of Agriculture*, 52 F.3d 1406, 1414 (6th Cir. 1995) (quoting *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138 (D.C. Cir. 1982)).

The Hodgins note many instances where the inspectors issued citations on the basis of standards higher than those set by the regulations. The list is too long to be presented here in full, and many of those instances will be discussed in the next section, but here are a few:

– Dr. Harlan's statement that the regulations require cleaning *three times* per day if necessary, whereas the regulations specifically mandate daily cleaning only. See, e.g., 9 C.F.R. § 3.1(c)(3) (requiring that hard surfaces be spot-cleaned daily); 9 C.F.R. § 3.11(a) (requiring the cleaning of primary enclosures once daily).

– Citations for cobwebs (a few of which were found in corners of the ceiling and ventilation ducts) as violations of the requirement that premises "be kept clean and in good repair to protect the animals from injury." 9 C.F.R. § 3.11(c).

– Repeated instances of issuing a citation for any animal showing any sign of illness, despite the fact that (as Dr. Harlan admitted in testimony) a facility with over 200 animals might see up to 20 or 30 animals with new symptoms *every day* just by chance. As Dr. Johnson testified in great detail, the kennels followed a protocol under which the Hodgins could treat sick or thin animals, except in serious situations, without summoning the veterinarian every day. The record leaves little room for doubt that more than a one-time visual observation of an ill dog ought to be necessary for inferring a violation of the requirement of adequate veterinary care under 9 C .F.R. § 2.40(a).

– Repeated mis-diagnoses of animals that were not sick at all, as discussed below.

– A statement by Inspector Rippy that the case against the Hodgins was a "test case," and that, to his knowledge, "in other facilities the same things may not be cited as noncompliant. . . ."

The evidence seems clear that the inspectors were, for whatever reason, going out of their way to find violations. We shall keep these instances in mind as we examine the sufficiency-of-the-evidence question.

3. Adequate veterinary care

The Hodgins were charged with failure "to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and [failure] to provide veterinary care to animals in need of care in willful violation of section 2.40 of the Regulations

(9 C.F.R. § 2.40)."[7] *In re Hodgins*, 1997 WL 392606, at *13. The judicial officer found that such violations had occurred on Nov. 16, 1993, and January 18, March 1, April 5, May 10, June 23, September 13, and November 22, 1994. *Id.* at *17. The specifics are as follows:

November 16, 1993 – On this date the inspectors described a cat with "both eyes stuck shut with copious ocular discharge;" the cat should have been euthanized five days earlier, according to the inspector. *Id.* at *14. The inspectors also claimed that "[m]any sick animals were not reported nor [sic] being treated." *Id.* at *13.

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[7]This provision states:

"§ 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."

January 18, 1994 – On this date the inspectors found an "extremely thin" dog whose nasal discharge had allegedly not been treated. *Id.* at *13. Mr. Kovach's report stated that "[m]any, many dogs were noted to be unresponsive and shaking with cold. These dogs need to be supported with additional heat and isolation from healthy dogs." *Id.* at *14.[8]

March 1, 1994 – On this date the inspectors noted four "extremely thin" dogs that allegedly needed to "be isolated, feed intake monitored and supplied with higher caloric density type of feed." *Id.* at *13. Dr. Dellar further testified that any thin dog requires a veterinarian's exam to determine the cause of the thinness. *Id.* She noted that the "thin dogs most commonly were cited because of inadequate veterinary care in that they were group housed with other dogs, [and] their feed intake could not be monitored." *Id.* The judicial officer agreed, finding that the "record does not show that thin dogs were promptly segregated while they were being monitored." *Id.* However, both of the attending veterinarians, Drs. Johnson and Vaupel, testified that it is not unusual for dogs arriving from pounds and shelters to be thin; that thinness is not a disease that necessarily requires a veterinary examination; and that standard veterinary practice is to observe thin animals to see if they are eating properly and gaining weight before doing a more thorough medical examination. Ms. Longhi further testified that these dogs were often taken out of their pens to monitor their food intake and prevent inordinate competition for food.

April 5, 1994 – On this date a dog was found coughing, shaking, and having difficulty breathing. Dr. Dellar thought that the treatment – tetracycline – was insufficient, and that the dog needed "further supportive care and other treatment if he's going to recover well or quickly." *Id.* at *14.

June 23, 1994 – On this date inspectors observed a dog that was "unresponsive, dehydrated, weak, coughing, and had a 'copious nasal discharge which had soiled his front legs.'" *Id.* at *14. Dr. Dellar wrote in the inspection report that the dog should have been "separated, given fluids and additional supportive care." *Id.*

May 10, 1994 – On this date the inspectors observed a dog with a bloody discharge that had not been detected as being abnormal, noting that "[m]any

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[8]On January 18, 1994, the inspectors also found a cat that had been treated with amoxicillin since December 28, 1993 – the inspectors cited this as a violation solely because the attending veterinarian's treatment schedule had been violated. The judicial officer did not seem to accept this allegation, however, as a basis for his finding that Section 2.40 had been violated on Jan. 18, 1994; the judicial officer's opinion cites testimony by the attending vet, Dr. Johnson, that his course of treatment was flexible, that Ms. Longhi was "very good" at determining the animal's responsiveness to treatment, and that if the animal failed to respond to the antibiotic within the prescribed time period, a longer treatment would be necessary. *Id.* at *14.

dogs/cats were found with unnoticed, untreated or inadequately treated conditions." *Id*. at *13.

September 13, 1994, and November 22, 1994 – The judicial officer found a violation of 9 C.F.R. § 2.40 for these dates, without specifying any basis for his holding or making any findings of fact. Without some explanation, we cannot uphold the findings for September 13, 1994 and November 22, 1994.

There is good reason to question whether any of these findings is supported by evidence that can fairly be characterized as "substantial." In the first place, Dr. Dellar (who was present at all the inspections) admitted that she did not perform a true physical examination of *any* of the animals. Rather, she made her reports based on "doing a visual examination only," a methodology that she admitted was insufficient to support an actual medical diagnosis. She further disclaimed any role that would include making medical diagnoses.[9]

Actual diagnoses by the attending veterinarians undermine the allegations made by the inspectors. Starting in early 1994, the Hodgins asked Dr. Johnson to examine all animals that the APHIS inspectors had cited as unhealthy. Dr. Johnson began doing so, usually examining each animal within 24 hours of an APHIS citation. He was cross-examined extensively about 17 specific animals that had been the subject of citations. As to each animal, he testified that the animal was either mis-diagnosed or was already being treated appropriately and was in the process of recovery at the time of the citation.

Here is an example of misdiagnosis. The APHIS inspectors reported on April 5, 1994, that they had found a cat that had a limp and enlarged lymph nodes. Dr. Johnson testified, however, that the limp was either an untreatable condition or an old injury that antedated the cat's arrival at Hodgins Kennels. He also testified

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[9]The transcript records the following exchange:

A. "I exam [sic] animals by looking at them, doing a visual examination only. So, when I do an inspection I examine every animal."

Q. "With your eyes?"

A. "With my eyes."

Q. "Do you do enough of any exam to allow you to diagnose an animal?"

A. "No."

Q. "And that's not your role, is it, for the USDA?"

A. "Correct."

that the cat did not have enlarged lymph nodes, but rather had prominent jowls, as do many older cats. In other words, Dr. Dellar had (because of her practice of making a "diagnosis" by a mere visual examination) mistaken a common, harmless condition of older cats for a medical disease.

We give the following as an example of an animal in the process of recovery: the APHIS inspectors issued a citation for a pig for with mange, but Dr. Johnson testified that the pig was being treated with Ivermectin and "recovered completely." The APHIS inspectors thus based a citation on an animal's simply being ill, even though it was being successfully treated.

Based on his repeated examinations of the animals cited by APHIS inspectors, Dr. Johnson testified as follows:

> Q. "And, Dr. Johnson, why don't you take a moment and look through these documents and see if we can generalize with respect to what you found? With respect to most of these animals, were they already on appropriate antibiotics at the time they were cited for inadequate veterinary care?"
>
> A. "Yes, I would have to say yes."
>
> Q. "Now, for the ones that were not yet on antibiotics, did your review of these and examination of these animals reveal that they had symptoms emerging as you expect them to emerge and as you found them to be appropriately treated by Hodgins Kennels on a regular basis?"
>
> A. "Yes."
>
> * * *
>
> Q. "Did you find that all of the animals cited here were receiving adequate veterinary care?"
>
> A. "Yes."

Dr. Johnson was then questioned about a later group of citations:

> Q. "[D]uring the course of your post-inspection examinations, did you see any substantial basis for citing these animals for inadequate veterinary care?"

A. "No."

Q. "Did you find that most of the observations or claims by the USDA inspectors ended up being unfounded?"

A. "Yes."

Dr. Johnson was then questioned about the inspection reports of September and November 1994:

Q. "[W]ere your conclusions with respect to all of those reports and examinations consistent with what you've already testified to with respect to the other inspection dates?"

A. "Yes."

Dr. Johnson then testified about the USDA inspections in general:

Q. "After the meeting with Dr. Dellar, did you have a concern that the USDA was going to pursue Hodgins Kennels to try to meet standards that weren't possible to meet?"

A. "Yes."

Q. "That weren't consistent with generally accepted veterinary practices?"

A. "Yes."

Q. "Did you get an impression that they were pressing for a level of care that was inappropriate?"

A. "Yes."

Q. "Inappropriately high?"

A. "Yes."

Moreover, Dr. Johnson and Dr. Vaupel both wrote letters to the USDA answering the allegations regarding veterinary care. Dr. Johnson wrote as follows:

> "The citations with respect to individual animals are best described as ludicrous. I examined individual animals within 24 hours of the animals being cited by the Department's Veterinarian. The vast majority of these animals were found to be on appropriate treatment, misdiagnosed by the Department's Veterinarian, or in normal health!!
>
> "Pointing to an animal that is ill and currently on treatment does not articulate a complaint as to the level of veterinary care. These are random source animals that have been stressed and exposed to various pathogens before Hodgins Kennels receives them. A certain percentage of these animals <u>are</u> going to become ill."

Dr. Vaupel wrote a letter in a similar vein:

> "I have provided a detailed veterinary protocol and plan to your Department, which, to my knowledge, has never been criticized. In accordance with that protocol, all of the Hodgins Kennels animals receive and have received over the years veterinary care that is far above average and far above adequate. The animals are wormed and vaccinated upon arrival and they receive courses of antibiotic treatment as necessary during their stay at Hodgins Kennels and other treatment as required. The Kennel's veterinary program includes weekly visits to the Kennels and availability by telephone or for emergency visits as necessary.
>
> "I have also been mystified by allegations of inadequate veterinary care with respect to specific animals. I now routinely try to examine these 'cited' animals within twenty-four (24) hours after a citation of inadequate veterinary care and routinely find that the animal, if ill, is already on a course of antibiotic treatment that is adequate and appropriate. In other cases, I find that animal cited is not sick at all.
>
> * * *
>
> "As we know the Department is aware, animals in kennel situations can become sick and sometimes injured; that is the whole point of a veterinary program. Furthermore, these animals can develop illnesses quite rapidly in

kennel situations. In some cases, it might be possible for symptoms in a given animal to appear during the course of an inspection, that would not have been apparent during the previous walk-through by staff. That is the nature of kennel situations and does not indicate that the staff is not checking for illness or signs of illness throughout the day. It has been my experience that the Hodgins staff is well trained and well qualified in recognizing signs of illness and consulting with me for appropriate courses of treatment.

"Indeed their livelihood depends on it. They sell medically conditioned animals which are guaranteed against illness. It would be completely counter- productive to their business to ignore illness and it has been my consistent experience that they do not do so."

The evidence seems clear that the attending veterinarians were in a better position than were the APHIS inspectors to assess accurately the health of the animals at Hodgins Kennels. Dr. Harlan admitted in testimony that she never performed follow-up visits or checked the veterinary records to see if any of the cited animals had improved under treatment. She further admitted that a kennel's attending veterinarian was in a better position to assess the progress that diseased animals were making. Dr. Dellar also admitted in testimony that she had never checked with any actual practicing veterinarians to determine whether the level of care at Hodgins Kennels met standard practices.

To sum up: all the allegations of mistreated animals rested on reports by Dr. Dellar, a non-practicing veterinarian, who admitted that she did not perform any medical examinations but simply conducted a visual inspection. A large number of her "diagnoses" were specifically challenged as inaccurate by both Dr. Johnson and Dr. Vaupel, the attending veterinarians, who unequivocally testified that whenever they reexamined the animals that the APHIS inspectors said were being mistreated, the animals were either healthy or were being treated appropriately and recovering normally.

It is plain that no kennel can always keep 100 percent of its animals 100 percent healthy; to expect such perfection is utopian. Yet that is seemingly what the APHIS inspectors demanded of the Hodgins Kennels. It is not a reasonable interpretation of "adequate veterinary care," 9 C.F.R. § 2.40, to insist that all the animals under such care should have unflaggingly perfect health.

After reviewing the record in its entirety, we conclude that the agency's determination that Hodgins Kennels violated 9 C.F.R. § 2.40 is not supported by substantial evidence.

4. Identification of Animals

The Hodgins were found guilty on four counts of failing to have certain animals individually tagged, in violation of 7 U.S.C. § 2141,[10] and 9 C.F.R. § 2.50. *In re Hodgins*, 1997 WL 392606, at *18. The relevant inspections were those of November 16, 1993, January 18, 1994, March 1, 1994, and September 13, 1994.

The regulation has not been changed substantially since 1989. See 54 Fed. Reg. 36123-01 (Aug. 31, 1989). However, APHIS's internal interpretation of this regulation seems to have been liberalized. At the time of the alleged violations. APHIS took the position that every dog had to have a collar/tag on its body. As Dr. Dellar testified, however, the agency's current interpretation allows a tag to be placed on the cage door if a dog is particularly resistant to being tagged on its body. (We could find no evidence that either interpretation was ever published in the Federal Register or made public in any fashion.)

The Hodgins were cited because they occasionally placed an animal's tag on the door of its cage, if that animal had chewed off its collar or showed great distress at being tagged. The judicial officer held that the Hodgins "were not in compliance with APHIS' policy at the time of the inspections, and therefore violated" the Animal Welfare Act and its regulations. *In re Hodgins*, 1997 WL 392606, at *18.

The prior APHIS interpretation of 9 C.F.R. § 2.50 was, in our view, arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A).[11] The USDA regulation itself explicitly allowed the placement of a cat's tag on the door of its cage if the cat "exhibits serious distress from the attachment of a collar and tag." 9 C.F.R. § 2.50(b)(4). There is no rational reason why this same exception should not extend to dogs that claw off their collars repeatedly or show distress at being tagged.

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[10]This provision reads as follows:

> "All animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe: Provided, That only live dogs and cats need be so marked or identified by a research facility."

[11]At least Two of the cited violations were not willful in any event. The November 18, 1993, inspection found several dogs untagged. The Hodgins responded to APHIS in a letter dated Nov. 18, 1993, that they had been instructed by a previous APHIS inspector that it was permissible to place a dog's tag on the door of its cage. They said that now that the policy was clear, they would place tags on all the dogs.

The March 1, 1994 inspection found only one dog that was not tagged. In the Hodgins' letter responding to this complaint, they noted that this particular dog was their personal pet. Since the Animal Welfare Act has no requirements for the treatment of personal pets, this is not a violation.

The placement of dog tags is hardly a matter that requires extensive scientific expertise or specialized knowledge. The deference that federal courts show to agency interpretations on scientific matters such as the biological effects of non-thermal radiation, see *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (D.C. Cir. 2000), or technical matters such as discounted cash flow methodologies, see *Illinois Bell Telephone Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993), is inappropriate here. The purpose of the regulation and the statute – identifying each individual animal – is served just as well by a tag hanging on a cage door as by a tag on the animal's neck. As Dr. Johnson testified, the Hodgins were always able to identify any animal by number when asked. Dr. Vaupel agreed, saying that he had never seen an animal without a tag either on its neck or on its cage door. Even the inspectors, when citing tag violations, identified the untagged animals by their number, indicating that they had no problem matching the number to the animal. (See, *e.g.*, the report of January 18, 1994, which states, "Dog # 41126 had no tag in Bldg. # 4. . . . In the cat bldg., cat number 42215 and 42216 had no tags."

The judicial officer found that no sanction, except a cease-and-desist order, was warranted for the alleged violations of the identification requirements. *In re Hodgins*, 1997 WL 392606, at *50. We find such an order inexplicable – why should the Hodgins be ordered to cease and desist from doing that which the regulations admittedly permit?

5. Recordkeeping

The Animal Welfare Act requires Class B dealers to keep records of "the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe." 7 U.S.C. § 2140. The purpose of this recordkeeping requirement is to prevent stolen animals from being sold for medical research.[12]

The judicial officer found five violations of the recordkeeping requirements. On January 18, 1994, Hodgins Kennels had rabbits and goats with no records. On

[12]The relevant regulation is 9 C.F.R. § 2.75, which states:

"Records: Dealers and exhibitors.

"(a)(1) Each dealer, other than operators of auction sales and brokers to whom animals are consigned, and each exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, 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."

March 1, 1994, Hodgins Kennels was cited for a pig with no record of acquisition. At the next inspection, April 5, 1994, the pig's record had been corrected, but there were five dogs and one cat on the records that were not present in the facility. On May 10 and June 23, 1994, the inspectors counted one fewer dog in the facility than the records showed. *In re Hodgins*, 1997 WL 392606, at *18.

The judicial officer agreed with the Hodgins that there was no evidence or allegation that the Hodgins Kennels had trafficked in stolen animals, the purpose underlying the extensive recordkeeping requirements of 9 C.F.R. § 2.75. Nevertheless, the judicial officer found that the "failure to maintain the required records, even for a short period of time, constitutes a violation. . . ." *In re Hodgins*, 1997 WL 392606, at *19.

The Hodgins explain the discrepancies as resulting from a brief lag time between an animal's arrival, sale or euthanization, and the entry of the event in the record books. This would seem understandable, as it appears that the Hodgins keep their records at their home. (Dr. Dellar testified that she had to go to their home to examine the records.) As the Hodgins argued in their appeal to the judicial officer, "[s]ince the inspections involved are unannounced, it appears that the only way to avoid litigation on a record keeping violation is to have records that are absolutely perfect at every moment of every day, with no paperwork, not even a single journal entry, left undone, even for the briefest period of time."

More importantly, the evidence does not suggest any willful violation of the recordkeeping requirements; rather, the "violations" discovered seem to be nothing more than temporary and remediable discrepancies. Without evidence of willfulness, the Hodgins should have been given a chance to demonstrate compliance with the recordkeeping regulation. 5 U.S.C. § 558(c)(2). No license suspension can be based on this citation, although a minimal fine might be supportable.

6. Structural Violations

The fourth set of violations concerns the upkeep of the structures in which the Hodgins Kennels animals were housed.[13] The November 16, 1993, inspection reportedly found some broken cement blocks, a door with a poorly-patched hole,

[13]Specifically, these citations alleged violations of 9 C.F.R. § 3.1(a):

"(a) Structure; construction. Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering."

gaps underneath two doors, and cracking concrete. The January 18, 1994, inspection allegedly disclosed that some wall panels were loose or missing, and that ceiling panels in the cat building needed repair. It also alleged that a door was falling apart. The March 1, 1994, inspection disclosed that the "main barn ceiling had missing panels" and that the roof was leaking in another building. *In re Hodgins*, 1997 WL 392606, at *19. The Hodgins responded at the time that the panels were loose because of recent renovations and posed no harm to the animals. They repaired the panels immediately. They stated that the leaky roof had recently developed because of severe weather, and they requested additional time to "effect a proper repair." *Id.* The April 5, 1994, report stated that a barn ceiling was poorly repaired, "leaving exposed insulation and holes." As the judicial officer found, the Hodgins immediately repaired the ceiling. *Id.*

The Hodgins were also cited several times for bent or broken pen-wires, which (as Dr. Vaupel testified) is the natural and unavoidable result of keeping often-rowdy animals in cages.

The judicial officer noted that the Hodgins "corrected many of these structural problems at the time of the inspections." "Nevertheless, such deficiencies, even though corrected, are still violations of the Standards." *Id.* at *20. Unless these violations were willful, however, the Hodgins were entitled to a written notice and a chance to demonstrate or achieve compliance with the regulations. 5 U.S.C. § 558(c). There is no evidence of willfullness here.

As for written notice, the judicial officer held this requirement was satisfied because every member of the public is given constructive notice of all federal laws and regulations, the Hodgins had in fact been provided with copies of the regulations once per year, and the Hodgins were given written copies of each inspection report identifying each violation alleged by APHIS inspectors. The inspection reports satisfy the notice requirement, in our view, but it does not appear that the Hodgins were given the opportunity to demonstrate compliance.

The judicial officer's statement that "deficiencies, even though corrected [on the spot], are still violations" is simply wrong; correcting deficiencies on the spot is precisely what Congress envisioned would save a non-willful violator from a license suspension. 5 U.S.C. § 558(c). The cited violations for structural deficiencies that were corrected cannot be used to support a license suspension. Again, however, a minimal fine might be supportable.

7. Maintenance of Surfaces

The Hodgins were cited for two violations of 9 C.F.R. § 3.1(c)(3), a regulation requiring that surfaces be kept clean.[14] Specifically, the September 13, 1994, inspection found "soiled, empty cages," and also found urates (mineral deposits from urine) in gutters and on the just-cleaned concrete under the cages. *In re Hodgins*, 1997 WL 392606 at *21. The November 22, 1994, inspection found identical violations. The judicial officer, however, overturned the ALJ's finding of liability on these charges. *Id.* at *22. Accordingly, these citations are not in issue here.

8. Storage of Food and Bedding

The Hodgins were held guilty of violating 9 C.F.R. § 3.1(e),[15] by allegedly

[14]The provision states in full:

"(3) Cleaning. Hard surfaces with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with §§ 3.11(b) of this subpart to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in §§ 3.11(b)(3) for primary enclosures." *Id.*

[15]This provision states:

"(e) Storage. Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas ."

keeping food and bedding unprotected from spoilage, contamination and vermin.[16] Specifically, the January 18, 1994, inspection found bedding stored open and soiled bedding stored next to fresh food and bedding. The March 1, 1994, inspection found paint stored with feed. Finally, the September 13, 1994, inspection found open bedding, food stored on top of the furnace, rabbit feed placed in the dead animal storage room, and feed in the same room as gasoline.

The judicial officer found that the instances where food was found next to paint and gasoline (on March 1 and September 13) "were matters that were corrected immediately." *In re Hodgins*, 1997 WL 392606, at *22. The judicial officer reiterated the proposition that the immediate correction of these violations was irrelevant, and that the violations were still punishable. This is incorrect – without a finding of willfulness (a finding for which there is no substantial evidence), the immediate correction of the violations means, according to 5 U.S.C. § 558(c)(2), that they cannot be used to support a license revocation.

As for the charge of soiled bedding stored next to fresh bedding on January 18, 1994, the photograph reveals a wheelbarrow full of wood chippings and fecal matter sitting next to several large packages (presumably of fresh wood chips) that are wholly sealed and packed tightly. The Hodgins maintain that the wheelbarrow was inadvertently left in that place because it was too cold to take it outside that day (January 18 was the record-breaking cold day) and the staff had been sent home. Dr. Johnson testified that the placement of the wheelbarrow would not create any health hazard for the animals. We therefore see no reason to think that the placement of the wheelbarrow caused any danger of "contamination" within the meaning of 9 C.F.R. § 3.1(e). Moreover, considering the extreme weather conditions of January 18, we see no evidence of willfulness; therefore, the Hodgins should have been a chance to demonstrate compliance by moving the wheelbarrow.

As for the violations on September 13, the Hodgins point out that the bedding was open because of the time of day – 9:00 a.m., when they were in the process of changing bedding throughout the kennel. We see no reason to dispute this point; it is hard to imagine how a kennel owner is supposed to change an animal's bedding (as required) without ever having an open bag of fresh bedding somewhere. The Hodgins also note that the food found on the furnace was actually a bag of dog biscuits that belonged to an employee. This violation, if it can be called that, shows no signs of willfulness. The Hodgins argue that the barrel of rabbit feed in the dead animal storage room was completely closed, and that there were no rabbits in their kennel at the time of the inspection. The record is devoid of evidence suggesting

[16]The November 16, 1993, inspection cited open bags of bedding and feed, but the judicial officer dismissed this allegation.

that a danger of contamination might arise from storing a closed barrel of rabbit food in the same room as a freezer full of dead animals. Without such evidence, we have no reason to think that the placement of the barrel was a violation of the regulation, much less a willful violation.

9. Drainage and Waste Disposal

The seventh set of violations concerns 9 C.F.R. § 3.1(f), which requires adequate measures to clean waste materials from the animal housing areas.[17] Specifically, the January 18, 1994, inspection found puddles of water due to "melting snow off the equipment," piles of soiled bedding in the aisles, and standing water and feces in the drainage troughs. On March 1, 1994, inspectors found standing water, urine, and fecal debris in the drainage troughs. On June 23, 1994, inspectors found standing water in a walkway; Dr. Dellar testified that the water was "so high it was actually flowing into one of the dog enclosures and getting the bedding wet."

As to the violations alleged for January 18, 1994, Mr. Hodgins testified that the problems occurred because some employees did not make it to work that day, the temperature being 19 degrees below zero. He stated:

> "[T]here was no place to go with [the used bedding]. We cleaned the pens and left it in there because of the extreme cold temperatures. And

[17]The provision reads:

"(f) Drainage and waste disposal. Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas. food freezers, food refrigerators, or animal areas."

> the manure spreader could not be dumped because it was froze, so we were in a situation where we couldn't get rid of it. So until that manure spreader got thawed out and we dumped it the next day, then it would have been removed. But the pens were cleaned, the feces were in the middle of the floor in small piles." *Id.*

The puddles of water from "melting snow off the equipment" on January 18 were present because the Hodgins had to bring a piece of equipment into the building to thaw it out. Mr. Kovach admitted in testimony that the equipment had been placed in the equipment area of the building, which is separated from the animal area by concrete walls and wooden doors. The regulation prohibits only "puddles of water *in animal enclosures*." 9 C.F.R. § 3.1(f) (emphasis added). The puddles found on January 18 are thus not punishable.

As for the violations concerning the drainage trough (on Jan. 18, 1994, and March 1, 1994), the Hodgins argued that the troughs' very purpose is to catch urine and feces "so that it is taken away from the area in which the animals are kept and the animals stay clean and dry." The Hodgins also argue that the inspections usually took place at 9 a.m., at which time the daily trough cleaning had not taken place. Mr. Kovach, one of the inspectors, was asked whether there might not normally be some urine and feces in the trough that is intended to carry such waste away from the cages. His response: "Well there might be some, but from what I observed it looked like maybe a day or so worth of feces and urine." This observation is consistent with the Hodgins' assertion that they did in fact do a daily cleaning, which is all the regulations require.

The judicial officer stated that the standards have no exception for "extreme weather conditions" or "because the inspection occurs early in the work day." A failure to comply with the regulations is punishable no matter what excuse might be offered.

But the regulation does not outlaw "violations" arising only because of the time of the inspection. 9 C.F.R. § 3.1(f) provides that there must be "regular and frequent collection, removal, and disposal of animal and food wastes." Regular disposal of waste is not the same as *continuous* disposal of waste. No matter how regular the cleaning efforts of the kennel, there is bound to be *some* time of the day at which an inspection will discover waste that has not been cleaned up at that particular moment. The judicial officer seemed to interpret § 3.1(f) as though it read: "Housing facility operators must provide for immediate and continuous [rather than "regular and frequent"] collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals. . . ." This is not a tenable interpretation. Accordingly, the findings of

violations predicated on the failure to remove waste are not sustainable.

As to the alleged violation of June 23, 1994, where standing water was said to have been found flowing into a dog enclosure, the photographs do not support the claim. Moreover, the record contains no evidence of how standing water could have reached such a level (the cages are elevated at Hodgins Kennels), and there is no evidence of willfulness in any event. Having overturned the alleged structural violations, we think that no license suspension or fines can be predicated upon those citations.

10. Temperature

One citation was based on a low temperature reading on January 18, 1994.[18] That was the day, it will be recalled, when outdoor temperature was at a record low – around 20 degrees below zero. The inspectors found that the temperature in one kennel was 41 degrees and in the other kennel was 44 degrees. Mr. Hodgins testified that Dr. Dellar's first reading (with the thermometer in the air) was above 50 degrees, but that she took repeated readings on the floor, where the low temperatures were recorded.[19]

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[18]9 C.F.R. § 3.2(a) provides:

"(a) Heating, cooling, and temperature. Indoor housing facilities for dogs and cats must be sufficiently heated and cooled when necessary to protect the dogs and cats from temperature or humidity extremes and to provide for their health and well-being. When dogs or cats are present, the ambient temperature in the facility must not fall below 50 degrees F (10 degrees C) for dogs and cats not acclimated to lower temperatures, for those breeds that cannot tolerate lower temperatures without stress or discomfort (such as short-haired breeds), and for sick, aged, young, or infirm dogs and cats, except as approved by the attending veterinarian. Dry bedding, solid resting boards, or other methods of conserving body heat must be provided when temperatures are below 50 degrees F (10 degrees C). The ambient temperature must not fall below 45 degrees F (7.2 degrees C) for more than 4 consecutive hours when dogs or cats are present, and must not rise above 85 degrees F (29.5 degrees C) for more than 4 consecutive hours when dogs or cats are present. The preceding requirements are in addition to, not in place of, all other requirements pertaining to climatic conditions in parts 2 and 3 of this chapter."

[19]Mr. Hodgins' full statement on this issue was as follows:

"[S]he asked Dr. Harlan to place the thermometer on a portable dog cage that was sitting in the dry floor area of the kennel, and she did that. And they waited a few minutes and she asked Dr. Harlan what the temperature was. Dr Harlan told her that it was 50 degrees and Dr. Dellar stated, "That's not good enough. Put it on the pallet, on the floor." It was about two

(continued...)

The judicial officer held that there was a violation because the indoor temperature was under 50 degrees. This holding, however, does not square with the regulation. The regulation requires that the *ambient* temperature (defined as "the air temperature surrounding the animal," 9 C.F.R. § 1.1) be at or above 50 degrees. A temperature reading obtained only by putting the thermometer on a pallet on the floor would not show the ambient temperature. While seeming to prohibit all ambient temperatures below 50 degrees, moreover, the regulation goes on to provide that if the temperature *does* drop below 50 degrees, the animals must be provided with "dry bedding, solid resting boards, or other methods of conserving body heat." Clearly, then, the regulation does not create an absolute ban on any ambient temperature below 50 degrees; rather, the regulation envisions situations in which keeping the ambient temperature above 50 degrees might be impossible (something that could easily happen during record-breaking cold temperatures) and provides for methods of keeping the animals warm in that situation.

Given the undisputed testimony of Mr. Hodgins about the floor location of the temperature readings, we are not persuaded that substantial evidence supports a finding that the ambient (or atmospheric) temperature was actually below 50 degrees on January 18, 1994. Even if it was, the record contains no substantial evidence (or any evidence, for that matter) that the Hodgins Kennels failed to provide "dry bedding, solid resting boards, or other methods of conserving body heat." This citation will not support a fine or suspension of the license.

11. Ventilation

There were six counts of failing to ventilate the kennels properly, in violation of 9 C.F.R. § 3.2(b).[20] On the inspections of November 16, 1993, March 1, 1994,

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[19](...continued)
or three inches off the floor. So they placed the thermometer down there and they got a 42 or 41 degree reading. That's the explicit memory that I have on that."

[20]This provision states:

"(b) Ventilation. Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air conditioning must be provided when the ambient temperature is 85 degrees F (29.5 degrees C) or higher. The relative humidity must be maintained at a level that ensures the health and well- being of the dogs or cats housed therein, in accordance with the directions of the attending veterinarian and generally accepted professional and husbandry practices."

April 5, 1994, May 10, 1994, September 13, 1994, and November 22, 1994, the inspectors claim to have detected strong ammonia odors. The inspectors claimed that the odor could have been reduced by increased cleaning, ventilation, or a decreased animal population.

The Hodgins testified that their ventilation fans run constantly, and Dr. Vaupel testified that he had never noticed an excessive odor at the kennel. *In re Hodgins*, 1997 WL 392606, at *24. Dr. Dellar, however, testified that the ammonia odor burned her eyes and throat, and Dr. Harlan testified that her eyes watered as well. Based on the latter testimony, the judicial officer found six violations of § 3.2(b). Any ammonia level high enough to make an inspector's eyes water, he said, is too high for the health and well being of the animals.

This finding, however, fails to give full consideration to the veterinarians' testimony. Dr. Vaupel testified that the odor level at Hodgins Kennels "stacks up very, very well" compared to other kennels; that the odor was "minimal;" that he had never experienced any burning sensation from the odor; and that there was nothing about the odor or atmosphere at Hodgins Kennels that could "adversely affect" the animals there. Dr. Johnson similarly testified that he had never experienced a burning sensation in his eyes or throat at Hodgins Kennels; that he had never smelled an excessive odor there; and that the odor at Hodgins Kennels is "probably better than most."

The agency attempts to counter this testimony with a conclusory claim that an odor capable of making an inspector's eyes water is all that is needed to show inadequate ventilation. This argument, however, fails to account for the possibility that the inspectors might have been especially sensitive or allergic, or that a level of odor which made human eyes water was nevertheless safe for animals. The regulation does not penalize any level of odor that makes any given human being's eyes water; rather, it penalizes only a failure to maintain ventilation sufficient to minimize odors and provide for the "health and wellbeing" of the animals present. The agency presented no evidence that the odor tolerance of animals and humans is the same; on the other hand, the Hodgins did present a practicing veterinarian's testimony that the odor level he observed on his weekly visits could not adversely affect the animals there. On the record considered as a whole, the evidence on which the agency relies as support for its findings is not substantial.

12. Interior Surfaces

The Hodgins were found guilty of four counts of failing to keep interior surfaces impervious to moisture, as required by 9 C.F.R. § 3.2(d).[21] The inspectors found on November 16, 1993, that many floors needed to be resealed, and that metal grating on the walls of one building had begun to peel, "leaving areas of unsealed material which cannot be readily sanitized." *In re Hodgins*, 1997 WL 392606, at *25. On March 1, 1994, September 13, 1994, and November 22, 1994, the inspectors reported that the floors in the main barn needed to be resealed. *Id.*

The judicial officer found, however, that the inspectors' test for determining whether the floors were impervious to moisture was not necessarily accurate, and also noted testimony by Mr. Hodgins that he had applied sealant just eight days prior to a citation for having unsealed floors. The judicial officer therefore found no violation of § 3.2(d), and the "interior surface" counts are not in issue here.

13. Space Requirements

The Hodgins were found guilty of one count of failing to provide sufficient space for animals in violation of 9 C.F.R. § 3.6(a)(2)(xi).[22] On January 18, 1994, the inspectors found a pen in which too many dogs were housed together; nine dogs were in a pen that the inspectors said should have had only eight dogs.

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[21]This provision states:

"(d) Interior surfaces. The floors and walls of indoor housing facilities, and any other surfaces in contact with the animals, must be impervious to moisture. The ceilings of indoor housing facilities must be impervious to moisture or be replaceable (e.g., a suspended ceiling with replaceable panels)."

[22]This provision states:

" § 3.6 Primary enclosures. Primary enclosures for dogs and cats must meet the following minimum requirements:

"(a) General requirements.

* * *

"(2) Primary enclosures must be constructed and maintained so that they:

"(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner . . . ."

But how was this determined? The regulation itself provides merely that each enclosure should provide "sufficient space." It turns out that APHIS has its own unpublished standard for determining how exactly how many square inches count as sufficient. The inspectors' report indicates that the pen had 12,312 square inches, but that because of the ninth dog, the pen should have had 13,603 square inches. (To put these calculations into square feet, the pen had 85.5 square feet, but should have had 94.5 square feet – which means that one dimension of the pen (either length or width) should have been 1.5 feet greater.) As for APHIS's methodology, there being no published version, we quote the testimony of Mr. Kovach, one of the inspectors:

> A. "You measure the dog from the tip of the nose . . . to the tip of the tail [emphasis added], you add six inches to that, then you multiply the two figures together, which gives you your square inches for that dog. Then you go down, if there's nine dogs in a pen you add up the amount of square inches that are needed for that many dogs. Then you measure the cage length and width; that gives you your square inches of the cage."
>
> * * *
>
> Q. "Do you have any idea how long it normally takes you to measure nine dogs and figure out the square inches in the cage?"
>
> A. "Sometimes it can take 20 - 30 minutes. You have to get a care taker or handler to help you hold the dog to measure."
>
> * * *
>
> Q. "Do you have to stretch out the tail and get the tape measure from the nose?"
>
> A. "No. No, no, no, no."
>
> Q. "What parts do you measure?"
>
> A. "You misinterpreted me. It's from the tip of the nose to the *base of the tail*." (Emphasis added.)

The judicial officer failed to discuss whether this violation was willful. As Mr. Kovach's testimony indicates, the process of calculating can be quite cumbersome and confusing (Mr. Kovach himself gave conflicting testimony as to whether the measurement should be to the *tip* or the *base* of the dog's tail). Moreover, as noted above, the pen was a mere 1.5 feet shorter in length (or width) than it should have been for nine dogs. It thus seems unlikely that the violation was willful; there is every indication that it was, at worst, a temporary and accidental oversight.

Because there is no evidence of willfulness, and because the violation was immediately corrected by removing one of the dogs (as noted on the inspector's report), this violation is not punishable by a license suspension. A small fine might be supportable.

14. Housekeeping and Cleaning

Several types of housekeeping violations were cited.

First, the Hodgins were found guilty of two counts of failing to keep the primary dog enclosures clean, as required by 9 C.F.R. § 3.11(a).[23] The November 16, 1993, inspection found that "urine scale had built up on the floor under the dog enclosures." *In re Hodgins*, 1997 WL 392606 at *26. The September 13, 1994, inspection found urate scale (mineral residue from evaporated urine) on the floor beneath the pens, as well as hair and other debris stuck to the bottom of cages.

As for the allegations of urate scale buildup, the Hodgins correctly point out that an APHIS inspector admitted to never having tested the discolored spots to see if they really were urate scale. Moreover, Dr. Johnson testified that the water supply in the area had a high mineral content that would cause a mineral scale to appear on

[23]This provision states:

"(a) Cleaning of primary enclosures. Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and 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, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards pests, insects and odors."

surfaces that had been repeatedly cleaned with the water; that he had never seen any mineral buildup, whether from urine or otherwise, that would pose a health threat to the animals; and that there was no "excessive buildup" of feces or debris under the cages, indicating to him that the areas underneath the cages had indeed been "washed down daily." Dr. Vaupel similarly testified that he had never seen urine scale on the floors at Hodgins Kennels. Given the unanimous testimony of the practicing veterinarians, we conclude that the evidence supporting the above charges was not substantial.

Second, the Hodgins were found guilty of one count of failing to use appropriate cleaning practices as required by 9 C.F.R. § 3.11(b)(3).[24] The November 22, 1994, inspection alleged the following: "poorly cleaned, empty cages," "cages that have been cleaned (and were occupied) were still soiled between the grates and supports," "urates are accumulating and need to be removed on a regular basis." The judicial officer, inexplicably, upheld this violation despite the fact that he had previously held that there was no violation under 9 C.F.R. § 3.1(c)(3) for precisely the same conditions!

The inspection report shows a single paragraph with the heading "#12: Surfaces and Cleaning (3.1c3), # 36: Cleaning and Sanitation (3.11b3)." The report goes on to describe the conditions upon which both violations were charged. Yet the judicial officer held that the § 3.1(c)(3) violation had not been proved by a preponderance of the evidence, *In re Hodgins*, 1997 WL 392606 at *21, while at

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[24]This provision states:

"(b) Sanitization of primary enclosures and food and water receptacles.

* * *

"(3) Hard surfaces of primary enclosures and food and water receptacles must be sanitized using one of the following methods:

"(i) Live steam under pressure;

"(ii) Washing with hot water (at least 180 [degrees]F (82.2 [degrees]C)) and soap or detergent, as with a mechanical cage washer; or

"(iii) Washing all soiled surfaces with appropriate detergent solutions and disinfectants, or by using a combination detergent/disinfectant product that accomplishes the same purpose, with a thorough cleaning of the surfaces to remove organic material, so as to remove all organic material and mineral buildup, and to provide sanitization followed by a clean water rinse."

the same time upholding a violation under § 3.11(b)(3), id. at *27. This was capricious, and no penalty can be assessed with respect to this citation.

Third, the Hodgins were found guilty on seven counts of failing to clean the premises in violation of 9 C.F.R. § 3.11(c).[25] On November 16, 1993, the inspectors found that certain walls "appeared moldy" and were "splattered with debris;" that the floor needed sweeping and tools and bottles needed to be removed;" and that "[d]ead flies, shingles, vents, and gasoline cans need[ed] to be cleared away." *In re Hodgins*, 1997 WL 392606, at *27. The Hodgins responded that the splattered appearance of the walls was due to the installation of wallboard that had not been scrubbed yet. The Hodgins also noted that many of the items of which the inspectors complained were in a storage room, separated from the animals by a door. *Id*.

On January 18, 1994, the inspectors found cobwebs and rodent feces, and stated that the "walls and ceiling areas still need[ed] more cleaning." *Id*. On March 1, April 5, May 10, and June 23, 1994, the inspectors cited dust, debris, and cobwebs on the walls, window sills, ventilation ducts, ceilings, and fixtures. The May 10 inspection additionally noted that the "barrel used to euthanize the animals had a strong odor and was soiled, and rusting." *Id*. The September 13, 1994, inspection report claimed that the "entire facility was in need of a more frequent cleaning" because of dust, cobwebs, fecal accumulation, dead flies, and flaking light fixtures. *Id*.

As for the rust on the euthanization barrel (cited May 10), the charge reflects a fastidiousness that seems irrational. When a condemned man mounts the scaffold, shall he be heard to complain that the hangman has a communicable disease? Dr. Harlan testified that "[a]nything that comes in contact with the animals is required to be maintained in good condition, well repaired, no rusting surfaces, to allow for cleaning and disinfection. This includes everything associated with . . . euthanasia." *Id*. (quoting Tr. 708). But the pertinent regulation merely provides that the "[p]remises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair *to protect the animals*

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[25]This provision states:

> "(c) Housekeeping for premises. Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals."

from injury . . . ." 9 C.F.R. § 3.11(c). (Emphasis supplied.) Euthanasia provides guaranteed protection against subsequent injury, and a euthanization barrel would not appear to be covered by the terms "premises" or "buildings and surrounding grounds" anyway. Dr. Harlan's interpretation of the regulation is obviously overbroad.

As to the charges relating to dust, cobwebs, and debris, we have reviewed the numerous photographs submitted by the APHIS inspectors and by the Hodgins. In light of the photographs, it is difficult to see how there could have been any risk of "injury" to the animals – which is what the regulation is aimed at preventing. 9 C.F.R. § 3.11(c). The pictures show a few cobwebs in a corner of a ceiling and on ventilation shafts. No evidence was presented as to how this could possibly have caused any harm to the animals; in fact, the ALJ noted that Dr. Robert Walker, head of the Northeast Sector of APHIS, had reprimanded the inspectors under his supervision for being "nitpicky" about dust and cobwebs. Moreover, the regulations themselves allow for floors to be made of "dirt, absorbent bedding, sand[,] gravel, grass, or other similar material." 9 C.F.R. § 3.11(c)(3). If animals can be placed on dirt or sand (as they would be in a state of nature), is it not unduly nitpicky to complain about a little dust? The ALJ opined that "as the Standards are written, it is a judgment call by the inspectors whether the presence of such matters as dust and cobwebs, as well as fecal matter, constitutes a failure to comply with the Standards." That may be true within limits, but scattered instances of dust and cobwebs, which is all we have here, are not sufficient to support a finding that the regulations have been violated. No penalty can be assessed in this connection.

Finally, as to all the above charges relating to "Housekeeping," we note that the judicial officer had previously overturned findings of violations of § 3.1(c)(3), which provides that the surfaces "with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with § 3.11(b) of this subpart to prevent accumulation of excreta and reduce disease hazards." 9 C.F.R. § 3.1(c)(3). Compliance with § 3.1(c)(3) thus turns on the cleaning required by § 3.11(b). In explaining why he did not find any violations of § 3.1(c)(3), the judicial officer essentially quoted the text of § 3.11(a), which provides for daily cleaning of primary enclosures and cleaning under primary enclosures as often as necessary. *In re Hodgins*, 1997 WL 392606, at *21. He found that the Hodgins *do* clean the cages and the floors underneath on a daily basis, as well as changing the wood shavings in the pens. *Id*. at *22. Because the Hodgins "have instituted a program of daily cleaning," the judicial officer declined to find any violations of § 3.1(c)(3). But if the reason there is no violation of § 3.1(c)(3) is that the Hodgins provided daily cleanings as required by § 3.11, it is irrational to hold the Hodgins liable for violations of § 3.11. No penalty can be assessed with respect to the above citations.

15. Pest Control

The Hodgins were found guilty on three counts of failing to maintain an effective program of pest control, as required by 9 C.F.R. § 3.11(d).[26] The March 1, 1994, inspection claimed to have found rodent feces and nesting material. The June 23, 1994, inspection claimed to have found mosquitos and rodent feces. The September 13, 1994, inspection claimed to have found flies. The judicial officer acknowledged that the regulation does not "require the complete elimination of pests, which is probably impossible to achieve, but an 'effective program' of control." *In re Hodgins*, 1997 WL 392606, at *28. He found that Hodgins Kennels had failed to provide such a program.

The Hodgins point out, however, that on at least one occasion Dr. Harlan claimed to have seen rodent feces by a furnace, but when the Hodgins asked her to look closer, she agreed that what she thought was rodent feces was actually dust and soot from the furnace. Dr. Vaupel testified that he had never seen any rodents in his visits to Hodgins Kennels, nor had he ever seen rodent feces. Dr. Johnson also testified that he had never seen a rodent at Hodgins Kennels, but that he had seen the rodent bait placed by the Hodgins as part of their pest control program.

As for the mosquitoes, the Hodgins point out that the inspector who saw the insects claimed to have been concerned about malaria, a disease not known to plague the residents of Michigan. As for the flies, the Hodgins argue that flies are indeed prevalent in the summer, and that a violation should not be charged just because the inspectors saw flies on one occasion. We find it difficult to imagine any human habitation, let alone an animal kennel with two hundred cats and dogs, making it through a Michigan summer without the occasional presence of mosquitoes and flies.

The evidence presented here might suffice to show that the Hodgins Kennels pest control program was inadequate, if inadequate is taken to mean less than perfect. But the evidence does not show any *willful* decision to allow the presence of mosquitoes (a one-time violation) or flies (another one-time violation) or rodents (of which the regular veterinarians never saw any evidence). Since the Hodgins were not given a chance to demonstrate compliance with the inspectors' vision of

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[26] This provision states:

"(d) Pest control. An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas."

a mosquito-free and fly-free animal kennel, they should not suffer a license suspension for these alleged violations.

16. Primary Conveyance

The Hodgins were found guilty on one charge of failing to keep the interior of a van clean in violation of 9 C.F.R. § 3.15.[27] The inspection report of November 22, 1994, claimed that "a van used to transport animals . . . contained paper and plastic trash – along with potentially toxic substances like brake fluid and oil." Frances Hodgins provided more specifics, testifying that the inspectors found a McDonald's napkin and a can of WD-40 oil in the back of the van and a McDonald's wrapper in between the two passenger seats in the front of the van. Ms. Hodgins further testified that the dogs transported in that van are always kept in "portable airline cages." (*Id.*) The dogs thus could not have been harmed by the can of WD-40 or the McDonald's napkin.

Even if the dogs' "health and well-being" or "safety and comfort" were threatened by the WD-40 and napkin, there is no evidence that the violation was willful. The Hodgins should therefore have been a chance to demonstrate compliance, as provided by 5 U.S.C. § 558(c)(2). This opportunity was denied them. No license suspension can be based on this citation.

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[27]This provision states, in relevant part:

"§ 3.15 Primary conveyances (motor vehicle, rail, air, and marine).

"(a) The animal cargo space of primary conveyances used to transport dogs and cats must be designed, constructed, and maintained in a manner that at all times protects the health and well-being of the animals transported in them, ensures their safety and comfort, and prevents the entry of engine exhaust from the primary conveyance during transportation.

* * *

"(g) The interior of the animal cargo space must be kept clean.

"(h) Live dogs and cats may not be transported with any material, substance (e.g., dry ice) or device in a manner that may reasonably be expected to harm the dogs and cats or cause inhumane conditions."

17. Employees

The Hodgins were found guilty of seven counts of not having enough employees, in violation of 9 C.F.R. § 3.12.[28] The relevant inspection reports were those of November 16, 1993, and March 1, April 5, May 10, June 23, September 13, and November 22, 1994. The report for November 16, 1993 states:

> "Most of the items cited on this report are a reflection of inadequate man hours spent at this facility. This facility must have enough employees to carry out the required level of husbandry. Several times the statement was made to the inspectors that they were short handed at this facility."

In re Hodgins, 1997 WL 392606, at *28. As the judicial officer noted, however, this admission of short-handedness was actually due to the fact that some of the employees had gone hunting for the day and that Mr. Hodgins was out of town for an annual meeting.

The Hodgins also argued that because their workday started at 7:30 a.m., the employees did not have time to provide the animals with medical treatment, feeding, and cleaning by the time the inspectors arrived, as they typically did, at 9 a.m. Mr. Hodgins testified that the cleaning and medication of the animals began before 8 a.m. and lasted until late afternoon. Since most inspections took place in the early morning, the inspectors never saw the kennel after it had been cleaned for the day.

The judicial officer admitted that this argument was "reasonable." *In re Hodgins*, 1997 WL 392606, at *29. He nonetheless held that the regulations required that the kennel "have enough employees at all times to carry out the level of husbandry practices and care required by the Standards regardless of the time of an inspection. By not having enough employees to maintain the required level of

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[28] This provision states:

"§ 3.12 Employees.

"Each person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining dogs and cats must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide for husbandry and care, or handle animals, must be supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of dogs and cats to supervise others. The employer must be certain that the supervisor and other employees can perform to these standards."

husbandry and care at all times, Respondents violated Section 3.12 of the Standards . . . ."

We conclude that the inspectors used an unsupportably high standard for the number of employees. Various regulations require only that cleaning be done once per day. See, *e.g.*, 9 C.F.R. § 3 .1(c)(3) (requiring that hard surfaces be spot-cleaned daily); 9 C.F.R. § 3.11(a) (requiring the cleaning of primary enclosures once daily). Yet Dr. Harlan, one of the inspectors, testified that in her opinion, the regulations require cleaning *three times* per day if necessary. In the factual context presented here, this interpretation of the regulations goes too far.

Moreover, the citations for insufficient employees seem to be based explicitly on the inspectors' desire to see all tasks completed by 9:00 a.m. In one report (that of March 1, 1994) the inspectors wrote the following:

> "When asked, one employee responded that she didn't have enough time to complete tasks such as medicine treatments, feeding, or cleaning by 9:00 am. This employee starts at 7:30 am. This answer was given on several occasions when asked why some tasks were not completed. This indicates an insufficient number of employee hours at this site. Correct by 4-01-94."

The Hodgins responded to this citation with a letter making what seems to us an irrefutable point:

> "We respectfully suggest that this is another example of completely unrealistic and unsubstantiated citations. Our employees, like any others, work eight hour shifts. If we hire enough employees so that all the work to be done is completed in the first hour and a half, what are our employees supposed to do for the rest of the day? Essentially, the federal government appears to be ordering us to hire enough employees to complete all of our routine work in the first hour and one half of the day. Obviously, it is not possible to have the cleaning, feeding and medicating of over 200 animals completed in an hour and 30 minutes." (Letter of Hodgins Kennels to APHIS, March 8, 1994.

We agree. The regulations – which explicitly require no more than a daily cleaning – cannot with reason be interpreted to require that a kennel have enough employees to complete the daily cleaning and medicating by 9 a.m., or to do three rounds of cleaning per day. No license suspension or fine can be based on these citations.

C. Due Process

The Hodgins make several arguments to the effect that they were denied due process in the administrative hearing before the ALJ. We shall consider these arguments in turn.

1. Cross-Examination

The Hodgins say that they were wrongly denied the right to cross-examine Dr. Dellar about whether she had ever actually practiced veterinary medicine. They note instances of Dr. Dellar's seeming unfamiliarity with small animals, such as her admission of ignorance as to whether kittens are born with teeth – an admission highly relevant to Dr. Dellar's assertion that feeding Friskies cat food to kittens was illegal. The Hodgins apparently wished to elicit further admissions of ignorance from Dr. Dellar on cross-examination, but the ALJ did not permit the Hodgins' lawyer to pursue a line of questioning about Dr. Dellar's practical experience.

While the stifling of cross-examination is troubling, we do not see any violation of due process here. As the judicial officer pointed out, the Hodgins failed to object at the time cross-examination was curtailed, and therefore failed to preserve their right to review on that issue. *In re Hodgins*, 1997 WL 392606, at *44. It had already been pretty well established, moreover, that Dr. Dellar had little practical experience in treating animals. Given her admission that she did nothing more than a visual inspection (rather than an actual medical examination) of the animals, we have taken her "diagnoses" with the appropriate grain of salt, especially where her conclusions are contradicted by Drs. Johnson and Vaupel, practicing veterinarians with over 50 years of experience between them.

2. USDA's refusal to provide a definite statement

The Hodgins next argue that the USDA denied them due process in refusing to provide a definite and detailed statement of the charges brought against them. The USDA's complaint listed only broad charges, such as "APHIS inspected respondents' premises and found that the respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations. . . ." (Complaint, ¶ IIA). The Hodgins responded to the complaint with a "motion for more definite statement," in which they asked for more specific allegations that would explain why the USDA thought the

veterinary care program inadequate. Dr. Vaupel also submitted a letter requesting more specificity than the bare, conclusory allegations in the USDA complaint. The USDA responded by asserting that the Hodgins "are not entitled to a more definite statement" and suggesting that the complaint was specific enough for the Hodgins to file an answer denying the material violations.

At the hearing, the Hodgins' attorney found it difficult to pin the inspectors down on what, precisely, they considered to be a violation of the Animal Welfare Act. Consider, for example, the examination of Dr. Harlan as to how many cleanings per day would be required or whether lameness or diarrhea would count as a violation, or what veterinary treatment (if any) would be necessary for a "thin" dog. At one point the Hodgins' lawyer told the judicial officer that the USDA's demands were "somewhat nebulous" and that they possibly exceeded the USDA's authority; the USDA lawyer responded that asking the inspectors about the USDA requirements was inappropriate because the USDA's position would be put in its brief.

Notice and an opportunity to be heard represent the essence of due process. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The Administrative Procedure Act thus requires that all persons subject to an agency hearing shall "be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. § 554(b)(3). This court has previously found violations of the notice requirement of the Act where the agency sustained a charge different from any listed in the complaint, see *Grand Rapids Die Casting Corp. v. NLRB*, 833 F.2d 605, 606 (6th Cir. 1987); *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 544 (6th Cir. 1984).

Even where there is lack of notice prior to the administrative hearing, however, "due process is not offended if an agency decides an issue the parties fairly and fully litigated at a hearing. When parties fully litigate an issue they obviously have notice of the issue and have been given an opportunity to respond." *Yellow Freight*, 954 F.2d at 358. Although the agency's complaint against the Hodgins contained nothing more than recitations of the regulatory provisions that were allegedly violated, the complaint was based upon inspection reports that included numerous factual examples of the violations charged. And the specifics were debated and discussed at the administrative hearings in great detail. The complaint could have been drafted more clearly, but we do not think there was a denial of due process here. The Hodgins had a reasonably fair chance to litigate the specifics of each charge at the hearing, and that is all that is required.

3. Witnesses and Evidence

The Hodgins argue that the ALJ erred in not allowing them to depose or subpoena Dr. Joseph Walker, the head of APHIS's Northeast Sector, or introduce into evidence tapes of his discussion of the case. They claim to have had numerous conversations with him, some on tape, and they assert that what he said would have confirmed their position on several key points. Dr. Walker could have testified, for example, that he instructed inspectors not to try to diagnose animals; that he admonished inspectors not to be nitpicky about cobwebs and dust; and that political pressure was exerted on the agency to eliminate Class B animal dealers altogether. The Hodgins say that Dr. Walker would have made numerous admissions that could have come in as those of a party opponent under Federal Rule of Evidence 801(d)(2).

The Hodgins also challenge the ALJ's refusal to let Mr. Hodgins shed light on possible bias on the part of the agency's inspectors. Mr. Hodgins wanted to testify as follows: that he had successfully sued animal rights activists for defamation; that since his lawsuit, activists had sought to eliminate Class B animal dealers; that an animal rights activist named Christine Stevens had tried to convince the agency to eliminate Class B animal dealers; and that Ms. Stevens had in fact testified before Congress asking for $28 million in funding to do so. The ALJ did not allow Mr. Hodgins to testify to these matters. The Hodgins contend that given the evidence of selective enforcement (*e.g.*, Mr. Rippy's statement that some of the Hodgins' violations would not have been cited at other facilities, and the inspectors' seeming insistence on standards far above those actually in force), the ALJ should have taken Mr. Hodgins' evidence.

The judicial officer, adopting the ALJ's reasoning, held the evidence inadmissible. As for the attempt to subpoena Dr. Walker, the judicial officer held that his testimony would not provide any defense to the violations charged, nor would it be relevant to the proceeding. *In re Hodgins*, 1997 WL 392606, at *38. As for the tapes of Dr. Walker's conversations with the Hodgins, the judicial officer held it immaterial that his admissions were those of a party opponent under Federal Rule of Evidence 801(d)(2), because the Federal Rules of Evidence do not apply to administrative proceedings. Moreover, the judicial officer suggested that sound recordings must be accurate and authentic, and the Hodgins' recordings might have been altered. *Id.* at *43-44. As to Mr. Hodgins' proffered testimony, the judicial officer held that it was "irrelevant to whether Respondents violated the Animal Welfare Act. . . ." *Id.* at *70.

If it be true that the agency is biased in favor of animal rights activists and against Class B animal dealers, the existence of such bias may not be strictly

relevant to the question whether the Hodgins violated any given regulation under the Animal Welfare Act. The Hodgins' allegations of bias and selective prosecution were clearly relevant, however, to the question whether the inspectors' testimony and reports were credible. The USDA bears the initial burden of proof in prosecuting violations of the Animal Welfare Act. The credibility of the inspectors is highly pertinent to a determination of whether the USDA has met that burden.

We are somewhat skeptical, moreover, of the judicial officer's overall approach to the Federal Rules of Evidence. It is true that ALJs are not bound by these rules, and are free to admit "any oral or documentary evidence" which is not "irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d). But it stacks the deck against a hapless defendant if the ALJ can use the non-applicability of the Federal Rules of Evidence to admit evidence against the defendant which would be forbidden by the Rules (hearsay, *e.g.*), and at the same time refuse to entertain exculpatory evidence that would be admissible under the Rules. What is sauce for the goose ought to be sauce for the gander, it seems to us.

4. Separation of Powers

James Madison warned that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). Although the Supreme Court has often upheld administrative actions that depart from the strict separation doctrine, "[the] Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). Whether the administrative proceedings at issue here illustrate the wisdom of the Framers' judgment presents an interesting question, but it is not a question that this court need answer in order to decide the case now before us.

The petition for review is **GRANTED**, the challenged decision is **VACATED**, and the case is **REMANDED** to the agency for further proceedings not inconsistent with this opinion.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: CURTIS G. FOLEY AND ERTIS JERRY FOLEY, d/b/a MID-STATES EXOTICS, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION, AND AS WELDING SERVICE, A CORPORATION.
AWA Docket No. 98-0018.
Decision and Order filed August 16, 2000.

Failure to file timely answer – Default decision – Exhibitor – Refusing to allow inspection – Adequate veterinary care – Housing – Sanitation – Civil penalty – License revocation.

The Judicial Officer affirmed, with minor modifications, the Default Decision issued by Administrative Law Judge Edwin S. Bernstein (ALJ) assessing Respondents, jointly and severally, a civil penalty and revoking Respondents' Animal Welfare Act license. The Respondents' failure to file a timely answer to the Amended Complaint is deemed an admission of the allegations in the Amended Complaint (7 C.F.R. § 1.136(c)) and a waiver of hearing (7 C.F.R. § 1.139). However, the Judicial Officer found that, as a matter of law, the Respondents did not violate 9 C.F.R. § 3.127(d) because it was not effective on the date the Respondents were alleged to have violated it. Based on the Judicial Officer's conclusion that the Respondents did not violate 9 C.F.R. § 3.127(d), the Judicial Officer reduced the civil penalty assessed by the ALJ from $7,500 to $6,667.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on April 6, 1998. On June 17, 1999, Complainant filed a Motion to Amend Complaint and an Amended Complaint. On July 16, 1999, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] granted Complainant's Motion to Amend Complaint (Order Amending Complaint).

The Amended Complaint alleges that on March 20, 1997, March 31, 1997, May 12, 1997, July 30, 1997, February 24, 1998, April 7, 1998, April 20, 1998, May 21, 1998, November 6, 1998, and December 1, 1998, Curtis G. Foley, Ertis

Jerry Foley, Mid-States Exotics, C and C Computers, and Welding Service, a corporation [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards (Amended Compl. ¶¶ 4-12).

The Hearing Clerk served Respondents with a copy of the Amended Complaint on January 13, 2000.[1] Respondents failed to answer the Amended Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On February 18, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondents with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision on March 22, 2000.[2] Respondents did not file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 14, 2000, the ALJ issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision]: (1) finding that, at all times material to this proceeding, Respondents operated as exhibitors, as defined in the Animal Welfare Act and the Regulations; (2) concluding that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Amended Complaint; (3) assessing Respondents, jointly and severally, a $7,500 civil penalty; and (4) revoking Respondents' Animal Welfare Act license.

On July 18, 2000, Respondents appealed to the Judicial Officer. Complainant failed to file a timely response to Respondents' appeal petition, and on August 11, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with only minor modifications, the ALJ's Default Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's Findings of Fact and Conclusions of Law, as restated.

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[1]See Domestic Return Receipt for Article Number P 368 427 161.

[2]See memorandum of TMFisher dated March 22, 2000.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 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 county 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[.]

. . . .

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, 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 regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. . . . The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

. . . .

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

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) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

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. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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. . . .

. . . .

§ 2151. Rules and regulations

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. §§ 2131, 2132(h), 2146(a), 2149(a), (b), 2151.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

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.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinarian 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.

. . . .

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.

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

. . . .

PART 3—STANDARDS

. . . .

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

FACILITIES AND OPERATING STANDARDS

§ 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. Refrigeration shall be provided for supplies of perishable food.

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

(b) Food, and food receptacles, if used, shall be sufficient in quantity and located so as to be accessible to all animals in the enclosure and shall be placed so as to minimize contamination. Food receptacles shall be kept clean and sanitary at all times. If self-feeders are used, adequate measures shall be taken to prevent molding, contamination, and deterioration or caking of food.

§ 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.

§ 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.

(b) *Sanitation of enclosures.* Subsequent to the presence of an animal with an infectious or transmissible disease, cages, rooms, and hard-surfaced pens or runs shall be sanitized either by washing them with hot water (180 F. at source) and soap or detergent, as in a mechanical 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 saturated live

steam under pressure. Pens or runs using gravel, sand, or dirt, shall be sanitized when necessary as directed by the attending veterinarian.

(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.

(d) *Pest control*. A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

. . . .

§ 3.133 Separation.

Animals housed in the same primary enclosure must be compatible. Animals shall not be housed near animals that interfere with their health or cause them discomfort.

9 C.F.R. §§ 1.1; 2.40, .100(a), .126; 3.125(a), (c), .129, .130, .131, .133.

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS RESTATED)

The Hearing Clerk served Respondents with a copy of the Amended Complaint on January 13, 2000.[3] Respondents failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file a timely answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the allegations of the Amended Complaint are adopted as findings of fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

[3]See note 1.

Findings of Fact and Conclusions of Law

1. Respondent Curtis G. Foley is an individual whose mailing address is 6774 N. U.S. 31, Whiteland, Indiana 46184, and is an owner of or principal in Respondents Welding Service, a corporation, C and C Computers, and Mid-States Exotics, located at the same mailing address.

2. Respondent Ertis Jerry Foley is an individual whose mailing address is 6774 N. U.S. 31, Whiteland, Indiana 46184, and is an owner of or principal in Respondents Welding Service, a corporation, C and C Computers, and Mid-States Exotics.

3. At all times material to this proceeding, Respondents operated as exhibitors, as that term is defined in the Animal Welfare Act and the Regulations. Respondents maintain animals at two different locations: (1) 6774 N. U.S. 31, Whiteland, Indiana 46184; and (2) 945 E. Worthsville Road, Greenwood, Indiana 46143.

4. On May 12, 1997, February 24, 1998, April 7, 1998, April 20, 1998, November 6, 1998, and December 1, 1998, Respondents willfully violated section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and section 2.126 of the Regulations (9 C.F.R. § 2.126) by failing and refusing to make their facilities, animals, and records available for inspection by Animal and Plant Health Inspection Service inspectors during normal business hours.

5. On March 20, 1997, March 31, 1997, May 12, 1997, February 24, 1998, and May 21, 1998, the Animal and Plant Health Inspection Service inspected Respondents' facilities and found that Respondents had willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain a program of adequate veterinary care. Specifically, the Animal and Plant Health Inspection Service found that Respondents, on March 20, 1997, March 31, 1997, and May 12, 1997, failed to provide veterinary care to a wounded male lion; on March 20, 1997, failed to provide veterinary care to an ailing female lion; and on February 24, 1998, failed to provide veterinary care to a wounded skunk.

6. On March 20 1997, March 31, 1997, and February 24, 1998, the Animal and Plant Health Inspection Service inspected Respondents' facilities and found that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.129 of the Standards (9 C.F.R. § 3.129) by failing to provide animals with an adequate supply of uncontaminated, wholesome, and palatable food and/or vitamin supplements.

7. On March 20, 1997, July 30, 1997, February 24, 1998, and May 21, 1998, an inspection of Respondents' facilities revealed that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and

section 3.125(c) of the Standards (9 C.F.R. § 3.125(c)) by failing to store supplies of food in a manner that protects them from deterioration, molding, and contamination by vermin and by failing to provide refrigeration for perishable food supplies.

8. On March 31, 1997, and May 21, 1998, an inspection of Respondents' facilities revealed that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.130 of the Standards (9 C.F.R. § 3.130) by failing to keep water receptacles clean and sanitized.

9. On March 20, 1997, and May 21, 1998, the Animal and Plant Health Inspection Service inspected Respondents' facilities and found that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) by failing to construct and maintain animal housing facilities so that they are structurally sound, are in good repair, protect the animals from injury, and contain the animals securely.

10. On February 24, 1998, an inspection of Respondents' facilities revealed that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.131 of the Standards (9 C.F.R. § 3.131) by failing to clean and sanitize pens, runs, and outdoor housing areas and by failing to maintain the premises clean and in good repair.

11. On February 24, 1998, an inspection of Respondents' facilities revealed that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.133 of the Standards (9 C.F.R. § 3.133) by housing incompatible animals in the same primary enclosure.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents' Appeal Petition denies the material allegations of the Amended Complaint. Respondents' denial of the material allegations of the Amended Complaint is too late to be considered. Respondents are deemed, for the purposes of this proceeding, to have admitted the allegations in the Amended Complaint because Respondents failed to file an answer within 20 days after the Hearing Clerk served Respondents with the Amended Complaint.[4]

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[4]Among other allegations, the Amended Complaint alleges that on March 20, 1997, March 31, 1997, and May 12, 1997, Respondents willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) by failing to establish a method for the regular elimination of animal waste and other liquid from animal housing areas (Amended Compl. ¶ 6). The ALJ concluded that Respondents are deemed by their failure to file a timely answer to have admitted the violations of section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) alleged in the (continued...)

The Hearing Clerk served a copy of the Amended Complaint and a service letter on Respondents on January 13, 2000.[5] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 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 . . . .
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.
>
> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent

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[4](...continued)
Amended Complaint (Default Decision at 2-3). Section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) was not effective until November 17, 1999, and compliance with section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) was not required until May 17, 2000. Moreover, section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) does not require the establishment of a method for the regular elimination of animal waste and other liquid from animal housing areas. (64 Fed. Reg. 56,142 (1999).) Therefore, as a matter of law, I conclude that Respondents did not violate section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) on March 20, 1997, March 31, 1997, and May 12, 1997, as alleged in the Amended Complaint.

Based on my conclusion that Respondents did not violate section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)), as alleged in the Amended Complaint, I reduce the $7,500 civil penalty assessed against Respondents by the ALJ to $6,667.

[5]See note 1.

> 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.

§ 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. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Amended Complaint served on Respondents on January 13, 2000, clearly informs Respondents of the consequences of failing to file a timely answer, as follows:

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

Amended Compl. at 4.

Similarly, the Hearing Clerk informed Respondents in the service letter, which accompanied the Amended Complaint, that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Amended Complaint would constitute an admission of that allegation, as follows:

January 3, 2000

Mr. Curtis G. Foley
Mr. Ertis Jerry Foley d/b/a
Mid-States Exotics a partnership
or unincorporated association, and
as Welding Service, a corporation
6774 N. U.S. 31
Whitland, [sic] IN 46184

Mr. Curtis G. Foley
Mr. Ertis Jerry Foley d/b/a
Mid-States Exotics a partnership
or unincorporated association, and
as Welding Service, a corporation
945 E. Worthsville Road
Greenwood, IN 46143

Dear Sir:

Subject: In re: Curtis G. Foley and Ertis Jerry Foley d/b/a Mid-States Exotics a partnership or unincorporated association, and as Welding Service, a corporation - Respondents
AWA Docket No. 98-0018

Enclosed is a copy of the Complainant's Amended Complaint which has been filed with this office in the above-captioned proceeding.

Inasmuch as Complainant has filed the Amended Complaint prior to the filing of a motion of hearing, the amendment is effective upon filing.

You will have 20 days from the service of this letter in which to file an answer to the Amended Complaint. Failure to file a timely Answer to or plead specifically to any allegation of the Amended Complaint shall constitute an admission of such allegation.

Your answer, as well as any motions or requests that you wish to file hereafter in this proceeding, should be submitted to the Hearing Clerk, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250. An original and three copies are required for each document.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On February 9, 2000, the Hearing Clerk sent a letter to Respondents informing them that their answer to the Amended Complaint had not been received within the time required in the Rules of Practice (Letter dated February 9, 2000, from Joyce A. Dawson, Hearing Clerk, to Messrs. Curtis G. Foley and Ertis Jerry Foley). Respondents did not respond to this letter.

On February 18, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Default Decision and a Proposed Default Decision based on Respondents' failure to file a timely answer. On March 22, 2000, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[6] Respondents failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as provided in 7 C.F.R. § 1.139.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,[7] generally there is no basis for setting aside a

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[6]See note 2.

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

default decision that is based upon a respondent's failure to file a timely answer.[8]

[8] *See generally In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. ___ (July 12, 1999) (holding that the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and that the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding that the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and that the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding that the default decision was properly issued where the respondent filed his answer 1 year and 12 days after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding that the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding that the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding that the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding that the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding that the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994, and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the

(continued...)

Respondents were given notice of the proceeding and an opportunity for a hearing. The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondents' answer was filed 6 months and 5 days after Respondents were served with the Amended Complaint and 5 months and 16 days after Respondents' answer was due. Respondents' failure to file a timely answer is deemed, for the purposes of this proceeding, an admission of the allegations in the Amended Complaint[9] and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding.

Moreover, the Rules of Practice require that any objections to a motion for a default decision and proposed default decision must be filed within 20 days after service of the motion and proposed default decision (7 C.F.R. § 1.139). Respondents failed to file timely objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

Accordingly, the Default Decision was properly issued.[10] Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the United States

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[8](...continued)
complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding that the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and that the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding that the default decision was properly issued where the respondents failed to file timely answer and that the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding that the default decision was properly issued where the respondents failed to file an answer and that the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

[9]See note 4.

[10]See note 4.

Constitution.[11]

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

Order

1. Respondents are jointly and severally assessed a civil penalty of $6,667. Respondents shall pay the civil penalty by a certified check or money order, made payable to the Treasurer of the United States. Respondents shall send the certified check or money order to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to AWA Docket No. 98-0018.

2. Respondents' Animal Welfare Act license (Animal Welfare Act license number 32-C-0009) is revoked. The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this Order on Respondents.

———————

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

In re: REGINALD DWIGHT PARR.
AWA Docket No. 99-0022.
Decision and Order filed August 30, 2000.

Veterinary care – Recordkeeping – Housing – Employees – Perimeter fence – Willful – Consideration of whole record – Correction of violations – Civil penalty – License suspension – Cease and desist order.

The Judicial Officer affirmed the Decision by Administrative Law Judge Edwin S. Bernstein (ALJ), except the Judicial Officer reduced the sanction imposed on the Respondent by the ALJ. The Judicial Officer found the Respondent: (1) failed to maintain at the Respondent's facility records of acquisition, disposition, and identification of animals in violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1); (2) failed to maintain at the Respondent's facility a written program of veterinary care in violation of 9 C.F.R. § 2.40; (3) failed to provide animals with adequate shelter from inclement weather in violation of 9 C.F.R. § 3.127(b); (4) failed to provide animals with housing that was structurally sound and maintained in good repair in violation of 9 C.F.R. § 3.125(a); and (5) failed to utilize a sufficient number of employees to maintain the professionally acceptable level of husbandry practices set forth in 9 C.F.R. § 3.125 in violation of 9 C.F.R. § 3.132. The Judicial Officer rejected the Respondent's contention that he did not violate 9 C.F.R. §§ 2.40 and 2.75(b)(1) because he maintained the required records at his residence. The Judicial Officer held that the records required by 9 C.F.R. §§ 2.40 and 2.75(b)(1) must be maintained at an exhibitor's facility where they are readily available to Animal and Plant Health Inspection Service officials during inspections of the exhibitor's facility. The Judicial Officer held that, while 9 C.F.R. § 3.125(a) does not require the Respondent to have a perimeter fence, it does require an adequate safeguard to contain the Respondent's animals and that Respondent failed to maintain an adequate safeguard to contain the Respondent's animals. The Judicial Officer rejected the Respondent's contention that the ALJ failed to consider the whole record. The Judicial Officer rejected the Respondent's contention that his correction of a violation negates the willfulness of the violation and negates the violation. The Judicial Officer held a correction of a violation does not eliminate the fact that a violation has occurred and does not negate the willfulness of the violation. The Judicial Officer considered all the factors that must be considered when determining the amount of the civil penalty to be assessed (7 U.S.C. § 2149(b)) and assessed the Respondent a $7,050 civil penalty and suspended the Respondent's Animal Welfare Act license for 3 years and 6 months.

Brian Thomas Hill, for Complainant.
Greg Gladden, Houston, TX, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 29, 1999. Complainant instituted this proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal

Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that on April 9, 1997, July 14, 1997, April 14, 1998, November 8, 1998, and November 16, 1998, Reginald Dwight Parr [hereinafter Respondent] willfully violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ II-VI).

On July 1, 1999, Respondent filed an Answer to Complaint Under the Animal Welfare Act [hereinafter Answer].

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a hearing in Houston, Texas, on February 8 and 9, 2000. Brian Thomas Hill, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Greg Gladden represented Respondent. On April 10, 2000, Respondent filed Respondent's Memorandum of Law and Respondent's Findings of Fact and Conclusions of Law and Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On April 21, 2000, Respondent filed Respondent's Reply to Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Respondent's Reply Brief]. On April 24, 2000, Complainant filed Complainant's Reply Brief.

On June 8, 2000, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $10,000 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 5 years.

On July 12, 2000, Respondent appealed to, and requested oral argument before, the Judicial Officer. Complainant failed to file a timely response to Respondent's appeal petition or Respondent's request for oral argument. On August 11, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision and a ruling on Respondent's request for oral argument.

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 Respondent has thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order, except I disagree with the sanction imposed by the ALJ. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order with modifications to reflect my disagreement with the ALJ's sanction.

Additional conclusions by the Judicial Officer follow the ALJ's Initial Decision and Order, as restated.

Complainant's exhibits are designated by "CX" and transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7–AGRICULTURE

. . . .

CHAPTER 54–TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 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 county 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[.]

. . . .

§ 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.

. . . .

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, 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 regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business

and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

. . . .

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

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) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

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. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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. . . .

. . . .

§ 2151. Rules and regulations

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. §§ 2131, 2132(h), 2140, 2146(a), 2149(a), (b), 2151.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I–ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A–ANIMAL WELFARE

PART 1–DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

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.

. . . .

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.

. . . .

SUBPART G–RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and 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.

. . . .

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.

. . . .

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:
(1) To enter its place of business;
(2) To examine records required to be kept by the Act and the regulations in this part;
(3) To make copies of the records;
(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.
(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

. . . .

PART 3–STANDARDS

. . . .

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

FACILITIES AND OPERATING STANDARDS

§ 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.

. . . .

§ 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. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.132 Employees.

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. §§ 1.1; 2.40, .75(b)(1), .100(a), .126; 3.125(a), .127(b), .132.

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

Findings of Fact

1. Respondent is an individual whose mailing address is 6916 Dusty Lane, Conroe, Texas 77303 (Respondent's Reply Brief at 1; Respondent/Appellant's Petition for Appeal [hereinafter Appeal Petition] at 5).

2. At all times material to this proceeding, Respondent was licensed and operating as an exhibitor, as defined in the Animal Welfare Act and the Regulations (Answer ¶ I(B); CX 1, CX 5, CX 10, CX 13, CX 18 at 1; Tr. 22-31).

3. At all times material to this proceeding, Respondent was doing business as Animal Extravaganza, the address of which is 6916 Dusty Lane, Conroe, Texas 77303 (CX 5, CX 6 at 1, CX 7 at 1-2, CX 10, CX 13, CX 14 at 1, CX 15, CX 17 at 1, CX 18 at 1).

4. On April 9, 1997, an Animal and Plant Health Inspection Service inspector inspected Respondent's facility and issued an inspection report (CX 6). The following conditions existed at that time:

a. Respondent failed to maintain at Respondent's facility a written program of veterinary care;

b. Respondent failed to maintain at Respondent's facility complete records showing the acquisition, disposition, and identification of animals; and

c. An animal kept outdoors at Respondent's facility was not provided with adequate shelter from inclement weather.

5. On July 14, 1997, an Animal and Plant Health Inspection Service inspector inspected Respondent's facility and issued an inspection report (CX 7). At that time, an animal was not kept in housing that was structurally sound and maintained in good repair to protect the animal from injury, to contain the animal, and to restrict the entrance of other animals.

6. On April 14, 1998, an Animal and Plant Health Inspection Service inspector inspected Respondent's facility and issued an inspection report (CX 14). At that time, animals were not kept in housing that was structurally sound and maintained in good repair to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals.

7. On November 8, 1998, the following conditions existed at Respondent's facility:

a. Animals at Respondent's facility were not kept in housing that was structurally sound and maintained in good repair to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (CX 14, CX 16, CX 17, CX 18 at 7-8; Tr. 72, 102-12, 146-50); and

b. A sufficient number of employees were not utilized to maintain a professionally acceptable level of husbandry practices (CX 18 at 5-6).

8. On November 16, 1998, an Animal and Plant Health Inspection Service inspector inspected Respondent's facility and issued an inspection report (CX 15). At that time, Respondent failed to maintain an up-to-date written program of veterinary care.

Conclusions and Discussion

1. The April 9, 1997, Inspection

On April 9, 1997, a very experienced Animal and Plant Health Inspection Service inspector, Charles M. Currer, inspected Respondent's facility and found deficiencies of the Animal Welfare Act and the Regulations and Standards (CX 6, CX 18 at 3; Tr. 65-68). Mr. Currer testified in detail as to his normal inspection procedure (Tr. 55-57). Mr. Currer testified further that he discussed the deficiencies found during the April 9, 1997, inspection with Respondent's caretaker, Allen David O'Neal, as part of the process of educating and communicating with Animal Welfare Act licensees (Tr. 66-67). Mr. Currer found the following deficiencies:

a. The Failure to Maintain Proper Records

There were no records of acquisition, disposition, and identification of animals available to Mr. Currer at Respondent's facility during the April 9, 1997, inspection (CX 6; Tr. 66). Respondent admits that the required records of acquisition, disposition, and identification of animals were not at the facility on April 9, 1997. Respondent states that he kept the required records of acquisition, disposition, and identification of animals at his residence in Houston, Texas. (Answer ¶ II; CX 18 at 3.) I conclude that on April 9, 1997, Respondent willfully violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain at Respondent's facility records of acquisition, disposition, and identification of animals.

b. The Failure to Maintain a Written Program of Veterinary Care

There was no written program of veterinary care available to Mr. Currer at Respondent's facility during the April 9, 1997, inspection (CX 6; Tr. 67). Respondent admits that the required written program of veterinary care was not at Respondent's facility on April 9, 1997. Respondent states that he kept the required written program of veterinary care at his residence in Houston, Texas. (Answer ¶ II(A); CX 18 at 3.) I conclude that on April 9, 1997, Respondent willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain at Respondent's facility a written program of veterinary care.

c. The Failure to Provide Adequate Shelter From Inclement Weather

Mr. Currer testified that he observed a tiger in an enclosure that had a roof but had no protection on its sides from wind or blowing rain (CX 6; Tr. 65-66). Respondent states that he completed the repairs necessary to comply with 9 C.F.R. § 3.127(b) by April 20, 1997 (CX 18 at 3). I conclude that on April 9, 1997, Respondent willfully violated section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)) by failing to provide an animal shelter from inclement weather.

2. The July 14, 1997, Inspection

On July 14, 1997, Mr. Currer inspected Respondent's facility and found that Respondent failed to provide structurally sound housing facilities (CX 7; Tr. 68-69). Mr. Currer testified that he observed a tiger housed in a trailer that had holes in the floor. This condition prevented the trailer from being adequately cleaned and sanitized (CX 7; Tr. 68-69). Mr. Currer discussed this violation with Mr. O'Neal (Tr. 69). Respondent states that he removed the tiger from the housing facility after Mr. Currer found the violation and started the repair of the housing facility (Answer ¶ III; CX 18 at 4). I conclude that on July 14, 1997, Respondent willfully violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) by failing to provide an animal with housing that was structurally sound and maintained in good repair to protect the animal from injury, to contain the animal, and to restrict the entrance of other animals.

3. The April 14, 1998, Inspection

On April 14, 1998, Mr. Currer inspected Respondent's facility and found that Respondent failed to provide structurally sound housing facilities (CX 14; Tr.

71-73). Mr. Currer testified that he observed that Respondent's tigers and cougars were not enclosed by a continuous perimeter fence or other adequate safeguard necessary for the safe containment of dangerous, carnivorous, wild animals. Mr. Currer also testified that he discussed the violation with Zettler Monroe Cude, Jr., Respondent's caretaker at the time, and that this violation was deemed to be critical because of the risk of animals escaping or unwanted people getting close to the animals (CX 14; Tr. 72). Mr. Currer also stated that, in his conversation with Mr. Cude, it was agreed that the deficiency must be corrected within 4 months (CX 14; Tr. 72). Respondent admits that he did not begin to install a perimeter fence around the animal cages until August 14, 1998, and the perimeter fence was not complete until November 9, 1998 (Answer ¶ IV). I conclude that on April 14, 1998, Respondent willfully violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) by failing to provide animals with housing that was structurally sound and maintained in good repair to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals.

4. The November 8, 1998, Incident

Mr. Cude testified that as of November 8, 1998, 3 months after the time that Mr. Currer and Mr. Cude had agreed that a perimeter fence would be in place, no perimeter fence or other equivalent safeguard to ensure the safe containment of dangerous, carnivorous, wild animals had been completed (CX 14; Tr. 72, 146-50). As a result, two tigers escaped from Respondent's facility. Local authorities killed these two tigers because they were a threat to human life (CX 16, CX 17, CX 18 at 7-8; Tr. 102-12). I conclude that on November 8, 1998, Respondent willfully violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) by failing to provide animals with housing that was structurally sound and maintained in good repair to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals.

Respondent states that, after Mr. Currer's April 14, 1998, inspection, he (Respondent) asked Mr. Cude to build the perimeter fence, but Mr. Cude was unable to do so because of illness. Respondent states that he did not start to build a perimeter fence until August 14, 1998, and, because of limitations placed on his ability to travel by the State of Texas, he was not able to complete the perimeter fence until November 9, 1998 (CX 18 at 5). I conclude that on November 8, 1998, Respondent willfully violated section 3.132 of the Standards (9 C.F.R. § 3.132) by failing to utilize a sufficient number of employees to maintain the professionally acceptable level of husbandry practices set forth in 9 C.F.R. §§ 3.125-.142.

5. The November 16, 1998, Inspection

Mr. Currer testified that Respondent was not able to produce an up-to-date written program of veterinary care (CX 15; Tr. 73-74). Respondent admits that his written program of veterinary care had expired (Answer ¶ VI). I conclude that on November 16, 1998, Respondent willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain an up-to-date written program of veterinary care.

The Appropriate Sanctions

Respondent was given notice of the deficiencies at his facility and was given ample opportunity to correct the deficiencies. The Animal and Plant Health Inspection Service conducted eight inspections of Respondent's facility between September 28, 1995, and November 16, 1998. Following each inspection, an Animal and Plant Health Inspection Service official pointed out the deficiencies and recommended corrections. Animal and Plant Health Inspection Service officials discussed the Animal Welfare Act with Respondent and devoted time to educating him regarding the requirements of the Animal Welfare Act and the Regulations and Standards. (CX 2, CX 3, CX 4, CX 6, CX 7, CX 8, CX 14, CX 15, CX 18, CX 19; Tr. 56-57.)

Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful. A "willful violation" is one in which the violator "(1) intentionally does an act which is prohibited,–irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978). Respondent intentionally did acts which were prohibited and acted with careless disregard of statutory and regulatory requirements.

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that, with respect to the amount of the civil penalty to assess, the Secretary of Agriculture shall consider 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.

Respondent's April 14, 1998, and November 8, 1998, violations of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) and Respondent's November 8, 1998, violation of section 3.132 of the Standards (9 C.F.R. § 3.132) were of significant gravity. These violations enabled two dangerous tigers to escape from Respondent's facility and to terrorize the neighboring community and resulted in the death of these two tigers (CX 16; Tr. 102-12). Furthermore, Respondent had previously been warned during a December 8, 1995, inspection that a violation of

section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) poses a risk of animals escaping (CX 3, CX 19; Tr. 59-61). The fact that Respondent was saddened that the two tigers that escaped and terrorized the community were required to be put to death and the fact that Respondent has subsequently made efforts to bring his facility into compliance does not detract from the gravity of these violations.

The purpose of administrative sanctions is deterrence of not only the violator, but also other potential violators. The Animal Welfare Act authorizes a civil penalty of $2,500 for each violation (7 U.S.C. § 2149(b)). Accordingly, I assess Respondent a civil penalty of $7,050 and suspend Respondent's Animal Welfare Act license for 3 years and 6 months.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises 10 issues in Respondent's Appeal Petition. First, Respondent contends the ALJ erroneously concluded that on April 9, 1997, Respondent violated section 2.40 of the Regulations (9 C.F.R. § 2.40). Respondent states he maintained the required written program of veterinary care at his residence in Houston, Texas, and he is not required by section 2.40 of the Regulations (9 C.F.R. § 2.40) to keep the written program of veterinary care at his facility. (Appeal Pet. at 1-2.)

I agree with Respondent that section 2.40 of the Regulations (9 C.F.R. § 2.40) does not state the location at which an exhibitor must maintain the required written program of veterinary care. However, the Animal and Plant Health Inspection Service's ability to ensure that each exhibitor establishes and maintains a written program of veterinary care would be thwarted if each exhibitor was allowed to keep his or her written program of veterinary care in a location at which the program was not readily available to Animal and Plant Health Inspection Service officials during inspection.

Section 2.126 of the Regulations (9 C.F.R. § 2.126) requires that each exhibitor allow Animal and Plant Health Inspection Service officials to enter the exhibitor's place of business and examine records and make copies of records required to be kept by the Animal Welfare Act and the Regulations and requires that each exhibitor allow Animal and Plant Health Inspection Service officials the use of facilities necessary for the proper examination of records required to be kept by the Animal Welfare Act and the Regulations. While Complainant did not allege that Respondent violated section 2.126 of the Regulations (9 C.F.R. § 2.126), this provision makes clear that each exhibitor must keep required records at the exhibitor's facility. Respondent admits that on April 9, 1997, he kept his written program of veterinary care at his residence in Houston, Texas (Answer ¶ II(A); CX 18 at 3). Respondent's facility is located in Conroe, Texas (CX 5, CX 6 at 1,

CX 7 at 1-2, CX 10, CX 13, CX 14 at 1, CX 15, CX 17 at 1, CX 18 at 1). Therefore, I agree with the ALJ's conclusion that on April 9, 1997, Respondent violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to keep at his facility a written program of veterinary care where the written program would be readily available for inspection by Animal and Plant Health Inspection Service officials.

Second, Respondent contends the ALJ erroneously concluded that on April 9, 1997, Respondent violated section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)). Respondent states he maintained the required records of acquisition and disposition of animals at his residence in Houston, Texas, and he is not required by section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) to keep records of acquisition and disposition of animals at his facility. (Appeal Pet. at 2.)

I agree with Respondent that section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) does not state the location at which an exhibitor must maintain the required records of acquisition, disposition, and identification of animals. However, section 10 of the Animal Welfare Act (7 U.S.C. § 2140) requires exhibitors to make and retain records of acquisition, disposition, and identification of animals, and section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) provides that the Secretary of Agriculture shall, at all reasonable times, have access to records required to be kept pursuant to 7 U.S.C. § 2140.

Moreover, the Animal and Plant Health Inspection Service's ability to ensure that each exhibitor makes, keeps, and maintains records of acquisition, disposition, and identification of animals would be thwarted if each exhibitor was allowed to keep these records in a location at which the records were not readily available to Animal and Plant Health Inspection Service officials during inspection.

Section 2.126 of the Regulations (9 C.F.R. § 2.126) requires that each exhibitor allow Animal and Plant Health Inspection Service officials to enter the exhibitor's place of business and examine records and make copies of records required to be kept by the Animal Welfare Act and the Regulations and requires that each exhibitor allow Animal and Plant Health Inspection Service officials the use of facilities necessary for the proper examination of records required to be kept by the Animal Welfare Act and the Regulations. While Complainant did not allege that Respondent violated section 2.126 of the Regulations (9 C.F.R. § 2.126), this provision makes clear that each exhibitor must keep required records at the exhibitor's facility. Respondent admits that on April 9, 1997, he kept records of the acquisition, disposition, and identification of animals at his residence in Houston, Texas (Answer ¶ II; CX 18 at 3). Respondent's facility is located in Conroe, Texas (CX 5, CX 6 at 1, CX 7 at 1-2, CX 10, CX 13, CX 14 at 1, CX 15, CX 17 at 1, CX 18 at 1). Therefore, I agree with the ALJ's conclusion that on April 9, 1997,

Respondent violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) by failing to keep at his facility records of acquisition, disposition, and identification of animals where the records would be readily available for inspection by Animal and Plant Health Inspection Service officials.

Third, Respondent contends the ALJ erroneously concluded that on April 14, 1998, and November 8, 1998, Respondent violated section 3.125 of the Standards (9 C.F.R. § 3.125) by failing to have a perimeter fence. Respondent asserts that section 3.125 of the Standards (9 C.F.R. § 3.125) does not require a perimeter fence and that the requirement that outdoor housing facilities be enclosed by a perimeter fence was not effective until May 17, 2000. (Appeal Pet. at 2-3.)

Respondent is correct that section 3.125 of the Standards (9 C.F.R. § 3.125) does not specifically require a perimeter fence. Section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) requires that indoor and outdoor animal housing facilities must be structurally sound and must be maintained in good repair to protect the animals from injury and to contain the animals. However, I disagree with Respondent's assertion that the ALJ concluded that on April 14, 1998, and November 8, 1998, Respondent violated 9 C.F.R. § 3.125(a) because Respondent failed to have a perimeter fence around Respondent's animal housing facilities. The ALJ makes clear that his conclusion that on April 14, 1998, and November 8, 1998, Respondent violated 9 C.F.R. § 3.125(a) is based on Respondent's failure to have a perimeter fence or other adequate safeguard to ensure the safe containment of Respondent's animals (Initial Decision and Order at 5-6). I agree with the ALJ's conclusion that on April 14, 1998, and November 8, 1998, Respondent failed to have a perimeter fence or other adequate safeguard to ensure the safe containment of Respondent's animals in violation of 9 C.F.R. § 3.125(a).

Fourth, Respondent contends that the ALJ erroneously concluded that on November 8, 1998, Respondent violated section 3.132 of the Standards (9 C.F.R. § 3.132) by failing to have a sufficient number of adequately trained employees to maintain the professionally acceptable level of husbandry practices required by 9 C.F.R. §§ 3.125-.142 (Appeal Pet. at 3-4).

Complainant alleges that on November 8, 1998, Respondent failed to utilize a sufficient number of employees to maintain the prescribed level of husbandry practices in violation of section 3.132 of the Standards (9 C.F.R. § 3.132) (Compl. ¶ V(2)). Complainant does not allege that Respondent's employees were not adequately trained to maintain the prescribed level of husbandry practices (Compl. ¶ V(2)). Therefore, the ALJ's conclusion regarding the adequacy of Respondent's

caretaker's training is not relevant to this proceeding.[1]

However, I conclude that on November 8, 1998, Respondent willfully violated section 3.132 of the Standards (9 C.F.R. § 3.132) by failing to utilize a sufficient number of employees to maintain the professionally acceptable level of husbandry practices set forth in 9 C.F.R. §§ 3.125-.142. On April 14, 1998, Mr. Currer inspected Respondent's facility and found that Respondent failed to provide structurally sound housing facilities (CX 14; Tr. 71-73). Mr. Currer testified that he observed that Respondent's tigers and cougars were not enclosed by a continuous perimeter fence or other adequate safeguard necessary for the safe containment of dangerous, carnivorous, wild animals. Mr. Currer also testified that he discussed the violation with Mr. Cude, Respondent's caretaker at the time, and that this violation was deemed to be critical because of the risk of animals escaping or unwanted people getting close to the animals (CX 14; Tr. 72). Mr. Currer also stated that, in his conversation with Mr. Cude, it was agreed that the deficiency must be corrected by August 8, 1998 (CX 14; Tr. 72). Mr. Cude testified that as of November 8, 1998, 3 months after the time that Mr. Currer and Mr. Cude had agreed that a perimeter fence would be in place, no perimeter fence or other equivalent safeguard to ensure the safe containment of dangerous, carnivorous, wild animals had been completed (CX 14; Tr. 72, 146-50). Respondent states that, after Mr. Currer's April 14, 1998, inspection, he (Respondent) asked Mr. Cude to build the perimeter fence, but Mr. Cude was unable to do so because of illness. Respondent states that he did not start to build a perimeter fence until August 14, 1998, and, because of limitations placed on his ability to travel by the State of Texas, he was not able to complete the perimeter fence until November 9, 1998 (CX 18 at 5). I conclude, under these circumstances, Respondent failed to utilize a sufficient number of employees to maintain the professionally acceptable level of husbandry practices set forth in 9 C.F.R. § 3.125.

Fifth, Respondent contends the ALJ did not consider Respondent's evidence, Respondent's explanations for his violations of the Animal Welfare Act and the

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[1]The ALJ found that Respondent's caretaker, Mr. Cude, received only 1 week of training before he undertook his responsibilities at Animal Extravaganza (Initial Decision and Order at 6). Mr. Cude undertook his responsibilities at Animal Extravaganza in August or September 1997 (CX 18 at 6; Tr. 138). Complainant alleges Respondent violated section 3.132 of the Standards (9 C.F.R. § 3.132) on November 8, 1998, by failing to utilize a sufficient number of employees. Even if Complainant had alleged that Respondent violated 9 C.F.R. § 3.132 by failing to utilize a sufficient number of adequately trained employees, the extent of Mr. Cude's training prior to August or September 1997 would not dispose of the issue of whether Respondent violated 9 C.F.R. § 3.132 on November 8, 1998. The record establishes that Mr. Cude received significant training between the time he undertook his responsibilities at Animal Extravaganza in August or September 1997 and November 8, 1998, the date Complainant alleges Respondent violated 9 C.F.R. § 3.132 (Tr. 144-54).

Regulations and Standards, or the circumstances surrounding Respondent's violations of the Animal Welfare Act and the Regulations and Standards (Appeal Pet. at 5-9).

The Administrative Procedure Act provides that an order may not be issued except on consideration of the whole record or those parts cited by a party, as follows:

> **§ 556. Hearings; presiding employees; powers and burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d).

The ALJ states in the Initial Decision and Order that he considered all proposed findings, proposed conclusions, and arguments (Initial Decision and Order at 1). Moreover, the Initial Decision and Order reflects careful consideration of the record by the ALJ. Therefore, I reject Respondent's contention that the ALJ did not consider Respondent's evidence, Respondent's explanations for his violations of the Animal Welfare Act and the Regulations and Standards, or the circumstances surrounding Respondent's violations of the Animal Welfare Act and the Regulations and Standards.

Sixth, Respondent contends the ALJ erroneously found Respondent's mailing address is 101 West Rocky Creek, Houston, Texas 77076. Respondent contends his mailing address changed over the course of his ownership of Animal Extravaganza and his mailing address is now, and at the time the ALJ issued the Initial Decision and Order was, 6916 Dusty Lane, Conroe, Texas 77303. (Appeal Pet. at 5.)

The record contains evidence that, at times material to this proceeding, Respondent's mailing address was 101 West Rocky Creek, Houston, Texas 77076 (CX 1, CX 2 at 1, CX 3 at 1, CX 4 at 1, CX 5 at 1, CX 6 at 1, CX 7 at 1, CX 8 at 1, CX 10, CX 11, CX 18 at 1). However, the record establishes that Respondent's mailing address changed between the time of the violations alleged in the Complaint and the date the ALJ issued the Initial Decision and Order. For example, Respondent states in his Answer that his mailing address is 129 W. Rocky Creek

Road, Houston, Texas 77076-2015 (Answer ¶ I(A)). Respondent states in Respondent's Findings of Fact and Conclusions of Law, Respondent's Reply Brief, and Respondent's Appeal Petition that his mailing address is 6916 Dusty Lane, Conroe, Texas 77303. Complainant does not dispute the assertion in Respondent's Appeal Petition that Respondent's mailing address is 6916 Dusty Lane, Conroe, Texas 77303. Therefore, I find Respondent's mailing address is 6916 Dusty Lane, Conroe, Texas 77303.

Seventh, Respondent contends the ALJ erroneously found Respondent's facility, Animal Extravaganza, is located at 5165 Dusty Lane, Conroy, Texas. Respondent contends Animal Extravaganza is located at 6916 Dusty Lane, Conroe, Texas 77303. (Appeal Pet. at 5.)

I agree with Respondent. The record does not contain any evidence to support the ALJ's finding that Animal Extravaganza is located at 5165 Dusty Lane, Conroy, Texas. I find that, at all times material to this proceeding, Respondent was doing business as Animal Extravaganza, a facility located at 6916 Dusty Lane, Conroe, Texas 77303 (CX 3, CX 4, CX 5, CX 6 at 1, CX 7, CX 8, CX 10, CX 13, CX 14, CX 15, CX 17, CX 18 at 1).

Eighth, Respondent contends the ALJ erroneously concluded Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful. Respondent asserts his correction of violations and his efforts to comply with requirements establish that his violations of the Animal Welfare Act and the Regulations and Standards were not willful. (Appeal Pet. at 8.)

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 reliance on erroneous advice, or done with careless disregard of statutory requirements.[2] The

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[2] *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (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 James E. Stephens*, 58 Agric. Dec. 149, 201 n.7 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1144 (1998), *appeal dismissed*, No. 99-2640, 2000 WL 1010575 (Table) (8th Cir. July 24, 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1061 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1034 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 286 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1998) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1454 n.4 (1997), *aff'd*, 173 F.3d 422 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 869 (1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1352 (1997), *appeal docketed*,
(continued...)

record establishes that Respondent generally corrected violations found by Animal and Plant Health Inspection Service inspectors. Mr. Currer testified as to Respondent's compliance, as follows:

> [BY MR. HILL:]
>
> Q. Since you've been inspecting his facility, how would you characterize his record of compliance, in general?
>
> [BY MR. CURRER:]
>
> A. In general, Mr. Parr is pretty good. If I do identify non-compliances, normally by the next visit those non-compliances have been completed and corrected.

Tr. 56-57.

However, Respondent offers no authority for his contention that the correction of violations of the Animal Welfare Act and the Regulations and Standards negates

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[2](...continued)
No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *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, 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 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). Appeal in this proceeding does not lie either to the United States Court of Appeals for the Fourth Circuit or to the United States Court of Appeals for the Tenth Circuit. However, even under this more stringent definition, Respondent's violations would still be found willful.

willfulness. It is well settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred.[3] Similarly, a correction of a willful violation does not negate the willfulness of the violation. I conclude Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful and Respondent's correction of these violations does not negate Respondent's willfulness.

Ninth, Respondent contends the ALJ erroneously failed to address Mr. Currer's testimony that violations of the Animal Welfare Act and the Regulations and Standards are removed by the correction of the violative conditions (Appeal Pet. at 9).

Mr. Currer testified that a violation of the Animal Welfare Act or the Regulations and Standards is removed by a correction of that violation, as follows:

> [BY MR. HILL:]
>
> Q. So when someone is in violation and you write up a non-compliance, does later compliance with it remove the earlier violation? Does the earlier violation or non-compliance become moot once you write up that he's complied, maybe at your next visit or inspection down the line?
>
> [BY MR. CURRER:]
>
> A. It's removed, correct; it's noted that it has been corrected.

Tr. 96.

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[3] *In re Susan DeFrancesco*, 59 Agric. Dec. ___, slip op. at 23 n.12 (May 1, 2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E.* Stephens, 58 Agric. Dec. 149, 184-85 (1999); In *re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), printed in 57 Agric. Dec. 869 (1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

While I agree with Respondent that the ALJ did not discuss Mr. Currer's testimony regarding the effect of corrections of violations of the Animal Welfare Act and the Regulations and Standards, I do not find the ALJ's failure to discuss Mr. Currer's testimony error. It is well settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred.[4] Therefore, Mr. Currer's belief regarding the effect of a correction of a violation is not relevant to this proceeding.

Respondent also asserts Mr. Currer erroneously advised Respondent that a correction of a violation would remove the violation. Respondent contends the ALJ should have addressed this erroneous advice "because this testimony illustrates that [Respondent] was not intentionally disregarding the [R]egulations and [S]tandards, but that he believed that his compliance after suggestions from the APHIS official would remove any violation." (Appeal Pet. at 9.)

Respondent does not cite any portion of the record which establishes that Mr. Currer advised Respondent that a correction of a violation removes the violation, and I have been unable to locate evidence supporting Respondent's assertion. However, even if I found Mr. Currer erroneously advised Respondent that the correction of a violation of the Animal Welfare Act or the Regulations and Standards removed that violation, I would not conclude that Respondent's violations of the Animal Welfare Act and the Regulations and Standards were not willful.

As discussed in this Decision and Order, *supra*, a "willful violation" is one in which the violator (1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements. Respondent intentionally did acts which were prohibited by the Animal Welfare Act and the Regulations and Standards and acted with careless disregard of the Animal Welfare Act and the Regulations and Standards. Even if I found Mr. Currer erroneously advised Respondent that the correction of a violation removed that violation and the erroneous advice induced Respondent to intentionally do an act prohibited by the Animal Welfare Act or the Regulations and Standards, I would not conclude that Mr. Currer's erroneous advice negates Respondent's willfulness because a willful violation includes the intentional doing of a prohibited act irrespective of erroneous advice. Moreover, even if I found Mr. Currer erroneously advised Respondent that the correction of a violation removed that violation and the erroneous advice induced Respondent's careless disregard of the requirements of the Animal Welfare Act and the Regulations and Standards, I would not conclude that Mr. Currer's erroneous advice negates Respondent's

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[4]See note 3.

careless disregard of the Animal Welfare Act and the Regulations and Standards.

Tenth, Respondent contends the ALJ did not discuss all of the factors that must be considered when determining the amount of the civil penalty to be assessed against Respondent and the $10,000 civil penalty assessed by the ALJ against Respondent is extreme considering the nature of the violations, Respondent's good faith, and the size of Respondent's business (Appeal Pet. at 10-11).

I agree with Respondent that the ALJ did not discuss all of the factors that must be considered when determining the amount of the civil penalty to be assessed. However, I have considered all of the factors that must be considered when determining the amount of the civil penalty to be assessed. I find that Respondent operates a 7-acre facility and that, at all times material to this proceeding, Respondent had no more than five animals at the facility (CX 1, CX 3 at 3, CX 4 at 3, CX 5, CX 6 at 3, CX 7 at 3, CX 8 at 3, CX 10, CX 14 at 2, CX 18 at 6). Respondent does not derive any income from the facility (CX 18 at 6; Tr. 78). Therefore, I find the size of Respondent's business is small.

Respondent willfully violated the Animal Welfare Act and the Regulations and Standards eight times during the period of April 9, 1997, through November 16, 1998. Despite this history of previous violations,[5] Mr. Currer, the Animal and Plant Health Inspection Service inspector who inspected Respondent's facility during this period, described Respondent's record of compliance as "[i]n general . . . pretty good." (Tr. 56.) Moreover, Mr. Currer testified that when he cites Respondent for a violation of the Animal Welfare Act or the Regulations and Standards, Respondent generally corrects the violations by the next inspection (Tr. 57, 79). The record reveals that, except for Respondent's April 14, 1998, violation of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)), Respondent expeditiously corrected the violations cited by Mr. Currer. While corrections of violations do not eliminate the fact that the violations occurred,[6] corrections are to be encouraged and can be taken into account when determining the sanction to be imposed.[7]

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[5]The ongoing pattern of violations of the Animal Welfare Act and the Regulations and Standards during the period of April 9, 1997, through November 16, 1998, establishes a history of previous violations for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)).

[6]See note 3.

[7]*In re Judie Hansen*, 57 Agric. Dec. 1072, 1146 n.26 (1998), *appeal dismissed*, No. 99-2640, 2000 WL 1010575 (Table) (8th Cir. July 24, 2000) (per curiam); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (3d Cir. 1998) (Table) printed in 57 Agric. Dec. 869 (1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.);
(continued...)

I find that Respondent's April 14, 1998, and November 8, 1998, violations of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) and November 8, 1998, violation of section 3.132 of the Standards (9 C.F.R. § 3.132) were very grave because they risked and resulted in the escape and death of Respondent's dangerous, carnivorous, wild animals. Further, Respondent's April 9, 1997, violation of section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)) and Respondent's July 14, 1997, violation of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) were serious because the violations directly involved the well-being of Respondent's animals.

The United States Department of Agriculture'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):

> [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 recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[8]

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[7](...continued)
In re John Walker, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

[8]*In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, No. 99-2640, 2000 WL 1010575 (Table) (8th Cir. July 24, 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Allred's* (continued...)

Complainant seeks a 5-year suspension of Respondent's Animal Welfare Act license, the assessment of a $10,000 civil penalty against Respondent, and a cease and desist order. Complainant bases the requested sanction on the gravity of Respondent's willful violations. (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof.)

Respondent could be assessed a maximum civil penalty of $20,000 for Respondent's eight violations of the Animal Welfare Act and the Regulations and Standards.[9] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order, a 3-year and 6-month suspension of Respondent's Animal Welfare Act license, and a $7,050 civil penalty are appropriate and necessary to ensure Respondent's compliance in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to thereby fulfill the remedial purposes of the Animal Welfare Act.

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

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 Animal Welfare Act and the Regulations and Standards and shall cease and desist from:

a. Constructing and maintaining housing facilities for animals that are not structurally sound and in good repair to protect the animals from injury, to contain the animals securely, and to restrict other animals from entering;

b. Failing to provide animals kept outdoors with shelter from inclement weather;

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[8](...continued)
Produce, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 120 S.Ct. 530 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

[9]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards.

c. Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required; and

d. Failing to establish and maintain a written program of veterinary care, as required.

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

2. Respondent is assessed a $7,050 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States. Respondent shall send the certified check or money order to:

Brian Thomas Hill
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Mr. Hill within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 99-0022.

3. Respondent's Animal Welfare Act license is suspended for a period of 3 years and 6 months and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that Respondent is in full compliance with the Animal Welfare Act, the Regulations and Standards, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding, upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 3-year and 6-month license suspension period.

The Animal Welfare Act license suspension provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

4. In order to facilitate the care of animals during the suspension of Respondent's Animal Welfare Act license, Respondent may sell any animals under his control on the effective date of this Order. Respondent shall notify the Animal and Plant Health Inspection Service in writing at least 10 days prior to any such sale and shall specify the species and identification number of each animal, its location,

the prospective buyer, the time that the animal will be moved, and the method of transportation. This information shall be provided to: Dr. Walt Christensen, Director, Central Region, USDA, APHIS, ANIMAL CARE, P.O. Box 915004, Fort Worth, Texas 76115-9104 (Telephone number (817) 885-6923)). This paragraph does not modify the suspension of Respondent's Animal Welfare Act license, as provided in paragraph 3 of this Order, and shall not be construed as allowing Respondent to acquire any new animals for regulated activities, the sale and purchase of which is regulated by the Animal Welfare Act and the Regulations.

In re: REGINALD DWIGHT PARR.
AWA Docket No. 99-0022.
Order Denying Respondent's Petition for Reconsideration filed October 17, 2000.

Petition to reconsider – Veterinary care program – Recordkeeping – Knowledge of law presumed – Federal Register constructive notice – Perimeter fence – Correction of violations – Estoppel – Civil penalty – License suspension – Cease and desist order.

The Judicial Officer denied the Respondent's Petition for Reconsideration. The Judicial Officer rejected the Respondent's contention that he did not violate 9 C.F.R. § 2.40 and 9 C.F.R. § 2.75(b)(1) because he maintained the required written program of veterinary care and the required records at his residence. The Judicial Officer held that the written program of veterinary care required by 9 C.F.R. § 2.40 and the records of acquisition, disposition, and identification of animals required by 9 C.F.R. § 2.75(b)(1) must be maintained at an exhibitor's facility where they are readily available to Animal and Plant Health Inspection Service officials during inspections of the exhibitor's facility. The Judicial Officer also rejected the Respondent's contention that he was not provided with sufficient notice that he was required to maintain the written program of veterinary care and records at his facility. The Judicial Officer stated the Respondent had actual and constructive notice of the requirement that he maintain the written program of veterinary care and records at his facility. The Judicial Officer rejected the Respondent's contention that the conclusions that he violated 9 C.F.R. § 3.125(a) were error. The Judicial Officer also rejected the Respondent's contention that the conclusions that he violated the Animal Welfare Act and the Regulations and Standards were error because he was erroneously instructed by an Animal and Plant Health Inspection Service inspector that the correction of violations eliminates the violations. The Judicial Officer stated that it is well settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred. In addition, the Judicial Officer found that the Secretary of Agriculture was not estopped from concluding that the Respondent violated the Animal Welfare Act and the Regulations and Standards because an Animal and Plant Health Inspection Service inspector erroneously instructed the Respondent that his correction of violations eliminated the violations.

Brian Thomas Hill, for Complainant.
Greg Gladden, Houston, TX, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Procedural History

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 29, 1999. Complainant instituted this proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that on April 9, 1997, July 14, 1997, April 14, 1998, November 8, 1998, and November 16, 1998, Reginald Dwight Parr [hereinafter Respondent] willfully violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ II-VI).

On July 1, 1999, Respondent filed an Answer to Complaint Under the Animal Welfare Act [hereinafter Answer].

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a hearing in Houston, Texas, on February 8 and 9, 2000. Brian Thomas Hill, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Greg Gladden represented Respondent. On April 10, 2000, Respondent filed Respondent's Memorandum of Law and Respondent's Findings of Fact and Conclusions of Law and Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On April 21, 2000, Respondent filed Respondent's Reply to Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On April 24, 2000, Complainant filed Complainant's Reply Brief.

On June 8, 2000, the ALJ issued an Initial Decision and Order: (1) concluding Respondent willfully violated the Animal Welfare Act and the Regulations and Standards; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $10,000 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 5 years.

On July 12, 2000, Respondent appealed to, and requested oral argument before, the Judicial Officer. Complainant failed to file a timely response to Respondent's appeal petition or Respondent's request for oral argument. On August 11, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision and a ruling on Respondent's request for oral argument.

On August 30, 2000, I issued a Decision and Order: (1) denying Respondent's request for oral argument; (2) concluding Respondent willfully violated the Animal Welfare Act and the Regulations and Standards; (3) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (4) assessing Respondent a $7,050 civil penalty; and (5) suspending Respondent's Animal Welfare Act license for 3 years and 6 months. *In re Reginald Dwight Parr*, 59 Agric. Dec. ___, slip op. at 3, 14-18, 39-41 (Aug. 30, 2000).

On September 15, 2000, Respondent filed Appellant's Petition for Reconsideration [hereinafter Respondent's Petition for Reconsideration]. On October 11, 2000, Complainant filed Response to Appellant's Petition for Reconsideration. On October 13, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the August 30, 2000, Decision and Order.

Complainant's exhibits are designated by "CX" and transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7–AGRICULTURE

. . . .

CHAPTER 54–TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and

eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 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 county 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[.]

. . . .

§ 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.

. . . .

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, 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 regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

. . . .

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

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) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

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. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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. . . .

. . . .

§ 2151. Rules and regulations

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. §§ 2131, 2132(h), 2140, 2146(a), 2149(a), (b), 2151.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I–ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A–ANIMAL WELFARE

PART 1–DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

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.

. . . .

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.

. . . .

SUBPART G–RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and 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.

. . . .

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.

. . . .

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

. . . .

PART 3–STANDARDS

. . . .

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

FACILITIES AND OPERATING STANDARDS

§ 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.

. . . .

§ 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. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.132 Employees.

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. §§ 1.1; 2.40, .75(b)(1), .100(a), .126; 3.125(a), .127(b), .132.

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in Respondent's Petition for Reconsideration. First, Respondent contends the conclusions that he violated 9 C.F.R. § 2.40 and 9 C.F.R. § 2.75(b)(1) on April 9, 1997, are error (Respondent's Pet. for Recons. at ¶ I).

The Complaint alleges that on April 9, 1997, Respondent failed to maintain at Respondent's facility a program of veterinary care in violation of 9 C.F.R. § 2.40

and complete records of the acquisition, disposition, and identification of animals in violation of 9 C.F.R. § 2.75(b)(1) (Compl. ¶ II(A)-(B)). Respondent states he maintained the required written program of veterinary care and the required records of acquisition, disposition, and identification at his residence in Houston, Texas, rather than at his facility. Respondent contends 9 C.F.R. § 2.40 does not state the location at which an exhibitor must maintain the required written program of veterinary care, 9 C.F.R. § 2.75(b)(1) does not state the location at which an exhibitor must maintain the required records, and he was not provided with sufficient notice that he was required to maintain the written program of veterinary care and records at his facility. (Respondent's Pet. for Recons. ¶ I.)

I agree with Respondent's contentions that 9 C.F.R. § 2.40 does not state the location at which an exhibitor must maintain the required written program of veterinary care and 9 C.F.R. § 2.75(b)(1) does not state the location at which an exhibitor must maintain the required records. However, section 10 of the Animal Welfare Act (7 U.S.C. § 2140) requires exhibitors to make and retain records of acquisition, disposition, and identification of animals, and section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) provides that the Secretary of Agriculture shall, at all reasonable times, have access to records required to be kept pursuant to 7 U.S.C. § 2140. Moreover, section 2.126 of the Regulations (9 C.F.R. § 2.126) requires that each exhibitor allow Animal and Plant Health Inspection Service officials to enter the exhibitor's place of business and examine records and make copies of records required to be kept by the Animal Welfare Act and the Regulations and requires that each exhibitor allow Animal and Plant Health Inspection Service officials the use of facilities necessary for the proper examination of records required to be kept by the Animal Welfare Act and the Regulations. While Complainant did not allege that Respondent violated section 2.126 of the Regulations (9 C.F.R. § 2.126), this provision makes clear that each exhibitor must keep the required written program of veterinary care and records of acquisition, disposition, and identification of animals at the exhibitor's facility.

The Animal Welfare Act is published in the statutes at large and the United States Code, and Respondent is presumed to know the law.[1] Therefore, Respondent is presumed to know that section 10 of the Animal Welfare Act (7 U.S.C. § 2140) requires exhibitors to make and retain records of acquisition, disposition, and identification of animals, and section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) provides that the Secretary of Agriculture shall, at all reasonable times, have access to records required to be kept pursuant to 7 U.S.C. § 2140. The

[1] *See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925); *Johnston v. Iowa Dep't of Human Servs.*, 932 F.2d 1247, 1249-50 (8th Cir. 1991).

Regulations and Standards are published in the *Federal Register*, thereby constructively notifying[2] Respondent of the requirement in 9 C.F.R. § 2.126 that each exhibitor allow Animal and Plant Health Inspection Service officials to enter the exhibitor's place of business and examine records and make copies of records required to be kept by the Animal Welfare Act and the Regulations and allow Animal and Plant Health Inspection Service officials the use of facilities necessary for the proper examination of records required to be kept by the Animal Welfare Act and the Regulations.

Moreover, at all times material to this proceeding, Respondent was licensed and operating as an exhibitor, as defined in the Animal Welfare Act and the Regulations (Answer ¶ I(B); CX 1, CX 5, CX 10, CX 13, CX 18 at 1; Tr. 22-31). The Animal and Plant Health Inspection Service supplies each applicant for an Animal Welfare Act license with a copy of the Regulations and Standards, and each applicant for an Animal Welfare Act license must acknowledge receipt of the Regulations and Standards and agree to comply with them.[3] Further, the Animal and Plant Health Inspection Service supplies each applicant for renewal of an Animal Welfare Act license with a copy of the Regulations and Standards, and each applicant for renewal of an Animal Welfare Act license must acknowledge receipt of the Regulations and Standards, certify that, to the best of his or her knowledge and belief, he or she is in compliance with the Regulations and Standards, and agree to

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[2] *See FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *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); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir.), *cert. denied*, 396 U.S. 867, *and cert. denied*, 396 U.S. 843 (1969); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

[3] Section 2.2(a) of the Regulations provides, as follows:

> **§ 2.2 Acknowledgement of regulations and standards.**
>
> (a) *Application for initial license*. APHIS will supply a copy of the applicable regulations and standards to the applicant with each request for a license application. The applicant shall acknowledge receipt of the regulations and standards and agree to comply with them by signing the application form before a license will be issued.

9 C.F.R. § 2.2(a).

continue to comply with the Regulations and Standards.[4]

The Animal and Plant Health Inspection Service supplied Respondent with a copy of the Regulation and Standards. Respondent explicitly acknowledged receipt of the Regulations and Standards and agreed to comply with the Regulations and Standards in his application for an Animal Welfare Act license (CX 1). Respondent also explicitly acknowledged receipt of the Regulations and Standards and certified that he was in compliance with the Regulations and Standards in his applications for renewal of his Animal Welfare Act license (CX 5, CX 10).[5] I find, under these circumstances, that Respondent had actual notice of the requirement that he keep at his facility a written program of veterinary care required by 9 C.F.R. § 2.40 and the records required by 9 C.F.R. § 2.75(b)(1) where they would be available for inspection by Animal and Plant Health Inspection Service officials. I reject Respondent's contention that he was not given sufficient notice of the requirement that he keep the written program of veterinary care required by 9 C.F.R. § 2.40 and the records required by 9 C.F.R. § 2.75(b)(1) at his facility.

Second, Respondent contends the conclusions that he violated 9 C.F.R. § 3.125(a) on April 14, 1998, and November 8, 1998, are error. Specifically, Respondent contends he was cited by an Animal and Plant Health Inspection Service inspector for not having a perimeter fence and the requirement that outdoor housing facilities be enclosed by a perimeter fence was not effective until May 17, 2000. (Respondent's Pet. for Recons. at ¶ II.)

I agree with Respondent that section 3.125(a) of the Standards (9 C.F.R. §

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[4]Section 2.2(b) of the Regulations provides, as follows:

> **§ 2.2 Acknowledgement of regulations and standards.**
>
> . . . .
>
> (b) *Application for license renewal.* APHIS will supply a copy of the applicable regulations and standards to the applicant for license renewal with each request for a license renewal. Before a license will be renewed, the applicant for license renewal shall acknowledge receipt if [sic] the regulations and standards and shall certify by signing the applications [sic] form that, to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards.

9 C.F.R. § 2.2(b).

[5]Respondent did not explicitly agree to continue to comply with the Regulations and Standards on his applications for renewal of his Animal Welfare Act license (CX 5, CX 10). However, Respondent's failure to explicitly agree to continue to comply with the Regulations and Standards is not relevant to this proceeding.

3.125(a)) does not specifically require that facilities must be enclosed by a perimeter fence. Further, I agree with Respondent that the requirement in 9 C.F.R. § 3.127(d) that outdoor housing facilities be enclosed by a perimeter fence did not become effective until May 17, 2000. However, the Animal and Plant Health Inspection Service inspector's April 14, 1998, inspection report does not indicate that the inspector cited Respondent for a violation of 9 C.F.R. § 3.125(a) based on Respondent's failure to enclose his facility with a perimeter fence, as Respondent contends.[6] Instead, the Animal and Plant Health Inspection Service inspector states in the April 14, 1998, inspection report that he based his finding that Respondent violated 9 C.F.R. § 3.125(a) on Respondent's failure to maintain "animal areas . . . in good repair to protect animals from injury and to contain the animals." (CX 14 at 1.)[7]

Moreover, Respondent's focus on the Animal and Plant Health Inspection Service inspector's inspection report is misplaced. Respondent's failure to enclose his facility with a perimeter fence is not the basis for the allegations in the Complaint that Respondent violated 9 C.F.R. § 3.125(a) on April 14, 1998, and November 8, 1998. The Complaint alleges that on April 14, 1998, and November 8, 1998, Respondent's 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 willful violation of 9 C.F.R. § 3.125(a) (Compl. ¶¶ IV, V(1)). Complainant proved the allegations that on April 14, 1998, and November 8, 1998, Respondent willfully violated 9 C.F.R. § 3.125(a) by a preponderance of the evidence.[8] Therefore, I reject

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[6]The record contains no evidence that an Animal and Plant Health Inspection Service inspector conducted an inspection of Respondent's facility on November 8, 1998.

[7]The April 14, 1998, inspection report does indicate that the Animal and Plant Health Inspection Service inspector was under the impression that the installation of a perimeter fence was the only means available to Respondent to correct the violation of 9 C.F.R. § 3.125(a) (CX 14 at 1).

[8]The 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 James E. Stephens*, 58 Agric. Dec. 149, 151 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1107-08 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1052 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1015 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (continued...)

Respondent's contention that the conclusions that Respondent willfully violated 9 C.F.R. § 3.125(a) on April 14, 1998, and November 8, 1998, are error.

Third, Respondent contends the conclusions that he violated the Animal Welfare Act and the Regulations and Standards are error because an Animal and Plant Health Inspection Service inspector, Charles M. Currer, instructed Respondent that a correction of a violation removes that violation (Respondent's Pet. for Recons. at ¶ III).

Respondent does not cite any portion of the record which establishes that Mr. Currer erroneously instructed Respondent that a correction of a violation removes the violation, and I have been unable to locate evidence supporting Respondent's assertion.

It is well settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred.[9]

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[8](...continued)
(1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), printed in 57 Agric. Dec. 869 (1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1246-47 n.*** (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal 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).

[9]*In re Susan DeFrancesco*, 59 Agric. Dec. ___, slip op. at 23 n.12 (May 1, 2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E.* Stephens, 58 Agric. Dec. 149, 184-85 (1999); In *re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), printed in 57 Agric. Dec. 869 (1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), (continued...)

Therefore, even if I found that Mr. Currer erroneously instructed Respondent about the effect of the correction of violations, as Respondent contends, that finding would not cause me to alter my conclusions that Respondent violated the Animal Welfare Act and the Regulations and Standards.

I infer that Respondent contends the Secretary of Agriculture is estopped from concluding that Respondent violated the Animal Welfare Act and the Regulations and Standards because an Animal and Plant Health Inspection Service inspector erroneously instructed Respondent that the correction of violations eliminates those violations. 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.[10] 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 or her position for the worse.[11] Respondent has not shown that his position in this proceeding was changed for the worse based upon the alleged instruction by an Animal and Plant Health Inspection Service inspector.

Further, even if Respondent had acted to his detriment based on Mr. Currer's erroneous instruction, it is well settled that the government may not be estopped on the same terms as any other litigant.[12] 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

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[9](...continued)
aff'd, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

[10]*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).

[11]*Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, 965 F.2d 413, 418 (7th Cir. 1992).

[12]*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

laws.[13] Equitable estoppel does not generally apply to the government acting in its sovereign capacity,[14] as it is doing in this case,[15] 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.[16] Respondent bears a heavy burden when asserting estoppel against the government, and Respondent has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Therefore, even if I found that Mr. Currer erroneously instructed Respondent that the correction of violations eliminates those violations, I would reject Respondent's contention that the conclusions that he violated the Animal Welfare Act and the Regulations and Standards are error.

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[13] *Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Trapper Mining, Inc. v. Lujan*, 923 F.2d 774, 781 (10th Cir.), *cert. denied*, 502 U.S. 821 (1991); *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).

[14] *United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

[15] *See In re Mary Meyers*, 58 Agric. Dec. 861, 868 (1999) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1059 (1998) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act). *Cf. In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 601 (1999) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *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) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[16] *Lehman v. United* States, 154 F.3d 1010, 1016-17 (9th Cir. 1998), *cert. denied*, 526 U.S. 1040 (1999); *United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997); *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); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971).

For the foregoing reasons and the reasons set forth in *In re Reginald Dwight Parr*, 59 Agric. Dec. ___ (Aug. 30, 2000), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[17] Respondent's Petition for Reconsideration was timely filed and automatically stayed the August 30, 2000, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed August 30, 2000, is reinstated; except that the effective dates in paragraphs 1 and 3 of the August 30, 2000, Order, and the date within which payment of the civil penalty was required to be sent to and received by Mr. Hill in paragraph 2 of the August 30, 2000, Order, are the dates indicated in paragraphs 1-3 of the Order in this Order Denying Respondent's Petition for Reconsideration.

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

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[17]*In re Mangos Plus, Inc.*, 59 Agric. Dec. ___ , slip op. at 11 (Sept. 7, 2000) (Order Denying Pet. for Recons.); *In re David Tracy* Bradshaw, 59 Agric. Dec. ___, slip op. at 6 (Aug. 3, 2000) (Order Denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 201, 209 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. 222, 227 (1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. 369, 387 (1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 83 (1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. 336, 338-39 (1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299 (1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards and shall cease and desist from:

a. Constructing and maintaining housing facilities for animals that are not structurally sound and in good repair to protect the animals from injury, to contain the animals securely, and to restrict other animals from entering;

b. Failing to provide animals kept outdoors with shelter from inclement weather;

c. Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required; and

d. Failing to establish and maintain a written program of veterinary care, as required.

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

2. Respondent is assessed a $7,050 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States. Respondent shall send the certified check or money order to:

Brian Thomas Hill
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Mr. Hill within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 99-0022.

3. Respondent's Animal Welfare Act license is suspended for a period of 3 years and 6 months and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that Respondent is in full compliance with the Animal Welfare Act, the Regulations and Standards, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that

he has satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding, upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 3-year and 6-month license suspension period.

The Animal Welfare Act license suspension provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

4. In order to facilitate the care of animals during the suspension of Respondent's Animal Welfare Act license, Respondent may sell any animals under his control on the effective date of the suspension provisions of this Order. Respondent shall notify the Animal and Plant Health Inspection Service in writing at least 10 days prior to any such sale and shall specify the species and identification number of each animal, each animal's location, the prospective buyer of each animal, the time that each animal will be moved, and the method of transportation of each animal. This information shall be provided to: Dr. Walt Christensen, Director, Central Region, USDA, APHIS, ANIMAL CARE, P.O. Box 915004, Fort Worth, Texas 76115-9104 (Telephone number (817) 885-6923)). This paragraph does not modify the suspension of Respondent's Animal Welfare Act license, as provided in paragraph 3 of this Order, and shall not be construed as allowing Respondent to acquire any new animals for regulated activities, the sale and purchase of which is regulated by the Animal Welfare Act and the Regulations.

5. Respondent has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent must seek judicial review within 60 days after entry of this Order. (7 U.S.C. § 2149(c).) The date of entry of this Order is October 17, 2000.

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BEEF PROMOTION AND RESEARCH ACT

DEPARTMENTAL DECISIONS

In re: JEANNE AND STEVE CHARTER.
BPRA Docket No. 98-0002.
Decision and Order filed September 22, 2000.

Beef Promotion Act – First amendment – Official notice – Willful – Preponderance of the evidence – Sanction – Civil penalty.

The Judicial Officer affirmed Judge Baker's (ALJ) decision that the Respondents violated the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217) and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) by failing to remit assessments to a brand inspector or a qualified state beef council for 250 cattle and by failing to pay late-payment charges for the assessments the Respondents failed to remit when due. The Judicial Officer rejected the Respondents' contention that *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), was controlling. The Judicial Officer found that the ALJ properly relied on *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), and the Judicial Officer found that *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), was controlling. The Judicial Officer also found that the ALJ's denial of the Respondents' motion to take official notice of the unregulated nature of the beef market, the cattle industry, and the cattle market, was proper. The Judicial Officer found that the Respondents' disagreements with the administration of the beef promotion program and the activities of the National Cattlemen's Beef Association are not defenses to the Respondents' violations of 7 C.F.R. §§ 1260.172, .175, .311, and .312 and are not mitigating circumstances to be taken into account when considering the sanction to impose on the Respondents for their violations. The Judicial Officer rejected the Respondents' contention that the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board are a single entity and that the National Cattlemen's Beef Association is an agency of the federal government. The Judicial Officer found that the ALJ's assessment of a $12,000 civil penalty against the Respondents was warranted in law and justified in fact.

Sharlene A. Deskins, for Complainant.
Kelly J. Varnes, Billings, MT, for Respondents.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Procedural History

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding by filing a Complaint on August 5, 1998. Complainant instituted this proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C §§ 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations

(7 C.F.R. §§ 1260.301-.316) [hereinafter the Beef Promotion Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that Jeanne Charter and Steve Charter [hereinafter Respondents]: (1) willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997 (Compl. ¶ II); and (2) willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310, .312) by failing to pay assessments for three cattle sold on or about April 4, 1998 (Compl. ¶ III). Complainant requests the issuance of an order requiring Respondents to cease and desist from violating the Beef Promotion Order and the Beef Promotion Regulations and assessing civil penalties against Respondents in accordance with section 9 of the Beef Promotion Act (7 U.S.C. § 2908) (Compl. at 2-3).

On September 29, 1998, Respondents filed an Answer admitting that they did not pay assessments on the sale of cattle as alleged in the Complaint (Answer ¶¶ 3-4) and raising five affirmative defenses (Answer at 2-3).

On August 4, 1999, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] presided over a hearing in Billings, Montana. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Kelly J. Varnes, Hendrickson, Everson, Noennig & Woodward, P.C., Billings, Montana, represented Respondents.

On October 22, 1999, Complainant filed Complainant's Findings of Fact, Conclusions of Law and Brief in Support Thereof. On February 4, 2000, Respondents filed Respondents' Proposed Findings of Fact and Conclusions of Law and Memorandum in Support of Proposed Findings of Fact, Conclusions of Law and Order. On February 18, 2000, Complainant filed Complainant's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law and Memorandum.

On April 26, 2000, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded Respondents willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to deduct and collect assessments and by failing to remit assessments to a brand inspector or a qualified state beef council for 250 cattle sold on October 9, 1997, and April 4, 1998; (2) concluded Respondents willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay

late-payment charges for assessments Respondents failed to remit to a qualified state beef council when due; (3) ordered Respondents to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations; (4) assessed Respondents a $12,000 civil penalty; and (5) ordered Respondents to pay past-due assessments and late-payment charges of $417.79 to the Montana Beef Council (Initial Decision and Order at 3, 10-11).

On June 1, 2000, Respondents filed an Appeal Petition, a Brief in Support of Appeal Petition, and a Petition to Reopen Hearing. On July 7, 2000, Complainant filed Opposition to Defendant's Motion to Reopen Hearing. On September 1, 2000, Complainant filed Opposition to the Appeal Petition of the Respondents.[1] On September 5, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision and a ruling on Respondents' Petition to Reopen Hearing.[2]

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion of sanctions, as restated.

Complainant's exhibits are designated by "CX," Respondents' exhibits are designated by "B" and "C," and transcript references are designated by "Tr."

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

Findings of Fact and Conclusions of Law

1. Respondents own a 7,000-acre ranch located in Montana. The number of cattle Respondents have varies from 250 to 1,000. Respondents have been in the cattle business together for the past 25 years. Respondents operate using the business names "Country Marketing Services" and "Electronic Trading Company." (Answer ¶ 1; Tr. 168-70, 199-201.)

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[1]Complainant filed Opposition to the Appeal Petition of the Respondents 1 day late (See Informal Order dated August 2, 2000). Therefore, I have not considered Complainant's Opposition to the Appeal Petition of the Respondents, and Complainant's Opposition to the Appeal Petition of the Respondents forms no part of the record in this proceeding.

[2]I am filing a Ruling Denying Respondents' Petition to Reopen Hearing simultaneous with the filing of this Decision and Order. *In re Jeanne and Steve Charter*, 59 Agric. Dec. ___ (Sept. 22, 2000) (Ruling Denying Respondents' Pet. to Reopen Hearing).

2. Respondents, at all times material to this proceeding, were "producers" of cattle as defined in the Beef Promotion Order (7 C.F.R. § 1260.116) (Answer ¶ 2) and therefore were required by the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations to pay assessments for cattle they sold.

3. On or about October 9, 1997, Respondents sold 247 cattle. Montana law requires when cattle are sold that a brand inspector examine the brands. A brand inspector examined the brands on cattle during the October 9, 1997, sale. In addition to examining the brand, the brand inspector is also responsible for collecting from producers the assessment due from the sale of cattle. This assessment is sometimes referred to as a "checkoff dollar." At the time of the sale of the 247 cattle, and thereafter, Respondents did not pay the assessments due. The Cattlemen's Beef Promotion and Research Board was informed of Respondents' failure to pay the assessments due. The matter was ultimately referred to the United States Department of Agriculture. (Answer ¶ 3; Tr. 12-17, 31, 61-63, 69; CX 1, CX 2.)

4. On or about April 4, 1998, Respondents sold three cattle. At the time of the sale of the three cattle, and thereafter, Respondents did not pay the assessments due. The Cattlemen's Beef Promotion and Research Board was informed of Respondents' failure to pay the assessments due. The matter was ultimately referred to the United States Department of Agriculture. (Answer ¶ 4; Tr. 17-19, 69; CX 3.)

5. Respondents willfully failed to pay assessments for 247 cattle sold on or about October 9, 1997.

6. Respondents willfully failed to pay assessments for three cattle sold on or about April 4, 1998.

7. Respondents willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997, and by failing to pay assessments for three cattle sold on or about April 4, 1998. Each of the 250 transactions constitutes a separate violation.

8. Respondents willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late-payment charges for assessments that Respondents failed to pay when due.

Discussion

The Beef Promotion Act authorizes the creation of a coordinated program of research and promotion, directed and funded by the cattle industry and with

oversight authority by the Secretary of Agriculture. The Beef Promotion Act directs the Secretary of Agriculture to promulgate a Beef Promotion Order establishing the self-help program and providing for financing through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States (7 U.S.C. §§ 2903, 2904). The Beef Promotion Act establishes the assessment at the rate of $1 per head on cattle sales to be collected from producers and importers (7 U.S.C. § 2904(8)).

As directed by the Beef Promotion Act, the Secretary of Agriculture promulgated, after notice and comment, a Beef Promotion Order. The Beef Promotion Order became effective July 18, 1986 (51 Fed. Reg. 26,138 (1986)). As required by section 7(a) of the Beef Promotion Act (7 U.S.C. § 2906(a)), on May 10, 1988, the Secretary of Agriculture conducted a referendum among eligible cattle producers and cattle and beef importers for the purpose of determining whether the Beef Promotion Order should be continued (53 Fed. Reg. 509-14 (1988)). A majority of persons voting in the referendum approved the Beef Promotion Order, which remains in force today. The Beef Promotion Act provides, however, that after the initial referendum, the Secretary of Agriculture may conduct additional referenda upon the request of 10 per centum or more of cattle producers to determine whether the cattle producers favor the termination or suspension of the Beef Promotion Order. 7 U.S.C. § 2906(b).

The Beef Promotion Order establishes the Cattlemen's Beef Promotion and Research Board, composed of cattle producers and importers appointed by the Secretary of Agriculture, and the Beef Promotion Operating Committee, composed of 10 members of the Cattlemen's Beef Promotion and Research Board and 10 members elected by a federation that includes qualified state beef councils, such as the Montana Beef Council. 7 U.S.C. §§ 2903(a)-(b), 2904(1), (4)(A); 7 C.F.R. §§ 1260.141, .161.

The Cattlemen's Beef Promotion and Research Board acts primarily through the Beef Promotion Operating Committee, which develops and implements promotion, research, consumer information, and industry information plans or projects, subject to the Secretary of Agriculture's approval. 7 U.S.C. § 2904(4)(B); 7 C.F.R. § 1260.168(d), (e). These activities are funded by a $1-per-head assessment on cattle sold in or imported into the United States. Each person making payment to a cattle producer for cattle must collect the assessments and remit the money directly to the Cattlemen's Beef Promotion and Research Board or to a qualified state beef council, which, in turn, remits the money to the Cattlemen's Beef Promotion and Research Board. 7 U.S.C. § 2904(8)(A)-(C); 7 C.F.R. §§ 1260.172(a)(1), .310, .311(a), and .312(c). The Beef Promotion Order requires that the Beef Promotion Operating Committee implement programs of promotion, research, consumer

information, and industry information by contracting with established national nonprofit, industry-governed organizations. 7 C.F.R. § 1260.168(b). The Beef Promotion Act prohibits the use of the assessments collected by the Cattlemen's Beef Promotion and Research Board "for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the order." 7 U.S.C. § 2904(10). Similarly, the Beef Promotion Order prohibits the use of funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action, with the exception of recommending amendments to 7 C.F.R. pt. 1260. 7 C.F.R. § 1260.169(e). (See also 7 C.F.R. § 1260.181(b)(7) which provides that, in order to be certified by the Cattlemen's Beef Promotion and Research Board as a qualified state beef council, the state beef council must not use state beef council funds collected pursuant to the Beef Promotion Order for the purpose of influencing governmental policy or action.)

The Beef Promotion Act authorizes the Secretary of Agriculture to investigate violations of the Beef Promotion Act, to issue orders restraining or preventing persons from violating the Beef Promotion Order, and to assess civil penalties of not more than $5,000 per violation of the Beef Promotion Order. 7 U.S.C. §§ 2908(a), 2909.

Respondents acknowledge they violated the Beef Promotion Order and the Beef Promotion Regulations but seek to justify their failures to pay assessments on various allegations of infirmities as to the Beef Promotion Act and the Beef Promotion Order.

Neither the Beef Promotion Act nor the Beef Promotion Order exempts Respondents from paying assessments because of their opposition to one of the industry organizations with which the Beef Promotion Operating Committee contracts for services. Nor do Respondents' other arguments relating to their failures to pay assessments furnish justification for Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations.

Respondents' disagreements and contentions with respect to the administration of the Beef Promotion Order are not topics properly before this forum. The purposes of this administrative proceeding are to determine whether Respondents paid amounts properly assessed and, if not, to determine the appropriate sanctions. This forum is not the proper forum in which to adjudicate the validity of Respondents' position with respect to the National Cattlemen's Beef Association. Specifically, Respondents argue that the Agricultural Marketing Service should not have recognized the National Cattlemen's Beef Association as an established national nonprofit, industry-governed organization, as defined in 7 C.F.R. § 1260.113.

The National Cattlemen's Beef Association is the successor organization to the National Live Stock and Meat Board and has existed under various names since 1898 (C-1, C-5; Tr. 73, 96). The National Cattlemen's Beef Association is a nonprofit organization "governed by a [b]oard of [d]irectors representing the cattle or beef industry on a national basis" (Tr. 96). The National Cattlemen's Beef Association describes itself as follows:

> Initiated in 1898, NCBA is the marketing organization and trade association for America's one million cattle ranchers and farmers. With offices in Denver, Chicago and Washington D.C., NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation's food and fiber industry.

C-8 at 2.

The Agricultural Marketing Service recognized the National Cattlemen's Beef Association as an established national nonprofit, industry-governed organization, as defined in 7 C.F.R. § 1260.113 (B-4). An agency's interpretation of its own regulations should be accorded substantial deference. *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1349-50 (6th Cir. 1994), *cert. denied*, 516 U.S. 806 (1995). The record supports the Agricultural Marketing Service determination that the National Cattlemen's Beef Association is an established national nonprofit, industry-governed organization, as defined in 7 C.F.R. § 1260.113.

Respondents also contend the Cattlemen's Beef Promotion and Research Board is lobbying by contracting with the National Cattlemen's Beef Association to administer projects that promote beef. The Beef Promotion Order states that no funds collected by the Cattlemen's Beef Promotion and Research Board shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary of Agriculture amendments to 7 C.F.R. pt. 1260. 7 C.F.R. § 1260.169(e).

Respondents failed to present any evidence other than their own unsubstantiated assertions to support their claim that checkoff dollars were used for the purpose of influencing governmental policy or action. The Beef Promotion Order includes section 1260.168(b) which requires the Beef Promotion Operating Committee to contract with established national nonprofit, industry-governed organizations. The Beef Promotion Operating Committee's contracts and relationships with industry organizations are authorized by the Beef Promotion Order and are an effective way to promote beef.

Respondents' contentions, which are found to be without merit, relate to the Montana Beef Council's rejection of Respondents' proposal for a nutritional

speaker and the Montana Beef Council's denial of Respondents' application for funds to be used to pay for a speaker to talk about the nutritional value of beef. These contentions are not defenses to Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations.

Respondents' contention that they are not required to pay assessments because the Beef Promotion Act is unconstitutional is without merit. Both the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the Tenth Circuit have upheld the constitutionality of assessments under the Beef Promotion Act. *Goetz v. Glickman,* 149 F.3d 1131 (10th Cir. 1998), *cert. denied,* 525 U.S. 1102 (1999); *United States v. Frame,* 885 F.2d 1119 (3d Cir. 1989).

Respondents' violations were willful and significant. A violation is willful if the violator: (1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice; or (2) acts with careless disregard of statutory requirements.[3]

Respondents willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R.

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[3] *See, e.g., Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 120 S.Ct. 530 (1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (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). *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, 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 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). Appeal in this proceeding does not lie to either the United States Court of Appeals for the Fourth Circuit or to the United States Court of Appeals for the Tenth Circuit. However, even under this more stringent definition, Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations would still be found willful.

§§ 1260.172, .311, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997, and by failing to pay assessments for three cattle sold on or about April 4, 1998.

Respondents willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late-payment charges on assessments that Respondents failed to pay when due.

The Beef Promotion Act provides for sanctions for those who violate the terms of the Beef Promotion Order. The Beef Promotion Act provides, if the Secretary of Agriculture believes that the administration and enforcement of the Beef Promotion Act or an order will be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary of Agriculture may: (1) issue an order to restrain or prevent a person from violating an order; and (2) assess a civil penalty of not more than $5,000 for violation of such order. 7 U.S.C. § 2908(a).

Sanctions

The Judicial Officer has set forth criteria that are appropriate to consider in determining a civil penalty. The Judicial Officer stated that in determining the amount of the civil penalty to be assessed under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)), it is appropriate to consider the nature of the respondent's violations, the number of the respondent's violations, the damage or potential damage to the regulatory program from the respondent's violations, prior warnings or other instructions given to the respondent, and any other circumstances shedding light on the degree of the respondent's culpability. *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1524 (1997), *aff'd*, 99 F. Supp.2d. 1308 (D. Kan. 2000), *appeal docketed*, No. 00-3173 (10th Cir. June 14, 2000).

Respondents engaged in an effort to undermine or to otherwise challenge provisions of the Beef Promotion Order and the Beef Promotion Regulations by obtaining a public forum to air grievances for which no remedy could be offered in an administrative proceeding. If Respondents are assessed less than a substantial civil penalty, the sanction would not be meaningful and would serve to encourage Respondents and others to fail to pay assessments at some future date.

Respondents' own admissions establish that they failed to pay assessments as required by the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations and also that their violations of the Beef Promotion Order and the Beef Promotion Regulations were willful. Respondents were aware of the requirements of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations for paying assessments and decided not to comply with

those requirements as a means of getting publicity for their positions. Although the amount of assessments which was withheld was relatively small, the impact of Respondents' failures to pay the assessments has the potential to adversely impact the Beef Promotion Order and to encourage other people to withhold assessments so that they can seek redress of alleged grievances in an administrative proceeding. Respondents' conduct is more than sufficient reason to justify the assessment of a $12,000 civil penalty, which is the sanction recommended by Complainant.

The Beef Promotion Order provides that a late-payment charge must be assessed when assessments are not paid timely. 7 C.F.R. § 1260.175. As of December 31, 1999, Respondents owed the Cattlemen's Beef Promotion and Research Board $417.79 for past-due assessments and late-payment charges.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise nine issues in their Appeal Petition. First, Respondents contend the ALJ erred by failing to consider *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), and by relying on *Goetz v. Glickman,* 149 F.3d 1131 (10th Cir. 1998), *cert. denied,* 525 U.S. 1102 (1999), and *United States v. Frame,* 885 F.2d 1119 (3d Cir. 1989) (Appeal Pet. at 1-2). I disagree with Respondents' contention that the ALJ erroneously failed to consider *United Foods* and erroneously relied on *Goetz* and *Frame*.

The issue addressed in *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), is the constitutionality of provisions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) [hereinafter the Mushroom Promotion Act], a statute which is not at issue in this proceeding. In *United Foods*, the Sixth Circuit held that provisions of the Mushroom Promotion Act that compel mushroom producers and mushroom importers to contribute funds used to advertise mushrooms, violate the First Amendment to the United States Constitution.

The ALJ properly relied on *Goetz* and *Frame*, both of which address the constitutionality of provisions of the Beef Promotion Act which compel cattle producers to contribute funds used to promote beef and beef products. In *Goetz* and *Frame*, the United States Court of Appeals for the Tenth Circuit and the United States Court of Appeals for the Third Circuit, respectively, upheld the constitutionality of compelled assessments under the Beef Promotion Act and the use of those assessments for beef promotion and research. I find the ALJ's reliance on cases concerning the constitutionality of the Beef Promotion Act proper and the ALJ did not err by failing to discuss *United Foods*, which concerns the constitutionality of the Mushroom Promotion Act.

Respondents argue *United Foods* should be followed in this proceeding because the beef industry, like the mushroom industry, is largely unregulated and *Glickman v. Wileman Bros. & Elliott, Inc*., 521 U.S. 457 (1997), is inapposite (Brief in Support of Appeal Pet. at 3-4). I disagree with Respondents' contentions that *United Foods* should be followed in this proceeding and that *Wileman* is inapposite.

The Supreme Court of the United States held in *Wileman* that compelled assessments used to fund generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the Agricultural Marketing Agreement Act of 1937, as amended, neither abridge First Amendment rights nor implicate the First Amendment. The Sixth Circuit distinguished *Wileman* from *United Foods* on the ground that the California tree fruit business is extensively regulated, but that the mushroom business at issue in *United Foods* is unregulated, except for the enforcement of a regional mushroom advertising program. In *United Foods*, the Sixth Circuit interprets *Wileman* as holding that compelled commercial speech is permitted under the First Amendment to the United States Constitution if: (1) the compelled commercial speech is germane to a valid, comprehensive, regulatory scheme; and (2) the compelled commercial speech is nonideological, nonsymbolic, and nonpolitical in nature, as follows:

> We do not read the majority opinion in *Wileman* as saying that any compelled commercial speech that is nonpolitical or nonsymbolic or nonideological does not warrant First Amendment protection. We conclude that the explanation for the *Wileman* decision is found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of the free market, as well as in the nonpolitical nature of the compelled speech. The majority uses this concept of collectivization and the nonideological nature of the advertising together. The conjunction "and" germaneness "and" nonpolitical–is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing–either the collectivization of the industry or the purely commercial nature of the advertising–the First Amendment invalidates the compelled commercial speech, absent some other compelling justification not present in the case before us. The Court's holding in *Wileman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise.

United Foods, Inc. v. United States, 197 F.3d at 224.

I respectfully disagree with the Sixth Circuit's interpretation of *Wileman*. I read *Wileman* as holding that compelled assessments used to fund California tree fruit advertising is not a *restriction* on commercial advertising because producers are not prohibited or restrained from promoting or advertising their products or communicating any other message to any audience and that compelled funding of advertising of tree fruit passes constitutional muster "because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities." *Wileman*, 521 U.S. at 473.

The United States District Court for the Eastern District of California rejected the contention that *Wileman* does not apply to the California table grape industry and the California cut flower industry because those industries are not heavily regulated. In *Delano Farms Co. v. California Table Grape Comm'n*, the district court held:

> [*Wileman's*] holding is summarized in the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech. . . ." That principle controls. Plaintiff's argument [that] a different result obtains when a program does not regulate fruit size, color, etc. is unconvincing. Were that the case, the state could validate a program merely by adding additional regulatory burdens. Nothing in [*Wileman Bros.*] indicates results should differ in "stand alone" advertising programs.

Delano Farms Co. v. California Table Grape Comm'n, CV-F-96-6053 OWW DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997) (App. A).

In *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, the district court, as stated during the hearing, held:

> Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction.

Matsui Nursery, Inc. v. California Cut Flower Comm'n, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997) (Reporter's Transcript) (App. B).

Moreover, in *Goetz*, the United States Court of Appeals for the Tenth Circuit rejected a cattle producer's contention that compelled assessments under the Beef Promotion Act, used to fund the promotion of beef and beef products, violated his First Amendment rights and found *Wileman* applicable, as follows:

First Amendment

> Goetz also asserts the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption. Goetz argues the Act singles out and unfairly burdens producers, importers and persons who must collect the tax (buyers of beef).
>
> The Secretary responds that the Act does not suppress or restrict Goetz' speech, it merely requires he pay an assessment to fund the promotion of a commodity that he markets and is no different than compelled funding of unions or integrated bars. Furthermore, the Secretary and intervener argue the Act is "government speech" (as opposed to commercial speech) and there are no First Amendment restrictions on "government speech."
>
> This Court agrees with the Secretary and intervener. *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ___, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), involved a First Amendment challenge to a generic advertising program for California peaches, nectarines, and plums which was established pursuant to a marketing order promulgated by the Secretary of Agriculture and supported by mandatory assessments imposed on the handlers of fruit. The Supreme Court granted certiorari to resolve the conflict between the Ninth Circuit in *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (1995), which held the peach promotion program violated the First Amendment, and the Third Circuit in *Frame*, which held the Beef Promotion Act did not violate the First Amendment.
>
> In *Wileman Bros.* the Supreme Court held that the generic marketing program did not raise a First Amendment issue for the Court because the marketing order did not impose restraint on the freedom of any producer to communicate any message to any audience, did not compel any person to engage in any actual or symbolic speech, and did not compel the producers

to endorse or to finance any political or ideological views. *See id*. at 2138. The Supreme Court found its compelled speech cases inapplicable because there is no "compelled speech." The Court held the assessments for ads did not require the fruit producers to repeat objectionable messages, use their property to convey antagonistic ideological messages, force them to respond to a hostile message when they prefer to remain silent or require them to be publicly identified or associated with another's message. *See id.* at 2139. Furthermore, the Court said, the assessments are financial contributions for generic advertising that program participants do not disagree with, and the advertising is not attributed to individual handlers. *See id.* In addition, none of the generic ads promote any particular message other than encouraging consumers to buy California tree fruit. *See id.*

The Court concluded that the generic ads for California fruit are germane to the purposes of the marketing orders and the assessment is not used for ideological activities. *See id.* at 2140. The Court further concluded that generic advertising is a species of economic regulation that should enjoy the same strong presumption of validity that the Court accords other policy judgments made by Congress. *See id.* at 2141. Finding the generic advertisements do not warrant special First Amendment scrutiny under the *Central Hudson* standard, the Supreme Court reversed the Ninth Circuit decision. *See id.* at 2142.

In the case at bar, the district court incorrectly concluded that the Act was commercial speech and applied *Central Hudson*. The district court found the Act passed the *Central Hudson* test and did not violate Goetz' freedom of speech and association. *Goetz v. Glickman*, 920 F. Supp. at 1182-83. We find the district court erred in applying the *Central Hudson* test to Goetz' First Amendment claim. However, we can affirm the district court on a basis not relied on by the court if supported by record and law. *United States v. Corral*, 970 F.2d 719, 726 n.5 (10th Cir. 1992). Therefore, we affirm the district court and find under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless.

Goetz v. Glickman, 149 F.3d at 1138-39 (footnote omitted).

Therefore, I do not find *United Foods* applicable to this proceeding, as Respondents contend, and I find *Wileman* controlling.

Second, Respondents contend the ALJ's denial of Respondents' Motion to Take Official Notice is error (Appeal Pet. at 2). I disagree with Respondents' contention

that the ALJ's denial of Respondents' Motion to Take Official Notice is error.

Official notice is authorized by the Administrative Procedure Act and the Rules of Practice. The Administrative Procedure Act provides, as follows:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (e) . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show to the contrary.

5 U.S.C. § 556(e).

Section 1.141(h)(6) of the Rules of Practice identifies the circumstances under which an administrative law judge shall take official notice, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) *Evidence*. . . .
>
> . . . .
>
> (6) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

7 C.F.R. § 1.141(h)(6).

Respondents filed a Motion to Take Official Notice on January 10, 2000, requesting that the ALJ take official notice of the unregulated nature of the beef market, the cattle industry, and the cattle market. Respondents attached to their Motion to Take Official Notice United States Department of Agriculture, Economic Research Service, Technical Bulletin No. 1874 (April 1999).

On January 31, 2000, Complainant filed Opposition to Defendant's Motion to Take Official Notice stating: (1) official notice is limited to fact of established character and the state of the regulation of the beef industry cannot be characterized as being a fact of established character; (2) United States Department of

Agriculture, Economic Research Service, Technical Bulletin No. 1874 (April 1999), does not establish the state of the regulation of the beef industry; and (3) the state of the regulation of the beef industry is irrelevant to the proceeding.

On February 2, 2000, the ALJ denied Respondents' Motion to Take Official Notice, as follows:

> The Respondents seek official notice of the unregulated natures of the cattle industry and particularly the cattle market. Even if Bulletin 1874 tended to establish the facts as claimed by Respondents [which it does not] such circumstances would not be sufficient to relieve the Respondents from paying proper due assessments made pursuant to the provisions of the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) and the Beef Promotion and Research Order, 7 C.F.R. §§ 1260.101-.217.
>
> For these reasons as well as those enunciated by Complainant in its opposition to the requested official notice and based upon the record herein, the Respondents' Motion to the Official Notice, filed January 10, 2000, is denied.

Denial of Motion to Take Official Notice.

I agree with the ALJ. The state of the regulation of the beef market, the cattle industry, and the cattle market is not a fact of established character. Moreover, the state of the regulation of the beef market, the cattle industry, and the cattle market is not relevant to this proceeding. Respondents' Motion to Take Official Notice of the unregulated nature of the beef market, the cattle industry, and the cattle market is related to Respondents' contention that *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), is applicable to this proceeding (Memorandum in Support of Motion to Take Official Notice). However, for the reasons discussed in this Decision and Order, *supra*, I find *United Foods* is not applicable to this proceeding.

Third, Respondents contend the ALJ erroneously held that the Beef Promotion Act and the Beef Promotion Order, as applied to Respondents, is constitutional because it does not limit their freedom of speech (Appeal Pet. at 3). Respondents argue the Beef Promotion Act and the Beef Promotion Order, as applied to Respondents, are unconstitutional because the Beef Promotion Act and the Beef Promotion Order force Respondents to subsidize advertising with which they disagree and because the entity receiving most of the advertising funds, the National Cattlemen's Beef Association, engages in activities with which Respondents disagree (Brief in Support of Appeal Pet. at 8-9).

The Supreme Court of the United States held the First Amendment does not bar all mandatory assessments used to fund speech with which members of the group required to pay the assessments object. *Wileman*, 521 U.S. at 472. In *Goetz* and *Frame*, the United States Court of Appeals for the Tenth Circuit and the United States Court of Appeals for the Third Circuit, respectively, upheld the constitutionality of mandatory assessments under the Beef Promotion Act and the use of those assessments to fund beef promotion with which cattle producers required to pay the assessments disagreed. Respondents' objections to the use of assessments to fund beef promotion are not materially different from the objections raised by the cattle producers in *Goetz* and *Frame*.

Moreover, Respondents' disagreements with the National Cattlemen's Beef Association, one of the entities with which the Beef Promotion Operating Committee contracts to administer projects to promote beef, do not provide meritorious bases for Respondents' argument that the Beef Promotion Act and the Beef Promotion Order, as applied to Respondents, are unconstitutional.

Specifically, Respondents contend the National Cattlemen's Beef Association misrepresents itself as representing Respondents (Brief in Support of Appeal Pet. at 8-9).

The record does not support a finding that the National Cattlemen's Beef Association specifically identifies Respondents as individuals who the National Cattlemen's Beef Association represents. Moreover, the record does not support a finding that the National Cattlemen's Beef Association specifically identifies Respondents as agreeing with its positions.

However, the National Cattlemen's Beef Association does state that it is the marketing organization and trade association for America's one million cattle farmers and ranchers (C-4, C-5, C-6, C-7, C-8, C-9). Respondents are cattle ranchers located in the United States (Finding of Fact No. 1). Respondents could infer the National Cattlemen's Beef Association takes the position that there are one million cattle farmers and ranchers in the United States and that, since Respondents are United States cattle ranchers, the National Cattlemen's Beef Association is Respondents' marketing organization and trade association. However, even if I found that the National Cattlemen's Beef Association represents itself to be Respondents' marketing organization and trade association, that finding would not cause me to conclude that the Beef Promotion Act and the Beef Promotion Order, as applied to Respondents, are unconstitutional. Moreover, the National Cattlemen's Beef Association's purported misrepresentation is neither a defense to Respondents' violations of the Beef Promotion Order and the Beef Promotion

Regulations nor a mitigating circumstance to be taken into consideration with respect to the sanction to be imposed for Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations.

Respondents also contend the National Cattlemen's Beef Association uses funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e) (Brief in Support of Appeal Pet. at 8-9).

The record does not support a finding that the National Cattlemen's Beef Association used funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e). Instead, the record supports a finding that the National Cattlemen's Beef Association has not used funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e) (Tr. 77-79). Moreover, even if I found that the National Cattlemen's Beef Association used funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e), that finding would not cause me to conclude that the Beef Promotion Act and the Beef Promotion Order, as applied to Respondents, are unconstitutional. Further still, the National Cattlemen's Beef Association's purported use of funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e) is neither a defense to Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations nor a mitigating circumstance to be taken into consideration with respect to the sanction to be imposed for Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations.

Fourth, Respondents contend the ALJ's conclusion that the defenses raised by Respondents are not topics properly before this forum is error (Appeal Pet. at 3-4). Specifically, Respondents contend the ALJ should have addressed the activities of the National Cattlemen's Beef Association (Brief in Support of Appeal Pet. at 9-11).

The ALJ did conclude that a number of Respondents' contentions were not properly before her, as follows:

> The Respondents' disagreements and contentions with respect to the administration of the Order are not topics properly before this forum. This is an administrative proceeding to determine whether amounts properly assessed were paid and, if not, a determination of sanctions that are

> appropriate. This is not a proper forum to adjudicate the validity of the Respondents' position with respect to the National Cattlemen's Beef Association (NBA).

Initial Decision and Order at 5.

Despite this conclusion, the ALJ considered and rejected a number of Respondents' contentions regarding the activities of the National Cattlemen's Beef Association (Initial Decision and Order at 6-7).

The Complaint alleges that Respondents willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997, and by failing to pay assessments for three cattle sold on or about April 4, 1998 (Compl. ¶¶ II, III). The activities of the National Cattlemen's Beef Association are not relevant to the violations alleged in the Complaint or to the sanction to be imposed on Respondents for violations of the Beef Promotion Order and the Beef Promotion Regulations. The ALJ's conclusion that this forum is not the proper forum in which to address the activities of the National Cattlemen's Beef Association is not error.

Fifth, Respondents contend the ALJ erroneously determined that the National Cattlemen's Beef Association is not regulated by the Beef Promotion Order and thus not subject to the defenses raised by Respondents (Appeal Pet. at 4).

Respondents' contention that the National Cattlemen's Beef Association is regulated under the Beef Promotion Order is not relevant to this proceeding. Even if I found that the National Cattlemen's Beef Association is regulated under the Beef Promotion Order, that finding would not operate as a defense to Respondents' failures to pay assessments and late-payment charges required by the Beef Promotion Order and the Beef Promotion Regulations.

Respondents also contend the National Cattlemen's Beef Association is so closely tied to the Cattlemen's Beef Promotion and Research Board that no reasonable separation can be made between the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board and the National Cattlemen's Beef Association is, in effect, a governmental agency (Appeal Pet. at 4; Brief in Support of Appeal Pet. at 10-11).

The record establishes that the National Cattlemen's Beef Association is a private industry organization and that the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board are separate entities with separate boards, executive committees, and staffs (Tr. 68, 73-74). The National Cattlemen's Beef Association is one of the organizations with which the Cattlemen's Beef Promotion and Research Board has a contractual relationship.

The National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board have a joint staffing arrangement. Under this joint staffing arrangement, five National Cattlemen's Beef Association employees devote some of their time to Cattlemen's Beef Promotion and Research Board activities and the National Cattlemen's Beef Association bills the Cattlemen's Beef Promotion and Research Board for the time spent by National Cattlemen's Beef Association employees on Cattlemen's Beef Promotion and Research Board activities. (Tr. 83-92, 108-09.) Neither the contractual relationship nor the joint staffing arrangement between the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board support Respondents' contention that the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board are a single entity. Moreover, even if I found that no reasonable separation could be made between the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board, that finding would not operate as a defense to Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations and would not constitute a mitigating circumstance to be taken into consideration with respect to the sanction to be imposed for Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations.

Further, the record does not support Respondents' contention that the National Cattlemen's Beef Association is, in effect, a governmental agency. The United States Supreme Court concluded that the National Railroad Passenger Corporation [hereinafter Amtrak] was an agency of the United States for purposes of individual rights guaranteed by the United States Constitution. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995). The Court based its conclusion that Amtrak is an agency of the federal government on the following findings: (1) Amtrak is established under federal law for the purpose of pursuing federal government objectives under the direction and control of federal government appointees; (2) six of the nine Amtrak board members are appointed by the President; (3) the United States holds all of Amtrak's preferred stock; (4) the United States subsidizes Amtrak's losses; and (5) Amtrak is required to submit annual reports to the President and Congress. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. at 383-400.

I find, based on the factors the United States Supreme Court applied in *Lebron* to determine whether Amtrak is an agency, that the National Cattlemen's Beef Association is not, in effect, a federal agency, as Respondents contend. Unlike Amtrak, which was established under federal law, the National Cattlemen's Beef Association is a national nonprofit, industry-governed organization (Tr. 73, 95-96). The record does not contain any evidence that the National Cattlemen's Beef

Association was created by the federal government under federal law or that the purpose of the National Cattlemen's Beef Association is the furtherance of governmental objectives. Moreover, unlike Amtrak, in which six of the nine board members are appointed by the President, there is no evidence in the record that any member of the board of the National Cattlemen's Beef Association is appointed by any United States government employee or elected official, and unlike Amtrak, in which the United States owns all of the preferred stock, there is no evidence that the United States owns any stock in the National Cattlemen's Beef Association. Further still, unlike Amtrak, there is no evidence in the record that the United States subsidizes the National Cattlemen's Beef Association or that the National Cattlemen's Beef Association is required by law to report to the President or Congress.

Sixth, Respondents contend the ALJ's assessment of a $12,000 civil penalty against Respondents is error (Appeal Pet. at 4-5). Respondents state they violated the Beef Promotion Act and the Beef Promotion Order to protest perceived violations of their right under the First Amendment to the United States Constitution to free speech and perceived violations of the Beef Promotion Act by the United States Department of Agriculture and the National Cattlemen's Beef Association. Moreover, Respondents contend their violations did not damage or potentially damage the Beef Promotion Order and their failure to pay $250 in checkoff assessments does not warrant the $12,000 civil penalty assessed by the ALJ. (Brief in Support of Appeal Pet. at 11-13.)

A sanction by an administrative agency must be warranted in law and justified in fact.[4] The Secretary of Agriculture has authority to assess a civil penalty not

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[4] *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 186 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 291, 297 (1999); *In re Limeco, Inc.*,
(continued...)

exceeding $5,000 for each violation of the Beef Promotion Order and the Beef Promotion Regulations (7 U.S.C. § 2908(a)). Respondents violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997, and by failing to pay assessments for three cattle sold on or about April 4, 1998. Each of the 250 transactions constitutes a separate violation,[5] and Respondents could have been assessed a $1,250,000 civil penalty for their violations of 7 C.F.R. §§ 1260.172, .311, and .312. Moreover, Respondents violated section 1260.175 of the Beef Promotion Order by failing to pay late-payment charges for assessments that Respondents failed to pay when due. Late-payment charges are due each month (7 C.F.R. § 1260.175), and each month that Respondents failed to pay late-payment charges constitutes a separate violation of 7 C.F.R. § 1260.175.[6] Respondents were required to remit assessments on the 247 cattle sold on October 9, 1997, no later than November 15, 1997, and Respondents were required to remit assessments on the three cattle sold on April 4, 1998, no later than May 15, 1998. *See* 7 C.F.R. § 1260.172(a)(5). Late-payment charges are due on the day following the date assessments are due. *See* 7 C.F.R. § 1260.175. I find Respondents committed at least nine violations of section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) during the period from November 16, 1997, through August 5, 1998, and Respondents could have been assessed a $45,000 civil penalty for their violations

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[4](...continued)
57 Agric. Dec. 1548, 1571 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

[5]See *United States v. Frame*, 885 F.2d 1119, 1124 (3d Cir. 1989) (stating "[t]he Secretary may, after an administrative hearing, issue an order to restrain or prevent a person from violating the Beef Order, and assess a civil penalty of up to $5,000 for *a* violation already committed" (emphasis added)); *Goetz v. United States*, 99 F. Supp.2d 1308, 1320-22 (D. Kan. 2000) (affirming the Judicial Officer's imposition of a civil penalty for each violation of the Beef Promotion Order), *appeal docketed*, No. 00-3173 (10th Cir. June 14, 2000); *Goetz v. Glickman*, 920 F. Supp 1173, 1177 (D. Kan. 1996) (stating "[a]fter an administrative hearing, the Secretary may issue an order restraining violations and may impose a civil penalty of up to $5,000 for *each* violation of the [Beef Promotion] Act and the Order" (emphasis added)), *aff'd*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied,* 525 U.S. 1102 (1999).

[6]See note 5.

of 7 C.F.R. § 1260.175. Therefore, the ALJ's assessment of a $12,000 civil penalty against Respondents for 259 violations of Beef Promotion Order and the Beef Promotion Regulations is warranted in law.

Moreover, the ALJ's assessment of a $12,000 civil penalty is justified by the facts. Respondents admit they intentionally violated the Beef Promotion Order and the Beef Promotion Regulations (Brief in Support of Appeal Pet. at 12). Respondents were fully aware of the Beef Promotion Order and the Beef Promotion Regulations (Tr. 172-73, 224). The Beef Promotion Act is published in the statutes at large and the United States Code, and Respondents are presumed to know the law.[7] The Beef Promotion Order and the Beef Promotion Regulations are published in the *Federal Register*, thereby constructively notifying Respondents of the Beef Promotion Order and the Beef Promotion Regulations.[8] Moreover, Respondents were repeatedly warned that they were violating the Beef Promotion Order and the Beef Promotion Regulations (CX 4, CX 5, CX 6; Tr. 32-34, 61-63). Notwithstanding Respondents' knowledge of the requirements of the Beef Promotion Order and the Beef Promotion Regulations and the repeated warnings that they were violating the Beef Promotion Order and the Beef Promotion Regulations, Respondents intentionally violated the Beef Promotion Order and the Beef Promotion Regulations at least 259 times and continued to violate the Beef Promotion Order and the Beef Promotion Regulations during the period from November 15, 1997, through August 5, 1998. Under these circumstances, I find Respondents' violations were willful.[9]

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[7]*See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925).

[8]*See FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *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); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

[9]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. *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 120 S.Ct. 530 (1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d

(continued...)

Moreover, Respondents' violations are extremely serious because they undermine the ability to conduct the beef promotion program. If sufficient numbers of persons were to violate the Beef Promotion Order and the Beef Promotion Regulations in the manner in which Respondents violated the Beef Promotion Order and the Beef Promotion Regulations, the assessments remitted to the Cattlemen's Beef Promotion and Research Board and qualified state beef councils would not be sufficient for the operation of the beef promotion program.

I find Complainant proved by a preponderance of the evidence that Respondents committed at least 259 violations of the Beef Promotion Order and the Beef Promotion Regulations.[10] Complainant could have sought a maximum civil penalty of $5,000 for each of Respondents' violations, for a total civil penalty of $1,295,000. Instead, Complainant seeks a civil penalty of $46.332046 for each of Respondents' violations. In light of the number of Respondents' violations, the willful nature of Respondents' violations, and the serious nature of Respondents'

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[9](...continued)
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). *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, 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 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). Appeal in this proceeding does not lie to the United States Court of Appeals for the Fourth Circuit or to the United States Court of Appeals for the Tenth Circuit. However, even under this more stringent definition, Respondents' violations would still be found willful.

[10]Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act 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).

violations, I am perplexed by the small amount of the civil penalty recommended by Complainant for each violation. However, Complainant believes that a $12,000 civil penalty is sufficiently substantial to deter Respondents and other potential violators from future violations of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations (Complainant's Findings of Fact, Conclusions of Law and Brief in Support Thereof at 28; Tr. 125-31). The United States Department of Agriculture's sanction policy requires that I give appropriate weight to the sanction recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the statute in question,[11] and despite the facts of this proceeding, which would appear to warrant a significantly higher civil penalty, I am reluctant to assess a civil penalty larger than that recommended by Complainant. Therefore, I assess a civil penalty of $12,000 against Respondents.

Seventh, Respondents contend the ALJ erroneously concluded that Respondents' defense regarding the improper recognition of the National Cattlemen's Beef Association as an established national nonprofit, industry-governed organization was "factually and legally erroneous" (Appeal Pet. at 5).

Respondents' contention that the National Cattlemen's Beef Association is improperly recognized as an established national nonprofit, industry-governed organization as defined in section 1260.113 of the Beef Promotion Order (7 C.F.R. § 1260.113) is not relevant to this proceeding. Even if I found that the National Cattlemen's Beef Association did not meet the definition of an established national nonprofit, industry-governed organization in 7 C.F.R. § 1260.113, that finding would not operate as a defense to Respondents' failures to pay assessments and late-payment charges required by the Beef Promotion Order and the Beef Promotion Regulations. Moreover, as discussed in this Decision and Order, *supra*, the record supports a finding that the Agricultural Marketing Service properly recognized the National Cattlemen's Beef Association as an established nonprofit, industry-governed organization, as defined in 7 C.F.R. § 1260.113.

Eighth, Respondents contend the ALJ erroneously concluded Respondents' defense regarding the National Cattlemen's Beef Association's improper influence of governmental policy or action was "factually and legally erroneous" (Appeal Pet. at 5).

Respondents' contention that the National Cattlemen's Beef Association

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[11] *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).

improperly influences governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e) is not relevant to this proceeding. Even if I found that the National Cattlemen's Beef Association improperly influenced governmental policy and action, that finding would not operate as a defense to Respondents' failures to pay assessments and late-payment charges required by the Beef Promotion Order and the Beef Promotion Regulations. Moreover, as discussed in this Decision and Order, *supra*, the record does not support a finding that the National Cattlemen's Beef Association used funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e). Instead, the record supports a finding that the National Cattlemen's Beef Association has not used funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e) (Tr. 77-79).

Ninth, Respondents contend the ALJ erroneously concluded Respondents' defense regarding the rejection of Respondents' proposal to utilize checkoff funds for a nutritional speaker was "factually and legally erroneous" (Appeal Pet. at 5).

Respondents' contention that their proposal to utilize checkoff funds for a nutritional speaker was improperly rejected is not relevant to this proceeding. Even if I found that Respondents' proposal to utilize checkoff funds was improperly rejected, that finding would not operate as a defense to Respondents' failures to pay assessments and late-payment charges required by the Beef Promotion Order and the Beef Promotion Regulations.

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

Order

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

(a) failing to pay all assessments when due; and

(b) failing to pay late-payment charges.

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

2. Respondents are jointly and severally assessed a $12,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States. Respondents shall send the certified check or money order to:

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

Respondents' payment of the civil penalty shall be sent to, and received by, Ms. Deskins within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to BPRA Docket No. 98-0002.

3. Respondents shall pay past-due assessments and late-payment charges of $417.79 which shall be paid by certified check or money order, made payable to the Montana Beef Council. Respondents shall send the certified check or money order to:

Montana Beef Council
420 North California
Post Office Box 5388
Helena, Montana 59604

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

APPENDIX A

Delano Farms Co. v. The California Table Grape Comm'n, CV-F-96-6053 OWW DLB (E.D. Cal. Sept. 11, 1997).

APPENDIX B

Matsui Nursery, Inc. v. The California Cut Flower Comm'n, Civ. No. S-96-102 EJG/GGH (E.D. Cal. Aug. 4, 1997).

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In re: JEANNE AND STEVE CHARTER.
BPRA Docket No. 98-0002.
Ruling Denying Respondents' Petition to Reopen Hearing filed September 22, 2000.

Petition to reopen hearing – First amendment.

Sharlene A. Deskins, for Complainant.
Kelly J. Varnes, Billings, MT, for Respondents.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding by filing a Complaint on August 5, 1998. Complainant instituted this proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) [hereinafter the Beef Promotion Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that Jeanne Charter and Steve Charter [hereinafter Respondents]: (1) willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997 (Compl. ¶ II); and (2) willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310, .312) by failing to pay assessments for three cattle sold on or about April 4, 1998 (Compl. ¶ III). Complainant requests the issuance of an order requiring Respondents to cease and desist from violating the Beef Promotion Order and the Beef Promotion Regulations and assessing civil penalties against Respondents in accordance with section 9 of the Beef Promotion Act (7 U.S.C. § 2908) (Compl. at 2-3).

On September 29, 1998, Respondents filed an Answer admitting that they did not pay assessments on the sale of cattle as alleged in the Complaint (Answer ¶¶ 3-4) and raising five affirmative defenses (Answer at 2-3).

On August 4, 1999, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] presided over a hearing in Billings, Montana. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Kelly J. Varnes, Hendrickson, Everson, Noennig & Woodward, P.C.,

Billings, Montana, represented Respondents.

On October 22, 1999, Complainant filed Complainant's Findings of Fact, Conclusions of Law and Brief in Support Thereof. On February 4, 2000, Respondents filed Respondents' Proposed Findings of Fact and Conclusions of Law and Memorandum in Support of Proposed Findings of Fact, Conclusions of Law and Order. On February 18, 2000, Complainant filed Complainant's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law and Memorandum.

On April 26, 2000, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded Respondents willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to deduct and collect assessments and by failing to remit assessments to a brand inspector or a qualified state beef council for 250 cattle sold on October 9, 1997, and April 4, 1998; (2) concluded Respondents willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late-payment charges for assessments Respondents failed to remit to a qualified state beef council when due; (3) ordered Respondents to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations; (4) assessed Respondents a $12,000 civil penalty; and (5) ordered Respondents to pay past-due assessments and late-payment charges of $417.79 to the Montana Beef Council (Initial Decision and Order at 3, 10-11).

On June 1, 2000, Respondents filed an Appeal Petition, a Brief in Support of Appeal Petition, and a Petition to Reopen Hearing. On July 7, 2000, Complainant filed Opposition to Defendant's Motion to Reopen Hearing. On September 1, 2000, Complainant filed Opposition to the Appeal Petition of the Respondents.[1] On September 5, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision[2] and a ruling on Respondents' Petition to Reopen Hearing.

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing, as follows:

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[1]Complainant filed Opposition to the Appeal Petition of the Respondents 1 day late (See Informal Order dated August 2, 2000). Therefore, I have not considered Complainant's Opposition to the Appeal Petition of the Respondents, and Complainant's Opposition to the Appeal Petition of the Respondents forms no part of the record in this proceeding.

[2]I am filing a Decision and Order simultaneous with the filing of this Ruling Denying Respondents' Petition to Reopen Hearing. *In re Jeanne and Steve Charter*, 59 Agric. Dec. ___ (Sept. 22, 2000).

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite*. . . .

(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. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

Respondents request reopening of the hearing to adduce evidence "to demonstrate the unregulated nature of the cattle market." (Pet. to Reopen Hearing ¶ 2.) Respondents state that their purpose for adducing this new evidence would be to "provide a basis for the application of . . . *United Foods[, Inc.] v. United States*, 197 F.3d 221 (6th Cir. 1999)" and that "[n]o evidence was offered at the hearing concerning the nature and structure of the cattle market . . . because the *United Foods* decision was not issued until after the hearing on August 4, 1999." (Pet. to Reopen Hearing ¶ 4.)

I deny Respondents' Petition to Reopen Hearing for two reasons. First, *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), is not applicable to this proceeding. *United Foods* addresses the constitutionality of provisions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) [hereinafter the Mushroom Promotion Act], a statute which is not at issue in this proceeding. In *United Foods*, the Sixth Circuit held that provisions of the Mushroom Promotion Act that compel mushroom producers and mushroom importers to contribute funds used to advertise mushrooms, violate the First Amendment to the United States Constitution.

Relevant to this proceeding are two cases which address the constitutionality of provisions of the Beef Promotion Act which compel cattle producers to contribute funds used to promote beef and beef products. In *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), the United States Court of Appeals for the Third Circuit held the provisions of the Beef Promotion Act that compel cattle producers to contribute funds to promote beef and beef products, do not violate First Amendment rights to freedom of speech and association. Similarly, in *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), the United States Court of Appeals for the Tenth Circuit held compelled assessments under the Beef

Promotion Act used to fund advertising to promote beef consumption do not violate the First Amendment, as follows:

First Amendment

Goetz also asserts the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption. Goetz argues the Act singles out and unfairly burdens producers, importers and persons who must collect the tax (buyers of beef).

The Secretary responds that the Act does not suppress or restrict Goetz' speech, it merely requires he pay an assessment to fund the promotion of a commodity that he markets and is no different than compelled funding of unions or integrated bars. Furthermore, the Secretary and intervenors argue the Act is "government speech" (as opposed to commercial speech) and there are no First Amendment restrictions on "government speech."

This Court agrees with the Secretary and intervenors. *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ___, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), involved a First Amendment challenge to a generic advertising program for California peaches, nectarines, and plums which was established pursuant to a marketing order promulgated by the Secretary of Agriculture and supported by mandatory assessments imposed on the handlers of fruit. The Supreme Court granted certiorari to resolve the conflict between the Ninth Circuit in *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (1995), which held the peach promotion program violated the First Amendment, and the Third Circuit in *Frame*, which held the Beef Promotion Act did not violate the First Amendment.

In *Wileman Bros.* the Supreme Court held that the generic marketing program did not raise a First Amendment issue for the Court because the marketing order did not impose restraint on the freedom of any producer to communicate any message to any audience, did not compel any person to engage in any actual or symbolic speech, and did not compel the producers to endorse or to finance any political or ideological views. *See id*. at 2138. The Supreme Court found its compelled speech cases inapplicable because there is no "compelled speech." The Court held the assessments for ads did not require the fruit producers to repeat objectionable messages, use their property to convey antagonistic ideological messages, force them to respond

> to a hostile message when they prefer to remain silent or require them to be publicly identified or associated with another's message. *See id.* at 2139. Furthermore, the Court said, the assessments are financial contributions for generic advertising that program participants do not disagree with, and the advertising is not attributed to individual handlers. *See id.* In addition, none of the generic ads promote any particular message other than encouraging consumers to buy California tree fruit. *See id.*
>
> The Court concluded that the generic ads for California fruit are germane to the purposes of the marketing orders and the assessment is not used for ideological activities. *See id.* at 2140. The Court further concluded that generic advertising is a species of economic regulation that should enjoy the same strong presumption of validity that the Court accords other policy judgments made by Congress. *See id.* at 2141. Finding the generic advertisements do not warrant special First Amendment scrutiny under the *Central Hudson* standard, the Supreme Court reversed the Ninth Circuit decision. *See id.* at 2142.
>
> In the case at bar, the district court incorrectly concluded that the Act was commercial speech and applied *Central Hudson*. The district court found the Act passed the *Central Hudson* test and did not violate Goetz' freedom of speech and association. *Goetz v. Glickman*, 920 F. Supp. at 1182-83. We find the district court erred in applying the *Central Hudson* test to Goetz' First Amendment claim. However, we can affirm the district court on a basis not relied on by the court if supported by record and law. *United States v. Corral*, 970 F.2d 719, 726 n.5 (10th Cir. 1992). Therefore, we affirm the district court and find under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless.

Goetz v. Glickman, 149 F.3d at 1138-39 (footnote omitted).

In light of *Goetz* and *Frame*, which address the constitutionality of the statute under which this proceeding was instituted, I find *United Foods*, which addresses the constitutionality of the Mushroom Promotion Act, inapplicable to this proceeding. Therefore, Respondents' Petition to Reopen Hearing to adduce evidence to provide a basis for the application of *United Foods* is denied.

Second, even if I found *United Foods* applicable to this proceeding, I would deny Respondents' Petition to Reopen Hearing because Respondents have not provided a good reason for their failure to adduce evidence to demonstrate the unregulated nature of the cattle market during the August 4, 1999, hearing.

Respondents contend that they did not adduce evidence of the unregulated nature of the cattle market at the August 4, 1999, hearing because *United Foods* was not decided until after the August 4, 1999, hearing. I agree with Respondents that *United Foods* was not decided until after August 4, 1999. However, the decision in *United Foods* was not a necessary prerequisite to Respondents' adducing evidence to demonstrate that the cattle market is unregulated. Respondents appear to take the position that evidence of the unregulated nature of the cattle market became relevant to this proceeding only after the United States Court of Appeals for the Sixth Circuit, in *United Foods,* interpreted *Glickman v. Wileman Bros. & Elliott Inc.*, 521 U.S. 457 (1997), as only applying to extensively regulated industries.

The Supreme Court of the United States held in *Glickman v. Wileman Bros. & Elliott Inc.*, 521 U.S. 457 (1997), that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the Agricultural Marketing Agreement Act of 1937, as amended, neither abridge First Amendment rights nor implicate the First Amendment. The Sixth Circuit distinguished *Wileman* from *United Foods* on the ground that the California tree fruit business at issue in *Wileman* is extensively regulated, but that the mushroom business at issue in *United Foods* is unregulated, except for the enforcement of a regional mushroom advertising program. In *United Foods*, the Sixth Circuit interprets *Wileman* as holding that compelled commercial speech is permitted under the First Amendment to the United States Constitution if (1) the compelled commercial speech is germane to a valid, comprehensive, regulatory scheme, and (2) the compelled commercial speech is nonideological, nonsymbolic, and nonpolitical in nature, as follows:

> We do not read the majority opinion in *Wileman* as saying that any compelled commercial speech that is nonpolitical or nonsymbolic or nonideological does not warrant First Amendment protection. We conclude that the explanation for the *Wileman* decision is found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of the free market, as well as in the nonpolitical nature of the compelled speech. The majority uses this concept of collectivization and the nonideological nature of the advertising together. The conjunction "and" germaneness "and" nonpolitical–is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing–either the collectivization of the industry or the purely commercial nature of the advertising–the First Amendment invalidates the compelled commercial speech, absent some other compelling justification not present

> in the case before us. The Court's holding in *Wileman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise.

United Foods, Inc. v. United States, 197 F.3d at 224.

However, litigants raised the issue of the scope of *Wileman* long before the decision in *United Foods*. For instance, the United States District Court for the Eastern District of California rejected contentions that *Wileman* does not apply to the California table grape industry and the California cut flower industry because those industries are not extensively regulated. In *Delano Farms Co. v. California Table Grape Comm'n*, the district court held:

> [*Wileman's*] holding is summarized in the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech . . . ." That principle controls. Plaintiff's argument [that] a different result obtains when a program does not regulate fruit size, color, etc. is unconvincing. Were that the case, the state could validate a program merely by adding additional regulatory burdens. Nothing in [*Wileman*] indicates results should differ in "stand alone" advertising programs.

Delano Farms Co. v. California Table Grape Comm'n, CV-F-96-6053 OWW DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997) (App. A).

In *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, the district court, as stated during the hearing, held:

> Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction.

Matsui Nursery, Inc. v. California Cut Flower Comm'n, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997) (Reporter's Transcript) (App. B).

Respondents could have adduced evidence at the August 4, 1999, hearing to support their position that, based upon the nature of the cattle market, the provisions of the Beef Promotion Act, which compel cattle producers to contribute funds used to promote beef and beef products, are unconstitutional. The issuance of *United Foods* was not essential to Respondents' adducing evidence to support their position. Therefore, the issuance of *United Foods* after the August 4, 1999, hearing is not a good reason for Respondents' failure to adduce evidence regarding the nature of the cattle market during the August 4, 1999, hearing.

Respondents' Petition to Reopen Hearing to adduce evidence regarding the "unregulated nature of the cattle market" is denied.

APPENDIX A

Delano Farms Co. v. The California Table Grape Comm'n, CV-F-96-6053 OWW DLB (E.D. Cal. Sept. 11, 1997).

APPENDIX B

Matsui Nursery, Inc. v. The California Cut Flower Comm'n, Civ. No. S-96-102 EJG/GGH (E.D. Cal. Aug. 4, 1997).

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HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: WINSTON T. GROOVER.
HPA Docket No. 95-0004.
Decision and Order filed June 28, 2000.

Sore – Entering – Showing – Exhibiting.

Administrative Law Judge Dorothea A. Baker dismissed the Complaint with prejudice based upon an evaluation of the record as a whole, and found that the Government has not met its burden of proof.

Colleen A. Carroll, for Complainant.
Brenda A. Bramlett, Shelbyville, Tennessee, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative disciplinary proceeding instituted by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], by the filing of a Complaint on February 17, 1995, under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1825-1831) [hereinafter the Horse Protection Act or "Act"], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under various statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. The Complaint originally included as a Respondent, Marcella Smith.

The Complaint alleges that the Respondent Winston T. Groover was the trainer of the horse known as "Pusher's Night and Day" and entered this horse as Entry No. 454, Class No. 71, on March 27, 1993 at the National Walking Horse Trainers Show at Shelbyville, Tennessee.

The Complaint also alleges that Respondent Marcella Smith was the owner of the horse known as "Pusher's Night and Day" which was entered as Entry No. 454, Class No. 71, on March 27, 1993 at the National Walking Horse Trainers Show at Shelbyville, Tennessee.

The Complaint alleges, with respect to Respondent Groover that, he entered for the purpose of showing or exhibiting the horse known as "Pusher's Night and Day" in the aforesaid National Walking Horse Trainers Show while the horse was sore. The Complaint also alleges that the Respondent Marcella Smith allowed the entry for the purpose of showing or exhibiting of "Pusher's Night and Day" at the aforesaid National Walking Horse Trainers Show while the horse was sore. Said

allegations state that the aforesaid Respondents, in so acting, violated section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)) inasmuch as the horse was sore at the time.

The Respondent Winston T. Groover, through counsel, filed a timely Answer on April 17, 1995.

This case was assigned to this Administrative Law Judge on November 17, 1997. On October 20, 1997, the Complainant moved to dismiss the Complaint as to Respondent Marcella Smith because Complainant was unable to serve the Complaint upon her. Pursuant to said Motion, the Complaint was dismissed as to Respondent Marcella Smith by Order issued November 18, 1997.

Pursuant to pleadings properly filed, Respondent Winston T. Groover filed Notice of Substitution of Counsel on his behalf. Said Substitution of Counsel was recognized by Order issued November 18, 1997.

On December 11, 1997, an oral hearing date was designated, in accordance with agreement of the parties, to be July 15, 1998, in Nashville, Tennessee. By reason of Motion therefor, filed by the Respondent and for good cause set forth therein, the oral hearing date of July 15, 1998, was continued until a later date. By document filed January 25, 1999, the oral hearing was rescheduled to commence on June 23, 1999, in Nashville, Tennessee. Pursuant to request therefor by the Complainant that date was changed from June 23, 1999 to July 14, 1999, and July 20, 1999. The oral hearing herein took place on July 20 and 21, 1999, before Administrative Law Judge Dorothea A. Baker at which time documentary evidence and testimonial evidence were received into evidence. The Complainant was represented by Colleen A. Carroll, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC. Respondent was represented by Brenda A. Bramlett, Esquire, Shelbyville, Tennessee. In due course, and in a timely manner, the parties filed briefs herein, the last brief having been filed April 3, 2000.

Applicable Statutory Provisions

TITLE 15--COMMERCE AND TRADE

. . . .

CHAPTER 44--PROTECTION OF HORSES

15 U. S. C. § 1821(3).

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that--

(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, or

(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.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering 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).

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

. . . .

15 U.S.C. § 1825(b)(1).

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this

section or is subject to a final order under such subsection 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, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. § 1825(c).

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

. . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which 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).

Statement of the Case

The primary issue to be resolved herein is whether or not on March 27, 1993, the Respondent, Winston T. Groover, entered the Horse known as "Pusher's Night and Day" as Entry No. 454, Class No. 71 at the National Walking Horse Trainers Show, at Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)). Respondent admits that, at all times material hereto, he was the trainer of the horse "Pusher's Night and Day" and that he entered same on March 27, 1993, at the National Walking Horse Trainers Show.

Based upon an evaluation of the record as a whole, I find that the Government has not met its burden of proof. Accordingly, the Complaint is dismissed with prejudice.

To prevail, the Complainant must show by a preponderance of evidence that "Pusher's Night and Day" was sore when Respondent entered it in the horse show. In furtherance of that objective, Complainant relies upon the testimony and documentation relating to an examination of the horse by two qualified USDA veterinarians, namely Dr. Lynn P. Bourgeois and Dr. Scott L. Price who examined

the horse at the relevant time on March 27, 1993, both of whom found that the horse had been sored in both front feet. Neither of said witnesses had any independent recollection of the examination and relied upon documentation which was admitted into evidence. Complainant would show that both of said USDA veterinarians were experienced and qualified and utilized an examination procedure of the horse which has achieved the approval of the United States Department of Agriculture. That examination procedure, as generally applied, was related in detail during the testimony.

Prior to the USDA's veterinarians' examination, and when the horse was examined by Designated Qualified Person Charles Thomas, at approximately 6:30 p.m., on March 27, 1993, upon Mr. Thomas' palpation of both front pasterns and finding sensitivity, but not soreness, Mr. Thomas then excused the horse and issued a Designated Qualified Person's ticket for bilateral sensitivity.

The Act provides that a horse that is abnormally sensitive in both front feet is presumed to be sore: "In any civil or criminal action to enforce this Act or any regulation under this Act a horse shall be presumed to be a horse which 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).

Although Complainant indicates it did not rely upon the statutory presumption of soreness, but in fact proved its case by a preponderance of evidence, nevertheless section 2 of the Act defines a sore horse:

. . . .

(3) The term "sore" when used to describe a horse means that--

(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, or

(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. 15 U.S.C. § 1821

The Government put on evidence to show that "Pusher's Night and Day" exhibited specific areas of his pasterns which were painful when Dr. Bourgeois and Dr. Price, Government employees, palpated them during the preshow examination. Drs. Bourgeois and Price believed that chains would have hit the area that Dr. Bourgeois and Dr. Price found to be painful. Because of the location of the painful areas, the veterinarians indicated they could reasonably expect that "Pusher's Night and Day" would have been in physical pain if he had been exhibited on March 27, 1993. Both veterinarians concluded that the horse's pain was due to an artificial cause.

Respondent maintains that whether or not the rebuttal presumption found in section 1825(d)(5) is relied upon, the Complainant still has not borne the burden of persuasion. Whether or not that presumption is triggered, the Respondent maintains that he has presented sufficiently convincing and credible testimony from Drs. Ray Miller and Randy Baker, two licensed and qualified veterinarians; Lonnie Messick, Vice-President of the National Horse Show Commission and the head of the Designated Qualified Person program; Designated Qualified Person Charles Thomas; and a videotaped examination performed by Drs. Miller and Baker immediately following the examination conducted by Drs. Bourgeois and Price that show that "Pusher's Night and Day" was not sore on March 27, 1993. I agree with Respondent.

The Government's case depends upon the examination and testimony of two USDA veterinarians: Dr. Scott Price and Dr. Lynn Bourgeois neither of whom had any present recollection of the examination of the horse and both of whom depended upon the notations made during or shortly after their 1993 examination. The United States Department of Agriculture considers such affidavits and report violations as reliable and probative. *In re: Kim Bennett and Mr. and Mrs. David Broderick*, 55 Agric. Dec. 176 (1996).

The term "sensitive" is a term particularly utilized by Designated Qualified Person personnel and is understood to mean any reaction by a walking horse from palpation, meaning any movement in one or both front feet of the horse upon

palpation. The term "sensitive" is understood by Designated Qualified Person personnel and walking horse personnel to have a different meaning from the term "sore" as used under the Act. The terms are not synonymous.

It is misleading to suggest that the words "pain" and "sensitive" are synonymous or that bilaterally sore and sensitive are the same thing. The Act clearly requires that a horse be more than sensitive when palpated before considering it sore; it requires that a horse have abnormal bilateral sensitivity. A sensitive horse is not necessarily a sore horse. For instance, a sensitive silly horse--one that is so sensitive that it reacts to any palpation--is not considered a sore horse. It thus is misleading and inaccurate to use the words pain or sore and sensitive as synonyms in describing a horse's response to palpation. The fact that the horse may have had some sensitivity does not necessarily reflect abnormal sensitivity that equates with pain and which the Act requires be demonstratively present bilaterally before it can presume that the horse was sore.

As experienced veterinarians, the opinions of the Complainant's witnesses are entitled to considerable weight. However, in order to give controlling weight to their opinions, they are required, as skilled experts, to clearly set forth the facts on which they based their opinions. *Randolph v. Laeisz,* 896 F.2d 964 (5th Cir. 1990). This is particularly important when the veterinarians are unable to remember their examination. This lack of recall results not only in having to make a determination, whether a horse is sore, based upon such less reliable evidence as affidavits, and also results in handicapping a respondent's effort at cross-examining a veterinarian concerning his examination.

A Designated Qualified Person is an individual who was trained and licensed through the National Horse Show Commission to inspect horses that excel and show throughout the country. The Designated Qualified Person program is certified by the Department of Agriculture and Designated Qualified Persons and veterinary medical officers, employed by the Department of Agriculture, receive the same training to inspect horses for compliance with the Act.

Mr. Charles Thomas was the Designated Qualified Person on duty on March 27, 1993. He had a present recollection of his examination of "Pusher's Night and Day" on March 27, 1993, which horse he examined in his capacity as a Designated Qualified Person. After said examination, Mr. Thomas issued a ticket indicating his findings of "sensitive both feet, left foot outside, right foot front, led okay." Mr. Thomas' understanding of the term "sensitive" when referring to a reaction obtained during digital palpation of a horse was "if any horse moves in any way in any foot, he is excused from competition." He further testified that the definition of the term "sensitive," which Designated Qualified Persons utilize, is "more strict than what the definitions [of sensitive] under the rule book is." During his

examination of the subject horse, Mr. Thomas did not observe the horse bobbing his head, shuffling his back feet forward or contracting or rippling his abdominal muscles. Mr. Thomas indicated that "Pusher's Night and Day" was not sore as that term is defined in the Act. (Tr. 366, 384).

Mr. Lonnie Messick, Executive Vice-President of the National Horse Show Commission and head of the Designated Qualified Person program, was present at the horse show inspection station of the trainer show on March 27, 1993. Although he did not recall witnessing the examination of "Pusher's Night and Day" by Designated Qualified Person Charles Thomas or the subsequent examinations of said horse performed by Dr. Bourgeois and Dr. Price, he did observe the examination by Dr. Miller.

According to Mr. Messick, the terms "sensitive" and "sore" as defined under the Act are not synonymous. The definition of "sensitive" utilized by Designated Qualified Person personnel in 1993 was not the same as the meaning of "sore" as that term is defined under the Act. (Tr. 359). Mr. Messick observed Dr. Ray Miller examine "Pusher's Night and Day" on March 27, 1993 and did not see Dr. Miller obtain any reaction or movement to his palpation of said horse's pasterns. (Tr. 344). According to Mr. Messick, Dr. Miller conducted his examination of the horse in question by using the same procedure of palpation that the Designated Qualified Persons use.

"Pusher's Night and Day" was examined by two private veterinarians, Dr. Miller as mentioned above, and Dr. Baker at a distance approximately twenty feet away from where the horses were being checked or just outside the area and was within a time frame of five or ten minutes between the time that Dr. Bourgeois and Dr. Price examined the horse. The examination by the Respondent's two veterinarians occurred at approximately 7:00 p.m., on March 27, 1993, and said examination was videotaped.

At the time of his examination, Dr. Price was upset because the horse was in the warmup- ring area. It is not known whether or not the duties of a USDA veterinarian included the direction and management of the horse show. However, this has been a factor in the Department's Judicial Officer's decisions: namely, where the horse was subsequently examined.

The aforesaid two private veterinarians who inspected the horse and who appeared as witnesses at the hearing are licensed, practicing veterinarians of many years. Based upon their personal examinations, they concluded that "Pusher's Night and Day" was not sore and was not in violation of the Act. Both of these individuals are well-qualified professionals within the ambit of veterinarians' expertise. The fact that they were not employed by the United States Department of Agriculture does not diminish their professional ability. Dr. Baker had a present

recollection of his examination of "Pusher's Night and Day" from which examination he concluded that the horse was not sore as that term is defined under the Act. Neither Dr. Price nor Dr. Baker were pre-selected. Rather, they were simply in attendance at the show that night.

The probative value of the testimony of the two USDA Inspectors is diminished by certain discrepancies in their testimony and documentation such as time of filling out Form 7077; findings relating to indicia of soring and time of examination. The requirement of accuracy is not met here as there are notable discrepancies between the recollections of Dr. Bourgeois, as recorded by him on Form 7077 and stated in his affidavit, and the recollections of Dr. Price. (CX 1, 4-5). Not only did Dr. Price see alleged responses by "Pusher's Night and Day" that Dr. Bourgeois did not see; Dr. Price, in his affidavit, recalls "we witnessed Ronnie Messick (sic), DQP Supervisor, palpating the horse outside the DQP inspection area in the warm-up ring." (CX 5). He further states that he saw a total of three (3) persons examine the horse after he and Dr. Bourgeois completed their examination. (CX 5). Dr. Bourgeois, on the other hand, does not have a recorded recollection of seeing Lonnie Messick examine said horse. (CX 4). In fact, Dr. Bourgeois specifically notes that he saw two (2) veterinarians examine the horse in question while some person videotaped their examinations. (CX 4). Dr. Bourgeois recalls Lonnie Messick witnessing the examinations by the two (2) veterinarians but nothing more. (CX 4).

Further, when asked "Can you tell from your documentation whether the responses that this horse gave you were the results of artificial means?", Dr. Price responded "In my affidavit, it's concluded that these areas were sore because of chemicals, action devices or the combination of the two." (Tr. 102:11-16). The fact is that Dr. Price made no mention in his affidavit as to what caused "Pusher's Night and Day" to be allegedly sore. (CX 5).

There also was a reluctance to explain the basis of opinion of the two USDA Inspectors:

> Q You didn't answer my question, Doctor. [Bourgeois] Would you agree or disagree that there is a difference in the definition of sensitivity --
>
> A Yes, there is a difference.
>
> Q Could you explain it?
>
> A I don't have a dictionary. To us, sensitivity is not part of our vocabulary. It's not reaction to foundation. [palpation??]

Q Pardon me? Would you repeat that?

A No, I won't. (Tr. 56:2-11).

* * * * *

Q And you did not include it in form 7077 and horse shuffled his feet forward.

A Right.

Q Isn't that a direct contradiction of what you are saying?

A No.

Q Explain that, please.

A The horse is moving back on his feet. He is trying to redistribute his weight. It may be an omission, but it's what it was.

Q How does a horse rock back on his hind feet and at the same time shuffle forward?

A Can't.

Q Can you explain that?

A Shuffle and lean back -- he can do it.

Q But you agree there are discrepancies in the form you filled out, form 7077 and your affidavit?

A I agree. (Tr. 58:10-25; 59:1-2).

Also, Dr. Bourgeois, in a description of his examination:

Q Doctor, in your affidavit, you had stated that you palpated both front pasterns of this horse and you got pain responses; is that correct?

A Yes.

Q Do you recall whether or not -- or how many times you examined each foot and by that, I mean, did you check the horse's foot, put it down and go to the other foot?

A I don't recall, but I am sure I didn't.

Q Is that not your normal procedure?

A My normal procedure is to make a decision and then I don't go from foot to foot and back and forth and all that stuff. (Tr. 65:22-25; 66:1-8).

Dr. Price attributed any discrepancies in Form 7077 as attributable to which side of the horse one might be on. Dr. Price does not separate the term sensitive or sore. "Its identical." (Tr. 119).

It is misleading to attempt to equate the validity of the veterinarians' opinions with the number of horses physically examined. The important focus must relate to the professional qualifications, experience, and training required to arrive at a correct diagnosis of the horse's condition at the time of the physical examination. If the Government's position is that only those veterinarians who are employees of USDA are qualified to determine if a horse is sore within the meaning of the Act, then the hearing process is a futile undertaking. Although Congress, through legislation, seeks to abolish the cruel and inhumane practice of soring horses, it likewise, provides for a full and fair hearing where USDA evidence can be disputed. Private licensed veterinarians can be equally qualified and experienced in detecting the presence of soreness in a horse. To maintain otherwise is to cast dispersions on the capability of all such individuals.

It is argued that the Respondent's two examining veterinarians relied upon erroneous criteria in arriving at their opinions that the horse was not sore -- namely, requiring a gait deficit in addition to pain.

Dr. Ray Miller is a Tennessee licensed, practicing veterinarian for the past thirty years. (Tr. 208:1-6). The majority of his practice deals with equine. (Tr. 208:13-16). Dr. Miller knows how to identify a horse that is "sore" and considers himself an expert in determining when a horse is "sore." (Tr. 209:11-17; 229:23-25; 230:1). Dr. Miller had a present recollection of his examination of "Pusher's Night and Day" on March 27, 1993, which exam took place "a little before 7:00". (Tr. 219:15-19, 25; 220:1-2). The examination took place "probably 50 feet from the DQP and the VMO inspection area. . . ." (Tr. 221:2-4). Dr. Miller knew that his

examination of said horse was being videotaped. (Tr. 221:12-14). Dr. Miller used the same procedure of palpation on "Pusher's Night and Day" as the Designated Qualified Person used. (Tr. 345:20-24). According to Dr. Miller, and based upon his personal examination of said horse, "Pusher's Night and Day" was not in violation of the Act and "was not sore." (Tr. 226:12-19). Dr. Miller's examination of "Pusher's Night and Day is videotaped in its entirety. (RX 1).

Whether or not the affidavits and inspection reports generated by Drs. Bourgeois and Price constitute hearsay, which is not excluded in administrative proceedings, or constitute recorded recollection, said documentation lacks probative persuasion in light of Respondent's evidence. Past recollection recorded must show reliability and accuracy with respect to the testimony and other data relied upon in connection therewith. There is an insufficiency of evidence to support a finding of a presumption of soreness. Specifically, the portion of Form 7077 completed by Dr. Bourgeois and Dr. Price contained numerous inconsistencies. Also, the testimony of Dr. Bourgeois and Dr. Price was that Dr. Price denied any difference in meaning of the terms "sensitive" and "sore" whereas Dr. Bourgeois, to the contrary, agreed that there was a difference in meaning of the two terms.

The only evidence submitted by Complainant consists of the testimony of the two examining veterinarians, the violation report, and affidavits which indicated that the horse was sore on the night in question. This is not sufficient to carry its burden of persuasion. The Respondent has submitted reliable and credible evidence that said horse was not sore: Mr. Charles Thomas, the Designated Qualified Person who conducted the preshow inspection of "Pusher's Night and Day" on March 27, 1993 did not find said horse sore as that term is defined under the Act; Lonnie Messick, Vice-President of the National Horse Show Commission and head of the Designated Qualified Person program had a present recollection of Dr. Ray Miller's examination of "Pusher's Night and Day" on March 27, 1993. Mr. Messick observed said horse gave no reaction or pain responses as Dr. Miller examined him which indicates the horse was not sore. Further, Mr. Messick testified that the examinations performed by Dr. Miller and Dr. Baker were performed in a manner consistent with that of a Designated Qualified Person. On March 27, 1993, Dr. Ray Miller and Dr. Randy Baker examined "Pusher's Night and Day" within close proximity to the location of the horse inspection area and within a short period of time of the examinations conducted by Drs. Bourgeois and Price. Both Dr. Miller and Dr. Baker determined that said horse was not sore as that term is defined under the Act. A videotape documented the examinations of Dr. Miller and Dr. Baker and said videotape corroborates the findings of Drs. Miller and Baker that "Pusher's Night and Day" was not sore.

I have found the testimony of Drs. Miller and Baker to be entirely credible. They both were qualified to determine whether "Pusher's Night and Day" was sore. On the other hand, I find it disturbing that one of Complainant's witnesses, demonstrated noticeable agitation when being cross-examined and resented being cross-examined:

Q Doctor, what I am asking actually is what percentage of your time is actually spent enforcing the Horse Protection Act?

A I would say 20 to 25 percent.

Q How do you come up with that figure?

A This is getting ridiculous. It's an approximation, okay? Further than that I can't tell you. I don't know. (Tr. 37:5-12).

* * * * *

A I can't answer that. I don't have the documentation. I can't answer that. I can't. I just don't know. I'd have to go through my weekly reports. I didn't think I was on trial here. I thought it was someone else. (Tr. 38:11-14).

* * * * *

MS. BRAMLETT: Well, Your Honor, he has already testified that from 1980 to 1988, he spent 20 to 25 percent of his time with the VMOs inspecting horses, but that included time spent in office, attending court proceedings and he could not give me an estimate of what actual on hand experience checking horses in that time.

JUDGE BAKER: Very well.

MS. BRAMLETT: From 1988 to 1993 I am asking the exact same questions. (Tr. 40:17-25).

JUDGE BAKER: Very well, I think the significance becomes apparent.

BY MS. BRAMLETT:

Q Is there --

A I'm not going to lie to you. I don't know the answer. I am not going to perjure myself. (Tr. 41:1-6).

* * * * *

BY MS. BRAMLETT:

Q Have you ever been on the training committee?

A No.

Q Have you had as much experience as Dr. Given?

MS. CARROLL: Objection, relevance. We are getting a little far afield.

JUDGE BAKER: Do you wish to respond, Ms. Bramlett?

MS. BRAMLETT: Your Honor, actually what I am getting at is --

THE WITNESS: This is ridiculous. I can't answer that question. (Tr. 46:15 to 25; 47:1).

Respondent has shown by credible evidence a sufficient basis of rebuttable evidence as to cause the Complainant's evidence to lack the necessary preponderance of proof necessary to carry its burden.

Dr. Price's opinion in this case is subject to strict scrutinization in connection with his actions to have "Pusher's Night and Day" removed from the warmup inspection area. It could be inferred that Dr. Price was aware of the Judicial Officer's rulings concerning examinations of horses that were removed from the vicinity of the inspection area before being examined by independent experts of a respondent. The record does not disclose that Dr. Price's duties included that of show management. It is true that the Judicial Officer has considered this matter.

One of those cases is that of *Richard L. Thornton et al.*, 41 Agric Dec. 870, wherein it is stated by the Judicial Officer, among other things: "These

examinations occurring the following morning and one week later are not accorded the same probative weight that is given to examinations immediately following the horse's exit from the show ring. After the horse has departed from the USDA inspection station, the opportunity to anesthetize or alter the situation tends to diminish the probative value. If the horse was sored, the individuals responsible would have little or no hesitancy to try to conceal it." *Albert Lee Rowland and C. H. Meadows,* 40 Agric. Dec. 1934.

Here we have a situation where, as opposed to the testimony and documentation of two USDA Inspectors, we have four credible witnesses contradicting the Inspector's opinions that "Pusher's Night and Day" was sore. Said horse has been shown fairly regularly since he was two-years old in approximately 1989-1990. At the time of the hearing in July, 1999, the horse was still showing.

Certainly, Congress in its wisdom, wanted an accused Respondent to have the opportunity to refute Governmental assertions. Here the Respondent has done so.

All request, motions and suggestions of the parties have been carefully considered. To the extent, if any, they are inconsistent with this Decision and Order, they are denied.

Accordingly, the following Order is issued.

Order

The Complaint filed February 17, 1995, is dismissed with prejudice.

This Decision and Order shall become final and effective thirty-five (35) days after service, unless appealed within thirty (30) days after service to the Judicial Officer pursuant to the Rules of Practice, 7 C.F.R. § 1.145.

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 10, 2000.-Editor]

_____

In re: CARL DEAN CLARK, JR., AND MARIE JOYCE COLEMAN.
HPA Docket No. 98-0013.
Decision and Order as to Marie Joyce Coleman filed August 9, 2000.

Horse protection – Allowing entry – Knowledge – Ability to pay – Civil penalty – Disqualification.

The Judicial Officer affirmed the Decision by Judge Baker (ALJ), except with respect to the assessment of a $2,000 civil penalty. The Judicial Officer concluded that the Respondent waived her right to an oral hearing and admitted the material allegations of fact in the Complaint based on her failure to appear at the scheduled hearing after having been duly notified of the hearing (7 C.F.R. § 1.141(e)(1)). The Judicial Officer concluded that the Respondent allowed the showing or exhibiting in a horse show of a horse which was sore, in violation of 15 U.S.C. § 1824(2)(D). The Judicial Officer rejected Respondent's argument that she could not have violated 15 U.S.C. § 1824(2)(D) because she did not sore the horse in question and did not know that the horse in question had been sored. The Judicial Officer found that the Respondent proved her inability to pay the $2,000 civil penalty assessed by the ALJ and reduced the civil penalty to $1. In addition to the civil penalty, the Judicial Officer disqualified the Respondent for 1 year from showing, exhibiting, or entering any horse or participating in any horse show, horse exhibition, horse sale, or horse auction.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on August 17, 1998.

The Complaint alleges that Carl Dean Clark, Jr., and Marie Joyce Coleman violated the Horse Protection Act. Pursuant to section 1.138 of the Rules of Practice (7 C.F.R. § 1.138), Complainant and Carl Dean Clark, Jr., agreed to the entry of a Consent Decision. Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] entered the Consent Decision on December 1, 1999. *In re Carl Dean Clark, Jr.* (Consent Decision as to Carl Dean Clark, Jr.), 58 Agric. Dec. ___ (Dec. 1, 1999).

The Complaint alleges Marie Joyce Coleman [hereinafter Respondent]: (1) on or about May 1, 1997, entered, for the purpose of showing or exhibiting, a horse known as "Lincoln Lady," as entry number 144 in class number 28, at the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Horse

Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ II(C)); and (2) on May 1, 1997, allowed the showing or exhibiting of Lincoln Lady, as entry number 144 in class number 28, at the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ II(D)). On November 18, 1998, Complainant filed Notice of Amendment of Complaint which alleges that on May 1, 1997, Respondent allowed Lincoln Lady to be shown or exhibited as entry number 144 in class number 28, at the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, while the horse was wearing pad bands in a manner prohibited by section 11.2(b)(15) of the Horse Protection Regulations (9 C.F.R. § 11.2(b)(15)) (Notice of Amendment of Compl. ¶ II(F)).

On October 6, 1998, Respondent filed an Answer denying the material allegations of the Complaint, and on December 10, 1998, Respondent filed an Answer denying the material allegations of the Notice of Amendment of Complaint.

On August 6, 1999, the ALJ scheduled a hearing to begin on October 20, 1999, at 9:00 a.m, local time, in Shelbyville, Tennessee (Change in Oral Hearing Date). On October 20, 1999, the ALJ conducted a hearing in Shelbyville, Tennessee. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Eric L. Davis, Franklin, Tennessee, represented Carl Dean Clark, Jr. Respondent failed to appear at the October 20, 1999, hearing.

Section 1.141(e)(1) of the Rules of Practice provides that a respondent's failure to appear at the hearing constitutes a waiver of hearing and an admission of all the material allegations of fact contained in the complaint, as follows:

§ 1.141 Procedure for hearing.

. . . .

(e) *Failure to appear.* (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral 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 § 1.139 or whether to present evidence, in whole or in part, in the form of affidavits or by oral testimony before the Judge. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision and to

> appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

7 C.F.R. § 1.141(e)(1).

Complainant elected to follow the procedure in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), and on May 2, 2000, Complainant filed a Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order as to Marie Joyce Coleman Upon Admission of Facts by Reason of Default. On May 19, 2000, Respondent filed objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order as to Marie Joyce Coleman Upon Admission of Facts by Reason of Default.

On May 19, 2000, pursuant to sections 1.139 and 1.141(e) of the Rules of Practice (7 C.F.R. §§ 1.139, .141(e)), the ALJ issued a Decision and Order as to Marie Joyce Coleman [hereinafter Initial Decision and Order]: (1) concluding that on or about May 1, 1998, Respondent allowed the showing or exhibiting of Lincoln Lady, as entry number 144 in class number 28, at the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)); (2) assessing Respondent a $2,000 civil penalty; and (3) disqualifying Respondent 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 horse auction (Initial Decision and Order at 3-4).

On June 5, 2000, Respondent appealed to the Judicial Officer and filed a petition to reopen the hearing. Complainant failed to file a timely response to Respondent's appeal petition and failed to file a timely response to Respondent's petition to reopen the hearing. On August 8, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision and a ruling on Respondent's petition to reopen the hearing.[1]

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), except with respect to the civil penalty assessed against Respondent by the ALJ, I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's Conclusion of Law.

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[1]I am filing a Ruling Denying Petition to Reopen Hearing as to Marie Joyce Coleman simultaneous with the filing of this Decision and Order as to Marie Joyce Coleman. *In re Carl Dean Clark, Jr.* (Ruling Denying Petition to Reopen Hearing as to Marie Joyce Coleman), 59 Agric. Dec. ___ (Aug. 9, 2000).

Applicable Statutory Provisions

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that—

(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, or

(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.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering 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.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection 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, from showing

or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. §§ 1821(3), 1824(2), 1825(b)(1), (c).

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

Respondent failed to appear at the hearing on October 20, 1999, and the material facts alleged in the Complaint, as amended, which are admitted by Respondent's failure to appear, are adopted and set forth in this Decision and Order as Findings of Fact. Complainant elected to follow the procedure set forth in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). This Decision and Order is issued pursuant to sections 1.139 and 1.141(e) of the Rules of Practice (7 C.F.R. §§ 1.139, .141(e)).

The transcript reveals Respondent's failure to appear at the hearing, as follows:

> THE COURT: . . . Who appears for Respondent Coleman? Let the record reflect that there is no response. And I shall inquire, is Respondent Coleman in the room or is any representative of Respondent Coleman in the room? The record will reflect that there is no response.
>
> According to the information available in the file of this case, there is indicated that there was served upon the parties notification of this oral hearing date, namely October 20th, 1999 in Shelbyville, Tennessee.
>
> Ms. Carroll, with respect to Respondent Coleman, do you have any comments you wish to make?
>
> MS. CARROLL: Your Honor, at this time the Government would move for the issuance of a default judgment against Ms. Coleman for failure to appear at the hearing.
>
> THE COURT: Do you -- you have an alternative of offering evidence if you wish to. Do you intend to pursue that avenue or simply to rely upon failure to appear?

> MS. CARROLL: We would do both. We intend to present -- because Ms. Coleman is alleged to have been the owner of the horse and to have allowed the exhibition of the horse while sore in violation of the Act we would -- in one sense, at least, Ms. Coleman's liability depends on the case presented by the Government against Respondent Clark. So, we are prepared to proceed against Ms. Coleman in absentia as well.

Tr. 3-4.

At the oral hearing, Complainant and Carl Dean Clark, Jr., agreed to the entry of a Consent Decision. That agreement was finalized by the issuance of a Consent Decision dated December 1, 1999. Among the Findings of Fact set forth in the Consent Decision are the following:

> 3. On or about May 1, 1998, respondent Carl Dean Clark, Jr., entered for the purpose of showing or exhibiting, and showed or exhibited, "Lincoln Lady" as Entry No. 144 in Class No. 28, at the Spotted Saddle Horse Show in Shelbyville, Tennessee, while the horse was sore. . . .
>
> 4. On May 1, 1998, . . . respondent Carl Dean Clark, Jr., showed or exhibited "Lincoln Lady," as Entry No. 144 in Class No. 28, at the Spotted Saddle Horse Show in Shelbyville, Tennessee, while the horse was wearing hoof bands in a manner prohibited by section 11.2(15) [sic] of the horse protection regulations (9 C.F.R. § 11.2(15) [sic]).

In re Carl Dean Clark, Jr. (Consent Decision as to Carl Dean Clark, Jr.), 58 Agric. Dec. ___, slip op. at 2 (Dec. 1, 1999).

On May 2, 2000, Complainant filed a Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order as to Marie Joyce Coleman Upon Admission of Facts by Reason of Default. On May 19, 2000, Respondent filed objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order as to Marie Joyce Coleman Upon Admission of Facts by Reason of Default. Respondent states "I can't help that I've gotten old and confused, and missed that hearing. You say I allowed Lincoln Lady to be shown. You can bet your bottom dollar I did. . . . I didn't know she had been sored. . . . That is why I did without so much, never dreaming he had sored her."

Respondent's failure to appear at the hearing as well as the admissions made in her objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order as to Marie Joyce Coleman

Upon Admission of Facts by Reason of Default are sufficient bases for the issuance of the following Findings of Fact and Conclusion of Law.

Findings of Fact

Respondent Marie Joyce Coleman is an individual whose mailing address is 2201 Claude Fox Road, Cornersville, Tennessee 37047, and at all times material to this proceeding, was the owner of the horse known as "Lincoln Lady." On or about May 1, 1998, Respondent allowed the entry and showing or exhibiting of Lincoln Lady, as entry number 144 in class number 28, at the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show, in Shelbyville, Tennessee.

Conclusion of Law

On May 1, 1998, Respondent Marie Joyce Coleman allowed the showing or exhibiting of Lincoln Lady as entry number 144 in class number 28, at the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in her appeal petition. First, Respondent contends the ALJ's conclusion that Respondent allowed the showing or exhibiting of Lincoln Lady, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), is error.

Respondent is deemed by her failure to appear at the hearing without good cause to have admitted the material allegations of fact contained in the Complaint. Therefore, I find that the ALJ properly concluded Respondent allowed the showing or exhibiting of Lincoln Lady, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as alleged in the Complaint.

Moreover, Respondent's arguments in support of her contention that the ALJ's conclusion is error lack merit. Respondent contends Carl Dean Clark, Jr., admitted he sored Lincoln Lady and argues that, based on this admission, she could not, as a matter of law, have violated 15 U.S.C. § 1824(2)(D).

I disagree with Respondent. As an initial matter, Carl Dean Clark, Jr., did not admit that he sored Lincoln Lady. Instead, Mr. Clark admitted that, while Lincoln Lady was sore: (1) he transported Lincoln Lady to the Spotted Saddle Horse

Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lincoln Lady; (2) he entered Lincoln Lady in the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lincoln Lady; and (3) he showed or exhibited Lincoln Lady in the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, while Lincoln Lady was wearing hoof bands in a manner prohibited by section 11.2(b)(15) of the Horse Protection Regulations (9 C.F.R. § 11.2(b)(15)). *In re Carl Dean Clark, Jr.* (Consent Decision as to Carl Dean Clark, Jr.), 58 Agric. Dec. ___ (Dec. 1, 1999).

Moreover, even if Carl Dean Clark, Jr., admitted that he sored Lincoln Lady, that admission would not result in my finding that the ALJ erred by concluding that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). An owner may violate section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) even if a person other than the owner sored a horse, which was shown or exhibited in a horse show or horse exhibition while sore. Therefore, even if I found that Carl Dean Clark, Jr., sored Lincoln Lady, that finding alone would not cause me to conclude that the ALJ erred by concluding that Respondent violated 15 U.S.C. § 1824(2)(D).

Respondent also contends the ALJ's conclusion that Respondent violated 15 U.S.C. § 1824(2)(D) is error because Respondent did not know that Lincoln Lady had been sored.

An owner who does not know that a horse that she owns is sore, which horse is entered, shown, or exhibited at a horse show while sore, may be found to have violated 15 U.S.C. § 1824(2)(D), notwithstanding her ignorance.[2] Therefore, even if I found that Respondent did not know that Lincoln Lady was sore, that finding alone would not cause me to conclude that the ALJ erred by concluding that Respondent violated 15 U.S.C. § 1824(2)(D).

Second, Respondent contends that she is not able to pay the $2,000 civil penalty assessed by the ALJ.

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[2] *See Lewis v. Secretary of Agriculture*, 73 F.3d 312, 316 (11th Cir. 1996) (stating an owner may violate 15 U.S.C. § 1824(2)(D) even if the owner does not know the horse was sore); *Baird v. United States Dep't of Agric.*, 39 F.3d 131, 137 (6th Cir. 1994) (stating an owner who does not know that a horse he owns is sore, which horse is entered, shown, or exhibited at a horse show, may be found to have violated 15 U.S.C. § 1824(2)(D) notwithstanding his ignorance); *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1489 (9th Cir. 1984) (stating the owners of a horse could be held liable for a violation of 15 U.S.C. § 1824(2)(D) even though they had no knowledge that the horse was sore where they did not expressly order the trainer not to show the horse if he was sore); *Thornton v. United States Dep't of Agric.*, 715 F.2d 1508, 1511 (11th Cir. 1983) (rejecting the respondent's contention that the term "allowing" in 15 U.S.C. § 1824(2)(D) requires a showing that the owner knew the horse was sore at the time it was shown).

The sanction of a $2,000 civil penalty and a 1-year disqualification is the routine penalty for a first violation of the Horse Protection Act.[3] Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides that in determining the amount of the civil penalty the Secretary of Agriculture must take into account the respondent's ability to pay the civil penalty. Respondent bears the burden of coming forward with some evidence indicating an inability to pay the civil penalty.[4]

Respondent's filings provide evidence of Respondent's inability to pay the $2,000 civil penalty assessed by the ALJ. Moreover, on July 7, 2000, Complainant filed a Motion to Amend Decision and Order as to Marie Joyce Coleman requesting that no civil penalty be assessed against Respondent, as follows:

> Complainant, the Administrator of the Animal and Plant Health Inspection Service hereby moves to amend the Decision and Order issued on May 19, 2000, in the above-captioned case. This motion is based on section 1.143(a) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.143(a)), on all of the pleadings and papers on file herein, and specifically on respondent Marie Joyce Coleman's apparent inability to pay the $2,000 civil penalty assessed in the Order. For this reason, the

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[3] *In re David Tracy Bradshaw*, 59 Agric. Dec. ___, slip op. at 14 (June 14, 2000); *In re Jack Stepp*, 57 Agric. Dec. 297, 312 (1998), *aff'd* 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 890 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re Tracy Renee Hampton* (Decision as to Dennis Harold Jones), 53 Agric. Dec. 1357, 1390-91 (1994); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1240-41 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 317-18 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 283 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 248-50 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

[4] *In re Jack Stepp*, 57 Agric. Dec. 297, 318 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1324 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Danny Burks*, 53 Agric. Dec. 322, 346 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 317 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 194 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 249 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re A.P. "Sonny" Holt*, 49 Agric. Dec. 853, 865-72 (1990); *In re Richard L. Thornton*, 41 Agric. Dec. 870, 898 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983).

> complainant respectfully requests that paragraph 1 of the Order issued May 19, 2000 (assessing a civil penalty of $2,000), be deleted. The complainant requests that all other provisions of the Decision and Order be adopted.

Respondent did not respond to Complainant's Motion to Amend Decision and Order as to Marie Joyce Coleman.

Based on Respondent's evidence that she is unable to pay the $2,000 civil penalty assessed by the ALJ, I assess Respondent a $1 civil penalty. I reject Complainant's request that I assess Respondent no civil penalty. Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that a person may be disqualified from showing or exhibiting any horse and judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction if that person was convicted under section 6(a) of the Horse Protection Act (15 U.S.C. § 1825(a)) or has paid a civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). I find that the disqualification of Respondent in accordance with 15 U.S.C. § 1825(c) is necessary to deter Respondent and other potential violators from future violations of the Horse Protection Act. Therefore, in order to disqualify Respondent as provided in 15 U.S.C. § 1825(c), I assess Respondent a $1 civil penalty.

Third, Respondent contends that the ALJ prohibited Respondent from selling her horses and she must be allowed to sell her horses because she cannot feed them. The ALJ did disqualify Respondent from participating in any horse sale or horse auction for 1 year. However, section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)) provides that an administrative law judge's decision does not become effective if a party appeals to the Judicial Officer, as follows:

> **§ 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[.]

7 C.F.R. § 1.142(c)(4).

Respondent filed a timely appeal to the Judicial Officer. Therefore, the ALJ's Initial Decision and Order did not become effective and the Initial Decision and Order did not prohibit Respondent from participating in horse sales or horse auctions. Moreover, the disqualification provision in this Decision and Order is not effective until the 60th day after service of this Decision and Order on Respondent. Respondent's participation in a horse sale or horse auction prior to the effective date of this Decision and Order will not violate the Order in this Decision and Order.

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

Order

1. Respondent, Marie Joyce Coleman, is assessed a $1 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States," and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 98-0013.

2. Respondent, Marie Joyce Coleman, 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 horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of a horse to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up area, inspection area, or any area where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of any other person in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

_____

In re: CARL DEAN CLARK, JR., AND MARIE JOYCE COLEMAN.
HPA Docket No. 98-0013.
Ruling Denying Petition to Reopen Hearing as to Marie Joyce Coleman filed August 9, 2000.

Petition to reopen hearing – Right to reopen hearing – Right to jury trial.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on August 17, 1998.

The Complaint alleges that Carl Dean Clark, Jr., and Marie Joyce Coleman violated the Horse Protection Act. Pursuant to section 1.138 of the Rules of Practice (7 C.F.R. § 1.138), Complainant and Carl Dean Clark, Jr., agreed to the entry of a Consent Decision. Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] entered the Consent Decision on December 1, 1999. *In re Carl Dean Clark, Jr.* (Consent Decision as to Carl Dean Clark, Jr.), 58 Agric. Dec. ___ (Dec. 1, 1999).

The Complaint alleges Marie Joyce Coleman [hereinafter Respondent]: (1) on or about May 1, 1997, entered, for the purpose of showing or exhibiting, a horse known as "Lincoln Lady," as entry number 144 in class number 28, at the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ II(C)); and (2) on May 1, 1997, allowed the showing or exhibiting of Lincoln Lady, as entry number 144 in class number 28, at the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ II(D)).

On November 18, 1998, Complainant filed Notice of Amendment of Complaint which alleges that on May 1, 1997, Respondent allowed Lincoln Lady to be shown or exhibited as entry number 144 in class number 28, at the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, while the horse was wearing pad bands in a manner prohibited by section 11.2(b)(15) of the Horse Protection Regulations (9 C.F.R. § 11.2(b)(15)) (Notice of Amendment of Compl. ¶ II(F)).

On October 6, 1998, Respondent filed an Answer denying the material allegations of the Complaint, and on December 10, 1998, Respondent filed an Answer denying the material allegations of the Notice of Amendment of Complaint.

On August 6, 1999, the ALJ scheduled a hearing to begin on October 20, 1999, at 9:00 a.m, local time, in Shelbyville, Tennessee (Change in Oral Hearing Date). On October 20, 1999, the ALJ conducted a hearing in Shelbyville, Tennessee. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Eric L. Davis, Franklin, Tennessee, represented Carl Dean Clark, Jr. Respondent failed to appear at the October 20, 1999, hearing.

Section 1.141(e)(1) of the Rules of Practice provides that a respondent's failure to appear at the hearing constitutes a waiver of hearing and an admission of all the material allegations of fact contained in the complaint, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (e) *Failure to appear.* (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral 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 § 1.139 or whether to present evidence, in whole or in part, in the form of affidavits or by oral testimony before the Judge. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

7 C.F.R. § 1.141(e)(1).

Complainant elected to follow the procedure in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), and on May 2, 2000, Complainant filed a Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order as to Marie Joyce Coleman Upon Admission of Facts by Reason of Default. On May 19, 2000, Respondent filed objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order as to Marie Joyce Coleman Upon Admission of Facts by Reason of Default.

On May 19, 2000, pursuant to sections 1.139 and 1.141(e) of the Rules of Practice (7 C.F.R. §§ 1.139, .141(e)), the ALJ issued a Decision and Order as to Marie Joyce Coleman [hereinafter Initial Decision and Order]: (1) concluding that on or about May 1, 1998, Respondent allowed the showing or exhibiting of Lincoln Lady, as entry number 144 in class number 28, at the Spotted Saddle Horse Breeders and Exhibitors Association Horse Show in Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)); (2) assessing Respondent a $2,000 civil penalty; and (3) disqualifying Respondent 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 horse auction (Initial Decision and Order at 3-4).

On June 5, 2000, Respondent appealed to the Judicial Officer and filed a petition to reopen the hearing. Complainant failed to file a timely response to Respondent's appeal petition and failed to file a timely response to Respondent's petition to reopen the hearing. On August 8, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision[1] and a ruling on Respondent's petition to reopen the hearing.

Section 1.146(a)(2) of the Rules of Practice provides that a petition to reopen a hearing must state the nature and purpose of the evidence to be adduced and set forth a good reason why the evidence was not adduced at the hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take

[1]I am filing a Decision and Order as to Marie Joyce Coleman simultaneous with the filing of this Ruling Denying Petition to Reopen Hearing as to Marie Joyce Coleman. *In re Carl Dean Clark, Jr.* (Decision as to Marie Joyce Coleman), 59 Agric. Dec. ___ (Aug. 9, 2000).

> further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

Respondent states that she failed to adduce evidence at the hearing because she became confused about the hearing date and failed to attend the hearing. On August 6, 1999, the ALJ scheduled the hearing to take place on October 20, 1999, and ordered the notice of the date of the hearing to be served on the parties (Change in Oral Hearing Date). The ALJ commenced the hearing on October 20, 1999, as scheduled. Respondent does not contend that she did not receive the ALJ's August 6, 1999, notice of the change in the hearing date. Under these circumstances, I find no basis for Respondent's confusion regarding the date of the hearing.

Respondent also contends that she has the right to have the hearing reopened based on her status as a citizen and a taxpayer. Respondent cites no basis for her contention that, as a citizen and a taxpayer, she has the right to have the hearing reopened. Section 1.146(a)(2) of the Rules of Practice (7 C.F.R. § 1.146(a)(2)) does not provide parties with the right to have a hearing reopened. Instead, section 1.146(a)(2) of the Rules of Practice (7 C.F.R. § 1.146(a)(2)) only provides parties with the right to request that a hearing be reopened. Moreover, section 1.146(a)(2) of the Rules of Practice (7 C.F.R. § 1.146(a)(2)) provides that a party seeking to reopen a hearing bears the burden of showing why the evidence to be adduced was not adduced at the hearing. Respondent has not set forth a good reason for her failure to adduce evidence at the October 20, 1999, hearing.

Therefore, Respondent's petition to reopen the hearing is denied.

Respondent also requests that she be given a jury trial. Even if I had granted Respondent's petition to reopen the hearing, I would not order that Respondent be given a jury trial. Respondent has no constitutional right to a jury trial. This proceeding is not a criminal prosecution and the constitutional provisions in Article III, § 2 of the United States Constitution and the Sixth Amendment to the United States Constitution, which afford the right to a jury trial in criminal proceedings, are

not applicable to this proceeding.[2] The Seventh Amendment to the United States

[2] *See United States v. Zucker*, 161 U.S. 475, 481 (1895) (stating the Sixth Amendment relates to prosecution of an accused person which is technically criminal in nature); *United States v. Loaisiga*, 104 F.3d 484, 486 (1st Cir.) (stating deportation proceedings are civil matters exempt from Sixth Amendment protections; they are primarily conducted by administrative bodies and not by courts), *cert. denied*, 520 U.S. 1271 (1997); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) (stating deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment); *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1097 (6th Cir. 1991) (holding the Sixth Amendment does not apply to a civil matter, such as a labor relations proceeding conducted by the National Labor Relations Board); *United States v. Schellong*, 717 F.2d 329, 336 (7th Cir. 1983) (holding denaturalization proceedings are not criminal proceedings; therefore, there is no right to a jury trial under Article III of the United States Constitution or the Sixth Amendment), *cert. denied*, 465 U.S. 1007 (1984); *Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir. 1983) (holding the Sixth Amendment does not apply to administrative discharge proceedings conducted by the National Guard because such proceedings are not criminal in nature); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1366 (10th Cir. 1979) (rejecting the characterization of Occupational Safety and Health Administration administrative proceedings, in which civil penalties can be assessed, as criminal proceedings and the argument that the Sixth Amendment is applicable to such proceedings); *Camp v. United States*, 413 F.2d 419, 422 (5th Cir.) (holding there is no Sixth Amendment right to counsel in non-criminal administrative proceedings before the Selective Service Board), *cert. denied*, 396 U.S. 968 (1969); *Haven v. United States*, 403 F.2d 384, 385 (9th Cir. 1968) (holding the Sixth Amendment right to counsel does not apply in administrative proceedings in the selective service process), *cert. dismissed*, 393 U.S. 1114 (1969); *Olshausen v. Commissioner*, 273 F.2d 23, 27 (9th Cir. 1960) (stating the Sixth Amendment applies only to criminal proceedings and Congress may properly provide civil proceedings for the collection of civil penalties which are civil or remedial sanctions rather than punitive and the Sixth Amendment has no application to such proceedings); *Board of Trade of City of Chicago v. Wallace*, 67 F.2d 402, 407 (7th Cir. 1933) (rejecting the contention that proceedings under section 6(a) of the Grain Futures Act of September 21, 1922, are "essentially criminal" and holding that, since the proceedings are not criminal in nature, there is no right to a jury trial under Article III, § 2 of the United States Constitution), *cert. denied*, 291 U.S. 680 (1934); *Gee Wah Lee v. United States*, 25 F.2d 107 (5th Cir.) (per curiam) (concluding the appeal of a deportation order by a United States commissioner is not a trial on a criminal charge covered by Article III, § 2 of the United States Constitution), *cert. denied*, 277 U.S. 608 (1928); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating the guarantee under the Sixth Amendment applies only to those proceedings technically criminal in nature); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating the Sixth Amendment is only applicable to proceedings technically criminal in nature and concluding the Sixth Amendment is not applicable to administrative proceedings under the Packers and Stockyards Act of 1921); *In re David Tracy Bradshaw*, 59 Agric. Dec. ___, slip op. at 31-33 (June 14, 2000) (concluding the Sixth Amendment is not applicable to administrative proceedings instituted under the Horse Protection Act); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1132 (1998) (concluding the Sixth Amendment is not applicable to administrative proceedings instituted under the Animal Welfare Act), *appeal dismissed*, No. 99-2640 (per curiam), 2000 WL 1010575 (Table) (8th Cir. July 24, 2000); *In re Conrad Payne*, 57 Agric. Dec. 921, 931 (1998) (concluding the respondent's rights under the Sixth Amendment are not implicated in an administrative proceeding instituted under section 2 of the Act of
(continued...)

Constitution provides the right to a jury trial in suits at common law, as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

U.S. Const. amend. VII.

Courts have long construed the phrase "Suits at common law" as referring to cases analogous to those tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary.[3] Congress is free to create new

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[2](...continued)
February 2, 1903); *In re Saulsbury Enterprises, Inc.*, 57 Agric. Dec. 82, 100 (1997) (concluding Article III, § 2 of the United States Constitution and the Sixth Amendment, which afford the right to a jury trial in criminal proceedings, are not applicable to administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 608c(14)(B)) (Order Denying Pet. for Recons.)).

[3]*See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating "[t]he Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right'"); *Tull v. United States*, 481 U.S. 412, 417 (1987) (stating the Court has construed the language of the Seventh Amendment to require a jury trial on the merits in those actions that are analogous to "Suits at common law"); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449 (1977) (stating "[t]he phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (stating the Seventh Amendment preserves the right to trial by jury which existed under the common law when the amendment was adopted; thus the Seventh Amendment is not applicable where the proceeding is not in the nature of a suit at common law); *Parsons v. Bedford*, 3 Pet. 433, 445-46 (1830) (construing the phrase "Suits at common law" in the Seventh Amendment as referring to cases tried in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not customary); *Cavallari v. Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (stating the Seventh Amendment right to a jury trial attaches in cases involving legal rather than equitable claims); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating the Supreme Court has consistently interpreted the phrase "Suits at common law" in the Seventh Amendment to refer to suits in which legal rights are to be ascertained and determined, in contradistinction to those suits in which equitable rights alone are recognized and equitable remedies are administered), *cert. denied*, 513 U.S. 1148 (1995); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) (stating the right to a jury turns on the nature of the issue to be resolved and on the forum in which it is to be resolved); *Welch v. TVA*, 108 F.2d 95, 99 (6th Cir. 1939) (stating the usual method of determining the value of private property taken for public use has been to accord the land owner the right to have damages assessed by a jury, but this is a matter of legislative discretion because
(continued...)

statutory public rights, as it did with the enactment of the Horse Protection Act, and assign their adjudication to an administrative agency before which a litigant has no right to a jury trial, without violating the Seventh Amendment's requirement that a jury trial is to be preserved in suits at common law.[4] Thus, I conclude that the

[3](...continued)
condemnation proceedings by the United States for the use and benefit of the Tennessee Valley Authority are not suits at common law in which the right to trial by jury is guaranteed by the Seventh Amendment), *cert. denied*, 309 U.S. 688 (1940); *NLRB v. Tidewater Exp. Lines, Inc.*, 90 F.2d 301, 303 (4th Cir. 1937) (per curiam) (stating the Seventh Amendment preserves the right to trial by jury which existed under the common law when the amendment was adopted; thus the Seventh Amendment is not applicable where the proceeding is not in the nature of a suit at common law); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating the guarantee of the right to trial by jury under the Seventh Amendment applies only to suits as were maintainable under common law at the time the amendment was adopted); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating the guarantee of the right to trial by jury under the Seventh Amendment applies only to suits of such character as were maintainable at common law at the time the amendment was adopted); *In re Hudson*, 170 B.R. 868, 873-74 (E.D.N.C. 1994) (stating the right to a jury trial under the Seventh Amendment extends only to matters of private right and finding a creditor who files a claim with the bankruptcy court loses the Seventh Amendment right to a jury trial); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (stating the United States Supreme Court has interpreted the right to trial by jury to mean the right which existed in suits under common law in 1791, when the Seventh Amendment was adopted; the Seventh Amendment does not create a jury trial right, it simply preserves the right that already existed under the common law).

[4]*See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating if a claim that is legal in nature asserts a public right, then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity); *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (noting the Seventh Amendment is not applicable to administrative proceedings); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449-461 (1977) (stating when Congress creates statutory public rights, it may assign their adjudication to an administrative agency with which a jury trial would be incompatible without violating the Seventh Amendment's injunction that jury trial is to be preserved at common law); *Pernell v. Southhall Realty*, 416 U.S. 363, 383 (1974) (assuming the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency; and stating *Block v. Hirsh*, 256 U.S. 135 (1921), stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (stating the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication); *Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1378 (5th Cir. 1996) (stating that application to the Environmental Protection Agency for a boiler and industrial furnace permit required under the Resource Conservation and Recovery Act triggered a public rights dispute; therefore, the applicant has no right to a jury trial under the Seventh Amendment), *cert. denied*, 519 U.S. 1055 (1997); *Cavallari v. Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (stating when the government sues in its sovereign capacity to enforce public rights, Congress may assign the fact-finding
(continued...)

[4](...continued)
and initial adjudication to an administrative forum); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating in cases in which "public rights" are being litigated, e.g., cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact, the Seventh Amendment does not prohibit Congress from assigning that fact-finding function and initial adjudication to an administrative forum with which a jury would be incompatible), *cert. denied*, 513 U.S. 1148 (1995); *Sasser v. Administrator, EPA*, 990 F.2d 127, 130 (4th Cir. 1993) (holding a person charged in an administrative complaint for discharging pollutants has no Seventh Amendment right to a jury trial and stating "[g]enerally speaking, the Seventh Amendment does not apply to disputes over statutory public rights, 'those which arise between the Government and persons subject to its authority in connection with the performance of constitutional functions of the executive and legislative departments'"); *Joy Technologies, Inc. v. Manbeck*, 959 F.2d 226, 228 (Fed. Cir.) (stating public rights may be constitutionally adjudicated by legislative courts and administrative agencies without implicating the Seventh Amendment right to a jury trial), *cert. denied*, 506 U.S. 829 (1992); *Myron v. Hauser*, 673 F.2d 994, 1004 (8th Cir. 1982) (stating generally the Seventh Amendment is not applicable to administrative or statutory proceedings and concluding the Seventh Amendment is not applicable to reparation proceedings before the Commodity Futures Trading Commission); *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979) (stating the Supreme Court has held that the Seventh Amendment right to a jury trial does not extend to situations where Congress has seen fit to set up an administrative procedure for adjudication of disputes arising out of statutorily created rights), *cert. denied*, 449 U.S. 854 (1980); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) (stating that at least when only public rights are involved, Congress may provide for administrative fact-finding with which a jury trial would be incompatible and even where the statutory public rights are enforceable in favor of a private party, they can be committed to an administrative agency for determination); *Floyd S. Pike Electrical Contractor, Inc. v. Occupational Safety and Health Review Comm'n*, 557 F.2d 1045 (4th Cir. 1977) (per curiam) (stating the Seventh Amendment is not a bar to the imposition of civil penalties by an administrative tribunal as authorized by the Occupational Safety and Health Act of 1970); *Penn-Dixie Steel Corp. v. Occupational Safety and Health Review Comm'n*, 553 F.2d 1078, 1080 (7th Cir. 1977) (stating the Supreme Court held in *Atlas Roofing Co*., that the Seventh Amendment does not bar Congress from assigning to an administrative agency the task of adjudicating Occupational Safety and Health Act violations); *Dorey Electric Co. v. Occupational Safety and Health Review Comm'n*, 553 F.2d 357, 358 (4th Cir. 1977) (per curiam) (stating the Supreme Court held in *Atlas Roofing Co*., that the Seventh Amendment poses no bar to the disposition of a charge of the violation of the Occupational Safety and Health Act and the assessment of a civil penalty by an administrative tribunal); *Mohawk Excavating, Inc. v. Occupational Safety and Health Review Comm'n*, 549 F.2d 859, 865 (2d Cir. 1977) (stating the Seventh Amendment is not a bar to the imposition of civil penalties through the administrative process without a jury trial in the enforcement of the Occupational Safety and Health Act); *Clarkson Construction Co. v. Occupational Safety and Health Review Comm'n*, 531 F.2d 451, 455-56 (10th Cir. 1976) (stating it is within the power of Congress to choose an administrative process for the enforcement of the safe and healthful working conditions objective of the Occupational Safety and Health Act of 1970 and the administrative proceeding which resulted in the imposition of a civil sanction for the violation of the Act is not an action at common law within the meaning of the Seventh Amendment; hence no jury trial right arises); *National Velour Corp. v. Durfee*, 637 A.2d 375, 379 (R.I. 1994) (stating if an action involves the adjudication of public rights, no jury is required pursuant to the Seventh Amendment); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (stating where a right is created
(continued...)

Seventh Amendment to the United States Constitution does not entitle Respondent to a jury trial in this administrative proceeding.

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In re: WILLIAM J. REINHART AND REINHART STABLES.
HPA Docket No. 99-0013.
Decision and Order filed November 9, 2000.

Horse protection – Entry – Extension of time – Filing date – Atlanta protocol – Admissible evidence – Palpation reliable – Due process – Bias – Administrative law judge independence – Commerce Clause – Tenth amendment – Judicial Officer independence – State sovereignty – Referral to district court – Preponderance of evidence – Hearsay evidence – Civil penalty – Disqualification.

The Judicial Officer affirmed the decision by Judge Edwin S. Bernstein (ALJ): (1) concluding William J. Reinhart violated 15 U.S.C. § 1824(2)(B) by entering a horse at a horse show, for the purpose of showing or exhibiting the horse, while the horse was sore; (2) assessing Mr. Reinhart a $2,000 civil penalty; and (3) disqualifying Mr. Reinhart for 5 years from exhibiting, showing, or entering any horse, and from participating, in any horse show, exhibition, sale, or auction. The Judicial Officer held palpation alone is a reliable method by which to determine whether a horse is "sore" under the Horse Protection Act (HPA) and rejected Respondents' contention that palpation does not comply with the HPA because palpation is not conducted while the horse is moving. The Judicial Officer held that United States Department of Agriculture (USDA) veterinary medical officers' hearsay statements are admissible. The Judicial Officer found that 7 C.F.R. § 1.147(g), which provides that a document is deemed to be filed at the time when it reaches the Hearing Clerk, was not disparately applied to the parties and that *Carroll v. C.I.R.*, 71 F.3d 1228 (6th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996), does not require the Secretary of Agriculture to adopt the mailbox rule to determine the timeliness of filings in USDA proceedings. The Judicial Officer found an agency may combine investigative, adversarial, and adjudicative functions, as long as an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case does not participate in or advise in the decision or agency review in the case or a factually related case (5 U.S.C. § 554(d)). The Judicial Officer found,

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[4](...continued)
by statute and committed to an administrative forum, jury trial is not required by the Seventh Amendment); *In re Conrad Payne*, 57 Agric. Dec. 921, 931-34 (1998) (concluding the Seventh Amendment does not entitle the respondent to a jury trial in an administrative proceeding instituted under section 2 of the Act of February 2, 1903); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 100 (1997) (holding there is no constitutional right to a jury trial in administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 608c(14)(B)) (Order Denying Pet. for Recons.)); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988) (rejecting the respondent's contention that he was improperly denied a jury trial in an administrative proceeding under the Animal Welfare Act, and stating it is well settled that a jury trial is not required in an administrative disciplinary proceeding), *aff'd*, 878 F.2d 358, 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).

with minor exceptions, that the ALJ's findings are supported by the evidence. The Judicial Officer rejected Respondents' contentions that: (1) the HPA violates the Commerce Clause of the United States Constitution and the Tenth Amendment; (2) the HPA is unnecessary because the National Horse Show Commission prohibits the showing of sore horses; (3) the HPA encroaches upon the sovereignty of Tennessee, which prohibits the soring of horses; (4) the ALJ erroneously excluded the Atlanta Protocol from evidence; (5) USDA does not admit evidence that contradicts testimony by USDA veterinarians or challenges USDA's "agenda"; and (6) the ALJ and the Judicial Officer are biased in favor of USDA. The Judicial Officer denied Respondents' requests: (1) that the Judicial Officer refer the case to a United States district court, stating the Judicial Officer has no authority to make such a referral; (2) for the citations to decisions in administrative proceedings instituted under the HPA in the United States Court of Appeals for the Fifth Circuit, stating administrative proceedings under the HPA are instituted before the Secretary of Agriculture; and (3) for a free transcript, stating 7 C.F.R. § 1.141(i)(3) provides that transcripts shall be made available at the cost of duplication. The Judicial Officer found Complainant failed to prove by a preponderance of the evidence that Reinhart Stables was a partnership and violated the HPA.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Procedural History

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on March 10, 1999. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice]. Complainant alleges that on October 28, 1998, William J. Reinhart allowed the entry of a horse called "Double Pride Lady" as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ 3).

On April 2, 1999, William J. Reinhart filed a Response to the Complaint. In his Response, William J. Reinhart admits he is the owner of Double Pride Lady and admits he allowed the entry of Double Pride Lady at the National Walking Horse Trainers Show in Shelbyville, Tennessee. However, William J. Reinhart denies Double Pride Lady was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), when he allowed her entry at the National Walking Horse Trainers Show in Shelbyville, Tennessee. (Response.)

On June 28, 1999, Complainant filed a Motion to Amend Complaint and an

Amended Complaint. Complainant moved to amend the Complaint to add Reinhart Stables as a respondent (Motion to Amend Compl. ¶ 2). On August 5, 1999, William J. Reinhart filed an untitled document in which he opposed Complainant's Motion to Amend Complaint. On August 24, 1999, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] granted Complainant's Motion to Amend Complaint and deemed William J. Reinhart's opposition to Complainant's Motion to Amend Complaint to be William J. Reinhart's and Reinhart Stables' [hereinafter Respondents] Answer to the Amended Complaint (Order Granting Complainant's Motion to Amend Complaint).[1]

The Amended Complaint alleges that on October 28, 1998, Respondents entered and allowed the entry of Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore, in violation of sections 5(2)(B) and 5(2)(D) of the Horse Protection Act (15 U.S.C. §§ 1824(2)(B), 1824(2)(D)) (Amended Compl. ¶ 6).

The ALJ presided at a hearing in Nashville, Tennessee, on October 13 and 14, 1999. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. William J. Reinhart represented Reinhart Stables and himself.

On December 10, 1999, Respondents filed a Post-Hearing Brief. On December 27, 1999, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law and Memorandum of Point and Authorities in Support Thereof [hereinafter Complainant's Post-Hearing Brief]. On January 10, 2000, Complainant filed Complainant's Reply to Respondents' Post-Hearing Brief. On January 27, 2000, Respondents filed a Motion for Dismissal and Reply Brief of Respondent.

On June 5, 2000, the ALJ issued an Initial Decision and Order in which the ALJ: (1) concluded that on October 28, 1998, William J. Reinhart, acting as an owner of Reinhart Stables, violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore; (2) concluded that Reinhart Stables is merely a name

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[1]The ALJ also amended the caption of the proceeding which had previously been "*In re William J. Reinhart*" to read "*In re William J. Reinhart, an individual, and Reinhart Stables, an unincorporated association or sole proprietorship*" (Order Granting Complainant's Motion to Amend Complaint). The ALJ appears to have abandoned the caption in his Order Granting Complainant's Motion to Amend Complaint, and I have retained the caption adopted by the ALJ in his June 5, 2000, Decision and Order [hereinafter Initial Decision and Order].

under which William J. Reinhart does business; (3) assessed William J. Reinhart a $2,000 civil penalty; and (4) disqualified William J. Reinhart for 5 years from exhibiting, showing, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 4, 13-14).

On July 6, 2000, Respondents appealed to the Judicial Officer. On September 5, 2000, Complainant filed Complainant's Response to Respondents' Appeal of Decision and Order [hereinafter Complainant's Response to Respondents' Appeal Petition] and Complainant's Appeal of Decision and Order [hereinafter Complainant's Appeal Petition]. On September 27, 2000, Respondents filed Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order[2] and Respondent's Response to Complainant's Appeal of Decision and Order.

On October 2, 2000, Respondents filed a motion requesting a list of citations and a motion requesting a transcript of the hearing. On November 1, 2000, Complainant filed responses to Respondents' motion requesting a list of citations and Respondents' motion requesting a transcript of the hearing. On November 3, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision, a ruling on Respondents' motion requesting a list of citations, and a ruling on Respondents' motion requesting a transcript of the hearing.

I have considered the entire record in this proceeding. I have not considered Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order.[3] To the extent indicated, I have adopted proposed findings, proposed conclusions, and arguments; otherwise, they have been rejected as irrelevant or not supported by the evidence. Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion of sanctions, as restated.

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[2]The Rules of Practice do not provide for a litigant's filing a response to a response to an appeal petition. However, a litigant may file, and I may grant, a motion requesting the opportunity to file a response to a response to an appeal petition. Respondents did not file a motion requesting the opportunity to file a response to Complainant's Response to Respondents' Appeal Petition. Therefore, I have not considered Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order.

[3]See note 2.

Complainant's exhibits are designated by "CX"; Respondents' exhibits are designated by "RX"; and transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that–

(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, or

(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.

§ 1822. Congressional statement of findings

The Congress finds and declares that–

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering 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.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each

violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection 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, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any

horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

§ 1827. Utilization of personnel of Department of Agriculture and officers and employees of consenting States; technical and other nonfinancial assistance to State

(a) Assistance from Department of Agriculture and States

The Secretary, in carrying out the provisions of this chapter, shall utilize, to the maximum extent practicable, the existing personnel and facilities of the Department of Agriculture. The Secretary is further authorized to utilize the officers and employees of any State, with its consent, and with or without reimbursement, to assist him in carrying out the provisions of this chapter.

(b) Assistance to States

The Secretary may, upon request, provide technical and other nonfinancial assistance (including the lending of equipment on such terms and conditions as the Secretary determines is appropriate) to any State to assist it in administering and enforcing any law of such State designed to prohibit conduct described in section 1824 of this title.

§ 1829. Preemption of State laws; concurrent jurisdiction; prohibition on certain State action

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of

the State so that the two cannot be reconciled or consistently stand together. Nor shall any provision of this chapter be construed to exclude the Federal Government from enforcing the provision of this chapter within any State, whether or not such State has enacted legislation on the same subject, it being the intent of the Congress to establish concurrent jurisdiction with the States over such subject matter. In no case shall any such State take action pursuant to this section involving a violation of any such law of that State which would preclude the United States from enforcing the provisions of this chapter against any person.

15 U.S.C. §§ 1821(3), 1822, 1824(2), 1825(b)(1)-(2), (c), 1827, 1829.

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

Findings of Fact

1. Respondent William J. Reinhart, doing business as Reinhart Stables, is the owner of a horse known as "Double Pride Lady." William J. Reinhart's mailing address is 3878 Murfreesboro Highway, Manchester, Tennessee 37355. (CX 2, CX 6.)

2. William J. Reinhart employed Jack Stepp, full-time, as a trainer of Double Pride Lady (Tr. 190-91).

3. On October 28, 1998, William J. Reinhart entered for the purpose of showing or exhibiting Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee (CX 2, CX 3, CX 4, CX 5).

4. At the National Walking Horse Trainers Show, Designated Qualified Persons[4] Mark Thomas and Bob Flynn examined Double Pride Lady. Mark Thomas and Bob Flynn determined Double Pride Lady was sensitive in both front feet and refused to allow Double Pride Lady to be shown at the National Walking Horse Trainers Show. (Tr. 46-47; CX 9, CX 10, CX 15, CX 16, CX 17.)

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[4]A "Designated Qualified Person" or "DQP" is a person who is licensed by a horse industry organization or association having a DQP program certified by the United States Department of Agriculture. The management of any horse show, horse exhibition, horse sale, or horse auction may appoint DQPs to detect and diagnose horses which are sore and to otherwise inspect horses for the purpose of enforcing the Horse Protection Act. (15 U.S.C. § 1823(c); 9 C.F.R. §§ 11.1, .7.)

5. United States Department of Agriculture veterinary medical officers routinely monitor examinations conducted by Designated Qualified Persons. United States Department of Agriculture veterinary medical officers also randomly select horses, which have been entered at horse shows, and conduct their own examinations to determine whether these horses are sore. Two United States Department of Agriculture veterinary medical officers, Dr. John Edward Slauter and Dr. David C. Smith, were assigned to the National Walking Horse Trainers Show. (Tr. 19-21, 30-31, 87-89, 99.)

6. Dr. Slauter had been practicing veterinary medicine for 27 years at the time of the National Walking Horse Trainers Show. For the past 10 years, Dr. Slauter has been a United States Department of Agriculture veterinary medical officer. Dr. Slauter has personally examined at least 300 horses for compliance with the Horse Protection Act and has overseen inspections of several thousand horses by Designated Qualified Persons. (Tr. 14-17, 20-21.) Dr. Slauter is well qualified to examine horses to determine whether they are "sore" as defined in the Horse Protection Act. I found Dr. Slauter to be a forthright and credible witness.

7. Dr. Slauter observed Designated Qualified Persons Mark Thomas and Bob Flynn examine Double Pride Lady, who "led up to the inspection area very reluctant to move" (CX 9; Tr. 45-47). After Mark Thomas and Bob Flynn had examined Double Pride Lady, finding her to be sensitive on both front feet, Dr. Slauter examined Double Pride Lady (CX 9; Tr. 46-47). Dr. Slauter testified that he did not specifically remember his examination of Double Pride Lady. However, Dr. Slauter testified that he prepared an affidavit (CX 9) and the Summary of Alleged Violations form (CX 6) while his examination of Double Pride Lady was fresh in his mind and that his affidavit and the Summary of Alleged Violations form are accurate. (Tr. 36-37, 40-45.) Dr. Slauter repeatedly palpated Double Pride Lady, finding her to be bilaterally sore. Dr. Slauter found Double Pride Lady to be sore at the pastern of the left front foot just above the bulb of the heel and on the medial and lateral aspects of the pastern of the right front foot. (CX 6, CX 9; Tr. 47.) After Dr. Slauter completed his examination of Double Pride Lady, he asked Dr. Smith to examine Double Pride Lady (Tr. 47-48).

8. Dr. Smith had been practicing veterinary medicine for 11 years at the time of the National Walking Horse Trainers Show. Dr. Smith has been employed by the Animal and Plant Health Inspection Service, United States Department of Agriculture, for the past 3 years. (Tr. 85-86.) Dr. Smith has personally examined approximately 300 to 600 horses for compliance with the Horse Protection Act (Tr. 89). Dr. Smith is well qualified to examine horses to determine whether they are "sore" as defined in the Horse Protection Act. I found Dr. Smith to be a forthright and credible witness.

9. Dr. Smith testified that he did not specifically remember his examination of Double Pride Lady. However, Dr. Smith testified that he prepared an affidavit (CX 10) and the Summary of Alleged Violations form (CX 6) while his examination of Double Pride Lady was fresh in his mind and that his affidavit and the Summary of Alleged Violations form are accurate. (Tr. 99-103.) Double Pride Lady exhibited consistent and repeatable pain responses each time Dr. Smith palpated Double Pride Lady's pastern on the medial and lateral heel bulbs of the left front foot and on the medial and lateral aspects of the pastern of the right front foot (CX 6, CX 10).

10. After their examinations, Drs. Slauter and Smith agreed Double Pride Lady was bilaterally "sore" as defined in the Horse Protection Act (CX 9, CX 10).

Conclusions of Law

1. On October 28, 1998, Respondent William J. Reinhart, doing business as Reinhart Stables, violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering for the purpose of showing or exhibiting the horse known as "Double Pride Lady" as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore.

2. Respondent Reinhart Stables is merely a name under which Respondent William J. Reinhart does business.

Discussion

Congress found "the soring of horses is cruel and inhumane" and "horses shown or exhibited which are sore, where such soreness improves the performance . . ., compete unfairly with horses which are not sore" (15 U.S.C. § 1822(1)-(2)). Congress made it unlawful to: (1) show or exhibit a sore horse in any horse show or horse exhibition; (2) enter for the purpose of showing or exhibiting a sore horse in any horse show or horse exhibition; or (3) allow the showing of a sore horse in any horse show or horse exhibition. 15 U.S.C. § 1824(2)(A)-(B), (D). The term "sore" describes a horse, which, as a result of the use of a substance or practice, 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)).

Based on the credible testimony of Drs. Slauter and Smith, I find Double Pride Lady was sore when William J. Reinhart entered Double Pride Lady at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on October 28, 1998.

Drs. Slauter and Smith, who examined Double Pride Lady, are experienced and qualified veterinarians and were credible witnesses. Each veterinarian independently palpated Double Pride Lady's pasterns. Double Pride Lady exhibited strong and definite pain responses to each veterinarians' palpation of her forelimbs. (Tr. 47, 100; CX 9, CX 10.) Abnormal sensitivity in a horse's forelimbs raises a rebuttable presumption that the horse has been sored (15 U.S.C. § 1825(d)(5)).

Respondents contend that palpation alone is not sufficient to determine whether a horse is sore. Respondents also believe that Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady should be deemed unreliable because Complainant fails to "cite one scientific study or any medical data" that supports palpation as a reliable means for determining soreness in horses (Tr. 12-13, 328-29) and because Dr. Slauter and Dr. Smith failed to examine Double Pride Lady in accordance with the procedures recommended in the Atlanta Protocol (RX 1).[5] Respondents also cite *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), in support of their position that digital palpation alone is not a reliable method by which to determine whether a horse is sore (Respondents' Post-Hearing Brief at 10-11; Tr. 251-59).

The United States Department of Agriculture has used palpation to determine whether a horse is sore within the meaning of the Horse Protection Act for the past 30 years. The Judicial Officer and the two circuits in which this case may be appealed have held palpation to be the accepted method for determining whether a horse is sore. In *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1412-14 (6th Cir. 1995), the Court held that "pursuant to the [Horse Protection Act], the agency need not show inflammation or lameness in addition to a pain reaction in order to conclude that a horse is 'sore[,]'" and a horse's reaction to digital palpation alone is sufficient to invoke the presumption that the horse is sore. In the other circuit in which this case may be appealed, the United States Court of Appeals for the District of Columbia Circuit held in *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49-50 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995), palpation is an effective method for concluding that a horse is sore. In *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 957-60 (1996), *dismissed*, No. 96-9472 (11th Cir.

[5]The Atlanta Protocol is a memorandum authored by six veterinarians. The Atlanta Protocol contains procedures which the authors recommend Designated Qualified Persons follow when conducting inspections of horses at horse shows, horse exhibitions, horse sales, and horse auctions. Specifically, the authors of the Atlanta Protocol recommend that Designated Qualified Persons examine horses for inflammation and lameness, as well as for responses to digital palpation of the limbs. (RX 1.) The ALJ did not receive the Atlanta Protocol in evidence. However, the ALJ ordered the Atlanta Protocol marked as RX 1 and retained in the record as a rejected exhibit. (Tr. 259, 310-11.)

Aug. 5, 1997), the Judicial Officer held that the scientific basis for palpation is not necessary to be shown, and in *In re Kim Bennett*, 55 Agric. Dec. 176, 180-81 (1996), the Judicial Officer rejected the Atlanta Protocol and held "palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act."

Respondents also contend the United States Department of Agriculture veterinary medical officers' affidavits and Summary of Alleged Violations form (CX 6, CX 9, CX 10) are inadmissible hearsay because they were prepared in anticipation of litigation and do not meet the standard of evidence that was set out in *Young*, 53 F.3d 728 (5th Cir. 1995) (Respondents' Post-Hearing Brief at 8-9). Respondents cite *Palmer v. Hoffman*, 318 U.S. 109 (1943), which held that an accident report prepared by a railroad company did not carry the indicia of reliability of a routine business record because the accident report was prepared at least partially in anticipation of litigation and also cite *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979), which held that an affidavit prepared by an official of the United States Treasury Department was unreliable because the affidavit was prepared in anticipation of litigation (Respondents' Post-Hearing Brief at 9). Respondents further rely on the Fifth Circuit's holding in *Young*, 53 F.3d at 731, that the probative value of the United States Department of Agriculture veterinary medical officers' affidavits is limited because the affidavits were prepared in anticipation of litigation and because the affidavits only described observations supporting the conclusion that the horse in question was sore.

Dr. Slauter's and Dr. Smith's affidavits and the Summary of Alleged Violations form (CX 6, CX 9, CX 10) are reliable and probative hearsay statements. Under the Rules of Practice, 7 C.F.R. § 1.141(h), and the Administrative Procedure Act, 5 U.S.C. § 556(d), hearsay statements are admissible into evidence. As held in *In re Kim Bennett*, "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 [veterinary medical officers] 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' . . ., and the preparation of the Summary of Alleged Violations form and affidavits is the most important of the 'methods systematically employed for the conduct of the business as a business.'" *In re Kim Bennett*, 55 Agric. Dec. at 213-14 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 115 (1943)).

This case cannot be appealed to the United States Court of Appeals for the Fifth Circuit. Therefore, the *Young* decision does not govern. The United States Court of Appeals for the District of Columbia Circuit and the United States Court of

Appeals for the Sixth Circuit are the appellate courts that may hear this matter and, as such, their views will determine whether hearsay is admissible. In *Crawford*, 50 F.3d at 49, the District of Columbia Circuit confirmed that administrative agencies are not barred from reliance on hearsay evidence, which only need bear satisfactory indicia of reliability. Likewise, the Sixth Circuit held in *Bobo*, 52 F.3d at 1412-14, that the affidavits of and the Summary of Alleged Violations forms completed by four veterinary medical officers were sufficient to invoke the presumption, for the purpose of charges against the owner, that the horse in question was "sore" as defined by the Horse Protection Act, despite the contention that the affidavits were hearsay. Although in *Bobo*, three of the United States Department of Agriculture veterinary medical officers testified that they were unable to independently recall their examinations of the horse in question, they stated that they documented their examinations in written statements and signed their written statements while the details of their examinations were fresh in their minds. The Court emphasized that the written forms and affidavits contained great detail concerning the examinations of the horse in question, and the owner and trainer were given the opportunity to cross-examine the United States Department of Agriculture veterinary medical officers as to the content of these reports. *Bobo*, 52 F.3d at 1414.

In the instant proceeding, both Dr. Slauter and Dr. Smith testified that they did not recall their examinations of Double Pride Lady. However, they also testified that they completed the Summary of Alleged Violations form and documented their findings in affidavits while the facts were still fresh in their minds. (Tr. 31-32, 36-37, 40-45, 99-103.) Respondents had the opportunity to cross-examine Dr. Slauter and Dr. Smith regarding the content of their affidavits and the Summary of Alleged Violations form. Moreover, Dr. Slauter's affidavit, Dr. Smith's affidavit, and the Summary of Alleged Violations form contain great detail concerning the examinations of Double Pride Lady (CX 6, CX 9, CX 10). Therefore, these hearsay statements are reliable, probative, and admissible.

Respondents presented three witnesses: (1) William J. Reinhart's wife, Judith Reinhart; (2) Double Pride Lady's trainer, Jack Stepp, who was sanctioned by the National Horse Show Commission in connection with the entry of Double Pride Lady at the National Walking Horse Trainers Show on October 28, 1998 (Tr. 282-86); and (3) the steward at the National Walking Horse Trainers Show, Charles L. Thomas. None of Respondents' witnesses examined Double Pride Lady for compliance with the Horse Protection Act. Charles L. Thomas, who is a Designated Qualified Person, was only serving as a steward at the National Walking Horse Trainers Show. He merely viewed Double Pride Lady's movement but did not palpate her. Charles L. Thomas testified that, when he observed Double Pride Lady, he formed no opinion regarding whether Double Pride Lady was sore under

the Horse Protection Act and could not testify whether Double Pride Lady was sore when William J. Reinhart entered Double Pride Lady at the Natonal Walking Horse Trainers Show. (Tr. 127, 138, 145-50.) Respondents' evidence fails to rebut Complainant's evidence that Double Pride Lady was sore when William J. Reinhart entered her at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on October 28, 1998.

Respondents further contend the Horse Protection Act is unconstitutional as it does not fall within the confines of the Commerce Clause of the United States Constitution. Respondents rely on *United States v. Lopez*, 514 U.S. 549 (1995), which held that the Gun-Free School Zones Act of 1990 was invalid as it went beyond Congress' power to regulate commerce. The Gun-Free School Zones Act of 1990 made the intentional possession of a firearm in a school zone a federal offense. *Lopez*, 514 U.S. at 551. The Court in *Lopez* held that the activity being regulated must substantially affect interstate commerce and bringing guns onto a school ground does not have a great enough effect on interstate commerce to qualify for regulation under the Commerce Clause. Respondents compare their case to *Lopez* and argue that participation in a Tennessee walking horse exhibition does not have a substantial enough effect on interstate commerce to warrant regulation under the Commerce Clause. Respondents emphasize that the prizes are minimal (only $100 or so) and argue that these shows are presented merely for leisurely purposes.

In another case concerning Congress' power to regulate under the Commerce Clause, the Supreme Court in *United States v. Morrison*, 120 S. Ct. 1740 (2000), confirmed the holding that Congress' power to regulate through the Commerce Clause is allowed only in situations in which the activity to be regulated, if not a channel or instrumentality of interstate commerce, substantially affects interstate commerce. In *Morrison*, the Court invalidated a federal statute that provided a federal civil remedy for victims of gender-motivated crimes. The Court held that crimes that are gender-motivated are not economic activity and their results do not affect interstate commerce.

While an administrative law judge may not dismiss a case based upon a finding of unconstitutionality of the statute under which the case is instituted, the administrative law judge may render an opinion on the issue. *See Public Utilities Commission of California v. United States*, 355 U.S. 534, 539 (1958); *In re Utica Packing Co.*, 39 Agric. Dec. 590, 599 (1980). I do not agree that the Horse Protection Act is unconstitutional.

Lopez identified the three categories of activity that Congress may regulate under the Commerce Clause. Congress may regulate the use of channels of interstate commerce (roadways, railways, etc.); Congress may regulate and protect the instrumentalities of interstate commerce or persons and things in interstate

commerce; and Congress may also regulate activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. *See Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941). The activities regulated under the Horse Protection Act fall within the third category, as they have a substantial effect on interstate commerce.

The Horse Protection Act regulates an industry, not just a leisurely activity, as Respondents contend. Although this industry only provides minimal monetary returns in the form of prizes for the owner, it is an occupation for the individuals who prepare the horses for competition. Those who train, groom, and transport the horses would be adversely affected if the Horse Protection Act were not in place. Not only does the soring of horses endanger the health of the animals, but it also could affect the employment status of those who service horses that are unfairly disadvantaged.

Respondents also argue the Horse Protection Act encroaches upon the sovereignty of the State of Tennessee, which also has a statute prohibiting the soring of horses. A federal statute may be found to encroach upon the sovereignty of a state if: (1) the federal statute compels a state to enact or enforce a particular law;[6] (2) the federal statute compels state or local officials to perform specific federal administrative tasks;[7] or (3) the federal statute infringes on the authority of the people of a state to determine the qualifications for office of state government officials.[8] The Horse Protection Act does not require the State of Tennessee to enact or enforce any law, does not require state or local officials to perform federally delegated tasks, and does not infringe on the authority of the people of the State of Tennessee to determine qualifications for office of state government officials. The United States Department of Agriculture polices horse shows, using its own employees, and holds violators accountable through its own administrative law procedures. The State of Tennessee may still enforce its own statute and is not required to administer or enforce the Horse Protection Act (15 U.S.C. §§ 1827, 1829). Therefore, the Horse Protection Act does not encroach upon the sovereignty of the State of Tennessee.

Respondents also filed a Motion for Dismissal on January 27, 2000. In the Motion for Dismissal, Respondents argue that the Complaint should be dismissed because of an extension granted to Complainant to file Complainant's Post-Hearing

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[6] *See New York v. United States*, 505 U.S. 144 (1992).

[7] *See Printz v. United States*, 521 U.S. 898 (1997).

[8] *See Gregory v. Ashcroft*, 501 U.S. 452 (1991).

Brief. Respondents' Motion for Dismissal is denied. The extension was appropriate and caused no prejudice to Respondents.

Sanctions

The Horse Protection Act authorizes the assessment of a civil penalty of not more than $2,000 for each violation. 15 U.S.C. § 1825(b)(1). The Horse Protection Act also authorizes the disqualification, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction, of any person who is assessed a civil penalty. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation. 15 U.S.C. § 1825(c).

Complainant requests that I assess William J. Reinhart a $2,000 civil penalty and disqualify William J. Reinhart from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. Complainant also requests that any period of disqualification imposed on William J. Reinhart in this Decision and Order be consecutive to, rather than concurrent with, the disqualification of William J. Reinhart in *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd sub nom. Reinhart v. United States Dep't of Agric.*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). Complainant also requests that I assess Reinhart Stables a $2,000 civil penalty and disqualify Reinhart Stables from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction for 1 year.

The main purpose of the Horse Protection Act is to prevent the cruel, inhumane, and unfair practice of soring horses. Since deterrence is the goal of the Horse Protection Act, monetary penalties are not enough to achieve this goal. The Judicial Officer has held that disqualification is an appropriate sanction in almost every Horse Protection Act case. In *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1951-52 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983), the Judicial Officer stated:

> Congress has provided the Department with the "tools" needed to eliminate the practice of soring Tennessee Walking Horses. But they must be used, to be effective. In order to achieve the Congressional purpose of the Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on every horse owner (and trainer) who allows one of his horses to be exhibited while sore. [Footnote omitted.]

See also In re John Allan Callaway, 52 Agric. Dec. 272, 295-96 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20, 60-61 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

William J. Reinhart has violated the Horse Protection Act before. *See In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd sub nom. Reinhart v. United States Dep't of Agric.*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). Therefore, I find disqualification of William J. Reinhart from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction for the minimum 5-year period for a second violation of the Horse Protection Act, to be an appropriate sanction. 15 U.S.C. § 1825(c).

As far as sanctions for Reinhart Stables are concerned, the evidence indicates that Reinhart Stables is merely a name under which William J. Reinhart was conducting business. Thus, sanctioning Reinhart Stables would be redundant. Therefore, I conclude the sanctions requested by Complainant for Reinhart Stables are inappropriate.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents' Appeal Petition

Respondents raise 15 issues in their Petition for Review [hereinafter Respondents' Appeal Petition]. First, Respondents contend the ALJ erroneously accepted and considered Complainant's Post-Hearing Brief, which Respondents contend Complainant filed late (Respondents' Appeal Pet. at 3).

The ALJ ordered Complainant to "mail" Complainant's Post-Hearing Brief no later than December 10, 1999 (Tr. 332). On December 7, 1999, Complainant requested that the ALJ extend the time for "filing and mailing" Complainant's Post-Hearing Brief to December 23, 1999 (Motion to Amend Briefing Schedule). On December 7, 1999, the ALJ extended the time for "filing" Complainant's Post-Hearing Brief to December 23, 1999 (Order Extending Briefing Schedule). On December 14, 1999, Respondents requested that the ALJ reconsider the extension of time granted to Complainant for filing Complainant's Post-Hearing Brief (Statement in Opposition to Government's Motion for Extension of Time to File Briefs). On December 15, 1999, the ALJ rejected Respondents' request (Order).

Complainant did not file Complainant's Post-Hearing Brief until December 27, 1999. However, Complainant asserts Complainant's Post-Hearing Brief was timely filed, as follows:

> On December 23, 1999, Department of Agriculture employees were given early dismissal because of the Christmas holiday, and the Office of the Hearing Clerk closed early. Counsel for [C]omplainant, by telephone, requested and was granted leave to file [C]omplainant's [P]ost-[H]earing [B]rief on the following business day, December 27, 1999. (December 24th was a federal holiday). The extension of time was for good cause, in accordance with the Rules of Practice. 7 C.F.R. § 1.147(f).
>
> The [C]omplainant's [P]ost-[H]earing [B]rief was filed on December 27, 1999, and was timely filed in accordance with the Rules of Practice. 7 C.F.R. § 1.147(g).

Complainant's Response to Respondents' Appeal Petition at 3.

Complainant does not cite, and I cannot locate, any filing by the ALJ granting Complainant's oral request to extend the time for filing Complainant's Post-Hearing Brief to December 27, 1999. I find the lack of any filing granting Complainant's oral request for an extension of time, troubling. However, Respondents raised the issue of the timeliness of Complainant's Post-Hearing Brief before the ALJ in a Motion for Dismissal filed January 27, 2000. The ALJ denied Respondents' Motion for Dismissal stating "the extensions were appropriate and caused no prejudice to Respondent[s]." (Initial Decision and Order at 11.) Based on the ALJ's ruling on Respondents' Motion for Dismissal, I find Complainant orally requested that the ALJ extend the time for filing Complainant's Post-Hearing Brief to December 27, 1999, and the ALJ orally granted Complainant's request. Therefore, I find Complainant timely filed Complainant's Post-Hearing Brief on December 27, 1999, and I reject Respondents' contention that the ALJ erroneously accepted and considered Complainant's Post-Hearing Brief.

Second, Respondents contend the disparate application of section 1.147(g) of the Rules of Practice (7 C.F.R. § 1.147(g)) to parties in administrative proceedings conducted under the Rules of Practice violates Respondents' right to due process of law. Specifically, Respondents contend the Judicial Officer strictly applies 7 C.F.R. § 1.147(g) to the respondents in administrative proceedings and rejects documents filed by respondents that do not timely reach the Hearing Clerk. Respondents contend that, in contrast to the strict application of 7 C.F.R. § 1.147(g) to the respondents, the Judicial Officer accepts and considers documents filed by complainants that do not timely reach the Hearing Clerk. Respondents cite *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), as an example of the Judicial Officer's disparate treatment of the respondents and the

complainants in administrative proceedings conducted under the Rules of Practice. (Respondents' Appeal Pet. at 3-5.)

Section 1.147(g) of the Rules of Practice provides that any document or paper filed in an administrative proceeding conducted under the Rules of Practice shall be deemed to be filed at the time when it reaches the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

As an initial matter, the purported disparate application of 7 C.F.R. § 1.147(g) to litigants in prior proceedings is not relevant to this proceeding. Respondents' argument that they have been denied due process in this proceeding because the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to litigants in prior administrative proceedings is without merit.

Moreover, the Judicial Officer has been punctilious about the application of 7 C.F.R. § 1.147(g) to the complainants, as well as the respondents, in administrative proceedings conducted under the Rules of Practice.[9] Nothing in *In re Jack Stepp* supports Respondents' contention that the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to the litigants in that proceeding.

The Rules of Practice are binding on administrative law judges and the Judicial

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[9]*See e.g. In re Jeanne and Steve Charter*, 59 Agric. Dec. ___, slip op. at 4 n.1 (Sept. 22, 2000) (in which the Judicial Officer rejected the complainant's response to the respondents' appeal petition because the complainant's response reached the Hearing Clerk 1 day after the response was due); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (in which the Judicial Officer denied the complainant's oral request for an extension of time on the date the complainant's response to the respondent's appeal petition was due because the complainant made the oral request 13 minutes after the Hearing Clerk's office closed and, when the complainant nonetheless filed a response to the respondent's appeal petition, the Judicial Officer refused to consider the complainant's late-filed response), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3).

Officer,[10] and administrative law judges and the Judicial Officer have very limited authority to modify the Rules of Practice in a proceeding.[11] Even if an administrative law judge or the Judicial Officer was presented with a circumstance in which the administrative law judge or the Judicial Officer had authority to modify the Rules of Practice, I cannot now conceive of a circumstance in which an administrative law judge or the Judicial Officer would modify 7 C.F.R. § 1.147(g) in a manner which would result in the disparate application of 7 C.F.R. § 1.147(g) to litigants in a proceeding.

The record in this proceeding does not reveal that the ALJ or the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to the parties. All of Respondents' and Complainant's filings have been timely filed. Neither the ALJ nor the Judicial Officer has rejected a filing in this proceeding because it did not timely reach the Hearing Clerk. Therefore, I find no basis for Respondents' contention that the

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[10]*See In re Jack Stepp*, 59 Agric. Dec. ___, slip op. at 6 n.2 (May 23, 2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___, slip op. at 15-17 (Mar. 31, 2000) (Order Denying Pet. for Recons.) (stating the administrative law judges and the Hearing Clerk are bound by the Rules of Practice and neither the administrative law judges nor the Hearing Clerk has the authority to modify the Rules of Practice)*; In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judge are bound by the Rules of Practice); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating the Judicial Officer and the administrative law judge are bound by the Rules of Practice). *Cf. In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has no authority to depart from the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders).

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

Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to Respondents and Complainant, and I find no basis for Respondents' contention that the disparate application of 7 C.F.R. § 1.147(g) to Respondents and Complainant denied Respondents due process under the Fifth Amendment to the United States Constitution.

Third, Respondents contend section 1.147(g) of the Rules of Practice (7 C.F.R. § 1.147(g)) is contrary to *Carroll v. C.I.R.*, 71 F.3d 1228 (6th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996). Respondents assert that *Carroll* requires federal administrative agencies to provide that the effective date of filing in administrative proceedings is the date a properly addressed document, bearing proper postage, and sent by regular mail, is postmarked [hereinafter the mailbox rule]. (Respondents' Appeal Pet. at 3, 5.)

None of Respondents' filings have been rejected because they did not timely reach the Hearing Clerk, as provided in 7 C.F.R. § 1.147(g). Therefore, the application to this proceeding of 7 C.F.R. § 1.147(g), rather than the mailbox rule, has not resulted in the rejection of any of Respondents' filings. Even if I found that the Secretary of Agriculture is required by *Carroll* to apply the mailbox rule to this proceeding (which I do not find), that finding would have no effect on the timeliness of Respondents' filings. Under these circumstances, I find Respondents' contention that the mailbox rule must be applied to determine the effective date of filing has no relevance to this proceeding.

Moreover, in *Carroll*, the United States Court of Appeals for the Sixth Circuit did not hold that federal agencies must adopt the mailbox rule in administrative proceedings, as Respondents assert. Instead, the Sixth Circuit found that the petitioners in *Carroll* could not invoke the common law presumption that the Internal Revenue Service received their properly addressed communication bearing proper postage after the normal 2- or 3-day interval necessary for United States Postal Service delivery. *Carroll*, 71 F.3d at 1230, 1233. I find *Carroll* inapposite. Nothing in *Carroll* requires the Secretary of Agriculture to adopt the mailbox rule in this proceeding or any other United States Department of Agriculture administrative proceeding.

Fourth, Respondents contend the ALJ erroneously excluded the Atlanta Protocol. Specifically, Respondents contend the ALJ's exclusion of the Atlanta Protocol is reversible error because: (1) months before the hearing, Respondents listed the Atlanta Protocol as one of the documents which they would introduce at the hearing; (2) Respondents laid the proper foundation for the Atlanta Protocol through Charles L. Thomas; and (3) the United States Court of Appeals for the Fifth Circuit in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), accepted and relied on the Atlanta Protocol. (Respondents' Appeal Pet. at 5-9.)

I disagree with Respondents' contention that their listing the Atlanta Protocol as a document, which they would introduce at the hearing, requires the ALJ to admit the Atlanta Protocol into evidence. Section 1.140(a)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.140(a)(1)(iii)) provides that an administrative law judge may order each party to furnish copies of or a list of documents which that party anticipates introducing at the hearing. On May 11, 1999, pursuant to 7 C.F.R. § 1.140(a)(1)(iii), the ALJ issued an order requiring Complainant and Respondents to exchange copies of proposed hearing exhibits (Summary of Telephone Conference ¶ 2). On August 31, 1999, Respondents filed with the Hearing Clerk a list of the witnesses they intended to call and a list of the documents they intended to introduce at the hearing. Respondents listed the Atlanta Protocol as one of the documents which they intended to introduce into evidence. (Respondent's List of Witnesses and Exhibits.) However, the act of filing a list of documents, which a party anticipates introducing at the hearing, does not require the administrative law judge presiding at the hearing to admit the listed documents into evidence.

Section 1.141(h)(1)(iv) of the Rules of Practice provides that evidence may be excluded, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) Evidence–(1) *In general.*
>
> . . . .
>
> (iv) 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(h)(1)(iv).

Therefore, even if a party identifies a document as one which that party anticipates introducing into evidence, the administrative law judge presiding at the hearing may exclude the document because it is immaterial, irrelevant, unduly repetitious, or not the sort upon which responsible persons are accustomed to rely.

Respondents attempted to introduce the Atlanta Protocol through Jack Stepp, who could not authenticate the Atlanta Protocol, and the ALJ properly excluded the Atlanta Protocol, as follows:

> MS. CARROLL: Your Honor, could I also note for the record an objection on foundation grounds? Unless Mr. Stepp is going to testify that

he participated in the preparation of this document, I think there's a foundation problem and an authentication problem.

JUDGE BERNSTEIN: Well, I think someone should probably explain what this document is. Mr. Reinhart?

MR. REINHART: Yes?

JUDGE BERNSTEIN: Someone should explain what this document is.

MR. REINHART: Yes, I'll be glad to. Would you like me to explain it now?

MS. CARROLL: He's not under oath.

JUDGE BERNSTEIN: You're not under oath.

MR. REINHART: Oh, well, could you explain what the document is, Mr. Stepp?

THE WITNESS: It's just --

JUDGE BERNSTEIN: I don't want you to read it, just tell me where it came from.

THE WITNESS: What it tells me is that --

JUDGE BERNSTEIN: No, I don't want you to tell me what it says, I want you to tell me where it came from, what's the background of this?

THE WITNESS: Well, a group of veterinarians and doctors, it was in the early '90s sometime I think, they went to down in Georgia and they set down the rules and regulations governing the --

JUDGE BERNSTEIN: So this is what they think should be the standards for evaluating horses.

THE WITNESS: Horses, yes, sir.

MS. CARROLL: Same objection unless any of those -- the authors of this document are here to be cross examined. Mr. Stepp doesn't -- I assume didn't participate in this and doesn't -- cannot be cross examined on the validity of the statements in here. This is a third party document and as such it's hearsay, it's not regulations, it's opinions of third parties who are not available for cross examination. And it is offered, I assume, to establish the truth of the statements that it contains.

MR. REINHART: It was accepted as evidence in the Fifth Circuit.

JUDGE BERNSTEIN: One moment. I've had cases way back in which I've had veterinarians testify about it, but that's not the case here. I think the objection is well-founded and I will reverse my ruling and not admit the document, since it is hearsay of a type that should not be admitted.

Tr. 257-59.

I also disagree with Respondents' contention that the ALJ's exclusion of the Atlanta Protocol is reversible error because they laid the proper foundation for the Atlanta Protocol through Charles L. Thomas (Respondents' Appeal Pet. at 5-6). I thoroughly reviewed Charles L. Thomas' testimony and cannot locate any testimony about the Atlanta Protocol (Tr. 126-73). Therefore, I reject Respondents' contention that they laid the proper foundation for the Atlanta Protocol through Charles L. Thomas.

Further, I disagree with Respondents' contention that the ALJ's exclusion of the Atlanta Protocol is reversible error because the United States Court of Appeals for the Fifth Circuit, in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), accepted and relied on the Atlanta Protocol (Respondents' Appeal Pet. at 6, 8-9).

Appeal in this proceeding does not lie to the United States Court of Appeals for the Fifth Circuit. Moreover, the two circuits in which this case may be appealed rejected the position taken by Respondents, which is similar to the conclusion in the Atlanta Protocol, that palpation alone is not sufficient to determine whether a horse is sore. In *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1412-14 (6th Cir. 1995), the Court held that, pursuant to the Horse Protection Act, the United States Department of Agriculture need not show inflammation or lameness, in addition to a pain reaction, in order to conclude that a horse is sore under the Horse Protection Act and that a finding of soreness based on the results of digital palpation alone is sufficient to raise the presumption that a horse is sore. In the other circuit to which appeal in this proceeding lies, the United States Court of Appeals for the District

of Columbia Circuit held that palpation, whether used alone or not, is an effective diagnostic technique by which to determine whether a horse is sore. *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 50 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995). Thus, I conclude the ALJ's failure to follow *Young* is not error.

Even if Respondents could appeal to the United States Court of Appeals for the Fifth Circuit, I would find *Young* inapposite. The Court in *Young* held that digital palpation alone is not a reliable method by which to determine whether a horse is sore. However, the holding in *Young* is based upon a number of factors that are not present in this proceeding. In *Young*, several "highly qualified expert witnesses" testified for the respondents that "soring could not be diagnosed through palpation alone." *Young*, 53 F.3d at 731. Respondents, in this proceeding, did not introduce expert witness testimony that soring could not be diagnosed through palpation alone. Moreover, Dr. Slauter and Dr. Smith based their determinations that Double Pride Lady was sore not only on Double Pride Lady's reaction to palpation, but also on their observations of Double Pride Lady's movement (Tr. 46, 108-09; CX 9, CX 10).

In *Young*, two private veterinarians and one off-duty Designated Qualified Person testified they examined the horse in question immediately after United States Department of Agriculture veterinary medical officers found the horse was sore. These private veterinarians and the off-duty Designated Qualified Person testified they did not find the horse to be sore. *Young*, 53 F.3d at 731-32. The record in this proceeding does not contain any testimony regarding an examination of Double Pride Lady immediately after Drs. Slauter and Smith concluded their examinations. Moreover, Mark Thomas and Bob Flynn, the two Designated Qualified Persons who examined Double Pride Lady at the National Walking Horse Trainers Show, determined that Double Pride Lady was sensitive in both front feet, issued a ticket for bilateral soring, and refused to allow Double Pride Lady to be shown at the National Walking Horse Trainers Show. (Tr. 46-47; CX 9, CX 10, CX 15, CX 16, CX 17.)

In *Young*, the administrative law judge found the respondents' witnesses to be more credible than the complainant's witnesses. *Young*, 53 F.3d at 732. In the instant proceeding, the ALJ found Dr. Slauter and Dr. Smith forthright and credible witnesses and Dr. Slauter's affidavit (CX 9), Dr. Smith's affidavit (CX 10), the Summary of Alleged Violations form (CX 6), and Drs. Slauter's and Smith's testimony reliable (Initial Decision and Order at 3, 5, 7-8). The ALJ also found Respondents' three witnesses, none of whom examined Double Pride Lady for compliance with the Horse Protection Act, failed to rebut Complainant's evidence that Double Pride Lady was sore (Initial Decision and Order at 8).

Finally, in *Young*, the administrative law judge dismissed the complaint and the

Judicial Officer reversed the administrative law judge. *Young*, 53 F.3d at 732. In the instant proceeding, the ALJ and the Judicial Officer agree that the evidence supports the conclusion that William J. Reinhart violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering for the purpose of showing or exhibiting Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore.

Therefore, I find *Young* inapposite. I find the ALJ did not err by failing to follow the holding in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995).

Fifth, Respondents contend that "palpation is not in compliance with the Horse Protection Act because this examination is conducted while the horse is standing still with one foot off the ground in an unnatural position and not while 'moving' as the [Horse Protection] Act requires." (Respondents' Appeal Pet. at 8.)

I disagree with Respondents' contention that the Horse Protection Act requires that horses must be examined while they are moving. Respondents appear to be confusing the definition of "sore" under the Horse Protection Act with an examination used to determine if a horse is sore. Under the Horse Protection Act, the term "sore" describes a horse, which, as a result of the use of a substance or practice, suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness *when moving*. However, the Horse Protection Act does not specify the examination required to make the finding that the horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when moving.

Dr. Slauter testified he can determine, based upon a horse's reaction to palpation, whether it is reasonable to expect that the horse will experience pain when moving, as follows:

> BY MS. CARROLL:
>
> Q. I may have already asked this, but if I have, please let me know.
>
> I wanted to ask how you determine that what the horse is presenting to you during your examination is a response to pain rather than to some other condition.

[BY DR. SLAUTER:]

A. There's a number of conditions that can cause pain, but when you get on a horse's foot and you find localized areas of pain, local lesions, localized areas of pain that are consistent and repeatable, and in this case the horse that we're talking about here today, it was bilateral, areas of consistent repeatable pain, localized areas of pain, not just on one foot, but two feet. And you do not see that generalized areas of pain around the pastern, but you see areas of -- localized areas of pain where you go back and you consistently repeatedly get those pain responses and those are areas where action devices will hit, on those localized areas, and if that horse is exhibiting pain when it's not moving or at least when I have my hands on its foot, it's not moving, it's reasonable for me to expect that when that horse gets into the show ring, you know, hit with speed and the action devices on this particular horse coming down on those areas, that that horse will experience even more pain and stress on his front limbs.

Tr. 29-30.

Similarly, Dr. Smith testified he determined, based upon Double Pride Lady's reaction to palpation, that Double Pride Lady would have suffered pain if she had been shown at the National Walking Horse Trainers Show, as follows:

[BY MS. CARROLL:]

Q. Can you tell from your documentation whether this horse would have been in pain if it had been shown in the ring immediately following your examination?

[BY DR. SMITH:]

A. Yes.

Q. And what do you base that opinion on?

A. The locations of the painful areas on both those forefeet would be areas where an action device would fall.

Q. And what is -- how does that tell you that the horse would be in pain?

A. If the horse feels pain when I am pressing on the painful areas gently, with the flat of my thumb, certainly the pressure of a chain coming down on that area as the horse not only walks but canters, trots in the ring, would definitely cause pain to the horse.

Q. Would that be the case -- would there be pain if there were not action devices?

A. Well, the fact that I can elicit pain just by touching him, I think indicates that the area is painful. Action devices would certainly enhance that pain.

Tr. 106-07.

Moreover, Dr. Slauter and Dr. Smith did observe Double Pride Lady's movement and, in part, based their determinations that Double Pride Lady was sore on their observations of her movement (CX 9, CX 10). Drs. Slauter and Smith testified about Double Pride Lady's movement and the conclusions they drew from the manner in which Double Pride Lady moved, as follows:

[BY MS. CARROLL:]

Q. And can you tell from your documentation whether this horse would have been in pain if it had been shown in the ring?

[BY DR. SLAUTER:]

A. Yes, in my professional opinion, that horse would have experienced pain in the show ring.

Q. And what is that opinion based on?

A. It's based on my findings and the fact that the horse led up reluctantly. My observation of two DQPs who checked the horse before I did, both of them found the horse to be bilaterally sore.

. . . .

BY MS. CARROLL:

Q. Based on your documentation which contains the statement that the horse's way of going was stiff.

[BY DR. SMITH:]

A. Uh-huh.

Q. Or appeared a little stiff, would you believe that this horse would experience pain if it were shown in the show ring immediately following your examination?

A. I'd have to say yes because he's already showing me by his locomotion that something's not right. Now when I said that I didn't know earlier about whether or not the horse was going to experience pain, I was specifically addressing those painful areas to palpation, and looked at the whole picture of this particular horse, the fact that he was already abnormal as far as his locomotion went. Horses don't walk cautiously without a reason. There's something that's causing him to walk stiff, so that there's something going on.

Tr. 46, 108-09.

Sixth, Respondents contend the ALJ erroneously gave no weight to Charles L. Thomas' testimony (Respondents' Appeal Pet. at 9-10).

Respondents do not cite the portion of the Initial Decision and Order in which the ALJ states that he gives no weight to Charles L. Thomas' testimony, and I cannot locate the portion of the Initial Decision and Order in which the ALJ states that he gives no weight to Charles L. Thomas' testimony.

I have carefully reviewed Charles L. Thomas' testimony. On the basis of that review, I find Charles L. Thomas credible. However, Charles L. Thomas' testimony does not rebut Complainant's evidence that Double Pride Lady was sore. Charles L. Thomas testified that he observed Double Pride Lady's movement, but did not examine her. Charles L. Thomas also testified that, when he observed Double Pride Lady, he formed no opinion regarding whether Double Pride Lady was sore under the Horse Protection Act and could not testify regarding whether Double Pride Lady was sore when William J. Reinhart entered Double Pride Lady at the National Walking Horse Trainers Show. (Tr. 129, 134, 138, 145-50.)

Respondents also contend Charles L. Thomas was the chief witness for the

United States Department of Agriculture during the administrative hearing in *In re William Earl Bobo*, 53 Agric. Dec. 176 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995), and the United States Department of Agriculture "considers Mr. Thomas to be a valid witness when he is testifying for the [United States Department of Agriculture's] side that a horse was sore, but that his testimony deserves 'zero weight' when he is testifying for a [r]espondent that the [r]espondent's horse was not sore." (Respondents' Appeal Pet. at 10.)

Again, Respondents fail to cite, and I cannot locate, any portion of the Initial Decision and Order in which the ALJ states that he gives Charles L. Thomas' testimony no weight. Moreover, Charles L. Thomas testified that he has appeared on behalf of the respondents in a number of administrative proceedings conducted under the Horse Protection Act, but that he has "never testified for the government." (Tr. 138.) A review of *In re William Earl Bobo* reveals that Respondents' contention that Charles L. Thomas was the chief witness for the United States Department of Agriculture is not correct and that, in *In re William Earl Bobo,* Charles L. Thomas testified on behalf of the respondents. *See In re William Earl Bobo*, 53 Agric. Dec. at 186.

Seventh, Respondents contend the United States Department of Agriculture takes the position that palpation is 100 percent accurate, subject to no possibility of error (Respondents' Appeal Pet. at 10).

The United States Department of Agriculture has long held that palpation is a highly reliable method for determining whether a horse is "sore," as defined in the Horse Protection Act.[12] The United States Department of Agriculture's reliance on

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[12]*See, e.g., In re David Tracy Bradshaw*, 59 Agric. Dec. ___, slip op. at 11, 18 (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 836 (1996); *In re Kim Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (1996); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221, 309 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *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); *In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259-60 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1151 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1072-73 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 287 (1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd per*
(continued...)

palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses as part of their efforts to enforce the Horse Protection Act. Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act. However, the United States Department of Agriculture does not take the position that palpation is 100 percent accurate and not subject to error. Respondents do not cite any basis for their assertion that the United States Department of Agriculture takes the position that palpation is 100 percent accurate and not subject to error, and I cannot locate any case in which the Judicial Officer has taken that position.

Eighth, Respondents contend the United States Department of Agriculture does not admit or consider any evidence that contradicts testimony given by veterinarians employed by the United States Department of Agriculture and does not consider evidence that challenges the United States Department of Agriculture's "political and programmatic agenda"[13] (Respondents' Appeal Pet. at 10-11).

Section 1.141(h)(1)(iv) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iv)) provides that evidence may be excluded only as follows:

> **§ 1.141 Procedure for hearing.**
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> . . . .
>
> (h) *Evidence*–(1) *In general*. . . .
>
> . . . .
>
> (iv) 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(h)(1)(iv).

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[12](...continued)
curiam, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

[13]I am not certain of the meaning of Respondents' reference to evidence which challenges the United States Department of Agriculture's "political and programmatic agenda." However, the Rules of Practice identify evidence which shall be excluded insofar as practicable and there is no provision for the exclusion of evidence which challenges the United States Department of Agriculture's "political and programmatic agenda."

Section 1.141(h)(1)(iv) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iv)) does not provide that an administrative law judge or the Judicial Officer may exclude evidence merely because the evidence contradicts testimony given by veterinarians employed by the United States Department of Agriculture or because the evidence challenges the United States Department of Agriculture's "political and programmatic agenda." Respondents do not cite any proceeding in which an administrative law judge or the Judicial Officer excluded evidence merely because the evidence contradicted testimony given by veterinarians employed by the United States Department of Agriculture or because the evidence challenged the United States Department of Agriculture's "political and programmatic agenda." Moreover, I cannot locate any administrative proceeding conducted under the Rules of Practice in which an administrative law judge or the Judicial Officer excluded evidence merely because the evidence contradicted testimony given by veterinarians employed by the United States Department of Agriculture or because the evidence challenged the United States Department of Agriculture's "political and programmatic agenda." Further still, the record in this proceeding does not indicate that the ALJ excluded evidence because the evidence contradicted Dr. Slauter's or Dr. Smith's testimony or because the evidence challenged the United States Department of Agriculture's "political and programmatic agenda."

Ninth, Respondents contend United States Department of Agriculture administrative proceedings conducted under the Horse Protection Act are unfair because the veterinarians and investigators who testify, the attorneys who represent the complainants, and the administrative law judges who preside at the hearings are all employees of the United States Department of Agriculture (Respondents' Appeal Pet. at 12-13).

Dr. Slauter and Dr. Smith, the two veterinarians who testified in this proceeding; Colleen A. Carroll, the attorney who represents Complainant; and the ALJ were United States Department of Agriculture employees at the time of the hearing (Tr. 4, 14, 85, 334). While J.R. Odle, the investigator who testified, was not an employee of the United States Department of Agriculture at the time of the hearing, he was a former United States Department of Agriculture employee (Tr. 174). However, Respondents do not cite any authority for their contention that an administrative proceeding is unfair if the veterinarians and investigators who testify, the complainant's attorney, and the administrative law judge are all employed by the agency conducting the administrative proceeding. I find Respondents' contention is without merit.

An agency may combine investigative, adversarial, and adjudicative functions as long as an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case does not participate in or advise in the

decision or agency review in the case or a factually related case. (5 U.S.C. § 554(d).)[14] Respondents do not assert that a United States Department of Agriculture employee or agent engaged in the performance of investigative or prosecuting functions in this proceeding, participated in or advised in the ALJ's Initial Decision and Order, or the agency review of the ALJ's Initial Decision and Order. Further, the record contains no indication that a United States Department of Agriculture employee or agent engaged in the performance of investigative or prosecuting functions in this proceeding, participated in or advised in the ALJ's Initial Decision and Order or the agency review of the ALJ's Initial Decision and Order.

Respondents also assert Dr. Slauter, Dr. Smith, J.R. Odle, Colleen A. Carroll, and the ALJ traveled together to the hearing, ate lunch together, and appeared "to be a team" (Respondents' Appeal Pet. at 13).

Respondents do not cite, and I cannot locate, any evidence that supports Respondents' assertion that Dr. Slauter, Dr. Smith, J.R. Odle, Colleen A. Carroll, and the ALJ traveled together to the hearing, ate lunch together, and appeared "to be a team."

Tenth, Respondents contend administrative law judges in United States Department of Agriculture administrative proceedings are biased in favor of the United States Department of Agriculture (Respondents' Appeal Pet. at 13-16).

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[14] *See also Sheldon v. SEC*, 45 F.3d 1515, 1518-19 (11th Cir. 1995) (holding that Securities and Exchange Commission proceedings do not violate the "separation of powers" or deny broker-dealers due process of law merely because the agency combines investigative, adversarial, and adjudicative functions); *Trust & Investment Advisers, Inc. v. Hogsett*, 43 F.3d 290, 297 (7th Cir. 1994) (stating it has long been settled that the combination of investigative and adjudicative functions within an agency, absent more, does not create an unconstitutional risk of bias in administrative adjudication); *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (per curiam) (stating an agency may combine investigative, adversarial, and adjudicative functions, as long as no employees serve in dual roles); *Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164, 167 (2d Cir. 1992) (stating the Administrative Procedure Act is violated only where an individual actually participates in a single case as both a prosecutor and an adjudicator); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 581 (2d Cir. 1979) (stating it is uniformly accepted that many agencies properly combine the functions of prosecutor, judge, and jury, and a hearing conducted by such an agency does not automatically violate due process); *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940) (stating the blending of the functions of enforcement and adjudication in a single agency is not sufficient to invalidate a hearing fairly conducted); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1124 (1998) (stating an agency may combine investigative, adversarial, and adjudicative functions, as long as an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case, does not participate in or advise in the decision or agency review in the case or a factually related case), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam).

Due process requires an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality.[15] Further, the Administrative Procedure Act requires an impartial proceeding, as follows:

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[15] *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (stating a fair trial in a fair tribunal is a basic requirement of due process and this requirement applies to administrative agencies, which adjudicate, as well as to the courts; not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (stating any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias); *Harline v. DEA*, 148 F.3d 1199, 1203 (10th Cir. 1998) (stating due process guarantees a hearing concerning the deprivation of life or a recognized property or liberty interest before a fair and impartial tribunal and this guarantee applies to administrative adjudications as well as those in the courts), *cert. denied*, 525 U.S. 1068 (1999); *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (stating essential to a fair administrative hearing is an unbiased judge); *Grant v. Shalala*, 989 F.2d 1332, 1345 (3d Cir. 1993) (stating bias on the part of administrative law judges may undermine the fairness of the administrative process); *Roach v. NTSB*, 804 F.2d 1147, 1160 (10th Cir. 1986) (stating due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal), *cert. denied*, 486 U.S. 1006 (1988); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (stating trial before an unbiased judge is essential to due process and that this rule of due process is applicable to administrative as well as judicial adjudications); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984) (stating a fair hearing requires an impartial arbiter); *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1188 (5th Cir. 1977) (stating a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 843 (D.C. Cir. 1976) (stating a litigant's entitlement to a tribunal graced with an unbiased adjudicator obtains in administrative proceedings); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating an adjudicatory hearing before an administrative tribunal must afford a fair trial in a fair tribunal as a basic requirement of due process), *cert. denied*, 434 U.S. 834 (1977); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (stating a fair hearing requires an impartial trier of fact); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) (stating quasi-judicial proceedings entail a fair trial and fairness requires an absence of actual bias in the trial of cases and our system of law has always endeavored to prevent even the appearance of bias); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943) (stating a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Continental Box Co. v. NLRB*, 113 F.2d 93, 95-96 (5th Cir. 1940) (stating it is the essence of a valid judgment that the body that pronounces judgment in a judicial or quasi-judicial proceeding be unbiased); *Inland Steel Co. v. NLRB*, 109 F.2d 9, 20 (7th Cir. 1940) (stating trial by a biased judge is not in conformity with due process and the recognition of this principle is as essential in proceedings before administrative agencies as it is before the courts).

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

. . . The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b).

However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair.[16]

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[16] *Harline v. DEA*, 148 F.3d 1199, 1203 (10th Cir. 1998) (stating an administrative law judge enjoys a presumption of honesty and integrity which is only rebutted by a showing of some substantial countervailing reason to conclude that the administrative law judge is actually biased with respect to factual issues being adjudicated), *cert. denied*, 525 U.S. 1068 (1999); *Akin v. Office of Thrift Supervision*, 950 F.2d 1180, 1186 (5th Cir. 1992) (stating in order to disqualify an administrative law judge for bias, the moving party must plead and prove, with particularity, facts that would persuade a reasonable person that bias exists); *Gimbel v. CFTC*, 872 F.2d 196, 198 (7th Cir. 1989) (stating in order to set aside an administrative law judge's findings on the grounds of bias, the administrative law judge's conduct must be so extreme that it deprives the hearing of that fairness and impartiality necessary to fundamental fairness required by due process); *Miranda v. NTSB*, 866 F.2d 805, 808 (5th Cir. 1989) (stating a substantial showing of bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982) (stating the standard for determining whether an administrative law judge's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for a hearing before a new administrative law judge is an exacting one, and requires that the administrative law judge's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required

(continued...)

Respondents cite no evidence that indicates the ALJ was biased in favor of Complainant in this proceeding. I have reviewed the record in this proceeding, and I find no basis for Respondents' contention that the ALJ was biased in favor of Complainant in this proceeding.

The Administrative Procedure Act contains a number of provisions designed to ensure independent decision-making by administrative law judges. First, the Administrative Procedure Act provides that administrative law judges may only be removed for good cause established and determined by the Merit Systems Protection Board on the record after an opportunity for hearing before the Merit Systems Protection Board (5 U.S.C. § 7521). Second, the Administrative Procedure Act prohibits an administrative law judge from consulting a person or party on a fact in issue, unless on notice and opportunity for all parties to participate (5 U.S.C. § 554(d)(1)). Third, the Administrative Procedure Act prohibits an administrative law judge from being responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the agency (5 U.S.C. § 554(d)(2)). Fourth, the Administrative Procedure Act prohibits an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case from participating in or advising in the decision in that case or a factually related case (5 U.S.C. § 554(d)).

In response to questions by William J. Reinhart, the ALJ explained the employment status of administrative law judges and the protections designed to ensure that administrative law judges can render impartial decisions, as follows:

> JUDGE BERNSTEIN: Okay. Before we conclude the hearing, is there anything else that we need to refer to before closing this record?
>
> MS. CARROLL: No.
>
> MR. REINHART: Yes. I would like to make an inquiry of you, Your Honor. I saved this until the end of the hearing on purpose. I would like for

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[16](...continued)
by due process); *Nicholson v. Brown*, 599 F.2d 639, 650 (5th Cir. 1979) (stating in order to maintain a claim of personal bias on the part of an administrative tribunal, there must be a substantial showing); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating a substantial showing of personal bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair), *cert. denied*, 434 U.S. 834 (1977); *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 763 (8th Cir. 1954) (stating it requires a substantial showing of bias to disqualify a hearing officer or to justify a ruling that the hearing was unfair).

you to explain to me what your status is as an administrative law judge. Are you an employee of the U.S. Department of Agriculture or are you an independent contractor -- could you explain your status? And I'm not saying that in any derogatory way. I'm saying that in terms that it will help me --

JUDGE BERNSTEIN: It's a valid question. I am an employee of the United States Department of Agriculture. I was selected as a federal administrative law judge through a selection process that involves a rigorous evaluation of my credentials, many references, a written examination and an oral interview. Administrative law judges with the federal government, if they've been selected, have their names placed on a register filed by the Office of Personnel Management. From that register, they are selected by the agency for whom they are employed. And as I've indicated, I am an employee of the United States Department of Agriculture just as federal circuit, district and supreme court judges are employees of the federal government and state judges are employees of the state government.

I am not evaluated as to my performance by the Department of Agriculture, they are not allowed to evaluate my performance, they are not allowed to comment upon my decisions one way or the other. This is to guarantee the independence of federal administrative law judges. Federal administrative law judges cannot receive any bonuses, they cannot receive any awards for their work other than their pay and they cannot be penalized in any way for their decisions. This is all to guarantee their independence.

Any questions?

MR. REINHART: Yes. Do you have life tenure?

JUDGE BERNSTEIN: Yes

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MR. REINHART: You're appointed for life.

JUDGE BERNSTEIN: Yes.

MR. REINHART: And you can only be removed for cause.

JUDGE BERNSTEIN: Yes.

MR. REINHART: Same requirements as any federal judge, district judge --

JUDGE BERNSTEIN: Essentially the same.

MR. REINHART: And you work exclusively for the Department of Agriculture?

JUDGE BERNSTEIN: Yes.

MR. REINHART: Thank you.

JUDGE BERNSTEIN: Any other questions?

(No response.)

Tr. 334-36.

Respondents do not cite, and I cannot locate, any evidence that indicates the ALJ's independence was compromised in any way or that an employee of the United States Department of Agriculture violated the Administrative Procedure Act.

Eleventh, Respondents contend the Judicial Officer's role in United States Department of Agriculture administrative proceedings is to enforce the United States Department of Agriculture's "political or policy agenda"[17] (Respondents' Appeal Pet. at 14-16). Respondents do not cite any basis for their contention that the Judicial Officer's role is to enforce the United States Department of Agriculture's "political or policy agenda."

The Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), also called the Schwellenbach Act, authorizes the Secretary of Agriculture to delegate regulatory functions to an employee of the United States Department of Agriculture. Pursuant to the Schwellenbach Act, the Secretary of Agriculture delegated authority to the Judicial Officer to act as final deciding officer in adjudicatory proceedings instituted under the Horse Protection Act (7 C.F.R. § 2.35). Neither the

[17]I am not certain of the meaning of Respondents' reference to the United States Department of Agriculture's "political or policy agenda." However, the Judicial Officer's functions are described in the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and in the delegation of authority from the Secretary of Agriculture to the Judicial Officer (7 C.F.R. § 2.35). Neither the Act of April 4, 1940, nor the delegation of authority from the Secretary of Agriculture to the Judicial Officer indicate that the role of the Judicial Officer is the enforcement of the United States Department of Agriculture's "political or policy agenda."

Schwellenbach Act nor the delegation of authority from the Secretary of Agriculture to the Judicial Officer describes the Judicial Officer's role as the enforcer of the United States Department of Agriculture's "political or policy agenda."

The mission of the Judicial Officer is to issue final decisions in United States Department of Agriculture adjudicatory proceedings. The goal of the Judicial Officer is to issue final decisions which are clearly written, well-reasoned, and consistent with United States Department of Agriculture policy and the law.

United States Department of Agriculture policy requires that the Judicial Officer render impartial decisions in administrative proceedings. A number of statutory and regulatory provisions and institutional practices are designed to ensure that the Judicial Officer can render impartial decisions in administrative proceedings. The Administrative Procedure Act requires that the functions of the Judicial Officer must be conducted in an impartial manner (See 5 U.S.C. § 556(b)). Between the institution of a proceeding and the issuance of a final decision, the Judicial Officer is prohibited from discussing ex parte the merits of a proceeding (See 5 U.S.C. § 557(d); 7 C.F.R. § 1.151). The Judicial Officer has no responsibility for investigation, prosecution, or advocacy and is not responsible to, supervised by, or directed by any employee or agent engaged in the investigative or prosecuting functions of the United States Department of Agriculture.[18]

Further, no United States Department of Agriculture employee or official has ever discussed the merits of an ongoing administrative proceeding with me, without the opportunity for all parties to the proceeding to be present. During my employment as the Judicial Officer, my performance has never been evaluated and I have never been rewarded, promoted, demoted, penalized, or reprimanded for a decision, ruling, or any other action.

Twelfth, Respondents contend the Horse Protection Act is an unconstitutional exercise of power under the Commerce Clause of the United States Constitution because activities regulated under the Horse Protection Act do not affect interstate commerce (Respondents' Appeal Pet. at 16-27).

Respondents raised this very same issue before the ALJ. The ALJ opined that the Horse Protection Act regulates activities that substantially affect interstate commerce and is not unconstitutional (Initial Decision and Order at 8-10). I agree with the ALJ's opinion. Moreover, with minor modifications, which are reflected in this Decision and Order, *supra*, I agree with the ALJ's discussion of the issue. Therefore, I reject Respondents' contention that the Horse Protection Act is an

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[18]Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 Geo. Wash. L. Rev. 277, 284 (1957).

unconstitutional regulation of intrastate activity in violation of the Commerce Clause.

Thirteenth, Respondents contend the Horse Protection Act is not necessary because the National Horse Show Commission prohibits the showing of sore horses (Respondents' Appeal Pet. at 25-26).

I disagree with Respondents' contention that the Horse Protection Act is not necessary. Contrary to Respondents' contention that the Horse Protection Act is unnecessary, Congress makes a specific finding in section 3(5) of the Horse Protection Act (15 U.S.C. § 1822(5)) that regulation under the Horse Protection Act by the Secretary of Agriculture is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce. The primary purpose of the Horse Protection Act is to stop the cruel, inhumane, and unfair practice of soring horses (15 U.S.C. § 1822(1)-(2)). Congress specifically addressed the need for the Horse Protection Act in connection with legislative history applicable to 1976 Horse Protection Act amendments, as follows:

> NEED FOR LEGISLATION
>
> The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.
>
> The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the p[a]stern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other

> popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.
>
> The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.
>
> Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The facts in this proceeding and other proceedings that have been appealed to the Judicial Officer establish that the practice of soring horses has not stopped.[19]

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[19] *See, e.g., In re David Tracy Bradshaw*, 59 Agric. Dec. ___ (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re Stephen Douglas Bolton*, 58 Agric. Dec. 254 (1999); *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543 (1997); *In re David Hubbard* (Decision as to David Hubbard), 56 Agric. Dec. 617 (1997); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d

(continued...)

Despite the efforts of the National Horse Show Commission to stop the showing of sore horses, the practice of soring horses continues and the Horse Protection Act is necessary. Therefore, I reject Respondents' contention that the Horse Protection Act is unnecessary because the National Horse Show Commission prohibits the showing of sore horses.

Moreover, even if I found the Horse Protection Act unnecessary (which I do not find), that finding would have no effect on the outcome of this proceeding.

Fourteenth, Respondents contend the Horse Protection Act violates the Tenth Amendment to the United States Constitution (Respondents' Appeal Pet. at 26).

The Tenth Amendment to the United States Constitution provides, as follows:

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[19](...continued)
958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re Johnny E. Lewis* (Decision on Remand as to Jerry M. Morrison), 55 Agric. Dec. 246 (1996), *aff'd per curiam*, 111 F.3d 897 (11th Cir. 1997); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re Glen O. Crowe*, 52 Agric. Dec. 1132 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272 (1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181 (1978).

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

Respondents cite *New York v. United States*, 505 U.S. 144 (1992), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), in support of their contention that the Horse Protection Act violates the Tenth Amendment to the United States Constitution. In *New York v. United States*, the Supreme Court held the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 infringed upon state sovereignty in violation of the Tenth Amendment to the United States Constitution because the provision required the states to regulate. 505 U.S. at 178. In *Gregory v. Ashcroft*, the High Court stated that the authority of the people of the states to determine the qualifications for office of state government officials is a power reserved to the states under the Tenth Amendment and the Guarantee Clause of the United States Constitution. 501 U.S. at 463.

The Horse Protection Act does not require the states to regulate and does not infringe on the authority of the people of the states to determine the qualifications for office of state government officials. Therefore, I find *New York v. United States* and *Gregory v. Ashcroft* inapposite, and I find no basis for Respondents' contention that the Horse Protection Act violates the Tenth Amendment to the United States Constitution.

Fifteenth, Respondents contend the "finding" of the ALJ was not supported by evidence in the record (Respondents' Appeal Pet. at 28).

Respondents do not identify which finding of fact they believe is not supported by evidence in the record. I have reviewed the entire record in this proceeding. Except with respect to the ALJ's findings regarding co-ownership of Reinhart Stables and Double Pride Lady, I find that the ALJ's findings of fact are supported by reliable, probative, and substantial evidence.

Respondents seek dismissal of the proceeding and referral of the proceeding to a United States district court (Respondents' Appeal Pet. at 28-29).

I find no basis for dismissal of this proceeding. The Judicial Officer has no authority under the Rules of Practice to refer a proceeding to a district court of the United States.[20] Moreover, appeal of this proceeding does not lie to any United

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[20] *In re Jack* Stepp, 59 Agric. Dec. ___, slip op. at 4 (Apr. 26, 2000) (Order Lifting Stay); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 302, 305 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue). *Cf. In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 492 (1997) (stating the chief administrative law judge does not have authority to transfer a case to a district court of the United States

(continued...)

States district court. Instead, section 6(b)(2) and (c) of the Horse Protection Act (15 U.S.C. § 1825(b)(2), (c)) provides that a person against whom a violation is found and a civil sanction is imposed may obtain judicial review in the court of appeals of the United States for the circuit in which such person resides or has his or her place of business or the United States Court of Appeals for the District of Columbia Circuit.

Respondents' Motion Requesting A List of Citations

Respondents request the citations of any cases instituted by the United States Department of Agriculture under the Horse Protection Act after June 7, 1995, in the United States Court of Appeals for the Fifth Circuit (Motion to Request Documents).

Disciplinary administrative proceedings instituted under the Horse Protection Act are required to be instituted before the Secretary of Agriculture (15 U.S.C. § 1825(b)). I am not aware of any administrative proceeding under the Horse Protection Act in which the complainant instituted the proceeding in the United States Court of Appeals for the Fifth Circuit. Moreover, I am not aware of any document listing citations to administrative proceedings instituted by the United States Department of Agriculture under the Horse Protection Act in the United States Court of Appeals for the Fifth Circuit. Therefore, Respondents' Motion to Request Documents is denied.

Respondents' Motion for Transcript

Respondents request that I provide the hearing transcript to them at no cost (Motion Re: Administrative Law Judge's Decision and Order). Section 1.141(i)(3) of the Rules of Practice (7 C.F.R. § 1.141(i)(3)) provides that transcripts of hearings shall be made available to any person at actual cost of duplication. Therefore, Respondents' request for a transcript at no cost is denied.

Respondents state that they want the transcript of the hearing in order to address the ALJ's reference in the Initial Decision and Order to William J. Reinhart's age and health. The ALJ states "[w]ere it not for Mr. Reinhart's age and ill health, the penalties assessed would be much harsher." (Initial Decision and Order at 12.) Complainant proposes that I delete the ALJ's reference to William J. Reinhart's age

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[20](...continued)
under the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

and health, and I disqualify William J. Reinhart from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction for 8 years (Complainant's Response to Respondent William J. Reinhart's Motion Re: Administrative Law Judge's Decision and Order at 3).

I do not adopt the ALJ's reference to William J. Reinhart's age and health in this Decision and Order. Age and health are not relevant factors to be taken into consideration when determining the appropriate sanction for a violation of the Horse Protection Act.[21] I reject Complainant's proposal to increase the period of disqualification imposed on William J. Reinhart by the ALJ from 5 years to 8 years. I find that a 5-year disqualification is sufficient to deter William J. Reinhart and other potential violators from future violations of the Horse Protection Act.

Complainant's Appeal Petition

Complainant contends the ALJ erroneously found Reinhart Stables is merely a name under which William J. Reinhart does business and erroneously declined to find Reinhart Stables violated sections 5(2)(B) and 5(2)(D) of the Horse Protection Act (15 U.S.C. §§ 1824(2)(B), 1824(2)(D)) (Complainant's Appeal Pet. at 1). Complainant asserts Reinhart Stables is a partnership, which has been owned and operated by William J. Reinhart and Judith Reinhart since 1980, and Reinhart Stables is the owner of Double Pride Lady (Complainant's Appeal Pet. at 4-5).

Complainant, as the proponent of an order, has the burden of proof in this proceeding,[22] and the standard of proof by which this burden is met is the

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[21] *Cf. In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 96-97 (1997) (Order Denying Pet. for Recons.) (stating the respondent's age is not a relevant factor to be taken into consideration when determining the appropriate sanction for violations of the Agricultural Marketing Agreement Act of 1937, as amended); *In re Dora Hampton*, 56 Agric. Dec. 301, 320 (1997) (stating the respondent's age cannot be considered either as a defense to the respondent's violations of the Animal Welfare Act, as amended [hereinafter the Animal Welfare Act], or as a mitigating factor to be taken into consideration when determining the appropriate sanction for a violation of the Animal Welfare Act); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 258 (1997) (stating the failing health of the corporate respondent's president cannot be considered either as a defense to the respondent's violations of the Animal Welfare Act or as a mitigating factor to be taken into consideration when determining the appropriate sanction for a violation of the Animal Welfare Act), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999).

[22] *See* 5 U.S.C. § 556(d).

preponderance of the evidence standard.[23] While the record does contain some evidence that Reinhart Stables is a partnership, I do not find that the evidence is sufficiently strong to reverse the ALJ. Further, I note Complainant did not allege that Reinhart Stables is a partnership. Instead, Complainant alleges that Reinhart Stables is an unincorporated association or a sole proprietorship (Amended Compl. ¶ 2) and states Reinhart Stables appears to be controlled by William J. Reinhart (Motion to Amend Compl. ¶ 5). Therefore, I reject Complainant's contention that Reinhart Stables is a partnership which has been owned and operated by William J. Reinhart and Judith Reinhart since 1980.

Moreover, I do not find that Reinhart Stables was the owner of Double Pride Lady when Double Pride Lady was entered at the National Walking Horse Trainers Show. While Complainant introduced some evidence that Reinhart Stables owned Double Pride Lady (CX 2), the preponderance of the evidence establishes that William J. Reinhart was the owner of Double Pride Lady on October 28, 1998 (CX 3, CX 6, CX 11, CX 12, CX 15). Therefore, I reject Complainant's contention

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[23] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re David Tracy Bradshaw*, 59 Agric. Dec. ___, slip op. at 10-11 (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie 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); *In re A.P. Holt* (Decision as to Richard Polch and 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 Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

that the ALJ erroneously failed to conclude Reinhart Stables violated sections 5(2)(B) and 5(2)(D) of the Horse Protection Act (15 U.S.C. §§ 1824(2)(B), 1824(2)(D)).

I agree with the ALJ's conclusion that Reinhart Stables is merely a name under which William J. Reinhart does business (Initial Decision and Order at 4), and I have restated the ALJ's Initial Decision and Order to eliminate those findings of fact and conclusions which appear to conflict with the ALJ's conclusion that William J. Reinhart does business as Reinhart Stables.

Order

1. William J. Reinhart is assessed a $2,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

William J. Reinhart's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on William J. Reinhart. William J. Reinhart shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0013.

2. William J. Reinhart is disqualified for a period of 5 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

This 5-year period of disqualification is to be served consecutive to the disqualification of William J. Reinhart ordered in *In re Jack Stepp*, 57 Agric. Dec.

297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). The disqualification shall become effective on the 60th day after service of this Order on William J. Reinhart.

3. William J. Reinhart has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which William J. Reinhart resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. William J. Reinhart must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. (15 U.S.C. § 1825(b)(2), (c).) The date of this Order is November 9, 2000.

PLANT QUARANTINE ACT

DEPARTMENTAL DECISION

In re: CALZADO LEON.
P.Q. Docket No. 99-0037.
Decision and Order filed August 29, 2000.

Default – Failure to file timely answer – Avocados – Federal Register constructive notice – Civil penalty – Sanction policy.

The Judicial Officer affirmed the Default Decision issued by Chief Administrative Law Judge James W. Hunt (Chief ALJ) concluding the Respondent moved five boxes of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, in violation of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff and assessing the Respondent a $500 civil penalty for the violations. The Judicial Officer held the Respondent's lack of understanding of the risk of the spread of plant pests associated with the movement of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, and the Respondent's lack of intent to spread plant pests are not defenses to the Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff. The Judicial Officer also held the Respondent was constructively notified of the prohibition on the movement of Mexican Hass avocados to Tennessee by the publication of the prohibition in the *Federal Register*.

James D. Holt, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 29, 1999. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 301.11(b) and 319.56-2ff); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that on or about December 22, 1998, Calzado Leon [hereinafter Respondent] moved five boxes of Mexican Hass avocados from Chicago, Illinois, to Calzado Leon, Nashville, Tennessee, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff (Compl. ¶ 2).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice,

and a service letter on May 6, 1999.[1] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On April 12, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Decision and Order, Complainant's Proposed Decision and Order, and a service letter on April 24, 2000.[2] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order within 20 days after service of Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On June 6, 2000, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued a Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that on December 22, 1999, Respondent moved five boxes of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, in violation of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff; and (2) assessing Respondent a $500 civil penalty (Initial Decision and Order at 2, 4-5).

On July 12, 2000, Respondent appealed to the Judicial Officer. The Hearing Clerk served Complainant with Respondent's appeal petition on July 20, 2000.[3] Complainant failed to file a response to Respondent's appeal petition within 20 days after service of the appeal petition, as required by section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)). On August 25, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order, except I find Respondent moved five boxes of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, on or about December 22, 1998. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order with minor modifications to reflect my disagreement with the

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[1]See Domestic Return Receipt for Article Number P 093 175 035.

[2]See Domestic Return Receipt for Article Number P 093 175 219.

[3]See letter dated July 14, 2000, from the Hearing Clerk to Respondent filed at 11:20 a.m., July 20, 2000.

Chief ALJ regarding the date of Respondent's violations. Additional conclusions by the Judicial Officer follow the Chief ALJ's Discussion, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 7B—PLANT PESTS

. . . .

§ 150gg. Violations

. . . .

(b) Civil penalty

Any person who—

(1) violates section 150bb of this title or any regulation promulgated under this chapter[]

. . . .

may be assessed a civil penalty by the Secretary not exceeding $1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

. . . .

CHAPTER 8—NURSERY STOCK AND OTHER PLANTS AND PLANT PRODUCTS

. . . .

§ 163. Violations; forgery, alterations, etc., of certificates; punishment; civil penalty

. . . Any person who violates any . . . rule[] or regulation [promulgated by the Secretary of Agriculture under this chapter] . . . may be assessed a civil penalty by the Secretary not exceeding $1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. §§ 150gg(b), 163.

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER III—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

. . . .

PART 301—DOMESTIC QUARANTINE NOTICES

SUBPART—IMPORTED PLANTS AND PLANT PARTS

. . . .

§ 301.11 Notice of quarantine; prohibition on the interstate movement of certain imported plants and plant parts.

(a) In accordance with part 319 of this chapter, some plants and plant parts may only be imported into the United States subject to certain destination restrictions. That is, under part 319, some plants and plant parts may be imported into some States or areas of the United States but are prohibited from being imported into, entered into, or distributed within other States or areas, as an additional safeguard against the introduction and establishment of foreign plant pests and diseases.

(b) Under this quarantine notice, whenever any imported plant or plant part is subject to destination restrictions under part 319:

. . . .

(2) No person shall move any plant or plant part from any such quarantined State or area into or through any State or area not quarantined with respect to that plant or plant part.

. . . .

PART 319—FOREIGN QUARANTINE NOTICES

. . . .

SUBPART—FRUITS AND VEGETABLES

QUARANTINE

. . . .

§ 319.56-2ff Administrative instructions governing movement of Hass avocados from Mexico to the Northeastern United States.

Fresh Hass variety avocados (*Persea americana*) may be imported from Mexico into the United States for distribution in the northeastern United States only under a permit issued in accordance with § 319.56-4, and only under the following conditions:

(a) *Shipping restrictions*. . . .

. . . .

(3) The avocados may be distributed only in the following northeastern States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana,

Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

. . . .

(c) *Safeguards in Mexico*. . . .

. . . .

(3) *Packinghouse requirements*. The packinghouse must be registered with Sanidad Vegetal's avocado export program and must be listed as an approved packinghouse in the annual work plan provided to APHIS by Sanidad Vegetal. The operations of the packinghouse must meet the following conditions:

. . . .

(vii) The avocados must be packed in clean, new boxes. The boxes must be clearly marked with the identity of the grower, packinghouse, and exporter, and the statement "Distribution limited to the following States: CT, DC, DE, IL, IN, KY, ME, MD, MA, MI, NH, NJ, NY, OH, PA, RI, VA, VT, WV, and WI."

7 C.F.R. §§ 301.11(a), (b)(2), 319.56-2ff(a)(3), (c)(3)(vii).

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

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

Findings of Fact

1. Respondent is a business with a mailing address of 995 Thompson Place, Nashville, Tennessee 37217.

2. On or about December 22, 1998, Respondent moved five boxes of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee.

Conclusion of Law

By reason of the facts contained in the Findings of Fact, Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff.

Discussion

The United States Department of Agriculture'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):

> [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 success of the programs designed to protect United States agriculture by the prevention, control, and eradication of plant pests is dependent upon the compliance of businesses, such as Respondent, with the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. A failure to comply with Federal regulations designed to prevent the spread of plant pests greatly increases the risk of the spread of plant pests. The imposition of sanctions in cases, such as this case, is extremely important to the prevention of the spread of plant pests. Sanctions must be sufficiently substantial to deter the violator and other potential violators from future violations of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act.

Respondent committed five violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff. A single violation of 7 C.F.R. §§ 301.11(b) and 319.56-2ff could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. These circumstances suggest the need for a severe sanction to serve as an effective deterrent to future violations.

Complainant believes the assessment of a $500 civil penalty against Respondent will deter Respondent and other potential violators from future violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and

319.56-2ff (Complainant's Motion for Adoption of Proposed Decision and Order at 13). Complainant's recommendation as to the appropriate sanction is entitled to great weight in view of the experience gained by Complainant during his day-to-day supervision of the regulated industry.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in Respondent's July 5, 2000, letter to the Hearing Clerk [hereinafter Appeal Petition].

First, Respondent asserts it did not understand the risk of the spread of plant pests associated with the movement of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, and did not intend to spread plant pests (Appeal Pet.).

Respondent's lack of understanding of the risk of the spread of plant pests associated with the movement of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, is not a defense to Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff. Moreover, Respondent's lack of intent to spread plant pests is not a defense to Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff.

Second, Respondent asserts it did not have sufficient information about 7 C.F.R. §§ 301.11(b) and 319.56-2ff (Appeal Pet.).

The regulations prohibiting the movement of Mexican Hass avocados to Tennessee are published in the *Federal Register*; thereby constructively notifying Respondent of the prohibition on the movement of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee.[4] Therefore, Respondent's lack of actual knowledge of 7 C.F.R. §§ 301.11(b) and 319.56-2ff is not a defense to Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff.

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

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[4]*See FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *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); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

Order

Respondent is assessed a $500 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

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

The certified check or money order shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0037.

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MISCELLANEOUS ORDERS

In re: KEVIN FRIESEN, d/b/a FRIESEN FARMS.
AMAA Docket No. 00-0002.
Complaint Dismissed filed October 18, 2000.

Brian Thomas Hill, for Complainant.
Respondent, Pro se.
Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to Complainant's Motion therefor, the Complaint filed herein on March 30, 2000, is dismissed. The Motion for Hearing is withdrawn.

Copies hereof shall be served upon the parties.

In re: KREIDER DAIRY FARMS, INC.
98 AMA Docket No. M 4-1.
Ruling on Certified Question filed December 21, 2000.

Issue preclusion – Collateral estoppel – Claim preclusion – Res judicata.

The Judicial Officer on December 21, 2000, the Judicial Officer ruled, in response to a question certified by Administrative Law Judge Baker, that Respondent's Motion to Dismiss Amended Petition should be granted in part and denied in part. The Judicial Officer stated that Petitioner litigated the issue of its status as a producer-handler under Milk Marketing Order No. 2 in *In re Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M 1-2 (*Kreider I*), and the Decision and Order on Remand in *Kreider I* decided the issue of Petitioner's status under Milk Marketing Order No. 2 during the period January 1991 through April 1997 when Petitioner sold fluid milk products to Ahava Dairy Products, Inc. (Ahava). The Judicial Officer concluded that issue preclusion bars relitigation, in *In re Kreider Dairy Farms, Inc.*, 98 AMA Docket No. M 4-1 (*Kreider II*), of Petitioner's status under Milk Marketing Order No. 2 during the period January 1991 through April 1997. The Judicial Officer found that Petitioner is not barred by issue preclusion from litigating Petitioner's status under Milk Marketing Order No. 2 during the period May 1997 through December 1999 when Petitioner did not sell fluid milk products to Ahava. The Judicial Officer also found that Petitioner was not barred by claim preclusion from litigating in *Kreider II* Petitioner's status under Milk Marketing Order No. 2 during the period May 1997 through December 1999 and found no basis for dismissing the Amended Petition for failure to comply with 7 C.F.R. § 900.52b.

Sharlene A. Deskins, for Respondent.
Marvin Beshore, Harrisburg, Pennsylvania, for Petitioner.
Ruling issued by William G. Jenson, Judicial Officer.

Certified Question

On October 24, 2000, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] certified the following question to the Judicial Officer:

> I am hereby certifying to the Judicial Officer the question of whether or not the Amended Petition filed September 7, 2000, should be dismissed for the reasons stated by Respondent, including collateral estoppel and res judicata.

Certification to Judicial Officer.

On October 25, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on the ALJ's certified question.

Kreider I

On December 28, 1993, Kreider Dairy Farms, Inc. [hereinafter Petitioner], instituted a proceeding, *In re Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M 1-2 [hereinafter *Kreider I*], under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the marketing order regulating milk in the New York-New Jersey Marketing Area [hereinafter Milk Marketing Order No. 2]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

In *Kreider I*, Petitioner: (1) challenged the determination by the Market Administrator for Milk Marketing Order No. 2 [hereinafter the Market Administrator] that, beginning in November 1991, Petitioner was a handler regulated under Milk Marketing Order No. 2; (2) asserted that it was a producer-handler under Milk Marketing Order No. 2 exempt from the obligation under Milk Marketing Order No. 2 to pay into the producer-settlement fund; and (3) sought a refund, with interest, of the money it paid into the producer-settlement fund (*Kreider I* Pet. ¶¶ 13-14).

The Judicial Officer dismissed the *Kreider I* Petition concluding the Market Administrator correctly determined that Petitioner was a handler and that Petitioner was not a producer-handler exempt from the obligation under Milk Marketing Order No. 2 to pay into the producer-settlement fund. The Judicial Officer held the producer-handler exemption in Milk Marketing Order No. 2 clearly requires that, in order to be a producer-handler, a person must exercise complete and exclusive control over all facilities and resources used for the production, processing, and distribution of milk. The Judicial Officer found Petitioner relinquished the

complete and exclusive control of milk distribution necessary for producer-handler status under Milk Marketing Order No. 2 when Petitioner delivered milk to two subdealers, Ahava Dairy Products, Inc. [hereinafter Ahava], and The Foundation for the Propagation and Preservation of the Torah Laws [hereinafter FPPTL], which milk was subsequently distributed by Ahava and FPPTL to their retail and wholesale customers. *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995).

Petitioner sought judicial review of *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995). The United States District Court for the Eastern District of Pennsylvania found that neither the plain language of the producer-handler exemption in Milk Marketing Order No. 2 nor the rulemaking proceeding applicable to the producer-handler exemption in Milk Marketing Order No. 2 supports a finding that Petitioner should be denied producer-handler status without further factual findings that Petitioner was "riding the pool." *Kreider Dairy Farms, Inc. v. Glickman*, No. 95-6648, slip op. at 24, 1996 WL 472414, at *11 (E.D. Pa. Aug. 15, 1996). The Court remanded the action to the Secretary of Agriculture for further factual findings and a decision regarding whether Petitioner was "riding the pool." The Court explained the purpose of its remand order, as follows:

> The [Judicial Officer] and Defendant assert that to allow producer-handlers to sell to subdealers would frustrate the economic purpose behind [Milk Marketing] Order [No.] 2's producer-handler exemption. The JO explains the economic purpose as follows:
>
> > "[M]ilk marketing orders were adopted to end the chaotic conditions previously existing, by enabling all producers to share in the [fluid milk] market, and, also, requiring all producers to share in the necessary burdens of surplus milk . . . through means of the producer-settlement fund. The only justification for exempting a producer-handler from the pooling requirements is because the producer-handler is a self-contained production, processing and distribution unit. Since a producer-handler does not share its [fluid milk] utilizations with the other producers supplying milk to the area, it is vital to the regulatory program that the producer-handler not be permitted to "ride the pool," i.e., to count on milk supplied by other producers to provide milk for the producer-handler during its peak needs. That principle has been frequently stated . . . ."

In re: Kreider, 1995 WL 598331, at *32 (citations omitted). How this "pool riding" problem arises when a producer-handler is allowed to sell to subdealers is explained as follows:

> [Kreider] does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, [Kreider] can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying [Kreider's] milk. If a producer-handler could turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

Id. at *31. In other words, Kreider receives an unearned economic benefit unavailable to handlers who do not enjoy producer-handler status: Unlike other handlers, Kreider does not need to pay into the producer-settlement fund, and, unlike other handlers, Kreider has no surplus-milk concerns because it never has to produce an over-supply to satisfy its customers during times when cows produce less milk.

This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider's milk to receive Ahava's certification that the milk is kosher, there must be "direct and daily supervision and control over the production and processing facilities by appropriate rabbinical authorities" and that such supervision is "extensive." (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 3 & 3 n.2.) Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production.

If the record cannot support the economic justification behind the Defendant's action, then it appears arbitrary, especially since, as noted previously, the language of [Milk Marketing] Order [No.] 2 is ambiguous and the [Market Administrator's] action is not clearly supported by the promulgation history of [Milk Marketing] Order [No.] 2 or departmental interpretation. . . . Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact

> Kreider is "riding the pool." To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

Kreider Dairy Farms, Inc. v. Glickman, No. 95-6648, slip op. at 18-21 (footnote omitted), 1996 WL 472414, at *8-9 (E.D. Pa. Aug. 15, 1996).

On December 30, 1996, Administrative Law Judge Edwin S. Bernstein issued a notice of hearing stating:

> In a December 30, 1996, telephone conference with Denise Hansberry and Marvin Beshore, counsel for the parties, the following were agreed and/or decided:
>
> I reviewed with counsel that the remand was triggered by the following language in the Judicial Officer's September 28, 1995, Decision:
>
> > Respondent is arguing that Petitioner avoids producing a great deal of surplus milk. That is, Petitioner does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, Petitioner can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying Petitioner's milk. If a producer-handler could turn over its distribution functions to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production. [*In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. at 847-48.]
>
> Based upon this language, the United States District Court for the Eastern District of Pennsylvania stated in its August 15, 1996, Decision:
>
> > Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production. [p. 19]
> >
> > . . . .

> Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is 'riding the pool.' To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production. p[p. 20-21]

. . . .

> The issue is, during the Ahava and Kreider dealings going back to November 1990, were there any instances of short production by Kreider when Ahava acquired kosher milk from other handlers from the pool? This includes the following questions:
>
> > Are there seasonal periods of shortages in milk production from Kreider and other similar producer-handlers?
> >
> > What are the patterns as to whether and how regularly Kreider maintains a surplus?

Summary of Telephone Conference--Notice of Hearing, filed in *Kreider I*, December 30, 1996.

On April 23, 1997, Administrative Law Judge Edwin S. Bernstein conducted a hearing in Washington, DC, to receive evidence on the remand issue. On August 12, 1997, Administrative Law Judge Edwin S. Bernstein issued a Decision and Order [hereinafter Decision and Order on Remand]: (1) finding it was feasible for Ahava to obtain fluid milk products from other handlers in periods of Petitioner's short production; (2) finding Ahava was supplied with fluid milk products by at least one producer other than Petitioner during the period January 1991 through December 1996; (3) finding an inference can be made that Petitioner was able to reduce its surplus because of its ability to rely on other producers to meet Ahava's needs; (4) finding Petitioner was "riding the pool" and receiving an unearned economic benefit; (5) concluding the decision of the Market Administrator to deny Petitioner producer-handler status under Milk Marketing Order No. 2 must be upheld; and (6) dismissing Petitioner's *Kreider I* Petition (*Kreider I* Decision and Order on Remand at 4, 7, 10).

Petitioner failed to file a timely appeal, and the *Kreider I* Decision and Order on Remand became final.

Kreider II

On February 17, 1998, Petitioner instituted the instant proceeding, *In re Kreider Dairy Farms, Inc.*, 98 AMA Docket No. M 4-1 [hereinafter *Kreider II*], under the AMAA, Milk Marketing Order No. 2, and the Rules of Practice.

On March 12, 1998, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a Motion to Dismiss stating the doctrine of res judicata requires the dismissal of the *Kreider II* Petition. On June 20, 2000, the Hearing Clerk received Petitioner's untitled document opposing Respondent's Motion to Dismiss. On June 29, 2000, Respondent filed Respondent's Reply to Petitioner's Opposition to Motion to Dismiss. Petitioner filed Final Reply Brief of Petitioner Kreider Dairy Farms, Inc. in Opposition to Respondent's Motion to Dismiss. On September 15, 2000, the ALJ denied Respondent's Motion to Dismiss stating that neither the factual nor the legal issues raised in the *Kreider II* Petition were decided in *Kreider I* (*Kreider II* Ruling on Motion to Dismiss).

On September 7, 2000, Petitioner filed an Amended Petition in *Kreider II*. Petitioner: (1) challenges the determination by the Market Administrator that Petitioner was a handler regulated under Milk Marketing Order No. 2 during the period December 1995 through December 1999; (2) asserts that it was a producer-handler under Milk Marketing Order No. 2 exempt from the obligation under Milk Marketing Order No. 2 to pay into the producer-settlement fund during the period December 1995 through December 1999; and (3) seeks a refund, with interest, of the money it paid into the producer-settlement fund during the period December 1995 through December 1999 (*Kreider II* Amended Pet. ¶¶ 13-16).

Petitioner alleges the six Milk Marketing Order No. 2 customers to whom it sold fluid milk products during the period December 1995 through December 1999 were Ahava, FPPTL, Jersey Lynn Farms, Parmalat Farmland Dairies, D.B. Brown, Inc., and Readington Farms, Inc. Further, Petitioner identifies which of its six Milk Marketing Order No. 2 customers paid for fluid milk products in each month during the period December 1995 through December 1999. Petitioner alleges that Ahava paid for fluid milk products in each month during the period December 1995 through April 1997. (*Kreider II* Amended Pet. ¶ 14-15.)

On September 29, 2000, Respondent filed Respondent's Motion to Dismiss Amended Petition II; Motion for Reconsideration; Motion to Certify Question for the Judicial Officer; and Answer to Petition II and Amended Petition II [hereinafter Motion to Dismiss Amended Petition]. On October 23, 2000, the Hearing Clerk

received Petitioner's Opposition to Motion to Dismiss Amended Petition II; Opposition to Respondent's Motion for Reconsideration; and Opposition to Motion to Certify Question for Judicial Officer.

Response to Certified Question

Issue preclusion (also called collateral estoppel or direct estoppel) and claim preclusion (also called res judicata) concern the preclusive effect of prior adjudication.[1] Issue preclusion refers to the effect of a judgment in foreclosing relitigation of an issue of fact or law that has been litigated and decided.[2] Issue preclusion bars parties and their privies from relitigating issues which have been adjudicated on the merits in a prior action.[3]

Petitioner litigated the issue of its status as a producer-handler under Milk Marketing Order No. 2 in *Kreider I*. The *Kreider I* Decision and Order on Remand decided, on the merits, the issue of Petitioner's status under Milk Marketing Order No. 2. However, the *Kreider I* Decision and Order on Remand is limited to the time during which Petitioner sold fluid milk products to Ahava. Therefore, the issue of Petitioner's status under Milk Marketing Order No. 2 was decided in *Kreider I* only with respect to the time during which Petitioner sold fluid milk products to Ahava. Issue preclusion bars only that part of Petitioner's claim in the *Kreider II* Amended Petition that relates to the time during which Petitioner sold fluid milk products to Ahava. Thus, Petitioner is barred by issue preclusion from relitigating in *Kreider II* Petitioner's status under Milk Marketing Order No. 2 during the period December 1995 through April 1997.

Kreider I did not decide the issue of Petitioner's status under Milk Marketing Order No. 2 during the period in which Petitioner sold no fluid milk products to Ahava. Thus, Petitioner is not barred by issue preclusion from litigating in *Kreider II* Petitioner's status under Milk Marketing Order No. 2 during the period May 1997 through December 1999.

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[1] *Baker v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984); *Gregory v. Chehi*, 843 F.2d 111, 115-16 (3d Cir. 1988); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 n.4 (3d Cir. 1984).

[2] *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984); *Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 n.4 (3d Cir. 1984).

[3] *Witkowski v. Welch*, 173 F.3d 192, 198-99 (3d Cir. 1999); *Swineford v. Snyder County*, 15 F.3d 1258, 1266 (3d Cir. 1994); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1070 (3d Cir. 1990).

Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated because of a determination that the matter should have been advanced in an earlier suit.[4] Claim preclusion gives dispositive effect to a prior judgment if a particular issue, although not litigated in the prior action, could have been raised.[5] Claim preclusion requires: (1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privies; and (3) a subsequent suit on the same cause of action.[6]

Administrative Law Judge Edwin S. Bernstein limited the scope of the April 23, 1997, *Kreider I* hearing to Petitioner's status during the period Petitioner sold fluid milk products to Ahava.[7] Based on the limited scope of *Kreider I* after remand and the date of the *Kreider I* hearing after remand, I do not find that Petitioner could have advanced its claim that it was a producer-handler after it ceased selling fluid milk products to Ahava. Therefore, based on the record before me, I do not find that Petitioner is barred by claim preclusion from litigating in *Kreider II* Petitioner's status under Milk Marketing Order No. 2 during the period May 1997 through December 1999.

Respondent also seeks to dismiss the Amended Petition because it does not comply with the requirements in 7 C.F.R. § 900.52b (Motion to Dismiss Amended Pet. at 3). Respondent does not explain the basis for Respondent's contention that the Amended Petition does not comply with 7 C.F.R. § 900.52b. Based on the record before me, I find no basis for dismissing the Amended Petition for failure to comply with 7 C.F.R. § 900.52b.

Therefore, Respondent's Motion to Dismiss Amended Petition should be granted in part and denied in part, in accordance with this Ruling on Certified Question.

———————

[4] *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984); *Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988).

[5] *Corestates Bank v. Huls America, Inc.*, 176 F.3d 187, 194 (3d Cir. 1999); *Witkowski v. Welch*, 173 F.3d 192, 198 n.8 (3d Cir. 1999); *Swineford v. Snyder County*, 15 F.3d 1258, 1266 (3d Cir. 1994); *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 504 (3d Cir. 1992); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1070 (3d Cir. 1990).

[6] *Corestates Bank v. Huls America, Inc.*, 176 F.3d 187, 194 (3d Cir. 1999); *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 504 (3d Cir. 1992); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984).

[7] See Summary of Telephone Conference--Notice of Hearing, filed in *Kreider I*, December 30, 1996; *Kreider I* Decision and Order on Remand.

In re: DONALD D. FOSTER.
AWA Docket No. 99-0040.
Supplemental Order filed October 18, 2000.

Frank Martin, Jr., for Respondent.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Upon the motion of complainant, the Animal and Plant Health Inspection Service, the suspension of respondent's licence as a dealer under the Animal Welfare Act, as amended, contained in the Order issued in this case on July 31, 2000, is hereby terminated.

This order shall be effective upon issuance. Copies shall be served upon the parties.

_____

In re: BOBBY MOORING.
FCIA Docket No. 00-0009.
Order Dismissing Complaint filed November 20, 2000.

Donald McAmis, for Complainant.
Robert N. Habans, Jr., Slidell, LA, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's "Motion to Dismiss Complaint" is granted. The complaint, filed herein on September 12, 2000, is dismissed.

_____

In re: NEW YORK STATE.
FSP Docket No. 00-0004.
Order Dismissing Appeal filed July 12, 2000.

Samuel Chambers, Jr., Alexandria, VA, for Complainant.
John E. Robitzek, Albany, NY, for Appellant.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

By letter dated June 6, 2000, filed on July 11, 2000, the State of New York withdrew its appeal conditioned upon USDA's commitment to forego the $11,731,000 penalty that was the subject of the appeal.

Accordingly, this matter is dismissed without prejudice.

In re: COMMONWEALTH OF MASSACHUSETTS.
FSP Docket No. 00-0003.
Withdrawal of Appeal filed August 15, 2000.

Samuel Chambers, Jr., Alexandria, VA, for Complainant.
John E. Robitzek, Albany, NY, for Appellant.
Order issued by Dorothea A. Baker, Administrative Law Judge.

By communication dated July 28, 2000 and received by the Hearing Clerk on August 4, 2000, the Commonwealth of Massachusetts withdrew its appeal in the above-captioned proceeding, subject to a condition subsequent. The case is now considered closed before this Office.

In re: STEVE DUNN, JADA R. FLOYD, MICHAEL R. FLOYD AND BOBBY MALONE.
HPA Docket No. 00-0014.
Order of Dismissal filed July 7, 2000.

Colleen A. Carroll, for Complainant.
Knox D. Tally, Springhill, TN, for Respondent.
Dismissal issued by James W. Hunt, Administrative Law Judge.

In view of Complainant's notice of its withdrawal of the complaint as to Bobby Malone, it is ordered that the complaint as to Bobby Malone be dismissed without prejudice.

In re: CHARLES MASSEY, an individual; THOMAS SEYMOUR, an individual; and JOHN R. LINDAHL, an individual, d/b/a ASHLAND STABLES, a sole proprietorship or unincorporated association.
HPA Docket No. 00-0007.
Order Dismissing Complaint as to Thomas Seymour filed July 10, 2000.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Dismissal issued by James W. Hunt, Administrative Law Judge.

The complaint as to Respondent Thomas Seymour is dismissed without prejudice.

In re: DAVID TRACY BRADSHAW.
HPA Docket No. 99-0008.
Order Denying Petition for Reconsideration filed August 3, 2000.

Petition for reconsideration.

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer stated that petitions for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) relate to reconsideration of the Judicial Officer's decision only–not to reconsideration of an administrative law judge's initial decision. Therefore, the Judicial Officer treated Respondent's contentions that the Chief Administrative Law Judge and the Judicial Officer erred as contentions that the Judicial Officer erred in the Judicial Officer's June 14, 2000, Decision and Order. The Judicial Officer found that the six issues raised by Respondent in his Petition for Reconsideration had been raised in Respondent's appeal petition and addressed in *In re David Tracy Bradshaw*, 59 Agric. Dec. ___ (June 14, 2000). The Judicial Officer stated that he carefully reviewed the June 14, 2000, Decision and Order and found no error.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] by filing a Complaint on March 4, 1999.

The Complaint alleges that on August 28, 1998, David Tracy Bradshaw [hereinafter Respondent] allowed the entry of a horse called "Favorite's Fargo" as entry number 2016 in class number 25 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Favorite's Fargo, while Favorite's Fargo was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶¶ 2-3).

On April 1, 1999, Respondent filed an Answer denying the allegations in the Complaint. On December 8, 1999, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted a hearing in Fort Worth, Texas. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Kenneth A. Wright of the Law Offices of Rogers & Wright, Dallas, Texas, represented Respondent.

On February 16, 2000, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law and Memorandum of Points and Authorities in

Support Thereof, and Respondent filed Respondent's Brief in Support of Motion for Dismissal.

On April 6, 2000, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by entering or allowing the entry of Favorite's Fargo in the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on August 28, 1998, while Favorite's Fargo was sore, for the purpose of showing or exhibiting Favorite's Fargo; (2) assessed Respondent a $2,000 civil penalty; and (3) disqualified Respondent 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 horse auction (Initial Decision and Order at 9).

On May 5, 2000, Respondent appealed pro se to the Judicial Officer; on May 22, 2000, Complainant filed Complainant's Response to Respondent's Appeal Petition; and on May 23, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision.

On June 14, 2000, I issued a Decision and Order: (1) concluding that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Favorite's Fargo in the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on August 28, 1998, while Favorite's Fargo was sore, for the purpose of showing or exhibiting Favorite's Fargo; (2) assessing Respondent a $2,000 civil penalty; and (3) disqualifying Respondent 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 horse auction. *In re David Tracy Bradshaw*, 59 Agric. Dec. ___, slip op. at 15, 40-41 (June 14, 2000).

On June 28, 2000, Respondent filed a Petition for Reconsideration of the June 14, 2000, Decision and Order; on July 19, 2000, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration; and on July 20, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the June 14, 2000, Decision and Order.

Respondent raises six issues in Respondent's Petition for Reconsideration. Respondent contends, with respect to five of these issues, that both the Chief ALJ and the Judicial Officer erred. At this stage of the proceeding, error by the Chief ALJ is irrelevant. Section 1.142(c)(4) of the Rules of Practice provides, as follows:

§ 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).

On May 5, 2000, Respondent filed a timely appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145. Consequently, while the Chief ALJ's Initial Decision and Order is part of the record,[1] the Initial Decision and Order never became effective and no purpose relevant to this proceeding would be served by reconsidering the Initial Decision and Order.

Further, section 1.146(a)(3) of the Rules of Practice provides that a party to a proceeding may seek reconsideration of the decision of the Judicial Officer, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite*. . . .

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or 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. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

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[1]See 5 U.S.C. § 557(c).

Thus, petitions for reconsideration filed pursuant to section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) after the Judicial Officer's decision has been issued relate to reconsideration of the Judicial Officer's decision only.[2] Therefore, I treat Respondent's contentions that the Chief ALJ and the Judicial Officer erred as contentions that the Judicial Officer erred in the June 14, 2000, Decision and Order.

Respondent raises six issues in his Petition for Reconsideration.[3] Respondent raised, *inter alia*, these same six issues in his Appeal Petition filed May 5, 2000. I addressed each of these issues in *In re David Tracy Bradshaw*, 59 Agric. Dec. ___ (June 14, 2000). I have carefully reviewed the June 14, 2000, Decision and Order and find no error.

For the foregoing reason and the reasons set forth in *In re David Tracy Bradshaw*, 59 Agric. Dec. ___ (June 14, 2000), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[4]

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[2]*See In re JSG Trading Corp.*, 57 Agric. Dec. 710, 720 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (stating petitions for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) after the Judicial Officer's decision has been issued relate to reconsideration of the Judicial Officer's decision only); *In re Peter A. Lang*, 57 Agric. Dec. 91, 101 (1998) (Order Denying Pet. for Recons.) (stating petitions for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) relate to reconsideration of the Judicial Officer's decision only); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1435 (1996) (stating "[p]etitions for reconsideration under the Rules of Practice relate to reconsideration of the Judicial Officer's decision"); *In re Lincoln Meat Co.*, 48 Agric. Dec. 937, 938 (1989) (stating "[t]he Rules of Practice do not provide for a Motion for Reconsideration to the Administrative Law Judge").

[3]Respondent contends: (1) *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995) is applicable precedent; (2) digital palpation is an unreliable method by which to determine that a horse is sore; (3) the findings of fact are based upon unreliable hearsay documentation prepared in anticipation of litigation; (4) Dr. Price's affidavit (CX 8) and Dr. Taylor's affidavit (CX 7) are inadmissible hearsay; (5) he was deprived of the right to confront witnesses against him; and (6) the inference that if John Feltner, Jr., had testified, his testimony would not have favored Respondent is error (Respondent's Pet. for Recons. ¶¶ 1-5).

[4]*In re Kirby Produce Company, Inc.*, 58 Agric. Dec. ___, slip op. at 11 (Oct. 4, 1999) (Order Denying Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 201, 209 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. 222, 227 (1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. 369, 387 (1999)
(continued...)

Respondent's Petition for Reconsideration was timely filed and automatically stayed the June 14, 2000, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed June 14, 2000, is reinstated, with allowance for time passed.

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

Order

1. Respondent is assessed a $2,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

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[4](...continued)
(Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 83 (1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. 336, 338-39 (1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299 (1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0008.

2. Respondent 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 horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of a horse to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up or inspection areas, or in any area where spectators are not allowed; and (d) financing the participation of any other person in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

In re: BOWTIE STABLES, LLC, a Tennessee corporation; JAMES L. CORLEW, SR., an individual; and B.A. DORSEY, an individual.
HPA Docket No. 00-0017.
Order Allowing Withdrawal of "Billy Corlew" as Respondent and Order Amending Case Caption filed September 8, 2000.

Colleen A. Carroll, for Complainant.
Roger N. Bowman, Clarksville, TN, for Respondent.
David F. Broderick, Bowling Green, KY, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to withdraw the name of "Billy Corlew" as a Respondent is granted. The caption of the case is accordingly amended to read as follows:

Bowtie Stables, LLC, a Tennessee corporation;
James L. Corlew, Sr., an individual; and
B. A. Dorsey, an individual

In re: ROGER IVINS, an individual; FANNIE IVINS, an individual; and JIM ANDERSON, an individual.
HPA Docket No. 01-0005.
Order of Dismissal filed November 3, 2000.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

In view of Complainant's November 2, 2000, "Notice of Withdrawal of Complaint as to Respondent Jim Anderson," the complaint is dismissed as to Respondent Jim Anderson.

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In re: BENNY JOHNSON, an individual; SHERRY JOHNSON, an individual; BENNY JOHNSON STABLES, an unincorporated association; and PENNY MATTHEWS, an individual.
HPA Docket No. 00-0018.
Order filed December 5, 2000.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Upon the motion of complainant and for good cause shown, the complaint in HPA Docket No. 00-0018 is dismissed as to respondent Penny Matthews.

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In re: LATINO AMERICANA CARNECERIA.
P.Q. Docket No. 99-0052.
Ruling Granting Complainant's Motion to Dismiss Proceeding filed July 10, 2000.

Darlene Bolinger, for Complainant.
Respondent, Pro se.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary

administrative proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 301.11(b) and 319.56-2ff) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on August 27, 1999.

The Complaint alleges that on or about November 18, 1998, Latino Americana Carneceria [hereinafter Respondent] moved four boxes of Mexican Hass avocados from Chicago, Illinois, to St. Louis, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff (Compl. ¶ 2).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a service letter on September 29, 1999.[1] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On February 18, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order seeking the assessment of a $4,000 civil penalty against Respondent.

The Hearing Clerk served Respondent with a copy of Complainant's Motion for Adoption of Proposed Default Decision and Order and Proposed Default Decision and Order on or before March 3, 2000.[2] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On May 1, 2000, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] issued a Default Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that on or about November 18, 1998, Respondent moved four boxes of Mexican Hass avocados from Chicago, Illinois, to St. Louis, Missouri, in violation of the Plant Quarantine Act, the Federal Plant Pest Act, and the Regulations; and (2) assessing Respondent a $4,000 civil penalty (Initial Decision and Order at 2).

On June 2, 2000, Respondent appealed to the Judicial Officer; on June 22, 2000,

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[1]See Domestic Return Receipt for Article Number P093175131.

[2]See Domestic Return Receipt for Article Number P 368 427 138.

Complainant filed Response to Respondent's Appeal Petition; and on June 22, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On June 30, 2000, Complainant filed a motion to dismiss the proceeding against Respondent, and the Hearing Clerk transmitted Complainant's Motion to Dismiss to the Judicial Officer for a ruling.

Complainant's Motion to Dismiss states as follows:

> The complaint in this matter, which was filed on August 27, 1999, alleged that on or about November 18, 1998, respondent moved Mexican Hass avocados from Missouri to Illinois in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff. The respondent failed to answer in this proceeding. Respondent also failed to file any objection to the proposed decision and motion for adoption thereof filed on February 18, 2000. On May 1, 2000, Administrative Law Judge Edwin Bernstein issued a Default Decision and Order, which was appealed on June 2, 2000 and is currently pending before the Judicial Officer.
>
> Complainant has since discovered that an earlier complaint had been filed against the respondent, alleging not only the November 18, 1998 violation, but also other violations. That complaint was assigned P.Q. Docket No. 99-0018. Respondent filed an Answer in that proceeding on April 27, 1999. The matter is still pending and no hearing date has been set. A tentative settlement has been reached and should be finalized soon.
>
> In view of the complaint in this proceeding being inadvertently filed, a default is not in the public interest. Therefore, Complainant, with Respondent's concurrence, respectfully requests that P.Q. Docket No. 99-0052, be dismissed.

I agree with Complainant and Respondent that, under the circumstances described in Complainant's Motion to Dismiss, this proceeding instituted against Respondent on August 27, 1999, should be dismissed. Therefore, Complainant's Motion to Dismiss is granted. This proceeding, including the Initial Decision and Order issued by the ALJ on May 1, 2000, is dismissed. Based on my granting Complainant's Motion to Dismiss, I find Respondent's appeal petition moot. Therefore, I dismiss Respondent's appeal petition.

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DEFAULT DECISIONS

ANIMAL WELFARE ACT

In re: VICTOR HOLLENDER.
AWA Docket No. 00-0004.
Decision and Order filed on May 10, 2000.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, 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 wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq*.).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by personal service on January 20, 2000. 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. (a) Victor Hollender, hereinafter referred to as respondent, is an individual whose address is 203 Country Road 591, Hanceville, Alabama 35077.

(b) The respondent, at all times material hereto, was operating as a dealer as defined in the Act and the regulations.

2. On twenty-two separate dates between November 12, 1995, through October 31, 1998, respondent operated as a dealer as defined in the Act and the

regulations, without being licensed, in willful violation of section 2.1(a)(1) of the regulations (9 C.F.R. § 2.1(a)(1)). The sale of each animal constitutes a separate violation.

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 the Act, as well as the regulations promulgated under the Act.

3. 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 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. The respondent is assessed a civil penalty of $6,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The 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 service of this decision on the respondent. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 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 September 15, 2000.-Editor]

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In re: MARK DOTY.
AWA Docket No. 00-0028.
Decision and Order filed September 12, 2000.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued James W. Hunt, 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 violated the regulations issued thereunder (9 C.F.R. § 1.1 *et seq*.).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by the Hearing Clerk. 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. Mark Doty, hereinafter referred to as respondent, is an individual doing business as Westarr Bio-Products, whose address is 1318 Hermes Court, San Diego, California 92154.

2. The respondent, at all times material hereto, was registered and operating as a research facility as defined in the Act and the regulations. On July 18, 2000, the respondent canceled his registration as a research facility under the Act and regulations.

3. Respondent violated section 2.36 of the regulations (9 C.F.R. § 2.36), by failing to file an annual report 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 the regulations promulgated under the Act.

3. 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 regulations, and in particular, shall cease and desist from failing to file reports required under the regulations.

2. Respondent is assessed a civil penalty of $1,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The respondent is disqualified for a period of thirty (30) days from becoming registered as a research facility under the Act and regulations, and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act, the regulations and standards issued thereunder and this order, including payment of the civil penalty imposed herein.

The provisions of this Order shall become effective on the first day after service of this decision on the respondent. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 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 October 25, 2000.-Editor]

In re: KATHY WEATHERLY, d/b/a RAINBOW KENNELS.
AWA Docket No. 00-0023.
Decision and Order filed on October 25, 2000.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, 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 violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq*.).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon the respondent by certified 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 as set forth herein, 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. Kathy Weatherly, hereinafter referred to as respondent, is an individual doing business as Rainbow Kennels, whose mailing address is 885 Highway 14, Ellsworth, Kansas 67439.

2. The respondent, at all times material hereto, was operating as a dealer as defined in the Act and the regulations.

3. On February 28, 1996, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

4. On February 28, 1996, APHIS inspected respondent's premises and records and found that the respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

5. On February 28, 1996, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

B. The respondent failed to develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise and socialization (9 C.F.R. § 3.8); and

C. Excreta was not removed from primary enclosures daily and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces, to prevent soiling of the dogs, and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)).

6. On November 26, 1996, APHIS inspected respondent's premises and records and found that the respondent had failed to individually identify dogs, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

7. On November 26, 1996, APHIS inspected respondent's premises and records and found that the respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

8. On November 26, 1996, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

B. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b)); and

C. Primary enclosures for dogs were not kept clean and sanitized as required (9 C.F.R. §§ 3.11(a), (b)).

9. On March 6, 1997, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention,

euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

10. On March 6, 1997, APHIS inspected respondent's premises and records and found that the respondent had failed to individually identify dogs, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

11. On March 6, 1997, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

B. Excreta was not removed from under primary enclosures as often as necessary to prevent an excessive accumulation of feces, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)); and

C. Primary enclosures for dogs were not kept clean and sanitized as required (9 C.F.R. §§ 3.11(a), (b)).

12. On June 26, 1997, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

B. Excreta was not removed from under primary enclosures as often as necessary to prevent an excessive accumulation of feces, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)); and

C. Primary enclosures for dogs were not kept clean and sanitized as required (9 C.F.R. §§ 3.11(a), (b)).

13. On February 11, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

B. Excreta and food waste were not removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an

excessive accumulation of feces and food waste, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)); and

C. Primary enclosures for dogs were not kept clean and sanitized as required (9 C.F.R. §§ 3.11(a), (b)).

14. On October 5, 1998, respondent refused to allow Animal and Plant Health Inspection Services employees to conduct a complete inspection of her animal facilities, in willful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

15. On October 20, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

B. Excreta and food waste were not removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)); and

C. Primary enclosures for dogs were not kept clean and sanitized as required (9 C.F.R. §§ 3.11(a), (b)).

16. On November 4, 1998, the respondent operated 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) and section 2.1 of the regulations (9 C.F.R. § 2.1) by selling at least 10 dogs to a dealer for resale for use as pets.

17. On November 17, 1998, the respondent operated 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) and section 2.1 of the regulations (9 C.F.R. § 2.1) by selling at least one dog to a dealer for resale for use as a pet.

18. On December 18, 1998, the respondent operated 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) and section 2.1 of the regulations (9 C.F.R. § 2.1) by selling at least 23 dogs to a dealer for resale for use as pets.

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 the Act and the regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, her 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:

(a) 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, contain them securely, and restrict other animals from entering;

(b) Failing to provide animals with adequate shelter from the elements;

(c) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(d) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(e) Failing to individually identify animals, as required;

(f) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required; and

(g) Operating as a dealer without a license which is required under the Act and regulations.

2. The respondent is assessed a civil penalty of $7,500.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The respondent is disqualified from becoming licensed for one year and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that they are in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final December 7, 2000.]

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FEDERAL CROP INSURANCE ACT

In re: JAY STRANGER.
FCIA Docket No. 00-0003.
Decision and Order filed July 20, 2000.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

On November 16, 1999, the Manager, Federal Crop Insurance Corporation, filed a Complaint pursuant to the Federal Crop Insurance Act (7 U.S.C. § 1501 *et seq*.) seeking disqualification of the Respondent from purchasing catastrophic risk protection or any other benefit under the Act, for a specified period by reason of alleged violations of the Act and applicable regulations. Respondent's Answer constituted general denials and "However, I deny any wrong-doing or fraud." Respondent did not ask for an oral hearing.

On March 28, 2000, Complainant filed a Motion for Summary Judgment to which Respondent filed no response. For good cause set forth in said Motion and, based on the record as a whole, Complainant's Motion for Summary Judgment is hereby granted and this Decision and Order are issued.

Pursuant to section (b) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, the Motion for Summary Judgment filed on March 28, 2000, by the Complainant, Federal Crop Insurance Corporation (FCIC), is granted on the grounds that there are no genuine issues of material fact.

As set forth by Complainant in the Complaint and in its Motion for Summary Judgment the Respondent entered into a settlement agreement dated January 29, 1999 [February 4, 1999], and consented to Entry of Judgment in the amount of $74,355.50. There is preclusion of litigation arising from a judgment.

The documents (referred to herein as numbered Exhibits) accompanying the Motion for Summary Judgment indicate, among other things, that on April 8, 1998, Lawrence A. Grube (a.k.a. Larry Grube) (Grube), together with Larry Stranger and Jay Stranger and others, was indicted in the United States District Court for the District of North Dakota, Northern Division, for conspiracy to commit and commission of fraud to obtain monetary benefits to which he was not entitled from FCIC by larceny and by trick. Exhibit 1. Mr. Grube was convicted, by jury trial, of commission of these offenses on January 29, 1999. Exhibit 2.

Mr. Grube, Larry Stranger, and Jay Stranger were also the subjects of a civil action for damages in the same District Court in a Complaint filed by the United States on October 30, 1998. Exhibit 3.

Larry and Jay Stranger executed, through their attorney, a Settlement Agreement dated January 22, 1999, in which the civil Complaint against Grube would be dismissed, conditioned upon the Strangers' execution of the Settlement Agreement and entrance of Consents to Entry of Judgment. Exhibit 4. Larry Stranger entered a Consent to Entry of Judgment in the amount of $74,355.50 on January 29, 1999. Exhibit 5. Jay Stranger entered a Consent to Entry of Judgment in the amount of $74,355.50 on January 29, 1999 [February 4, 1999]. Exhibit 6.

The civil suit against Grube was dismissed with prejudice. Exhibit 18. Both the criminal and civil actions against the Strangers arose out of a scheme and conspiracy in which they were involved in 1993 and 1994 to aid and abet Grube to collect money through the concealment of production and the filing of false claims by Grube with the insurer. Exhibits 1, 3 and 7.

As part of this scheme, an individual named Gowan wrote checks to Jay Stranger in the amount of $58,278.36. Exhibit 9. He also wrote checks to Larry Stranger in the amount of $81,027.92 as a part of the scheme. Exhibit 10. These checks, although labeled as payments for equipment rental to Larry and Jay Stranger, actually reimbursed Grube for the grain and sunflower seeds sold by Gowan as his own as part of the scheme. Exhibits 11 and 8.

Neither Jay nor Larry Stranger have ever disputed the fact that they accepted these checks or that they passed the proceeds on to Grube. The scheme to hide production, participated in by Larry and Jay Stranger, allowed Grube to hide production from FCIC, thereby causing FCIC to pay out additional money to Grube to which he was not entitled. Exhibit 17. Respondent Jay Stranger tried to conceal his fraudulent participation by lying to officials of FCIC when questioned concerning the transaction. Exhibits 19 and 20.

Previously, on May 4, 2000, a Decision and Order was issued as to Larry Stranger, FCIA Docket No.00-0004, wherein it was found that Larry Stranger was disqualified from purchasing catastrophic risk protection and other benefits for specified periods.

Respondent's blanket denials in his Answer are not sufficient to remove this case from issue preclusion. Moreover, there is no genuine issue of any material fact.

The Respondent, Jay Stranger, willfully and intentionally provided false information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act, as amended (7 U.S.C. § 1501 *et seq*.) when he conspired with, aided, and abetted Lawrence A. Grube (Grube) together with others to commit fraud and did commit fraud to obtain

monetary benefits to which he was not entitled from the Federal Crop Insurance Corporation. The scheme involved the collection of money through the concealment of production and the filing of false claims by Grube with the insurer.

Therefore, 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 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 a substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of one year and from receiving any other benefit under the Act for a period of five years. The period of disqualification shall be effective thirty five days after this decision is served on the Respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary.

If the 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.

Copies shall be served upon the parties.

[This Decision and Order became final August 29, 2000.-Editor]

In re: RICHARD RENNICK, d/b/a RENNICK FARMS, INC.
FCIA Docket No. 00-0001.
Decision and Order filed August 29, 2000.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to section (b) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, the Motion for Summary Judgment filed by the complainant, Federal Crop Insurance Corporation (FCIC), is granted on the grounds that there are no genuine issues of material fact. The respondent, Richard Rennick, d/b/a Rennick Farms, Inc, (respondent) willfully and intentionally provided false information to FCIC or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act, as amended

(7 U.S.C. §§ 1501 *et seq*.), when he did commit fraud to obtain monetary benefits to which he was not entitled from the Federal Crop Insurance Corporation. The scheme involved the collection of money through the concealment of production and the filing of false claims with the insurer.

Therefore, 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 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 a substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of ten years. The period of disqualification shall be effective thirty five days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the 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 and Order became final October 10, 2000.-Editor]

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FEDERAL MEAT INSPECTION ACT

In re: JAY AND BOOTS MEATS, INC.
FMIA Docket No. 00-0005.
PPIA Docket No. 00-0004.
Decision and Order filed October 16, 2000.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

The Administrator of the Food Safety and Inspection Service, United States Department of Agriculture [herein the complainant], instituted this administrative proceeding under the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq*.)(FMIA) and the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq*.)(PPIA) [herein the Acts] and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statues (7 C.F.R. §§ 1.130-1.151) [herein the rules of practice], by the filing of a complaint on April 29, 2000.

The complaint alleges that, as a corporation organized and existing under the laws of the State of Tennessee, Jay and Boots Meats, Inc. [herein the respondent] was the recipient of federal inspection services at its meat and poultry processing establishment (establishment 8079/P-8079) in Knoxville, Tennessee. The complaint also alleges that on April 20, 1999, in the United States District Court for the Eastern District of Tennessee, respondent pled guilty to (1) the felony of preparing adulterated and mislabeled meat food products for commerce, with intent to defraud, in violation of 21 U.S.C. § 610(a), and (2) the felony of selling and transporting in commerce adulterated and misbranded meat food products, with intent to defraud, in violation of 21 U.S.C. § 610(c). The complaint further alleges that on July 9, 1999, United States District Judge Leon Jordan imposed upon the respondent a sentence of five years probation and $20,000 fine for those two felony convictions.

The Acts provide that inspection services may be indefinitely withdrawn if it is determined, after opportunity for a hearing, that the respondent is unfit to engage in any business requiring inspection under the Acts because the respondent has been convicted, in any Federal or State court, of any felony. 21 U.S.C. § 671 and 21 U.S.C. § 467. The complaint stated that the respondent had been determined, by reason of the two felony convictions, to be unfit to engage in any business requiring inspection under the Acts. Complaint, ¶ IV.

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the complaint to the respondent by certified mail on May 22, 2000. On June 29, 2000, the Hearing Clerk notified the respondent that their answer to the

complaint had not been received within the required time. 7 C.F.R. § 1.136(a). 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 the allegations. By this failure to file a timely answer, respondent has admitted the allegations of the complaint. Pursuant to section §1.139 of the rules of practice (7C.F.R. § 1.139) the failure to file an answer also constitutes a waiver of hearing and requires the complainant to file a proposed decision, along with a motion for the adoption thereof.

Accordingly, respondent has waived his opportunity for a hearing and the material allegations alleged in the complaint are adopted as set forth herein as the Findings of Fact. This Decision and Order 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. Jay and Boots Meats, Inc. is, or at all times material herein was, a corporation organized and existing under the laws of the State of Tennessee.

2. Jay and Boots Meats, Inc. operates, or at all times material herein operated, a meat and poultry processing establishment (Establishment 8079/P-8079) at 3701 Neal Road, Knoxville, Tennessee 37918.

3. Jay and Boots Meats, Inc. is the recipient of services provided under Title I of the FMIA and the PPIA at said establishment.

4. On April 20, 1999, in the United States District Court for the Eastern District of Tennessee, respondent pled guilty to one felony count for preparing adulterated and mislabeled meat food products for commerce, with intent to defraud, in violation of 21 U.S.C. § 610(a); and one felony count for selling and transporting in commerce adulterated and misbranded meat food products, with intent to defraud, in violation of 21 U.S.C. § 610(c).

5. On July 9, 1999, a federal court imposed upon respondent a sentence of 5 years probation and $20,000 fine for the two felony convictions described in paragraph 4 above.

Conclusion

By reasons of the findings of fact, and pursuant to section 401 of the FMIA (21 U.S.C. § 671) and section 18 of the PPIA (21 U.S.C. § 467), respondent is unfit to engage in any business requiring inspection under the FMIA and the PPIA.

Order

Therefore, the following Order is issued:

Federal inspection services provided to respondent at its meat and poultry processing establishment (establishment 8079/P-8079) in Knoxville, Tennessee, pursuant to the authority of Title I of the FMIA and the PPIA, are hereby indefinitely withdrawn.

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 December 8, 2000.-Editor]

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HORSE PROTECTION ACT

In re: JOSEPH SPENCER.
HPA Docket No. 00-0009.
Decision and Order filed June 29, 2000.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This proceeding was instituted under the Horse Protection Act, as amended (15 U.S.C. § 1821 *et seq*.)(the "Act"), 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.

The Hearing Clerk served on the respondent, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). 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 said respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

Respondent Joseph Spencer is an individual whose mailing address is Post Office Box 84, Pine Ridge, Kentucky 41360, and at all times mentioned herein was the owner of the horse known as "Push Light." On February 5, 2000, respondent Joseph Spencer offered "Push Light," for sale at the 2000 Kentucky After Christmas Sale in Lexington, Kentucky (the "Tattersalls Sale"), as entry number 855.

Conclusions of Law

On February 5, 2000, respondent Joseph Spencer offered "Push Light," for sale at the Tattersalls Sale, as entry number 855, while the horse was sore, in violation of section 5(2)(C) of the Act (15 U.S.C. § 1824(2)(C)).

Order

Respondent Joseph Spencer is assessed a civil penalty of $2,000, and is disqualified for one year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction.[3]

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final August 8, 2000.-Editor]

In re: BRUCE J. SIEDLECKI, JEFFREY L. GREEN, AND CHARLES R. GREEN, d/b/a CHARLIE GREEN STABLES.
HPA Docket No. 00-0004.
Decision and Order filed July 3, 2000.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This proceeding was instituted under the Horse Protection Act, as amended (15 U.S.C. § 1821 *et seq*.)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act.

The Hearing Clerk served on the respondents, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondents were 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. Respondent Bruce J. Siedlecki has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the

[3]"Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in any area where spectators are not allowed, and financing the participation of others in equine events.

complaint, which are admitted by said respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

Respondent Bruce J. Siedlecki is an individual whose mailing address is 379 Riverbend Road, Shelbyville, Tennessee 37160, and at all times material herein was the owner of the horse known as "I Like Cash." On June 19, 1999, respondent Bruce J. Siedlecki exhibited "I Like Cash" as Entry No. 166 in Class No. 11, at the Eagleville Lions Club Horse Show in Eagleville, Tennessee (the "Eagleville Show").

Conclusions of Law

On June 19, 1999, respondent Bruce J. Siedlecki exhibited "I Like Cash" as Entry No. 166 in Class No. 11, at the Eagleville Show, while the horse was sore, in violation of section 5(2)(A) of the Act (15 U.S.C. § 1824(2)(A)).

Order

1. Respondent Bruce J. Siedlecki is assessed a civil penalty of $2,000.

2. Respondent Bruce J. Siedlecki is disqualified for one year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in any area where spectators are not allowed, and financing the participation of others in equine events.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final August 15, 2000.-Editor]

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PLANT QUARANTINE ACT

In re: TAQUERIA La MICHOACANA.
P.Q. Docket No. 99-0038.
Decision and Order filed May 26, 2000.

James Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [herein Complainant], instituted this administrative proceeding under 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) [herein the Acts], the regulations promulgated thereunder (7 C.F.R. §§ 301.11(b), 319.56-2ff), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statues (7 C.F.R. §§ 1.130-1.151) [herein the Rules of Practice], by filing a Complaint on April 29, 1999.

The Complaint alleged that on January 22, 1999, Taqueria La Michoacana [herein Respondent] violated the Acts by moving 5 boxes of Mexican Hass avocados from Chicago, Illinois to Muscatine, Iowa, because such movement is prohibited. Federal Regulations provide that no person shall move any plant or plant part from a quarantined State into or through any State not quarantined with respect to that plant or plant part. 7 C.F.R. § 301.11. Federal Regulations prohibit the distribution of Mexican Hass avocados outside of the following States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. 7 C.F.R. § 319.56-2ff(a)(3). The movement of each box of Mexican Hass avocados outside of the States quarantined for Mexican Hass avocados is a separate violation of the Acts. Pursuant to section 163 of the Plant Quarantine Act, the Complainant is authorized to assess a civil penalty of $1,000 for each violation of the Act. 7 U.S.C. § 163. Therefore the maximum civil penalty which could be assessed in these proceedings is $5,000.

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the Complaint to Respondent by certified mail on April 30, 1999. On June 15, 1999, the Hearing Clerk notified Respondent that their answer to the Complaint had not been received within the required time. 7 C.F.R. § 1.136(a). 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 the allegations. By this failure to file a timely 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. The mailing address of Taqueria La Michoacana is 813 Oregon Street, Muscatine, Iowa 52761.

2. On January 22, 1999, Taqueria La Michoacana, Respondent, moved 5 boxes of Mexican Hass avocados from Chicago, Illinois to Muscatine, Iowa.

Conclusion

It is 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 responsibility for achieving the congressional purpose." *S.S. Farms Linn County, Inc*., 50 Agric. Dec. 476 (1991).

The success or failure of the programs designed to protect America's agriculture by the prevention, control and eradication of plant pests is dependent upon the compliance of individuals such as the Respondent. Without the adherence of these individuals to Federal Regulations concerned with the prevention of the spread of plant pests, the risk of the undetected spread of plant pests is greatly increased. The imposition of sanctions in cases such as this are extremely important in the prevention of the spreading of plant pests. The sanctions must be substantial enough to be meaningful. This is important not only to insure that a particular Respondent will not again violate the regulations, but that the sanction will also deter others in similar situations. These proceedings address five violations of the Acts. A single violation of the Acts could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. This suggests the need for a severe sanction to serve as an effective deterrent to violations.

Complainant believes the compliance and deterrence can now be achieved only with the imposition of the $500 civil penalty requested. Complainant's

recommendation "as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry." *In re S.S. Farms Linn County, Inc*., *et al*., 50 Agric. Dec. 476 (1991)).

Complainant 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). "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 Kaplinsky*, 47 Agric. Dec. 629 (1988). Furthermore, "if the person cannot pay the penalty imposed, arrangements can be made to pay the civil penalty over a period of time." *Id*. at 633.

Under USDA's sanction policy "great weight is given to the recommendation of the officials charge with the responsibility for administering the regulatory program." *In re Spencer Livestock Commission Co*., 46 Agric. Dec. 268, 447, *aff'd*, 841, F.2d 1451 (9th Cir. 1988). "In order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws." *In re Capistrano*, 45 Agric. Dec. 2196, 2198 (1986). *Accord*, *In re Vallata*, 45 Agric. Dec. 1421 (1986).

Therefore, by reason of the facts contained in the Findings of Fact above, I find that the Respondent has violated the Acts and the regulations (7 C.F.R. §§ 301.11(b), 319.56-2ff).

Therefore, the following Order is issued.

Order

Taqueria La Michoacana is hereby assessed a civil penalty of five hundred dollars ($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:

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 July 7, 2000.-Editor]

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In re: VERONICA ARRIAGO.
P.Q. Docket No. 99-0050.
Decision and Order filed May 30, 2000.

Rick Herndon, 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 movement of fruit 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, 156-165 and 167) (Acts), and the regulations promulgated under the Acts, by a complaint filed on July 9, 1999, by the 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. Veronica Arriago, herein referred to as the respondent, is an individual whose mailing address is 144 Renwich Street, Newburgh, New York 12550.

2. On or about July 27, 1998, at J.F. Kennedy International Airport, Jamaica, New York, respondent imported ten (10) mangoes from Mexico into the United States in violation of 7 C.F.R. § 319.56 because importation of mangoes from Mexico into the United States 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 seven hundred and fifty dollars ($750.00). 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. 99-0050.

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 July 9, 2000.-Editor]

In re: ESTELA OLVERA-RIOS.
P.Q. Docket No. 00-0002.
Decision and Order filed July 31, 2000.

Howard Levine, 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 Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167) and 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 Estela Olvera-Rios, respondent, on November 26, 1999, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, and sent via certified mail to the Respondent on November 30, 1999. On January 4, 2000, the Complaint was returned to the Hearing Clerk marked "unclaimed." On January 11, 2000, the complaint was mailed to Respondent via first class mail. Respondent has not filed an answer to date.

Pursuant to section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), the complaint is deemed to have been received by respondent on January 11, the date of remailing by ordinary mail. Furthermore, 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. Estela Olvera-Rios, hereinafter referred to as the respondent, is an individual with a mailing address of 82449 Bliss 3, Indio, CA 92201.

2. On or about August 28, 1997, the respondent violated 7 C.F.R. § 319.56(c) of the regulations by importing thirty (30) fresh pears, four (4) avocados, five (5) pitayas, and ten (10) fresh limes from Mexico into the United States, importation of which is prohibited.

3. On or about August 28, 1997, the respondent violated 7 C.F.R. § 319.56-3(a) of the regulations by importing one (1) mango from Mexico into the United States without a permit.

4. On or about August 28, 1997, the respondent violated 9 C.F.R. § 94.9(b) by importing two (2) pounds of Chorizo from Mexico into the United States without the required certificate.

Conclusion

By reason of the facts contained in paragraphs one and two above, Estela Olvera-Rios, respondent, has violated 7 C.F.R. § 319.56-3(a).

Therefore, the following order is issued.

Order

Estala Olvera-Rios, respondent, is hereby assessed a civil penalty of three thousand dollars ($3000). This penalty shall be payable to "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 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 September 2, 2000.-Editor]

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In re: BRONCO PRODUCE CORP., d/b/a J&J PRODUCE.
P.Q. Docket No. 00-0011.
Decision and Order filed August 16, 2000.

James Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued Dorothea A. Baker, Administrative Law Judge.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [herein the complainant], instituted this administrative proceeding under 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) [herein the Acts][1], the regulations promulgated thereunder (7 C.F.R. §§ 301.11(b), 319.56-2ff), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statues (7 C.F.R. §§ 1.130-1.151) [herein the Rules of Practice], by filing a complaint on June 1, 2000.

The complaint alleged that on December 9, 1999, Bronco Produce Corp., d/b/a J&J Produce [herein the respondent], violated the Acts by moving 12 boxes of Mexican Hass avocados from the Bronx, New York, to Guanynabo, Puerto Rico. The complaint further alleges that on December 16, 1999, respondent violated the Acts by moving 26 boxes of Mexican Hass avocados from the Bronx, New York, to Guanynabo, Puerto Rico. Federal regulations provide that no person shall move any plant or plant part from a quarantined State into or through any State not quarantined with respect to that plant or plant part. 7 C.F.R. § 301.11. Federal regulations prohibit the distribution of Mexican Hass avocados outside of the following States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. 7 C.F.R. §319.56-2ff(a)(3). The movement of each box of Mexican Hass avocados outside of the States quarantined for Mexican Hass avocados is a separate violation of the Acts. Pursuant to section 163 of the Plant Quarantine Act, the complainant is authorized to assess a civil penalty of $1,000 for

[1] I note that while section 438(a) of the Plant Protection Act, enacted on June 20, 2000, repealed the Act of August 20, 1912 (commonly known as the "Plant Quarantine Act:(7 U.S.C. 151-164a, 167) and the Federal Plant Pest Act (7 U.S.C. 150aa *et seq.*, 7 U.S.C. 147a note), section 438(c) of that Act states that "Regulations issued under the authority of a provision of law repealed by subsection (a) shall remain in effect until such time as the Secretary issues a regulation under section 434 [Regulations and Orders] that supersedes the earlier regulation."

each violation of the Act. 7 U.S.C. § 163. Therefore the maximum civil penalty which could be assessed in these proceedings is $38,000.[2]

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the complaint to the respondent by certified mail on June 1, 2000. After receiving an extension of time to file an answer in this matter,[3] respondent filed an answer on July 7, 2000.

In its answer, respondent admitted that there was a "shipment of a few cases of Mexican avocadoes (sic) to Puerto Rico" and that it "involved 38 cases of the fruit and shipped only with the intention to service our customer in Puerto Rico." A copy of an sworn statement made by Leoandro E. Fernandez to Michael F. Connors, an Investigator with the Investigative and Enforcement Services, USDA, was attached, and made part of the answer, by the respondent. In his sworn statement, Mr. Fernandez identified himself as "the President/Owner of Bronco Produce Corp. d/b/a J&J Produce located at 257-B NYC Terminal Market, Hunts Point, NY 10474." Mr. Fernandez further states his records show that there were two sales to Puerto Rico: one sale on December 9, 1999, involving 12 boxes, and a second sale on December 14, 1999, involving 26 boxes.

The admission by the answer of all the material allegations of fact contained in the complaint constitutes a waiver of hearing. 7 C.F.R. § 1.139. On July 20, 2000, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), complainant filed a proposed decision, along with a motion for the adoption thereof, both which were served upon the respondent by the Hearing Clerk. There having been no meritorious objections filed, the material allegations alleged in the complaint, and admitted to in the answer, 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.

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[2] As already noted, section 438(a) of the Plant Protection Act, enacted on June 20, 2000, repealed the Act of August 20, 1912 (commonly known as the "Plant Quarantine Act:(7 U.S.C. 151-164a, 167) and the Federal Plant Pest Act (7 U.S.C. 150aa *et seq.*, 7 U.S.C. 147a note). However, section 109 of Title One, United States Code (1 U.S.C. § 109) provides, in relevant part, that: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

[3] An Order Extending Time to File Answer, issued June 16, 2000, extended the time for respondent to file an answer to the complaint until July 10, 2000.

Finding of Fact

1. The mailing address of Bronco Produce Corp., d/b/a J&J Produce, is 257-B NYCTerminal Market, Hunts Point, Bronx, New York 10474.

2. On December 9, 1999, respondent moved 12 boxes of Mexican Hass avocados from the Bronx, New York, to Guanynabo, Puerto Rico.

3. On December 16, 1999, respondent moved 26 boxes of Mexican Hass avocados from the Bronx, New York, to Guanynabo, Puerto Rico.

Conclusion

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*., 50 Agric. Dec. 476 (1991).

The success or failure of the programs designed to protect America's agriculture by the prevention, control and eradication of plant pests is dependent upon the compliance of individuals such as the respondent. Without the adherence of these individuals to Federal regulations concerned with the prevention of the spread of plant pests, the risk of the undetected spread of plant pests is greatly increased. The imposition of sanctions in cases such as this are extremely important in the prevention of the spreading of plant pests. The sanctions must be substantial enough to be meaningful. This is important not only to insure that a particular respondent will not again violate the regulations, but that the sanction will also deter others in similar situations. These proceedings address 38 violations of the Acts. A single violation of the Acts could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. This suggests the need for a severe sanction to serve as an effective deterrent to violations.

Complainant believes that compliance and deterrence can now be achieved only with the imposition of the $3,800 civil penalty requested. Complainant's recommendation "as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry." *In re S.S. Farms Linn County, Inc*., *et al*., 50 Agric. Dec. 476 (1991).

Complainant 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). "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 Kaplinsky*, 47 Agric. Dec. 629 (1988). Furthermore, "if the person cannot pay the penalty imposed, arrangements can be made to pay the civil penalty over a period of time." *Id*. at 633.

Under USDA's sanction policy "great weight is given to the recommendation of the officials charge with the responsibility for administering the regulatory program." *In re Spencer Livestock Commission Co*., 46 Agric. Dec. 268, 447, *aff'd*, 841 F.2d 1451 (9th Cir. 1988). "In order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws." *In re Capistrano*, 45 Agric. Dec. 2196, 2198 (1986). *Accord*, *In re Vallata*, 45 Agric. Dec. 1421 (1986).

Therefore, by reason of the facts contained in the Findings of Fact above, I find that the respondent has violated the Acts and the regulations (7 C.F.R. §§ 301.11(b), 319.56-2ff).

Therefore, the following Order is issued.

Order

Bronco Produce Corp., d/b/a'. J&J Produce, is hereby assessed a civil penalty of three thousand, eight hundred dollars ($3,800.00). 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
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 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 September 26, 2000.-Editor]

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In re: HERMAN E. HOFFMAN, JR., d/b/a HERMAN AND ASSOCIATES, AND BILLY G. TURNER, d/b/a WES AND MOM TRUCKING.
P.Q. Docket No. 00-0010.
Decision and Order filed August 28, 2000.

James 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 violations of the regulations governing the importation of plant pests and related articles (7 C.F.R. § 301.81 *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 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 the regulations promulgated thereunder, by a complaint filed on June 1, 2000, 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. Billy G. Turner, d/b/a Wes and Mom Trucking, respondent, is an individual whose mailing address is 110 3rd Street, Moore, TX 78057.

2. On or about August 25, 1998, the respondent, in violation of 7 C.F.R. §

301.81-4(a), moved regulated articles (a used bulldozer and trailer, soil) from the quarantined area of Montgomery county, Texas, into the nonquarantined area of Arizona without a certificate or limited 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 Act (7 C.F.R. § 301.81 *et seq*.). Therefore, the following Order is issued.

Order

The respondent, Billy G. Turner, d/b/a Wes and Mom Trucking, is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This civil 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. 00-0010

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 October 10, 2000.-Editor]

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CONSENT DECISIONS

(Not published herein - Editor)

ANIMAL WELFARE ACT

Gary M. Hicks, d/b/a It's Alive. AWA Docket No. 00-0029. 7/31/00.

Donald D. Foster. AWA Docket No. 99-0040. 7/31/00.

Loki Clan Wolf Refuge, Inc., a New Hampshire corporation; and G. Fredric Keating, an individual. AWA Docket No. 98-0017. 8/4/00.

City of Dallas, Texas. AWA Docket No. 99-0027. 8/25/00.

Thomas W. Atchison, Carolyn D. Atchison, and Animal House Zoological Park. AWA Docket No. 99-0033. 11/3/00.

Oregon Zoo. AWA Docket No. 01-0005. 11/15/00.

Johnnie F. Hargrove, William F. Hargrove, and Bio Research Supply. AWA Docket No. 99-0018. 12/1/00.

Norman Jean Klushman. AWA Docket No. 00-0021. 12/12/00.

Consent Decision as to Dean Shocker. AWA Docket No. 99-0034. 12/12/00.

FEDERAL MEAT INSPECTION ACT

Marathon Enterprises, Inc., and Gregory Paplexis. FMIA Docket No. 01-0001. 11/20/00.

HORSE PROTECTION ACT

James R. Nelms and J.T. Nelms. HPA Docket No. 99-0019. 7/7/00.

Consent Decision as to Raymond F. Akin. HPA Docket No. 99-0034. 8/18/00.

Consent Decision as to Bobby W. Yokley. HPA Docket No. 00-0012. 8/28/00.

Ronnie Spears, an individual; Ronnie Spears Stables, also known as Spears Stables; and Billy Boyd, an individual. HPA Docket No. 99-0017. 9/12/00.

Consent Decision as to Mark A. Akin, Camille C. Akin, and Akin Equine Veterinary Services. HPA Docket No. 99-0034. 9/14/00.

Danny R. French. HPA Docket No. 00-0010. 11/3/00.

Consent Decision as to Wade Crum. HPA Docket No. 00-0015. 11/17/00.

Rebecca Ann Barnes. HPA Docket No. 99-0015. 11/24/00.

Consent Decision as to Ernest Warner and Carolina Equine Investors, LLP. HPA Docket No. 01-0002. 12/1/00.

Consent Decision as to Benny Johnson, Sherry Johnson and Benny Johnson Stables. HPA 00-0018. 12/5/00.

PLANT QUARANTINE ACT

Distribuidora Nacional de Frutas y Vegetales, Inc., d/b/a C.J. Fidalgo Produce Co. P.Q. Docket No. 00-0009. 7/14/00.

La Principal and La Bodega. P.Q. Docket No. 00-0007. 7/17/00.

Durango's Products, Inc., d/b/a Junior Produce. P.Q. Docket No. 99-0007. 7/27/00.

KLM Royal Dutch Airlines. P.Q. Docket No. 00-0008. 8/25/00.

James F. Pontari & Bros. P.Q. Docket No. 99-0009. 9/18/00.

Latino Americana Carniceria. P.Q. Docket No. 99-0018. 9/18/00.

Tienda Leon. P.Q. Docket No. 99-0027. 9/28/00.

W. R. Vernon Produce Co. P.Q. Docket No. 99-0010. 10/18/00.

Opuulani Kuluhiwa. P.Q. Docket No. 00-0006. 10/27/00.

Maria's Fashion. P.Q. Docket No. 99-0015. 11/17/00.

Nick Penachio Co., Inc., d/b/a The Best LaMejor Comida. P.Q. Docket No. 01-0002. 11/17/01.

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AGRICULTURE DECISIONS

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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 adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. 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 number, e.g., AWA Docket No. 99-0022, 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 consent decisions is included. Consent 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: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443.

LIST OF DECISIONS REPORTED

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PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: CHARLES L. HAMBORSKY.
P&S Docket No. D-98-0036.
Decision and Order filed July 3, 2000.

Eric Paul, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.), hereinafter referred to as the Act, instituted by a complaint filed by the 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.

Copies of the complaint and the Hearing Clerk's letter of service dated August 28, 1998 with an enclosed copy of the Rules of Practice (7 C.F.R. § 1.130 *et seq*.) governing proceedings under the Act were served upon Respondent by personal service on March 30, 2000. A certificate of service was filed with the Hearing Clerk on April 3, 2000. 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 would constitute an admission of all the material allegations contained in the complaint. Respondent was required under section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) to file an answer by April 19, 2000. Respondent failed to file an answer by this date or request an extension of time in which to file an answer. The material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer within the time prescribed in 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. Charles L. Hamborsky is an individual whose business mailing address was 211 South 12th Street, Connellsville, PA 15425-2553, and whose present mailing address is 210 Fourth Ave., Scottdale, PA 15683.

2. Charles L. Hamborsky, hereinafter referred to as the 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) Not registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

3. The Respondent was notified by certified mail that he was required to register as a dealer and obtain adequate bond coverage or its equivalent before continuing his livestock operations subject to the Act. The Respondent submitted an application for registration as a dealer on May 27, 1997, that was not accepted because the Respondent failed to submit the required bond or bond equivalent with his application. Notwithstanding repeated notice, the Respondent has continued to engage in the business of a dealer without obtaining an adequate bond or its equivalent.

4. The Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth below, purchased livestock and failed to pay, when due, the full purchase price of the livestock.

Purchase Date	Livestock Seller	No. of Head	Livestock Purchase Amount	Payment Due per § 409	Credit From Payments on Account	Date of Last Payment	Unpaid Balance
25-Nov-97	Mercer Livestock Auction, Inc.	22	$8,316.92	26-Nov-97	$5,377.68	06-Feb-98	$ 2,939.24
02-Dec-97	Mercer Livestock Auction, Inc.	24	7,805.91	03-Dec-97			7,805.91
09-Dec-97	Mercer Livestock Auction, Inc.	19	6,574.72	10-Dec-97			6.574.72
16-Dec-97	Mercer Livestock Auction, Inc.	11	3,820.21	17-Dec-97			3,820.21
23-Dec-97	Mercer Livestock Auction, Inc.	25	7,450.48	24-Dec-97			7,450.48 $28,590.56

20-Oct-97	New Wilmington Livestock Auction, Inc.	23	$8,320.67	21-Oct-97	$6,995.13	20-Feb-98	$ 1,325.54
27-Oct-97	New Wilmington Livestock Auction, Inc.	25	9,320.80	28-Oct-97			9,320.80
03-Nov-97	New Wilmington Livestock Auction, Inc.	15	5,328.55	04-Nov-97			5,328.55
10-Nov-97	New Wilmington Livestock Auction, Inc.	28	8,133.44	12-Nov-97			8,133.44
17-Nov-97	New Wilmington Livestock Auction, Inc.	38	$9,145.07	18-Nov-97			$ 9,145.07
24-Nov-97	New Wilmington Livestock Auction, Inc.	19	6,569.33	25-Nov-97			6,569.33
01-Dec-97	New Wilmington Livestock Auction, Inc.	5	1,272.40	02-Dec-97			1,272.40
08-Dec-97	New Wilmington Livestock Auction, Inc.	18	4,041.52	09-Dec-97			4,041.52
15-Dec-97	New Wilmington Livestock Auction, Inc.	22	6,958.61	16-Dec-97			6,958.61
29-Dec-97	New Wilmington Livestock Auction, Inc.	3	1,133.75	30-Dec-97			1,133.75 $53,229.01

5. As of February 27, 1998, the Respondent had failed to pay $81,819.57 of the full purchase price of livestock purchased in the above transactions.

6. The Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because the Respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay the checks when presented.

Livestock Seller	Purchase Date	Livestock Purchase Amount	Check Number	Check Date	Check Amount	Date Returned NSF
Mercer Livestock Auction, Inc.	09-Dec-97	$6,574.72	115	16-Dec-97	$6,574.72	23-Dec-97[1]
Mercer Livestock Auction, Inc	16-Dec-97	3,820.21	116	23-Dec-97	3,820.21	31-Dec-97[1]
New Wilmington Livestock Auction, Inc.	03-Nov-97	5,328.55	4	03-Nov-97	5,328.55	20-Jan-98[1]
New Wilmington Livestock Auction, Inc.	10-Nov-97	8,133.44	none	10-Nov-97	8,133.44	15-Jan-98[1]
New Wilmington Livestock Auction, Inc.	17-Nov-97	9,145.07	none	17-Nov-97	9,145.07	15-Jan-98[1]
New Wilmington Livestock Auction, Inc.	24-Nov-97	6,569.33	105	24-Nov-97	6,569.33	16-Dec-97[1]
New Wilmington Livestock Auction, Inc.	01-Dec-97	1,272.40	111	08-Dec-97	1,272.40	22-Dec-97[1]
New Wilmington Livestock Auction, Inc.	08-Dec-97	4,041.52	112	08-Dec-97	4,041.52	29-Dec-97[1]

[1]These NSF checks, which were issued in purported payment for livestock purchases found unpaid in Finding of Fact 4 above, remain unpaid and were not replaced.

Conclusions

By reason of the facts found in Finding of Fact 3 above, Respondent has wilfully violated section 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).

By reason of the facts found in Findings of Fact 4 through 6 above, Respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Order

Respondent Charles L. Hamborsky his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which registration and bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without registering and filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;
2. Failing to pay, when due, the full purchase price of livestock;
3. Failing to pay the full purchase price of livestock; and
4. Issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented.

Respondent Charles L. Hamborsky shall not be registered under the Act for a period of 5 years and, pursuant to section 303 of the Act (7 U.S.C. § 203), Respondent is prohibited from operating without being registered. Provided, however, that upon application to the Packers and Stockyards Programs, GIPSA, a supplemental order may be issued permitting the registration of Respondent at any time after the initial 120 days of this prohibition period upon demonstration by Respondent that all livestock sellers have been paid in full and upon the submission of the required bond. Provided further, that upon application to the Packers and Stockyards Programs, GIPSA, a supplemental order may be issued permitting the salaried employment of Respondent Charles L. Hamborsky by another registrant or packer after the expiration of the initial 120 days of this 5 year period and upon demonstration of circumstances warranting modification of this 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 of this decision shall be served upon the parties.
[This Decision and Order became final August 9, 2000.-Editor]

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In re: ROBERT SCHENK.
P&S Docket No. D-00-0004.
Decision and Order filed August 16, 2000.

Mary Hobbie, 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 Administrator, Grain Inspection, Packers and Stockyards Administration, 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 on April 11, 2000. 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 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. Robert Schenk, hereinafter referred to as the Respondent, is a individual doing business in the State of Michigan, and whose business mailing address is 4435 E. Lochalpine, Ann Arbor, Michigan 48106.

2. Respondent is, and at all times material herein was:

(a) Engaged in business as a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis.

3. Respondent, in connection with his operations subject to the Act, was served with a letter of notice on June 23, 1999, as set forth in paragraph II in the complaint informing him that he was required to obtain a surety bond or its equivalent in the amount of $50,000.00 before continuing his livestock operation to secure the performance of its livestock obligations under the Act. Notwithstanding such notice, Respondent failed to obtain the bond and has continued to engage in the business of a market agency without maintaining an adequate bond or its equivalent as required by the Act and regulations.

Conclusions

By reason of the facts found in the Finding of Facts herein, Respondent has willfully violated section 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 Robert Schenk, 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.

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 two thousand five hundred dollars ($2,500.00). 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 October 27, 2000.-Editor]

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In re: JOHN CARL STEPHENS, d/b/a CARL STEPHENS.
P&S Docket No. D-00-0009.
Decision and Order filed September 28, 2000.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, 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 Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that Respondent willfully 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 and Notice of Hearing, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision Without Hearing by Reason of Default, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. John Carl Stephens, d/b/a Carl Stephens (hereinafter referred to as "Respondent"), is an individual whose business mailing address is P.O. Box 513, Irwinville, Georgia 31760.

2. Respondent was at all times material herein:

(a) Engaged in the business of a market agency, buying livestock on a commission basis, and a dealer, buying and selling livestock for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock on a commission basis and as a dealer to buy livestock in commerce for his own account.

3. As more fully set forth in paragraph II of the complaint, Respondent, in connection with his operations subject to the Act, purchased livestock and in purported payment therefor, 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, purchased livestock and failed to pay, when due, the full purchase price of such livestock, and failed to pay for livestock.

Conclusions

By reason of the facts alleged in Finding of Fact 3 herein, Respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Order

Respondent, John Carl Stephens, d/b/a Carl Stephens, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from:

1. Issuing insufficient funds checks in payment for livestock purchases;
2. Failing to pay the full purchase price for livestock purchases; and
3. Failing to pay, when due, the full purchase price for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of five (5) years. Provided, however, that upon application to Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension at any time after 90 days, upon demonstration that all livestock sellers or shippers identified in the complaint have been paid in full. Provided, further, that this order may be modified upon application to Packers and Stockyards Programs to permit the salaried employment of Respondent by another registrant or packer after the expiration of 90 days of this suspension term and upon demonstration of circumstances warranting modification of the order.

The provisions of this order shall become effective on the sixth day after service of this order on Respondent.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final November 6, 2000.-Editor]

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PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDER

In re: TOM HODGE.
P&S Docket No. D-98-0004.
Supplemental Order filed October 20, 2000.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

On April 20, 1998, an Order was issued in the above-captioned matter which, *inter alia*, suspended Respondent as a registrant under the Act until such time as Respondent demonstrated that he was in full compliance with the bonding requirements under the Act and the Regulations, and upon demonstration that Respondent is in full compliance with such bonding requirements, a Supplemental Order should be issued terminating the suspension.

Respondent Tom Hodge has demonstrated that he is in full compliance with the bonding requirements under the Act and the Regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the Order issued April 20, 1998 is terminated. The Order shall remain in full force and effect in all other respects.

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CONSENT DECISIONS

(Not published herein - Editor)

PACKERS AND STOCKYARDS ACT

Danny L. Johnson. P&S Docket No. D-00-0002. 11/20/00.

Central Livestock Association, Inc. P&S Docket No. D-00-0014. 12/1/00.

Carl D. Brittingham, d/b/a Wyoming Livestock Auction. P&S Docket No. D-01-0001. 12/15/00.

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AGRICULTURE DECISIONS

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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 adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. 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 number, e.g., AWA Docket No. 99-0022, 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 consent decisions is included. Consent 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: Editor, Agriculture Decisions, 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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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

PMD BROKERAGE CORP. v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 00-1163.
Decided December 19, 2000.

(Cite as 234 F.3d 48 (D.C. Cir. 2000)).

Rules of practice – Oral decision – Bench decision – Issuance – Service – Timeliness of appeal.

The United States Court of Appeals for the District of Columbia Circuit reversed the Judicial Officer's order denying late appeal to the Judicial Officer. The Judicial Officer found PMD Produce Brokerage Corporation (PMD) filed its appeal to the Judicial Officer of an administrative law judge's oral decision more than 35 days after the administrative law judge issued the decision. The Judicial Officer concluded that, under the Rules of Practice, the administrative law judge's oral decision had become effective and PMD's appeal was not timely filed. The Court found 7 C.F.R. §§ 1.142(c)(2) and 1.145(a) ambiguous because the Rules of Practice do not indicate that "issuance" of an oral decision under 7 C.F.R. § 1.142(c)(2) is considered "receiving service" for the purposes of appeal under 7 C.F.R. § 1.145(a). The Court granted PMD's petition because neither the Rules of Practice nor any other action by the Secretary provided fair notice to PMD that "issuance" of the administrative law judge's oral decision under 7 C.F.R. § 1.142(c) was "receiving service" for purposes of appeal to the Judicial Officer under 7 C.F.R. § 1.145(a).

United States Court of Appeals
District of Columbia Circuit

Before: **WILLIAMS**, **ROGERS** and **TATEL**, Circuit Judges.
Opinion for the Court filed by Circuit Judge **ROGERS**.
ROGERS, Circuit Judge:

PMD Produce Brokerage Corporation challenges the dismissal, as untimely, of its appeal of an administrative law judge's decision that it violated the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a-s ("PACA").[1] PMD contends that the Secretary of Agriculture's Rules of Practice Governing Formal Adjudicatory Proceedings, *see* 7 C.F.R. §§ 1.142(c), 1.145(a) (2000), are ambiguous regarding

[1] *See In re PMD Brokerage Corp.,* PACA Docket No. D-99-0004 (Dep't of Agric. March 31, 2000); *In re PMD Brokerage Corp.,* PACA Docket No. D-99-0004, 2000 WL 202696 (Dep't of Agric. Feb. 18, 2000).

the time to appeal and, further, that it reasonably relied on statements of the Administrative Law Judge and the Hearing Clerk regarding the deadline for filing an administrative appeal. Because §§ 1.142(c) and 1.145(a) are ambiguous, as confirmed by contrary interpretations within the Department of Agriculture, we hold that the Secretary did not give fair notice of his interpretation of § 1.142(c)(2) as requiring an appeal to be filed within 30 days of issuance of an administrative law judge's oral decision. Accordingly, because the Secretary was arbitrary and capricious in dismissing PMD's appeal, we grant the petition.

I.

The Secretary, acting through the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, filed an administrative complaint on November 16, 1998, alleging that PMD had violated § 2(4) of PACA, 7 U.S.C. § 499b(4), by willfully failing repeatedly to make full payment promptly to 18 sellers of 633 lots of perishable agricultural commodities that it had purchased and received. On November 12, 1999, the Department filed a motion for a bench decision, a proposed findings of fact and conclusions of law, and a proposed order, in accordance with § 1.142(b) of the Secretary's Rules of Practice, 7 C.F.R. § 1.142(b).[2] After hearing testimony, the Administrative Law Judge orally announced his decision. The Judge found that PMD had violated PACA and recommended revocation of PMD's license as a dealer and merchant of perishable agricultural products under PACA, 7 U.S.C. §§ 499c, 499h(a). The Judge directed that his decision and order be published pursuant to the Rules of Practice and stated: "This decision will become final without further proceedings 35 days after service of this decision, unless [PMD] appeals this decision, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145)." The Judge thereafter excerpted his oral decision and filed the written excerpt on November 30, 1999.

By letter dated December 1, 1999 to PMD's counsel, the Hearing Clerk enclosed "a copy of the Bench Decision, issued . . . on November 30, 1999." The letter stated that "[e]ach 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." The

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[2]Section 1.142(b) provides, in relevant part:

> Prior to the Judge's decision, each party shall be afforded a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof.

7 C.F.R. § 1.142(b) (2000).

letter also instructed PMD "to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal."

On January 7, 2000, PMD filed with the Department's Judicial Officer a petition seeking reversal of the Judge's decision, and, alternatively, a new hearing. Following receipt of the Department's response, the Judicial Officer denied PMD's appeal for lack of jurisdiction. The Judicial Officer, relying on §§ 1.142(c)(2) & (4) of the Rules of Practice, found that the Judge's oral decision was issued on November 17, 1999 and became effective 35 days thereafter, on December 22, 1999. Because PMD's appeal was not filed before the decision became effective, the Judicial Officer ruled that he lacked jurisdiction to hear the appeal, citing Department precedent under the Rules of Practice.[3] Because he lacked jurisdiction to hear PMD's appeal, the Judicial Officer issued an order that the Judge's oral decision of November 17, 1999 was the final administrative order. The Judicial Officer denied PMD's petition for reconsideration.

II.

On appeal, PMD contends that the Secretary's Rules of Practice, specifically §§ 1.142(c)(4) and 1.145(a), are internally inconsistent.[4] The ambiguity arises, PMD maintains, because the Rules of Practice do not indicate that "issuance" of an oral decision under §§ 1.142(c)(2) and (4) is to be considered "receiving service" under § 1.145(a). PMD points out that § 1.142(c)(4) provides that an oral decision becomes effective 35 days after issuance, while § 1.145(a) provides that a party has 30 days after "receiving service" of the Judge's decision to appeal. "Clearly," PMD contends, "receiving service of the Judge's decision is a form of notice of entry requirement, that requires serving a copy of the written decision on the parties before the time to appeal begins to run." In addition, PMD contends that it reasonably relied on the statements by the Judge and the Hearing Clerk that the Judge's opinion did not become effective until 35 days after service because they

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[3]The Judicial Officer noted that the Secretary's interpretation of his Rules of Practice, treating time limits as jurisdictional, is consistent with the judicial construction of Federal Rule of Appellate Procedure 4(a)(1) and 4(a)(5)(A) and the Administrative Orders Review Act, *see* 28 U.S.C. § 2344, as interpreted in *Illinois Central Gulf Railroad Co. v. ICC,* 720 F.2d 958, 960 (7th Cir. 1983). *See Kidd v. District of Columbia*, 206 F.3d 35, 38 (D.C. Cir. 2000); *Energy Probe v. United States Nuclear Regulatory Comm'n,* 872 F.2d 436, 437 (D.C. Cir. 1989); *see also Marine Mammal Conservancy, Inc. v. USDA,* 134 F.3d 409, 410-11 (D.C. Cir. 1998).

[4]Although PMD's brief refers to § 1.142(a)(4), there is no such subsection and it is obvious that PMD intends to refer to § 1.142(c)(4).

would not intentionally misinform a party about the time to appeal. The court reviews the Secretary's decision dismissing PMD's appeal to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

The Secretary states that he has consistently interpreted the Rules of Practice to divest the Judicial Officer of jurisdiction to hear an appeal of an administrative law judge's decision that has become effective. *See, e.g., In re Toscony Provision Co.,* 43 Agric. Dec. 1106, 1108-09 (Dep't of Agric. 1984) (order denying late appeal) and Department orders cited. Further, he states that PMD had actual notice from the Judge's oral ruling on November 17, 1999 that his decision would be final in 35 days unless an appeal was filed pursuant to § 1.145. Having failed to file an appeal before December 22, 1999, the Secretary maintains that PMD's contention that the court should disregard the jurisdictional nature of § 1.142(c)(4) is meritless. In other words, although not expressly stated in his Rules of Practice, the Secretary has interpreted "issuance" of an oral decision under § 1.142(c)(4) to mean "receiving service" for purposes of § 1.145(a).

The Secretary explains, in his brief on appeal, that the bench decision procedures of § 1.142 are designed to allow expedited proceedings in disciplinary cases where the violation is so patent that "the usual opportunity for the parties to submit written findings of fact and conclusions of law is unnecessary." Under these circumstances, the Secretary contends, "[n]o good reasons exist for delaying the imposition of the order of the [J]udge." Perhaps not. Indeed, on the basis of this rationale, the court could readily view the Secretary's interpretation of § 1.142(c)(4) as reasonable. *Cf. Veg-Mix, Inc. v. USDA,* 832 F.2d 601, 608-09 (D.C. Cir. 1987). The question before the court, however, is not whether the Secretary's interpretation of the Rules of Practice is reasonable, but whether the Secretary has given fair notice of his interpretation that "issuance" of an oral opinion pursuant to § 1.142(c)(2) is "receiving service" for purposes of taking an appeal under § 1.145(a). *See United States v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998); *Rollins Environmental Servs. (NJ) Inc. v. EPA,* 937 F.2d 649 (D.C. Cir. 1991); *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n,* 790 F.2d 154 (D.C. Cir. 1986).

The dismissal of PMD's appeal implicates the Secretary's obligation to give fair notice because the sanction of dismissal of its appeal petition as untimely forecloses relief from revocation of its license under PACA. In *Satellite Broadcasting Co. v. FCC,* 824 F.2d 1 (D.C. Cir. 1987), the court explained:

> Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule. The

> dismissal of an application, we have held, is a sufficiently grave sanction to trigger this duty to provide clear notice.

Id. at 3 (citations omitted). In that case, an applicant for FCC licenses had failed to file its application in the proper location. *See id*. at 2-3. The court observed that the rules, taken as a whole, were conflicting. *Id*. at 2. Thus, while an "agency's interpretation [of its own rule] is entitled to deference, [ ] if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation." *Id*. at 4. Because the FCC had not provided fair notice of its interpretation of the relevant rules, the court held that it had acted arbitrarily and capriciously in dismissing the license applications, and that the applicant was entitled to reinstatement of the applications *nunc pro tunc*. *See id*.

Similarly, in *General Electric Co. v. EPA,* 53 F.3d 1324 (D.C. Cir. 1995), the court deferred to the agency's reasonable interpretation of its rules but held that the agency could not fine a private party for failure to comply with a rule interpretation that was "so far from a reasonable person's understanding of the regulations that [the regulations] could not have fairly informed GE of the agency's perspective." *Id*. at 1330. Most recently, in *Trinity Broadcasting of Florida, Inc. v. FCC,* 211 F.3d 618 (D.C. Cir. 2000), the court rejected the agency's contention that its regulation requiring an entity to be "minority-controlled," *id.* at 628, provided fair notice of its interpretation of the regulation as mandating that non-profit organizations demonstrate *de facto* minority control and not simply a majority-minority board. *See id*. at 625, 628-30. The court likewise rejected the agency's contentions that agency statements and other agency action provided fair notice of its interpretation. *See id*. at 628-31. Therefore, the court reversed the denial of an application for renewal of a broadcast license. *See Trinity Broadcasting*, 211 F.3d at 632.

Here, the question is whether the Secretary's rules gave PMD fair notice of the time within which it had to appeal the Judge's decision.[5] Two sections of the Secretary's Rules of Practice are implicated. Section 1.142, addressing when an Administrative Law Judge's decision becomes effective, provides in relevant part:

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[5]On appeal, the Secretary has abandoned the Judicial Officer's alternative position, in denying reconsideration, that PMD's appeal was untimely because it was filed 31 days after PMD was furnished a copy of the Bench Decision by the Hearing Clerk. PMD claims first, that it did not receive the Bench Decision until December 7, 1999, and second, that under agency precedent, the Judicial Officer can grant an extension of time "if an appeal [i]s inadvertently filed up to 4 days late, e.g., because of a delay in the mail system. . . ." *In re Scamcorp, Inc*., 55 Agric. Dec. 1395, 1996 WL 678862, at *6 (Dep't of Agric. Nov. 7, 1996); *see also id.* at *7.

> 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) (2000) (emphasis added).[6] Section 1.145, addressing appeals, provides in relevant part:

> 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) (2000) (emphasis added).

As the Secretary points out, §§ 1.142(c)(2) & (4) clearly describe when a Judge's opinion, whether oral or written, becomes effective. Similarly, § 1.145(a) clearly states there is a 30-day period within which to appeal the Judge's decision. But the triggering event under § 1.145(a) is "receiving service," and the Rules of Practice at no point state that "issuance" of an oral opinion under § 1.142(c)(2) is deemed "receiving service" for purposes of § 1.145(a). In other words, the Secretary's Rules of Practice are silent regarding whether "issuance" of an oral decision under § 1.142(c)(2) is "receiving service" for purposes of noting an appeal under § 1.145(a). Thus, PMD could not simply read the Rules of Practice and know that this was so. Nor would the purpose of expedition, which the Secretary asserts is the underlying rationale for the procedures in § 1.142(c), compel an interpretation of the regulations, much less give fair notice, that "issuance" is to be equated with "receiving service" under § 1.145(a). *Cf. Trinity Broadcasting,* 211 F.3d at 629-30.

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[6]Section 1.142 also provides:

> If the [Administrative Law Judge's] decision is announced orally, a copy thereof, excerpted from the transcript or recording, shall be furnished to the parties by the Hearing Clerk. Irrespective of the date such copy is mailed, the issuance date of the decision shall be the date the oral decision was announced.

7 C.F.R. § 1.142(c)(2) (2000).

At oral argument, the Secretary agreed that the period after which an opinion becomes effective is different from the period in which a party may note an appeal.

Of course, the Secretary may utilize means other than the language of his Rules of Practice to give adequate notice of his interpretation. *See, e.g., General Elec.*, 53 F.3d at 1329. However, the Secretary points to no action, such as public statements or pre-enforcement efforts, that would have informed PMD of the Secretary's interpretation. Instead, the statements by the Judge and the Hearing Clerk demonstrate that the Rules of Practice were ambiguous regarding the time period for appealing an oral bench decision. *See id.* at 1330-32. Each statement erroneously referred to "service" as the event triggering the 30-day appeal period and, consequently, neither statement informed PMD that the appeal period had been triggered by the Judge's oral issuance of his opinion on November 17, 1999. Such statements, it could be argued, justify application of a "unique circumstances" exception. *Prudential-Bache Securities, Inc. v. Fitch,* 966 F.2d 981, 984-86 (5th Cir. 1992) (construing Fed. R. App. P. 4(a)); *cf. Moore v. South Carolina Labor Bd.,* 100 F.3d 162, 164 (D.C. Cir. 1996). Under the unique circumstances doctrine, "appellate courts will excuse an untimely notice of appeal where the appellant could have filed a timely notice but was mislead to delay filing by a court order or ruling which purportedly extended or tolled the appeal deadline." *Id.* at 163.

In denying PMD's petition for reconsideration, the Judicial Officer made three principal points. First, he noted that PMD had been furnished with a copy of the Secretary's Rules of Practice, which are also published in the Federal Register, and that PMD's reliance on the statement of the Hearing Clerk was "misplaced." Yet the Rules themselves were, at best, unclear on the critical point for PMD. The lack of clarity was exacerbated by the Judge's statement, which appeared to be consistent with the statement of the Hearing Clerk.

Second, the Judicial Officer emphasized that the only decision issued by the Judge was announced at the November 17, 1999 hearing. The written Bench Decision later received by PMD was merely an excerpt from the transcript of the earlier hearing. Hence, the Judicial Officer concluded that the reference to "this decision" in the Judge's Bench Decision furnished to PMD, as well as the references in the Hearing Clerk's December 1, 1999 letter, were all references to the oral decision issued on November 17, 1999. The Judicial Officer also recognized, however, that the references to the Judge's decision were "not without ambiguity." Further, the fact that the only decision in the case was the Judge's oral decision begs the question. The question is whether the Rules of Practice, or other action by the Secretary, provided fair notice of which event–"issuance" or "receiving service"–triggered the appeal time under § 1.145(a).

Third, the Judicial Officer found that the statements by the Judge and the Hearing Clerk that the decision would become effective 35 days after service, rather

than after issuance, were "error" because the only decision in the case was the oral decision issued on November 17, 1999. Acknowledging further that there was an ambiguity in the statements made to PMD by the Judge and the Hearing Clerk because both failed to distinguish between the November 17, 1999 oral decision and the written Bench Decision when informing PMD of the period to appeal, the Judicial Officer nevertheless appeared to conclude that a simple reading of the Rules of Practice sufficed to give fair notice to PMD. In that regard, for reasons already discussed, he erred. Moreover, any similarity between the Secretary's interpretation of § 1.145(a) as a jurisdictional bar and judicial construction of Federal Rule of Appellate Procedure 4 and the Administrative Orders Review Act, 28 U.S.C. § 2344, as presenting jurisdictional bars to untimely appeals, *see supra* n.3, does not address whether the Secretary provided fair notice of his interpretation of § 1.142(c).

Accordingly, because neither the Secretary's Rules of Practice nor any other action by the Secretary provided fair notice to PMD that "issuance" of the Judge's oral decision under § 1.142(c) was "receiving service" for purposes of noting an appeal under § 1.145(a), we grant the petition.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

EAST PRODUCE, INC. v. SEVEN SEAS TRADING CO., INC., a/t/a VALLEY VIEW FARMS.
PACA Docket No. R-97-0142.
Decision and Order filed August 14, 2000.

Jurisdiction.

The Department does not have jurisdiction to resolve the issue of an alleged "joint venture" agreement where the complaining party's cause of action accrued in 1992 and the party in question failed to pursue its cause of action until 1997, well beyond the nine month statute of limitation under the PACA. Respondent alleges in its counterclaim that it entered into a joint venture agreement with Complainant to provide consulting services in exchange for 2% of the 18% commission that Complainant was receiving in connection with a separate marketing agreement with a farmer in Mexico. The alleged oral contract covers the years from 1991-1996 and the Respondent did not request payment of its consulting fees until 1997, although Complainant was being paid its commission fees on a yearly basis under the marketing contract with the Mexican farmer.

Kimberly D. Hart, Presiding Officer.
John Watkins, Glendora, CA, for Complainant.
Wesley Chen, White Plains, NY, 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 $60,472.00 in connection with the sale of various fruits and vegetables, perishable agricultural commodities in interstate commerce. 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 timely reply to the Respondent's counterclaim.

Since the amount claimed as damages exceeds $30,000.00 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). The oral hearing was held on November 3, 1998, in New York, New York and further testimony was taken by

telephone conference on November 9-10, 2000, due to the various scheduling conflicts before Kimberly D. Hart, Presiding Officer. The Complainant was represented by John F. Watkins, Esq. and Nolan E. Clark, Esq. of Watkins & Watkins located in Glendora, California and the Respondent was represented by Peter Meisels, Esq. of Serchuk & Zelermyer located in White Plains, New York.

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. A deadline of April 6, 2000, was imposed for both parties. Both parties submitted their findings of fact and supporting briefs as well as claims for fees and expenses by the imposed deadline. The documents were served on the respective parties by the Department in accordance with the Rules of Practice and neither party elected to file objections to the opposing party's claim for fees and expenses within the time period set forth in section 47.19(5) of the Rules of Practice (7 C.F.R. § 47.19(5)).

Findings of Fact

1. Complainant, Far East Produce, Inc., is a corporation whose mailing address is 1040 S. San Julian Street, Los Angeles, California 90015. Complainant is licensed under the Act.

2. Respondent, Seven Seas Trading Co., Inc. a/t/a Valley View Farms, is a corporation whose mailing address is 119 Christie Street, New York, New York 10002. At the time of the transactions alleged herein, Respondent was licensed under the Act.

3. Complainant, on or about February 29th and May 17, 1996, sold to Respondent, in the course of interstate commerce, thirty-six (36) lots of mixed fruits and vegetables, being perishable agricultural commodities, at the agreed contract price totaling $68,006.50. Complainant shipped the produce to Respondent on or about February 29th through May 17, 1996, in accordance with the oral contract and the produce was received and accepted by the Respondent upon arrival. Respondent remitted a partial payment in the amount of $7,534.50 to complainant, leaving a remaining balance due in the amount of $60,472.00. Respondent has failed to pay complainant the remaining amount due for its produce purchases. Complainant admits that it owes Respondent $2,223.00 for box charges in connection with other produce transactions to which it agrees to an offset to the amount owed by Respondent. Therefore, Respondent has failed to pay Complainant in the amount of $58,249 for its produce purchases after allowance of the offset in the amount of $2,223.00.

4. The informal complaint was filed on July 25, 1996, which is within nine months from when the cause of action accrued.

Conclusions

There are three major issues to be resolved in this decision. The **first** issue is whether Complainant has carried its burden of proving that Respondent owes it for produce purchases in the amount of $60,472.00. The **second** issue is whether Respondent is entitled to a further offset on any amounts found to be owing to Complainant for its produce purchases for alleged transportation costs that it incurred on behalf of Complainant and compensation for box charges. The **third** issue is whether the Department has jurisdiction over Respondent's counterclaim alleging that Complainant owes it approximately $250,000 in "consulting fees" in connection with the growing, marketing and sale of the Podesta Farm produce from 1991 to 1996, and if so, whether Respondent has carried the burden of proving its counterclaim. There was a great deal of testimony taken in relation to the issues in question and the presiding officer is charged with the responsibility of judging the credibility of the witnesses' testimony. The credibility of the witnesses will be a major factor in deciding on the issues as well as the weight accorded to the voluminous documentation introduced into evidence.

As the moving party, Complainant bears the burden of proving its case that Respondent owes it for produce purchases received and accepted in accordance with the contract terms. *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506 (1975); *New York v. Sandler*, 32 Agric. Dec. 702 (1973). The party with the burden of proof must meet the preponderance of evidence test. *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (1969). Complainant has submitted evidence documenting the produce transactions at issue including invoices and transportation documents that reflect the shipping of the pertinent produce to the Respondent (*see Exhibit no. 1 contained in the report of investigation*). Respondent, in its answer, generally denies Complainant's allegations but admits the "receipt of certain shipments of produce from Far East during the time period alleged (*see Respondent's answer to formal complaint*). The complaint does not specifically state the terms of contracting for the loads in question, however, the transportation documents do indicate that the respondent, as purchaser, was responsible for the freight charges associated with the shipping of said produce. "In an f.o.b. transaction, the buyer is responsible for paying freight . . . ." *In re Ben Gatz Company*, 38 Agric. Dec. 1038 (1979). In addition, case law precedent dictates that ". . . the existence of f.o.b. terms are [sic] are assumed when the contract is silent as to the terms of delivery. *Hunts Point Tomato Co., Inc. v. S & K Farms, Inc.*, 42 Agric. Dec. 1224, 1225 (1983). See UCC § 2-503, Comment 5. See also J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code, § 5-2, page 143 (1972). Based on the foregoing, we find that the produce transactions in question were subject to f.o.b. terms.

Complainant has submitted persuasive evidence to support its allegation that the produce was shipped to respondent on the various dates. In a f.o.b. transaction, the Regulations mandate that "the buyer assumes all risk of damage and delay in transit not caused by the seller". 7 C.F.R. § 46.43(i). There is no evidence to suggest that there were any problems encountered during the transportation of the produce in question. In addition, the Respondent is responsible for the produce in f.o.b. transactions even if it never receives the produce as long as the seller has not caused problems in the shipment of the produce such as lack of reasonable care in the selection of the transportation company or failing to give proper shipment instructions. *Progressive Groves v. Bittle*, 31 Agric. Dec. 436 (1972); *Gilmer Packing v. D.L. Piazza Co.*, 21 Agric. Dec. 783 (1962). Therefore, Respondent is deemed to have received and accepted the produce in these f.o.b. transactions. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from breach of contract by the seller. *Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987).

Respondent has not alleged any breach of contract by the seller that would entitle it to damages but Respondent does allege that the agreed upon contract prices were incorrectly noted by Complainant on its invoices and were later modified by mutual agreement of the parties. The party who alleges a modification of the contract terms bears the burden of proving such allegation. *Regency Packing Co., Inc. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042 (1983); *F.H. Hogue Produce v. Singer's Sons*, 33 Agric. Dec. 451 (1974). According to Respondent, three (3) of the thirty-six (36) produce transactions at issue were invoiced incorrectly by the complainant despite the fact that the parties had mutually agreed on different contract prices prior to shipment. Respondent contends that invoice #159798 was incorrectly billed at $25 per box versus the agreed upon price of $15 per box; invoice #160136 was incorrectly billed at $25 per box versus the agreed upon price of $15 per box; and invoice #160209 was incorrectly billed at $18 per box versus the agreed upon price of $15 per box (Tr. at 81-85). Respondent also contends that it contacted Complainant about the price discrepancies and the parties mutually agreed that the contract prices would be modified to $15.00 per box for each of the three invoice numbers (Tr. at 84-85). Respondent submitted its purchasing and receiving record for the three different shipments which reflect that the original price was quoted as $25 per box but was later changed to $15 per box for invoice #159798 (Rx-TT) by Respondent's employee. The purchase and receiving records for invoice #s 160136 and 160209 (Rx-RR & Rx-SS) indicate an original price of $15 per box versus the prices contained in Complainant's invoice for the same transactions.

Complainant's principals testified that its records do not reflect price modifications for any of the three relevant transactions and that, while Respondent did contact Complainant subsequent to shipment to request a change in the price, Complainant declined to grant the reduction because the proceeds from those transactions had already been reported to the farmer at the originally invoiced prices (Tr. at 23-30, 265-67). Complainant also submitted, as evidence, a copy of a letter, dated July 1996, sent to Respondent in response to its request for a price modification which basically mirrors the testimony provided at hearing (*Exhibit 1a in report of investigation*). Respondent has submitted no evidence to persuade us that the alleged price modifications were agreed to by the Complainant. In addition, we find Complainant's witnesses to be more credible in their testimony that the Respondent was billed correctly the first time and that it never agreed to any modification of the original contract prices for these three invoices. Therefore, we conclude that Respondent has not carried its burden of proving that the original contract prices were incorrectly reflected on the invoices or that the parties mutually agreed to a modification of the original contract prices for invoice numbers 159798, 160136 and 160209. We have previously concluded that the produce was accepted by the Respondent, that there was no evidence of breach of contract on Complainant's part and that there was no modification of the original contract terms. Therefore, Respondent is liable to Complainant for the full contract price of $68,006.50 for the thirty-six (36) lots of produce in question. Respondent has remitted a partial payment in the amount of $7,534.50, leaving a remaining balance due of $60,472.00.

Respondent has claimed several offsets to the amounts owed to Complainant for these produce purchases. It has been long held that "a party may offset losses from one produce transaction by deducting them from payment due on another." *McMillan Brokerage Co. v. Bushman Growers Sales, Inc.*, 32 Agric. Dec. 950 (1973); *Pilgrim Fruit Co., Inc. v. Valda Wooten*, 28 Agric. Dec. 260 (1969). However, Respondent still has the burden of proving that it is due money from a produce related transaction in order to obtain an offset. Respondent's first offset claim relates to 2,340 boxes of snow peas delivered to Complainant on or about March 28, 1996, for which Complainant allegedly agreed to compensate the Respondent in the amount of $2,223.00 for the cost of the boxes. Respondent contends that Complainant failed to compensate it for the cost of the boxes as previously agreed by the parties. The issue was discussed at hearing and Complainant admits that it indeed owes Respondent the amount of $2,223.00 for the cost of the boxes and does not contest offsetting this amount from any sums found to be due to it on the produce transactions at issue. Therefore, we conclude that Complainant owes Respondent in the amount of $2,223.00 for boxes supplied

to Respondent and that this amount shall be offset against the $60,472.00 owed to Complainant for the produce transactions at issue.

The second offset claimed by the Respondent is for trucking fees amounting to approximately $8,344 allegedly owed by Complainant in connection with five different produce transactions shipped to it from the respondent's seller, Buena Vista Farms, on or about March 6th, 12th, 17th, 21st, and 27th, 1996 (Rx-BBB, CCC, DDD, EEE, FFF, GGG, HHH). We note at the outset that the produce contained in these five shipments were not part of the produce transactions contained in the complaint. The produce transactions contained in second offset allegation originated from Respondent's shipper, Buena Vista Farms and not from the shipper of the produce contained in the complaint (Rx-BBB, CCC, DDD, EEE, FFF, GGG, HHH).

Although a party is allowed to offset losses from one produce transaction from another, there is a jurisdictional requirement applicable to freight related claims. "This forum lack jurisdiction over the subject matter when there is only a transportation contract in issue, which contract is not related to a produce transaction which is in issue." *Maine Banana Corp. v. Walter Davis*, 32 Agric. Dec. 983 (1973); *Reid & Joyce Packing Co. v. Touchstone*, 15 Agric. Dec. 884 (1956). Since the produce transactions at issue in Respondent's alleged freight offset are separate from the transactions at issue in the complaint, we cannot reach the question of whether the offset is proper and can be allowed. Therefore, Respondent cannot be allowed to offset the freight costs that it allegedly incurred on Complainant's behalf.

The third offset claimed by the Respondent is for alleged "consulting fees" due in conjunction with a contract between the parties by which Mr. Tan, respondent's president, would assist complainant in providing consulting services to Podesta Farm in exchange for a 2% of the 18% commission being paid to the complainant in connection with a separate marketing contract entered into between Complainant and Podesta Farm for the sale of perishable agricultural commodities grown on the Podesta Farm from 1991 to 1996.[1] According to Respondent, Complainant was party to a marketing contract with Podesta Farm to market all of its produce in exchange for an 18% commission from the sales generated from the produce. According to Respondent, its two percent (2%) "consulting fees" were to be paid by Complainant from the 18% commission paid to Complainant, in connection with its marketing contract with Podesta Farm, which was based on the total sales of

[1]Respondent originally asserted in its counterclaim that the alleged 2% commission to be paid to Mr. Tan was based on all of Complainant's total sales from 1991 to 1996 but modified the basis of its claim at hearing.

produce generated from the Podesta Farm. Respondent alleges that it entered into a oral contract with the Complainant in 1991 to provide "consulting services" such as advice on the type of commodities to plant, growing techniques, seed choices and other general subjects relating to the growing of produce on the Podesta Farm in order to increase the profitability of the marketing agreement between complainant and Podesta Farm.

Mr. Tan asserts that he made several trips to Mexico with Respondent's principals prior to the terms of the "consulting contract" being finalized and thereafter (Tr. at 10-31). Mr. Tan testified that he mainly dealt with Albert Wu regarding the "consulting contract" who was the person who suggested the use of Mr. Tan's services to Complainant's primary principals (Tr. at 24-25, 154, 162). Mr. Tan asserts that, pursuant to the "consulting contract", there was no specific provision as to when payment of the consulting fees would take place, although they were to be computed on a yearly basis. Respondent's Mr. Tan stated that payment of the consulting fees was never requested from Complainant during the years 1991-1996 because Respondent felt that it would be best to wait until the Podesta Farm operations became more profitable (Tr. at 73-74).

There were two checks, totaling approximately $5,000, issued to Mr. Tan individually from complainant in 1991, that were allegedly portions of commissions due Respondent from Complainant. Mr. Tan testified that the parties' business relationship deteriorated when Albert Wu was terminated by the Complainant in 1996 (Tr. at 72). The evidence at hearing established that Complainant's principals, Camilla and John Lim, terminated the employment of Albert Wu on April 15, 1996 (Cx-D). According to Mr. Tan, it was not until after Mr. Wu was terminated effective April 15, 1996 that he realized that Complainant had no intention of continuing the "consulting contract" or paying Respondent the commissions due from 1991-1996 pursuant to the contract.

Complainant denies that it entered into any kind of "consulting agreement" with Respondent or Mr. Tan, verbal or otherwise, for the provision of services in connection with the planting, harvesting and sale of vegetables from its marketing agreement with the Podesta Farm. Complainant admits that Mr. Tan accompanied Mr. Lim and Mr. Wu on several trips to the Podesta Farm in early 1991 when it was considering entering into an agreement with the owners of the Podesta Farm to market their produce (Tr. at 34-42). Complainant also does not deny that it entered into a contract with Podesta Farm to act as its marketing agent in exchange for an 18% commission which was to be based on the total proceeds generated from the sale of the Podesta Farm produce. However, Complainant does deny that it entered into a contract with Respondent by which it would pay Respondent 2% of its 18% commission for consulting services.

Mrs. Lim testified that the checks that were issued to Mr. Tan were not for

consulting services pursuant to the alleged "consulting contract" but rather money given to Mr. Tan by Mr. Wu for another reason while he was still employed with Complainant and had check signing authority. In support of its position that Respondent and Mr. Wu concocted the story of the alleged "consulting contract" after Mr. Wu was terminated, Complainant points to the fact that Respondent initially alleged, in its counterclaim, that it was to receive a two percent (2%) commission on all produce sales generated by Complainant from 1991 to 1996. However, Respondent, at hearing, changed its claim to the contract providing for Respondent to receive two percent (2%) commission for the produce sales generated from the Podesta Farm only (Tr. at 172-73). In addition, Mr. Wu created a sworn affidavit, at the behest of Mr. Tan, which basically mirrored Mr. Tan's original assertion of the two percent (2%) commission on all of Complainant's produce sales from 1991-1996 (Tr. at 249-51) (*Exhibit B as attached to Respondent's answer and counterclaim*). At hearing, Mr. Tan testified that its original assertion was merely a misstatement (Tr. at 172-73) and Mr. Wu testified that he was also initially mistaken in his affidavit regarding the manner in which the commission was to be computed (Tr. at 249-51).

There was a great deal of testimony provided and documents submitted, at hearing, in support of both parties' position. However, it is Respondent who bears the burden of proving first and foremost that the Secretary would have jurisdiction over the alleged "consulting contract" since Complainant challenges the Secretary's jurisdiction over this counterclaim. If jurisdiction can be established, Respondent must overcome its burden of proving the existence of verbal contract and there terms therein. There are four basic jurisdictional requirements under the Act: (1) the transaction must involve "perishable agricultural commodities" (7 U.S.C. § 499a(4)); (2) the transaction must involve "interstate or foreign commerce" (7 U.S.C. § 499a(8)); (3) the person complaining must petition the Secretary within nine months after the cause of action accrues (7 U.S.C. § 499f(a)); and (4) Respondent must be a licensee under the Act or operating subject to the licensing requirements of the Act (7 U.S.C. § 499d(a))." *Jebavy-Sorenson Orchard Company v. Lynn Foods Corporation*, 32 Agric. Dec. 529 (1973).

Respondent alleges that Mr. Tan entered into an agreement with Complainant whereby he was to provide consulting services, on behalf of Respondent, in the form of "expert advice" as to the best kind of seeds to plant to obtain optimal results and other issues surrounding the successful planting and harvesting of the oriental vegetables on the Podesta Farm. Mr. Tan testified that he possesses a great deal of expert knowledge on the planting of Oriental vegetables that benefitted the Complainant by increasing the profitability of the marketing arrangement between Complainant and the Podesta Farm (Tr. at 21-24, 31-35). The statute requires that the transaction[s] involve a perishable agricultural commodity and Respondent

alleges that Mr. Tan provided advice on the planting of produce which was to be subsequently sold by Complainant on behalf of Podesta Farm for an eighteen (18) percent commission fee. Although Respondent was not to be directly responsible for the sales of the produce, he was to share in the proceeds derived from the sale of the Podesta Farm produce in exchange for his consultation services on the planting and growing of produce on the Podesta Farm. The Secretary has recognized similar types of contractual arrangements, sometimes referred to as "joint ventures" which have been deemed to satisfy the first jurisdictional requirement of the statute. *See Eady v. Eady & Associates*, 37 Agric. Dec. 1589 (1978). Therefore, we find that Respondent has satisfied the first jurisdictional requirement of the statute.

Second, Respondent must demonstrate that the produce transaction[s] occurred in interstate or foreign commerce. For a party to be liable, it must have a contractual relationship involving the purchase and sale of produce – transportation, or the sale of bags, separate from the sale of produce is not such a relationship. *E.J. Harrison & Son v. A.E. Albert & Sons, Inc.*, 24 Agric. Dec. 884 (1965); *Reid & Joyce Packing Co. v. G.W. Touchstone*, 15 Agric. Dec. 884 (1956); *Anonymous*, 4 Agric. Dec. 332 (1945). The Podesta Farm is located in Mexico and the produce grown on that farm was being shipped from Mexico to various destinations within the United States. We find that the evidence contained in the record is sufficient to establish that the "consulting contract" would have involved produce transaction[s] occurring in interstate or foreign commerce which satisfies the second jurisdictional requirement of the statute.

Third, Respondent must demonstrate that its action within nine months from when the cause of action accrued. A cause of action accrues at the time when the right to institute and maintain a suit arises which is the time that the event occurs and not at the time when a party discovers the facts or learns of his rights thereunder." *Calava Growers of California v. International Food Marketing, Inc.*, 40 Agric. Dec. 972 (1981); *Fresh Pict Foods v. Consumer's Produce*, 29 Agric. Dec. 163 (1970). *See also Louisville Cement Co., Inc v. Interstate Commerce Commission*, 246 U.S. 638, 62 L.Ed 914, 38 S.Ct. 408 (1918); *Boler Fruit & Veg. Co. v. Kenworthy*, 19 Agric. Dec. 226 (1960). In addition, a counterclaim arising out of different transactions than those covered by a timely complaint must be filed within nine months after the cause of action as to such counterclaim accrued. *Sandra v. Gardner*, 31 Agric. Dec. 128 (1972); *Calcagno Farms v. Spring Kist Sales*, 22 Agric. Dec. 406 (1963); *C.F. Smith Inc. v. Bushala*, 21 Agric. Dec. 1365 (1962).

A review of the Department's record indicates that a timely informal complaint was filed by the Complainant in July 1996 seeking reparation for produce sales made to respondent (*see report of investigation*). There is a mention in the records

of the informal complaint proceeding that of respondent's allegation that it was owed money from Complainant in conjunction with a "consulting contract" but nothing informal or formal was filed with the Department by Respondent seeking reparation for these alleged consulting fees during the informal complaint stage. Complainant filed a formal complaint with the Department on November 1, 1996, which basically mirrored its informal complaint. On January 13, 1997, Respondent filed a timely answer and asserted several counterclaims including the one involving the alleged "consulting contract".

Respondent alleges that the parties entered into the "consulting contract" in 1991 and that the contract was in effect until April 1996 when Complainant terminated Albert Wu and thereafter allegedly severed its ties with respondent in relation to the "consulting contract". Respondent also states that, prior to Mr. Wu's termination, it never requested payment of the unpaid consulting fees from Complainant and Complainant never offered to pay him the consulting fees other than the two payments made in February 1992 and December 1993 for approximately $5,000. Respondent asserts that there was no specified provision as to when the consulting fees would be payable but that the fees would be computed on a yearly basis from the sales resulting from the perishable agricultural commodities originating from the Podesta Farm. Mr. Tan asserts that he intended to wait until the Podesta Farm operations became more profitable before requesting his lump sum payment. The alleged agreement between Complainant and Respondent was not a part of the marketing agreement entered into between Complainant and Podesta Farm but rather a completely separate agreement, upon which services were provided for the Podesta Farm and compensation was to be based on sales of the Podesta Farm produce. Mr. Tan alleges it was not until Mr. Wu was terminated in April 1996, when it requested payment of the unpaid commission fees and became aware that Complainant was refusing to acknowledge the contract or pay the commissions due under the contract due from as far back as 1991.

The evidence indicates that Complainant had a yearly contract with Podesta Farm from 1991 to 1996 to market its produce for a commission fee of 18 percent and that Complainant was required to account to the grower on a regular basis while a particular year's crop was being marketed by complainant. It appears that Complainant was paid its 18% commission as compensation for its services provided under the marketing agreement with Podesta Farm within the same year that the sales for a given crop year was taking place. Since Respondent's alleged commission fees were to be indirectly based upon the proceeds generated from the Podesta Farm produce sales, those sales figures ostensibly would have been available at the end of the marketing period in a given year and Respondent would have been able to compute the alleged commission fees due to it for that given year.

There is no evidence to suggest that Respondent ever made a formal request for the sales figures from the Podesta Farm produce sales prior to 1996. However, the fact that Respondent did not request an accounting regarding the Podesta Farm produce sales in the year in which they occurred does not mean that it was not capable of requesting that information for purposes of calculation of its commissions due under the alleged "consulting contract" or that it could not have instituted a suit to obtain those figures in order to seek reparation for monies allegedly owed by Complainant.

Based on the facts presented, we find that Respondent's cause of action accrued as early as the fall of 1992, when the sales from the 1991 planting season took place. At the very latest, Respondent's cause of action accrued on or about November 1992. Respondent could have filed an action against Complainant for recovery of its alleged consulting fees resulting from the sale of the Podesta Farm produce by Complainant on or about November 1992. The mere fact that Respondent never formally requested an accounting or payment of its commission fees until 1996 does not mean that Respondent's cause of action accrued in 1996 when Complainant refused to pay the total amount of commission fees alleged to be owed from 1991 to 1996. It is apparent that the Podesta Farm entered into a contract with Complainant in July 1991 for the marketing of its produce and that Complainant did, in fact, market the produce pursuant to this contract as early as the fall of 1992. The evidence shows that Complainant and Podesta Farm entered into a new contract every year subsequent to 1991 to cover its marketing agreement and that an accounting of the produce sales covered by respective contract was due prior to the signing of a new contract.

A cause of action accrues regardless of whether a party exercises his rights under that cause of action. Respondent cannot attempt to extend the accrual of its alleged cause of action by asserting that there was no specific period of time for payment of the commission fees pursuant to the agreement. Respondent's cause of action accrued on or November 1992, it would have been necessary for Respondent to file its claim for reparation no later than August 1993. Respondent filed its counterclaim seeking reparation for the alleged "consulting contract" on January 13, 1997, which is far beyond the nine month statute of limitations period. The fourth jurisdictional requirement, that Respondent be licensed or subject to licensing under the Act, is satisfied. However, since Respondent does not meet the statutory requirements that the complaint be filed within 9 months of the accrual of the cause of action, the Secretary has no jurisdiction over Respondent's counterclaim for commissions due pursuant to a "consulting contract".

Respondent is liable to Complainant in the amount of $58,249.00 for produce purchased, received and accepted in interstate commerce. The counterclaims filed by Respondent regarding the trucking claims and the "consulting contract" are hereby dismissed based on the Secretary's lack of jurisdiction over these issues.

Respondent's failure to pay Complainant this sum is a violation of section 2 of the Act 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 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); *W.D. Crockett v. Producers Marketing Association, Inc.*, 28 Agric. Dec. 66 (1963). Complainant was required to pay a $300 handling fee to file its formal complaint. Pursuant to (7 U.S.C. §499e(a)), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party.

Complainant and Respondent filed the appropriate forms for their claims for fees and expenses incurred in connection with the oral hearing. The parties' claims were properly served upon the parties and they were given an opportunity to object to the opposing party's claims. Neither party filed an objection to the opposing party's claim for fees and expenses. Fees and expenses will be awarded to the extent that they are reasonable. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieri Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). It is the province of the Secretary to determine the reasonableness of the requested fees and expenses. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). 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).

We have reviewed Complainant's claim for fees and expenses. Complainant has claimed 3.75 in preparation of its answer and response to Respondent's cross-claim. It has been held that expenses which would have been incurred in connection with the case if that case had been heard by shortened procedure may not be awarded under section 7(a) of the Act. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). There Complainant's claim for recovery of $731.25 in preparation of answer and response to cross-claim are disallowed since Complainant would have had to incur these costs regardless of whether the matter was heard by oral hearing. Complainant claims $2,812.50 representing 11.25 hours at $250.00 per hour for scheduling and preparation of the oral hearing. We will

allow Complainant's counsel an hourly rate of $200.00 as reasonable based on the issues involved. We find that the 11.25 hours claimed by Complainant is a reasonable amount of time for preparation of the oral hearing. Therefore, Complainant will be allowed $2,250.00 for costs incurred in preparation for the oral hearing.

Complainant claims that it incurred costs of $5,000.00 in connection with its counsel's travel to and from the oral hearing in New York City. This claim is disallowed since it is our policy to not allow attorney's fees for time spent in travel. *See Golden Harvest Farms, Inc. v. Stanley Produce Co., Inc.*, 38 Agric. Dec. 727 (1979). Complainant requests reimbursement for 21.25 hours spent in scheduling continuation dates for the hearing and in preparation for the remainder of the hearing held by telephone conference. Based on the complexity of the issues involved, we will grant Complainant 15 hours at $200.00 per hour as being reasonable costs incurred by Complainant. Therefore, Complainant will be allowed to recover $3,000.00 in connection with costs incurred in scheduling hearing dates and preparation for hearing. Complainant claims 12.50 hours spent at the hearing which we find to be reasonable. Complainant will be allowed to recover costs incurred for the 12.50 hours spent at the hearing at $200.00 per hour totaling $2,500.00. Complainant also requests recovery for 38 hours spent in preparing its brief and proposed findings of fact. Expenses which would have been incurred under the shortened procedure are not recoverable under section 7(a) of the Act which would include findings of fact, conclusions of law and post hearing briefs. *See Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieri Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). Therefore, Complainant's request is disallowed.

Complainant has claimed $1,526.42 for expenses incurred in airline and hotel expenses for the hearing held in New York. Complainant did not include an itemization as to how these expenses were computed, including copies of airline tickets and hotel receipts. However, respondent did not object to the Complainant's claim for recovery for its airline and hotel expenses. Therefore, we will allow Complainant's request for recovery of costs for airline and hotel expenses totaling $1,526.42 as being a reasonable expense. In addition, Complainant seeks recovery in the amount of $1,962.26 for costs incurred in obtaining hearing transcripts. We find this cost to be reasonable and therefore allow it as a reasonable expense. In total, Complainant will be allowed to recover $11,238.68 as reasonable fees and expenses incurred in connection with the oral hearing.

Order

Within 30 days from the date of this order, Respondent shall pay to Complainant, as reparation, $58,249.00 with interest thereon at the rate of 10 percent per annum from July 1, 1996, until paid plus the amount of $300.

Within 30 days from the date of this order, Respondent shall also pay to Complainant, as reasonable fees and expenses incurred in connection with the oral hearing, the amount of $11,238.68.

Copies of this order shall be served upon the parties.

DiMARE HOMESTEAD, INC. v. KOAM PRODUCE, INC.
PACA Docket No. R-00-0159.
Decision and Order filed November 16, 2000.

Misrepresentation and Mistake - adjustment contracts void on grounds of.

Federal inspections - credibility rebutted by bribery of federal inspectors.

Burden of proof - not met where federal inspections found unconvincing due to bribery of inspectors.

Where there was no showing that the particular inspections on the Hunts Point market of the tomato shipments at issue were falsified, but the inspections were performed by inspectors who pleaded guilty to accepting bribes for the falsification of inspection certificates, and the inspections were performed at the place of business of the buying firm whose employee pleaded guilty to the bribery of federal inspectors, it was held that the failure of the buying firm to disclose the bribery of the federal inspectors to the seller to whom it submitted the inspections as a basis for adjustments to the original contracts amounted to a misrepresentation, and that the adjustment agreement was void on that basis. It was also held that the seller made a mistake as to a basic assumption on which the adjustments were made, and that the adjustment agreements were also void on the basis of that mistake.

Under the original f.o.b. contract the buyer who accepted the tomatoes had the burden of proving a breach on the part of the seller. Although under the Act federal inspections are prima facie evidence of the truth of the statements recorded therein, it was held that such prima facie evidence is rebuttable, and that the credibility of the inspections was rebutted by the guilty pleas of the inspectors coupled with the implication of the buyer in the bribery of inspectors. It was found that the federal inspections were unconvincing under the circumstances of this case; and it was also found that testimony from the buyer's employees was an insufficient basis on which to conclude that the seller breached the contract of sale. The seller was awarded the original contract price.

George S. Whitten, Presiding Officer.
Mike D. Bess, Orlando, FL, for Complainant.
Paul T. Gentile, New York, NY, 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 $4,800.00 in connection with transactions in interstate commerce involving tomatoes.

No Report of Investigation was filed by the Department. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is any report of investigation filed by the Department. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Both parties filed briefs.

Before the time for the filing of briefs expired, and pursuant to section 47.7 of the Rules of Practice, the Deputy Administrator filed what is referred to in the Rules as a supplemental report of investigation, and a copy thereof was served upon the parties. As required by the Rules each party was then given opportunity to file affidavit evidence in rebuttal to the supplemental report of investigation, and both Complainant and Respondent filed supplemental evidence.

Findings of Fact

1. Complainant, DiMare Homestead, Inc., is a corporation whose address is 258 N. W. 1st Avenue, Florida City, Florida 33034.

2. Respondent, Koam Produce, Inc., is a corporation whose address is 238 NYC Terminal Market, Bronx, New York 10474. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about April 17, 1999, Complainant sold to Respondent under its invoice number 2102, and shipped from loading point in Florida, on a truck bearing tag number AT10398-NC, to Respondent at the Hunts Point Market in Bronx, New York, one truck lot consisting of 800 cartons of DiMare brand 5x6 and larger

tomatoes in 25 pound cartons at $7.85 per carton, or $6,280.00, plus $23.50 for a temperature recorder, or a total of $6,303.50, f.o.b.

4. On or about April 17, 1999, Complainant sold to Respondent under its invoice number 91077, and shipped from loading point in Florida, on a truck bearing tag number AT10398-NC, to Respondent at the Hunts Point Market in Bronx, New York, one truck lot consisting of 240 cartons of light pink plum tomatoes in 25 pound cartons at $6.90 per carton, and 560 cartons of pink plum tomatoes in 25 pound cartons at $6.90 per carton, or a total of $5,520.00, f.o.b.

5. Following arrival of the tomatoes mentioned in Findings of Fact 3 and 4, Respondent accepted the two lots, and called for a federal inspection. On April 20, 1999, at 5:45 a.m., a federal inspection of the two lots of tomatoes was made, and a certificate, No. K-679517-3, was issued by federal inspector Elias Malavet, which disclosed in relevant part as follows:

LOT: A
TEMPERATURES: 52 to 53°F
PRODUCT: Tomatoes
BRAND/MARKINGS: "DiMare" 5+6 + lgr
ORIGINS: FL
LOT ID.: 129DY
NUMBER OF CONTAINERS: 800 Cartons
INSP. COUNT: N

LOT: B
TEMPERATURES: 51 to 52°F
PRODUCT: Plum Tomatoes
BRAND/MARKINGS: "Di Roma" 25lbs
ORIGINS: FL
LOT ID.: –
NUMBER OF CONTAINERS: 800 Crts
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	04 %	00 %	00 %	Sunken Discolored Areas (0 to 11%)	Average Approximately 85% light red and red.
	14 %	14 %	14 %	Soft (11 to 18%)	
	00 %	00 %	00 %	Decay	
	18 %	14 %	14 %	Checksum	
B	04 %	00 %	00 %	Sunken Discolored Areas (0 to 13%)	Average Approximately 90% light red and red.
	11 %	11 %	11 %	Soft (0 to 21%)	
	00 %	00 %	00 %	Decay	

	15 %	11 %	11 %	Checksum	Count: lot B, Ranges from 99 to 201 tomatoes per carton Average 140 tomatoes per carton

GRADE:

REMARKS: Count on lot B Reported at Applicant's Request.

6. On the basis of the damage reported in the federal inspection quoted above the parties agreed to an allowance being granted to Respondent of $1.50 per carton on the 800 cartons of 5x6 tomatoes and $1.00 per carton on the 800 cartons of Plum tomatoes, or a total of $2,000.00 on the two lots of tomatoes covered by Findings of Fact 3 and 4.

7. On or about April 19, 1999, Complainant sold to Respondent under its invoice number 2107, and shipped from loading point in Florida, on a truck bearing tag number WBL11E-FL, to Respondent at the Hunts Point Market in Bronx, New York, one truck lot consisting of 800 cartons of DiMare brand 5x6 and larger tomatoes in 25 pound cartons at $7.85 per carton, or $6,280.00, plus $23.50 for a temperature recorder, or a total of $6,303.50, f.o.b.

8. Following arrival of the load mentioned in Finding of Fact 7, Respondent accepted the tomatoes, and called for a federal inspection. On April 23, 1999, at 5:30 a.m., a federal inspection of the lot of tomatoes was made, and a certificate, No. K-679880-5, was issued by federal inspector Elias Malavet, which disclosed in relevant part as follows:

LOT: A
TEMPERATURES: 52 to 53°F
PRODUCT: Tomatoes
BRAND/MARKINGS: "Dimare" 5x6 & lgr
ORIGINS: FL
LOT ID.: FL 129DY
NUMBER OF CONTAINERS: 800 Cartons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	17 %	17 %	17 %	Soft (13 to 21%)	
	04 %	00 %	00 %	Sunken discolored Areas (0 to 9%)	Average Approximately 85% light red and red.
	00 %	00 %	00 %	Decay	
	21 %	17 %	17 %	Checksum	

GRADE:

9. On the basis of the damage reported in the federal inspection quoted above the parties agreed to an allowance being granted to Respondent of $1.50 per carton, or $1,200.00 on the lot of tomatoes covered by Finding of Fact 7.

10. On or about April 24, 1999, Complainant sold to Respondent under its invoice number 2189, and shipped from loading point in Florida, on a truck bearing tag number XG21954-PA, to Respondent at the Hunts Point Market in Bronx, New York, one truck lot consisting of 800 cartons of DiMare brand 5x6 and larger tomatoes in 25 pound cartons at $8.85 per carton, or $7,080.00, plus $23.50 for a temperature recorder, or a total of $7,103.50, f.o.b.

11. Following arrival of the load mentioned in Finding of Fact 10, Respondent accepted the tomatoes, and called for a federal inspection. On April 23, 1999, at 5:30 a.m., a federal inspection of the lot of tomatoes was made, and a certificate, No. K-680040-3, was issued by federal inspector Michael Tsamis, which disclosed in relevant part as follows:

LOT: A
TEMPERATURES: 53 to 55°F
PRODUCT: Tomatoes
BRAND/MARKINGS: "DiMare" 25 lbs. 5x6
ORIGINS: FL
LOT ID.: 129-EEGR70
NUMBER OF CONTAINERS: 800 Cartons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	14 %	14 %	14 %	Soft (3 to 27%)	Average approximately 5% turning and pink, 80% red to light red color
	00 %	00 %	00 %	Decay	
	14 %	14 %	14 %	Checksum	

GRADE:

12. On the basis of the damage reported in the federal inspection quoted above the parties agreed to an allowance being granted to Respondent of $1.00 per carton, or $800.00 on the lot of tomatoes covered by Finding of Fact 10.

13. On or about April 26, 1999, Complainant sold to Respondent under its invoice number 91197, and shipped from loading point in Florida, on a truck bearing tag number TLM7538-OH, to Respondent at the Hunts Point Market in

Bronx, New York, one truck lot consisting of 800 cartons of pink Plum tomatoes in 25 pound cartons at $7.90 per carton, or $6,320.00, f.o.b.

14. Following arrival of the load mentioned in Finding of Fact 13, Respondent accepted the tomatoes, and called for a federal inspection. On April 28, 1999, at 1135 p.m., a federal inspection of the lot of tomatoes was made, and a certificate, No. K-680205-2, was issued by federal inspector Thomas Vincent, which disclosed in relevant part as follows:

LOT: A
TEMPERATURES: 54 to 55°F
PRODUCT: Plum Tomatoes
BRAND/MARKINGS: "DiRoma" 25 lbs. Net Wt.
ORIGINS: FL
LOT ID.: None
NUMBER OF CONTAINERS: 800 Cartons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	10 %	10 %	10 %	Soft (2 to 18%)	Decay in early stages
	02 %	02 %	02 %	Decay	Average Approx. 90% light red & red
	12 %	12 %	12 %	Checksum	

GRADE:

15. On the basis of the damage reported in the federal inspection quoted above the parties agreed to an allowance being granted to Respondent of $1.00 per carton, or $800.00 on the lot of tomatoes covered by Finding of Fact 13.

16. The informal complaint was filed on December 1, 1999, which was within nine months after the causes of action herein accrued.

Conclusions

The background to this proceeding involves the nine USDA fruit and vegetable inspectors who were arrested in October of 1999 for taking bribes from employees of thirteen produce firms on the Hunts Point Market, Bronx, New York. All nine of the inspectors have pleaded guilty in Federal Court. Some of the employees of the 13 produce firms have also pleaded guilty, one has been acquitted in a jury trial, one has been convicted, and others are being prosecuted. On February 25, 2000, Marvin Steven Friedman, an employee of Respondent, pleaded guilty to all counts of an indictment in the United States District Court for the Southern District of

New York. The indictment charged Mr. Friedman with ten counts of making cash payments to a USDA fruit and vegetable inspector, between April 6, and July 1, 1999, in order to influence the outcome of the inspection of fresh fruits and vegetables conducted at Koam Produce Inc., Respondent herein.

There is no showing on this record that falsified inspections were issued as to the specific lots of tomatoes listed in the findings of fact. However, the lots of tomatoes involved in this proceeding were all inspected by one of the convicted inspectors at the place of business of Koam Produce, Inc., on the Hunts Point Market, and Koam negotiated a reduction in the price of the tomatoes on the basis of the excessive damage shown by the federal inspections.

Complainant seeks to recover by this reparation action the amount of the adjustments on the five lots of tomatoes, totaling $4,800.00. Complainant asserts that the adjustment claims were allowed by Complainant at a time when Complainant was unaware of the bribery that was occurring on the Hunt's Point Market. Implicitly, Complainant asks that the allowances be set aside on the grounds of misrepresentation or mistake. In other words, it is contended that Respondent's withholding from Complainant of the information that it possessed about the bribery of federal inspectors caused Complainant to have a confidence in the federal inspections of the subject tomatoes that Complainant otherwise would not have had. Since Complainant's confidence in the federal inspections was central to its willingness to negotiate the adjustments, Complainant feels that the adjustment negotiations were grounded on misrepresentation and/or Complainant's mistake as to a basic assumption on which the adjustments were made.

We will first treat the subject of misrepresentation as a possible ground for the voiding of the adjustment agreements. The Restatement (Second) of Contracts, section 159, defines misrepresentation as "an assertion that is not in accord with the facts." Section 164(1) states that:

> If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.
>
> . . . .

Section 161 relates the circumstances under which non-disclosure is equivalent to an assertion:

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

> (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
>
> . . . .

The Comment to section 161 states: "[t]he notion of disclosure necessarily implies that the fact in question is known to the person expected to disclose it." However, the Comment also makes it clear that clause (a) of section 161 is not limited in its coverage to non-disclosure by the actual person who negotiated the transaction, and section 1-201(27) of the Uniform Commercial Code (referenced as applicable in the Comment to section 161) shows that knowledge of the pertinent fact can be imputed to a corporation under appropriate circumstances.[1] In the circumstances at issue in this case, Respondent's non-disclosure that it was making payments to a federal inspector is the same as an affirmative misrepresentation where Respondent knew that the Complainant would not know that the inspection certificate could be fraudulent or a misrepresentation unless Complainant knew of the bribery. Absent that knowledge, Complainant would take the statements on the inspection as a basis for agreeing to adjustments on the contract price.

Section 16 of the Act provides that:

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[1]Paragraph (27) of § 1-201 of the UCC affirms that knowledge received by an organization is effective for a particular transaction "from the time when it is brought to the attention of the individual conducting that transaction, *and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence*." (Emphasis supplied.) According to paragraph (27):

> An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

This definition of "due diligence" shows that the pertinent knowledge under consideration here (the bribery of federal inspectors) would have certainly been brought to the attention of the party conducting the tomato transactions if Respondent had exercised due diligence. This is so because the information was obviously significant, and because the person with unquestioned knowledge of the bribery, Marvin Steven Friedman, by reason of his position of responsibility in the firm, had ample reason to know that all Respondent's purchase transactions in which an adjustment would be negotiated on the basis of an inspection would be materially affected by the information.

> In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

The only benefit (other than to the person receiving the bribes) deriving from the falsification of inspections would be to the purchaser of the inspected produce, and not, directly at least, to any individual employee of the purchaser. The October 1999 edition of The Blue Book, published by the Produce Reporter Co., Carol Stream, Illinois, (of which we take official notice), lists Kimberly Park as President of Koam Produce, Inc. The listing states "Buying and sales handled by C.J. Park, Chang Y. Park & Charles Lamendola Marvin Friedman, Vegetables & Fruit." A general phone and fax number is given for the business, but residence and cell phone numbers are listed only for C.J. Park and Friedman. Although there is no explicit testimony in the record that Friedman was authorized by Koam to bribe the federal inspectors, we conclude that the bribing of the federal inspectors was within his inherent agency power, and was done by Friedman within the scope of his employment.[2] Respondent is thus deemed responsible under the Act for the bribery in which its employee participated.

Whether the individual inspections involved in this proceeding were falsified is immaterial for our purposes. Respondent asserted to Complainant the results of the federal inspections. Respondent then used those results as a basis for the negotiation of the adjustments. When it engaged in the negotiation of the adjustments it knew that disclosure of its involvement in the bribery of federal inspectors was necessary to prevent the previous assertions, made in the federal inspections, from being material.[3] Respondent's non-disclosure of this involvement was, therefore, equivalent to an assertion that no such bribery had taken place, and was a misrepresentation for which the adjustment agreements may be voided.

We will next treat the question whether the adjustment agreements are also voidable on the ground of a mistake by one of the parties. In certain circumstances,

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[2]See H. Reuschlein and W. Gregory, The Law of Agency and Partnership, § 26, p. 69-71 (second ed. 1989).

[3]It is obvious that the federal inspections would have instantly become immaterial to the adjustment negotiations if Respondent's involvement in the bribery of federal inspectors had been revealed to Complainant.

if Complainant was mistaken as to a basic assumption that underlay the adjustment agreements, such agreements are voidable at Complainant's option.

The Restatement (Second) of Contracts, section 151, defines "mistake" as "a belief that is not in accord with the facts." Section 153 states:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

To break this section down into its parts with regard to the circumstances at issue here, Complainant believed that Respondent was not making payments to federal inspectors to affect the outcome of inspections (mistake); that mistake was as to a basic assumption on which Complainant agreed to the adjustments (made the contract); Complainant's belief had a significant (material) effect on the agreed adjustments (agreed exchange of performances); that resulted in Complainant agreeing to less than invoice price (adverse to him). In these circumstances, the adjustments are voidable by Complainant if he does not bear the risk of the mistake under the rule stated in section 154.

According to section 154:

> A party bears the risk of a mistake when
>
> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

First, as to clause (a), the risk of the mistake was not allocated to Complainant by any agreement between the parties. Second, as to clause (b) it is clear that Complainant was not aware, at the time the adjustments were made, that he had only limited knowledge with respect to the integrity of the federal inspections. The general limited knowledge that all people share is not in view here. Instead, what is meant by clause (b) is awareness of a specific area of limited knowledge, coupled with a determination to treat that area of limited knowledge as unimportant for purposes of the contract. As we have pointed out:

> Any belief that is not in accord with the facts must *always* be due to limited knowledge. If § 154(b) had in view that general awareness of limited knowledge which all reflective humans possess, all parties would always bear the risk of their mistake under §§ 152 and 153 and there would be no law relating to mistake.[4]

And third, as to clause (c) there is nothing in the circumstances of this case that would make it reasonable to allocate the risk of the mistake to Complainant.

Complainant made the adjustments because the federal inspections indicated that Complainant had breached the contract of sale. A basic assumption on which Complainant made the adjustments was the integrity of the federal inspection process applicable to produce inspected at Koam Produce, Inc. Clearly, if Complainant had known that an employee of Koam had bribed federal inspectors, and that the very inspectors who inspected the subject tomatoes were guilty of accepting bribes to falsify inspections, Complainant would not have been willing to rely upon the inspections performed by those inspectors as a basis for adjusting the contract of sale. We conclude that Complainant, in making the adjustments, made a mistake as to a basic assumption on which it made the adjustments. In view of the involvement of Respondent in the corruption of the inspection process enforcement of the adjustments would be unconscionable. Certainly Respondent knew of the mistake, and in addition it was the fault of Respondent that caused the mistake. We conclude that the adjustments should be voided on the grounds of both misrepresentation and mistake.

Although the adjustments are deemed to be voided, the original contracts are still in place. Respondent contends that Complainant breached these contracts by supplying tomatoes that did not meet contract requirements. Respondent submitted the affidavits of two of its employees stating that they personally inspected the tomatoes in the subject lots and observed that they were in fact "not in acceptable

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[4] *Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc.,* 46 Agric. Dec. 674, 682 (1987).

condition as evidenced by softness, over ripe condition and poor quality." Since Respondent accepted the lots of tomatoes it became liable for the full purchase price thereof less any damages resulting form a breach of contract on the part of Complainant.[5] Respondent had the burden of proving a breach by a preponderance of the evidence.[6] The Act, section 14(a), provides in relevant part that:

> . . . official inspection certificates for fresh fruits and vegetables issued by the Secretary of Agriculture pursuant to any law shall be received by all officers and all courts of the United States, in all proceedings under this chapter, and in all transactions upon contract markets under Commodities Exchange Act (7 U.S.C. 1 et seq.) as prima-facie evidence of the truth of the statements therein contained.

This provision is no more than the typical statutory exception to the hearsay rule which excludes documents apart the testimony of the person who wrote them.[7] Prima facie evidence is always subject to rebuttal and contradiction. The guilty pleas of the inspectors, coupled with the implication of Respondent in the bribery of inspectors, rebuts the prima facie evidence presented by the federal inspections submitted in evidence in this proceeding. As the trier of the facts we are unconvinced by the statements in the federal inspections which testify to the poor condition of the subject tomatoes. In addition, "[w]e have often discounted testimonial evidence concerning the condition of perishable commodities and stated the necessity of obtaining a neutral inspection showing the exact extent of damage."[8] We find that Respondent has not met its burden of proving a breach on the part of Complainant. Accordingly, Respondent is liable to Complainant for the balance of the contract price of the five lots of tomatoes, or $4,800.00.

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[5] *Norden Fruit Co., Inc. v. E D P, Inc.,* 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.,* 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.,* 46 Agric. Dec. 1681 (1987).

[6] See UCC 2-607(4). See also *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

[7] See C. McCormick, Handbook of the Law of Evidence, §§ 291-292, pp. 614-615 (1954).

[8] *Mutual Vegetable Sales v. Select Distributors, Inc.,* 38 Agric. Dec. 1359 (1979). See also *Tyre Farm, Inc. v. Dandrea Produce, Inc.,* 45 Agric. Dec. 796 (1986); *G. J. Albert, Inc. v. Salvo,* 36 Agric. Dec. 240 (1977); *Salt Lake Produce Co., Inc. v. Butte Produce Company, Inc.,* 32 Agric. Dec. 1732 (1973); *B. G. Anderson Company, Inc. v. Mountain Produce Co.,* 29 Agric. Dec. 513 (1970).

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.[9] 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.[10] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $4,800.00, with interest thereon at the rate of 10% per annum from June 1, 1999, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

LAKE ERIE GREENHOUSE MANAGEMENT & LEASING CORPORATION OPERATING AS CLIFTON PRODUCE v. AGRISTAR PRODUCE LLC.
PACA Docket No. R-97-0075.
Order of Dismissal filed December 6, 2000.

Election of Remedies – Canadian counterclaim not compulsory.

Where a Canadian firm filed a formal reparation complaint before the Secretary, and thereafter filed a counterclaim against the reparation Respondent in civil court in Ontario, Canada covering the same breach as alleged in its complaint before the Secretary, it was found, based on material filed by counsel, that counterclaims are not compulsory in Canada, and that Complainant had made an election between its PACA remedy and the Canadian civil court remedy. The Complaint was dismissed.

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[9] *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).

[10] *See 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).

George S. Whitten, Presiding Officer.
Frank C. Ricci, Leamington, Ontario, Canada, for Complainant.
Kenneth D. Nyman, Boise, Idaho, for Respondent.
W. Anthony Park, Boise, Idaho, for Respondent.
John Mill, Windsor, Ontario, Canada, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.). On August 21, 1996, Complainant (hereafter sometimes Clifford) filed an informal reparation complaint before the Secretary, and on September 24, 1996, filed a formal complaint. Cliford's complaint seeks reparation from Respondent (hereafter sometimes Agristar) on the basis of an alleged failure to pay the purchase price for tomatoes sold by Clifford to Agristar and shipped from Canada, to Agristar in Idaho. Agristar filed an answer before the Secretary on October 29, 1996. Agristar's defense was that Clifford promised to give Agristar 60% of its production, and breached the promise. Agristar claimed a set-off, and sought to recover the excess of damages over the set-off in a counterclaim before the Secretary, also filed October 29, 1996. On September 12, 1996, Agristar filed a claim in the Ontario Court (General Division) against Cliford covering the same breach as is alleged in its counterclaim before the Secretary. Clifford then filed, on Nov. 4, 1996, a counterclaim in the Ontario Court based on the same cause of action as is alleged in Clifford's reparation complaint before the Secretary.

Following the filing of the pleadings before the Secretary, the parties were advised by administrative personnel of this Department that this matter could proceed only if the Complainant's counterclaim filed in the Canadian court was compulsory.[1] Thereafter, based upon a letter from Complainant's Canadian counsel (who admitted that he was not sure what was meant by "compulsory"), the administrative personnel determined that the counterclaim was "compulsory or necessary," and the case was referred for hearing. Respondent contended in response to this ruling that the Canadian counterclaim was not compulsory.

On August 24, 1999, the Superior Court of Justice, Windsor, Ontario, Canada issued what amounts to a default judgment against Agristar, that firm having withdrawn its complaint before that tribunal. On February 2, 2000, Complainant's

[1]We have held many times that section 5(b) of the Act forces litigants who are before the Secretary to elect whether they will pursue their action in a civil jurisdiction or this administrative forum. See *Hastings Potato Growers Association v. Southern Planters Company,* 20 Agric. Dec. 279 (1961). The only exception is where the claimant before the Secretary is also before the civil forum because of having filed a compulsory counterclaim. See *Kurt Van Engel Commission Co., Inc. v. Schultz Sav-o Stores, Inc.*, 48 Agric. Dec. 731 (1989).

counsel moved for a the issuance of a reparation order based on the alleged *res judicata* effect of the Canadian court judgment. This motion was served on opposing counsel, and counsel for both parties proceeded to brief the matter, and also to address the question of whether counterclaims are compulsory under Canadian court procedure.

The question of whether the Canadian counterclaim was compulsory is pertinent because of the provision in the Act providing for an election of remedies. That provision has been interpreted by us to not apply to a reparation claim that is also the subject of a compulsory counterclaim in state or federal court.[2] The applicable section of the Act refers to liability for violation of section 2 of the Act, a federal law having application only within the United States, and therefore it is appropriate to inquire whether the alternative presented in the election of remedies provision has any application to an action brought in a foreign jurisdiction. Section 5b of the Act (7 U.S.C. § 499e(b)) states:

> "Such liability [for violation of section 2] 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[3] now existing at common law or by statute, and the provisions of this Act are in addition to such remedies."

In *M. S. Thigpen Produce Co., Inc. v. The Park River Growers, Inc.*, 48 Agric. Dec. 695 (1989) we stated:

> While it appears from an examination of analogous cases that a number of courts might treat the Perishable Agricultural Commodities Act as creating a distinct cause of action for the violation of Section 2, the general rule and the better rule is to the contrary. Moore, in treating the question makes the following observations:
>
> > What constitutes a single cause of action for these purposes [application of doctrine of res judicata barring second suit on same cause of action] has been a troublesome question. Generally, it has been held that the "cause of action," or "claim," as it is referred to in the Restatement

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[2] *Kurt Van Engel Commission Co., Inc. v. Schultz Sav-o Stores, Inc.,* 48 Agric. Dec. 731 (1989).

[3] The term "remedies" refers to procedural rights, not to substantive rights. *Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 21 A.L.R.2d 832 (3rd Cir. 1950).

> (Second) [Judgements], is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies. Thus, a judgement in an action to settle Indian land claims under the 1881 Treaty was a bar to a second suit involving the same land but relying on the 1895 Treaty. And a judgement in an action in the district court asserting that plaintiff's discharge was a violation of the Age Discrimination In Employment Act barred a subsequent action asserting that the same discharge was a breach of his employment contract. Similarly, a judgement in a possessory action in the state court barred a subsequent action in the federal court charging that his eviction violated his first amendment rights. And a summary judgement for defendant corporation in a suit on a note, pitched on the theory that the corporation was the alter ego of the debtor barred a later suit by the assignee of the note against the receiver of the corporation charging "conspiracy" and "joint venture." As a general principle, then, the plaintiff must assert in his first suit all the legal theories that he wishes to assert, and his failure to assert them does not deprive the judgement of its effect as res judicata. (Moore's Federal Practice, 2nd ed. 1984 ¶ 0.410, p. 350-351.)

From the above it follows that, although federal PACA law is not applicable in Canadian courts, such courts are not thereby rendered incompetent to hear the underlying cause of action. Causes of action based upon breach of contractual obligations, and which underlie most of the prohibitions of section 2[4], are capable of litigation in both Canadian and American forums. This conclusion accords with the evident intent of Congress which was to avoid simultaneous litigation based on the same subject matter, while preserving the unique PACA remedy to those litigants who filed with the Secretary, and were willing to forego seeking enforcement of their claim in an alternate forum.

Under the Federal Rules of Civil Procedure (and in state courts which follow the Federal Rules) a counterclaim is compulsory only if it meets all four of the following conditions: (1) It must arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. [Any claim that is "logically related" to another claim that is being sued upon is properly the basis for a compulsory counterclaim. Only claims that are unrelated or are related but within

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[4]For instance, section 2(4) makes it unlawful for a licensee "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any" transaction in interstate or foreign commerce.

the exceptions, need not be pleaded. See *City of Cleveland v. Cleveland Electric Illuminating Co.*, 570 F.2d 123 (6th Cir. 1978).]; (2) It must be matured and owned by the pleader at the time he serves his pleading; (3) It must not require for its adjudication the presence of third parties of whom the court cannot acquire personal jurisdiction; and (4) It must not have been, at the time the original action was commenced, the subject matter of another pending action.[5] The term "compulsory" means that if a claim meeting the above criteria is not filed it is forever barred.

It is apparent from the material that has been filed by counsel that counterclaims in Canada are not compulsory. We therefore conclude that Complainant and Respondent in this matter made an election to proceed before the Ontario court when the complaint and counterclaim were filed before that court.[6] Accordingly, Complainant's motion for the entry of a reparation award is denied, and the complaint and counterclaim are dismissed.

Copies of this order shall be served upon the parties.

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[5]A PACA reparation action qualifies as "another pending action" [the phrase "another pending action" includes administrative proceedings. *Bethlehem Steel Co. v. Lykes Bros. Steamship Co.*, 35 F.R.D. 344 (D.D.C. 1964)] only if a formal complaint has been filed. A pending informal complaint is not viewed as commencing an "action." See *Trans West Fruit Co., Inc. v. Ameri-Cal Produce, Inc.,* 42 Agric. Dec. 1955, 1957 n. 2 (1983).

[6]See *Symms Fruit Ranch, Inc. v. Arizona Fresh Foods, Inc.*, 41 Agric. Dec. 351 (1982).

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: MANGOS PLUS, INC.
PACA Docket No. D-98-0025.
Order Denying Petition for Reconsideration filed September 7, 2000.

Petition for reconsideration – Flagrant and repeated violations – Publication of facts and circumstances.

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer rejected Respondent's contention that the Chief ALJ made a finding that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable. The Judicial Officer stated that the Chief ALJ did not find the investigation was credible and reliable, but, instead, found that the investigator's testimony was reliable and sufficient to establish Complainant's *prima facie* case that during the period March 1996 through July 1998, Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce, and that, at the time of the November 4, 1999, hearing, approximately $228,000 of the $922,742.43 debt was still outstanding. The Judicial Officer also rejected Respondent's contention that the June 15, 2000, Decision and Order was erroneously based on unreliable testimony and Respondent's failure to rebut unreliable testimony.

Kimberly D. Hart, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 13, 1998. Complainant instituted this proceeding under 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-.49) [hereinafter the PACA Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that: (1) during the period March 1996 through July 1998, Mangos Plus, Inc. [hereinafter Respondent], failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices

for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ IV). On December 3, 1998, Respondent filed an Answer denying the material allegations of the Complaint.

On November 4, 1999, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing in New York, New York. Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. On January 14, 2000, Complainant filed Complainant's Proposed Findings of Fact, Conclusions, Order and Supporting Brief.

On March 14, 2000, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) found that, during the period March 1996 through June 1998, Respondent purchased, received, and accepted in interstate commerce, from 30 produce sellers, 306 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $922,742.43; (2) found that, at the time of the November 4, 1999, hearing, approximately $228,000 of the $922,742.43 debt was still outstanding; (3) concluded that Respondent's failures to make full payment promptly to produce sellers of the agreed purchase prices totaling $942,742.43[1] constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances set forth in the Initial Decision and Order (Initial Decision and Order at 5).

On April 18, 2000, Respondent appealed to the Judicial Officer and petitioned to reopen the hearing. On May 30, 2000, Complainant filed Complainant's Response to Respondent's Appeal Petition. On June 1, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and for a decision.

On June 15, 2000, I issued a Decision and Order: (1) denying Respondent's petition to reopen the hearing; (2) finding that, during the period March 1996 through July 1998, Respondent purchased, received, and accepted in interstate commerce, from 30 produce sellers, 306 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $922,742.43; (3) finding that, at the time of the November 4, 1999, hearing, approximately $228,000 of the $922,742.43 debt was

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[1]I infer, based on the Findings of Fact in the Initial Decision and Order, the Chief ALJ's conclusion that Respondent failed to pay agreed purchase prices totaling "$942,742.43" is a typographical error and that the correct amount is "$922,742.43."

still outstanding; (4) concluding that Respondent's failures to make full payment promptly to produce sellers of the agreed purchase prices totaling $922,742.43 constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) ordering publication of the facts and circumstances set forth in the Decision and Order. *In re Mangos Plus, Inc.*, 59 Agric. Dec. ___, slip op. at 4, 10, 22 (June 15, 2000).

On July 31, 2000, Respondent filed Respondent's Petition for Reconsideration requesting reconsideration of the June 15, 2000, Decision and Order. On September 5, 2000, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration. On September 6, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the June 15, 2000, Decision and Order.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

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 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[.] . . .

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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 (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, 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.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

TITLE 7–AGRICULTURE

. . . .

SUBCHAPTER B–MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46–REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(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[.]

7 C.F.R. § 46.2(aa)(5).

Respondent raises two issues in Respondent's Petition for Reconsideration. First, Respondent contends the following statement in *In re Mangos Plus, Inc.*, 59 Agric. Dec. ___, slip op. at 11 (June 15, 2000), is error:

The Chief ALJ did not find that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable, as Respondent contends.

I disagree with Respondent's contention that the above-quoted statement is error. The Chief ALJ did not make a finding that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable in the Initial Decision and Order. Instead, the Chief ALJ addressed Respondent's contention that the investigation was not complete, as follows:

Respondent contended at the hearing that the investigator's testimony relating to Respondent's alleged failure to make full and prompt payments should not be admitted because the investigator did not make a complete inquiry about Respondent's alleged debt. (Tr. 68-69.) This contention is rejected. Complainant had the burden, in establishing a *prima facie* case, to come forth with evidence that Respondent was not in compliance with

> PACA's prompt payment requirement. The investigator's testimony on this point was reliable and sufficient to establish Complainant's case. Any evidence that Respondent had made prompt payments was as available, if not more so, to Respondent as it was to Complainant. Thus, once Complainant established a *prima facie* case of noncompliance, the burden was on Respondent to show that it had come into compliance by making payments to its creditors.

Initial Decision and Order at 2-3.

Thus, the Chief ALJ found the testimony of the United States Department of Agriculture, Agricultural Marketing Service, investigator, Ms. Shelby, reliable and sufficient to establish Complainant's *prima facie* case that, during the period March 1996 through July 1998, Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce, and that, at the time of the November 4, 1999, hearing, approximately $228,000 of the $922,742.43 debt was still outstanding. The Chief ALJ did not address the issue of whether the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable.

Moreover, Respondent's focus on the extent of Ms. Shelby's investigation is misplaced. The issue in this proceeding is not whether Ms. Shelby should have conducted a more extensive investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), but rather the issue is whether Complainant proved by a preponderance of the evidence that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).[2]

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[2]Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act 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). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *reprinted in* 58 Agric. Dec. 474 (1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *appeal docketed*, No. 00-1011 (D.C. Cir. Jan. 13, 2000); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, (continued...)

Complainant established a *prima facie* case. Respondent failed to rebut Complainant's evidence. Therefore, I agree with the Chief ALJ's conclusion that Complainant proved by a preponderance of the evidence that Respondent failed to make full payment promptly for perishable agricultural commodities as alleged in the Complaint.

Even if I found that Ms. Shelby could have engaged in a more thorough investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), that finding would not cause me to reverse the Chief ALJ because Complainant proved by a preponderance of the evidence that Respondent failed to make full payment promptly of the agreed purchase prices of perishable agricultural commodities, as alleged in the Complaint, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Second, Respondent contends Ms. Shelby failed to conduct an adequate, error-free investigation and hence Ms. Shelby was not credible (Respondent's Pet. for Recons. at 1-3). Respondent contends I erroneously based the June 15, 2000, Decision and Order on Ms. Shelby's unreliable testimony and Respondent's failure to rebut Ms. Shelby's testimony (Respondent's Pet. for Recons. at 3-4).

I fully addressed Respondent's contentions regarding Ms. Shelby's investigation, the evidence of Respondent's violations of section 2(4) of the PACA

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[2](...continued)
178 F.3d 743 (5th Cir.), *cert. denied*, 120 S. Ct. 530 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 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 Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

(7 U.S.C. § 499b(4)), and Respondent's failure to rebut the evidence of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in *In re Mangos Plus, Inc.*, 59 Agric. Dec. ___ (June 15, 2000). I have carefully reviewed my reasoning and conclusions regarding Ms. Shelby's investigation, the evidence of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's failure to rebut the evidence of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in the June 15, 2000, Decision and Order, and I find no error.

Finally, Respondent requests that I reconsider the June 15, 2000, Decision and Order "revoking the Respondent's PACA license" (Respondent's Pet. for Recons. at 1). The June 15, 2000, Decision and Order does not revoke Respondent's PACA license. Respondent's PACA license was terminated on April 8, 1999, for failure to pay the annual license renewal fee (Answer ¶ 2; CX 1 at 1, 16). Therefore, on June 15, 2000, when I issued the Decision and Order, Respondent did not have a PACA license which could be revoked, and I ordered publication of the facts and circumstances of Respondent's violations. *In re Mangos Plus, Inc.*, 59 Agric. Dec. ___, slip op. at 22 (June 15, 2000).

For the foregoing reasons and the reasons set forth in *In re Mangos Plus, Inc.*, 59 Agric. Dec. ___ (June 15, 2000), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[3]

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[3]*In re David Tracy* Bradshaw, 59 Agric. Dec. ___, slip op. at 6 (Aug. 3, 2000) (Order denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 201, 209 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. 222, 227 (1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. 369, 387 (1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 83 (1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. 336, 338-39 (1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299 (1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel*
(continued...)

Respondent's Petition for Reconsideration was timely filed and automatically stayed the June 15, 2000, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed June 15, 2000, is reinstated, with allowance for time passed.

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

Order

The facts and circumstances set forth in the June 15, 2000, Decision and Order shall be published.

In re: PRODUCE DISTRIBUTORS, INC., AND IRENE T. RUSSO, d/b/a JAY BROKERS.
PACA Docket No. D-97-0013.
Order Denying Motion to Lift Stay as to Irene T. Russo, d/b/a Jay Brokers, filed November 7, 2000.

Kimberly D. Hart, for Complainant.
Irene T. Russo, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On January 25, 1999, I issued a Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, concluding that Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA] and revoking Jay Brokers' PACA license. *In re Produce Distributors, Inc.* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506 (1999). On March 2, 1999, Respondent filed a petition for reconsideration of the January 25, 1999,

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[3](...continued)
Zimmerman, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, and on March 23, 1999, I denied Respondent's petition for reconsideration. *In re Produce Distributors*, 58 Agric. Dec. 535 (1999) (Order Denying Petition for Reconsideration as to Irene T. Russo, d/b/a Jay Brokers).

On May 4, 1999, Respondent filed a request for a stay of the January 25, 1999, Order revoking Jay Brokers' PACA license, pending the outcome of proceedings for judicial review. On May 17, 1999, I granted Respondent's request for a stay. *In re Produce Distributors, Inc.*, 58 Agric. Dec. 542 (1999) (Stay Order as to Irene T. Russo, d/b/a Jay Brokers).

The United States Court of Appeals for the Second Circuit affirmed the January 25, 1999, Decision and Order as to Irene T. Russo, d/b/a Jay Brokers. *Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2^{d} Cir. 1999). Respondent filed a petition for a writ of certiorari which the Supreme Court of the United States denied on October 10, 2000. *Russo v. Department of Agric.*, 121 S. Ct. 308 (2000).

On October 17, 2000, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a Motion to Lift Stay Order for Irene T. Russo d/b/a Jay Brokers [hereinafter Motion to Lift Stay]. On November 6, 2000, Respondent filed a response to Complainant's Motion to Lift Stay, and the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Respondent states in her response to Complainant's Motion to Lift Stay that she has been granted an extension of time within which to file a petition for rehearing with the Supreme Court of the United States. Attached to Respondent's response to Complainant's Motion to Lift Stay is a copy of a letter from the Clerk of the Supreme Court of the United States to Respondent which states that on November 1, 2000, Justice Ginsburg extended the time within which Respondent may file a petition for rehearing to and including December 4, 2000.

I find that proceedings for judicial review of the January 25, 1999, Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, are not concluded. Therefore, Complainant's Motion to Lift Stay is denied.

———————

In re: MacCLAREN & ASSOCIATES, INC.
PACA Docket No. D-00-0022.
Order Dismissing Application for PACA License, Dismissing Notice to Show Cause and Canceling Hearing filed November 20, 2000.

Ruben D. Rudolph, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

On November 15, 2000, Rhonda MacClaren, President of MacClaren & Associates, Inc., the Applicant in this matter, filed a notice that Applicant was withdrawing its application for a PACA license. In view of the notice, it is ordered that the license application filed herein be dismissed.

Accordingly, as the application is dismissed, the Notice to Show Cause filed on August 21, 2000, by the Associate Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, is also dismissed.

The hearing scheduled for January 24-25, 2001, is canceled.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: GOLDEN PHOENIX TRADING, INC.
PACA Docket No. D-99-0014.
Decision and Order filed August 1, 2000.

Eric Paul, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq*.) (PACA), was initiated on July 20, 1999, by a complaint alleging that Respondent wilfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the purchase prices, in the total amount of $988,874.49, to three (3) sellers for 71 lots of agricultural commodities which it purchased, received, and accepted in interstate commerce during May and June 1997. The complaint requests a finding that Respondent committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of its violations be published.

The complaint was served on Respondent by certified mail to Daniel E. Forsh, Trustee in Bankruptcy for Golden Phoenix Trading, Inc. (hereinafter "Trustee") since Respondent had ceased operating and was the debtor in an involuntary Chapter 7 proceeding in the United States Bankruptcy Court for the Western District of Washington, Case No. 98-00381). Respondent filed an answer through its Trustee on August 17, 1999. This answer asserts that Respondent is the subject of a pending Chapter 7 Bankruptcy proceeding and that all actions seeking pecuniary damages from Respondent are automatically stayed. This answer does not acknowledge, admit or deny Respondent's violations of Section 2(4) of the PACA as alleged in the complaint, but states "The Trustee has no concern over or opposition to the application of appropriate police power measures by the Department."

A copy of the complaint was also served on Michael Moore, Vice President, Golden Phoenix Trading, Inc. Mr. Moore filed a Notice of Answer on August 16, 1999. The responding party in this pleading, however, is Michael Moore not Respondent Golden Phoenix Trading, Inc. Michael Moore denies in his answer that he had any knowledge of the violations alleged, that he was ever personally involved in any produce transactions, that he had any knowledge of the financial

condition of the firm after approximately August 1996, when negotiations were commenced to buy-out his ownership interest, and asserts that he had resigned as a director in June 1997. Michael Moore attached supporting documentation, including pleadings filed in Bankruptcy Court and United States District Court actions involving PACA trust claims (brought by sellers alleged unpaid in this administrative proceeding), and a United States District Court decision holding that Michael Moore had no personal responsibility or liability for any PACA trust violations. As relief, Michael Moore has requested that the Administrative Law Judge "NOT find the RESPONDING PARTY, Michael Moore, liable for willfully, or flagrantly, or repeatedly violating any Sections, including Section 2(4) of the PACA (7 U.S.C. § 499b(4)."[1]

Neither answer filed in this proceeding constitutes a denial of the substantive allegations of the complaint by Respondent Golden Phoenix Trading, Inc. The failure of Respondent Golden Phoenix Trading, Inc. to deny or otherwise respond to the substantive allegations of the complaint shall be deemed under section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) to be an admission of said allegations for purposes of this proceeding.

On motion of Complainant for the issuance of a Decision Without Hearing by Reason of Admission of Facts, the following decision is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice governing this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Golden Phoenix Trading, Inc., herein referred to as Respondent, is a corporation organized and existing under the laws of the State of Washington whose last business addresses were 3131 Elliott Avenue, Suite 770, Seattle, Washington 98121 and 19550 International Boulevard, Suite 330, Sea Tac, Washington 98188.

2. At all times material to this matter, Respondent operated subject to the PACA. PACA license number 951292 was issued to Respondent on May 8, 1995, but terminated on May 8, 1998, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), because Respondent failed to pay the required annual renewal fee.

3. Since January 12, 1998, Respondent has been a debtor in a proceeding under Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq*.), which has been

[1]Michael Moore's answer was treated by the PACA Branch as a request for a determination of his responsibly connected status by the Chief of the PACA Branch. On March 1, 2000, the Acting Chief, PACA Branch, Fruit and Vegetable Programs notified Michael Moore of his determination that Mr. Moore was not responsibly connected to Golden Phoenix Trading, Inc. during the period of the alleged violations.

designated Case No. 98-00381, in the United States Bankruptcy Court for the Western District of Washington. The Chapter 7 trustee is Daniel E. Forsch, whose address is 1218 Third Avenue, Suite 1422, Seattle, Washington 98101.

4. Respondent failed to make full payment promptly of $988,874.49 to three sellers for 71 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce during May and June 1997.

Conclusion

Respondent has filed an answer which constitutes an admission of all of the material allegations contained in the complaint. Therefore, the following order is issued.

Order

Respondent is found to have committed wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

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 sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Decision and Order became final September 15, 2000.-Editor]

In re: HURWITZ DISTRIBUTING COMPANY, INC.
PACA Docket No. D-00-0006.
Decision and Order filed August 11, 2000.

Kimberly D. 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 March 8, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that, during the period of June 4, 1998, through October 15, 1998, Respondent, Hurwitz Distributing Company, Inc. [hereinafter "Respondent"], failed to make full payment promptly to 44 sellers of the agreed purchase prices, or balances thereof, in the total amount of $997,078.99 for 321 lots of perishable agricultural commodities, which it received, accepted and sold in interstate and foreign commerce. In February 1999, a pro rata distribution of trust assets totaling $179,712.85 was made to thirty-nine (39) PACA claimants who protected their trust rights under Section 5(c) of the PACA (7 U.S.C. § 499e(c)) by filing timely trust notices. This pro rata distribution reduced the amount that remains past due and unpaid for purchases made by Respondent in the course of interstate and foreign commerce to $817,366.14.

A copy of the complaint was served upon Respondent on March 20, 2000, which Respondent has not answered. The time for filing an answer having expired, and upon motion of the Complainant for issuance of a default order, the following Decision and Order shall be issued without further investigation of hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.1.39).

Findings of Fact

1. Respondent is a corporation whose business address is 55 Galli Drive, Suite J, Novato, California 94949-5713. Its mailing address is P.O. Box 4280, San Rafeal, California 94913-4280.

2. At all times material herein, Respondent was licensed under the provisions of the Act. PACA license number 840901 was issued to Respondent on March 16, 1984. This license terminated on March 16, 1984, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a) when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph III of the complaint, Respondent, during the period of June 4, 1998 and October 15, 1998, failed to make full payment promptly to forty-four (44) sellers of the agreed purchase prices, or balances thereof, in the total amount of $997,078.99 for 321 lots of perishable agricultural commodities, which it received, accepted and sold in interstate and foreign commerce. In February 1999, a pro rata distribution of trust assets totaling $179,712.85 was made to thirty-nine (39) PACA claimants who protected their trust rights under Section 5(c) of the Act (7 U.S.C. §499e(c)) by filing time trust notices. This pro rata distribution reduced the amount that remains past due and unpaid for

produce purchases made by Respondent in the course of interstate and foreign commerce to $817,366,14.

5. On October 19, 1999, Respondent filed a Voluntary Petition for Bankruptcy pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq*.) in the United States Bankruptcy Court for the Northern District of California. This petition has been designated Case No. 99-13208.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)) for which the Order below is issued.

Order

It is ordered that Respondent's willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)) be published.

This Order shall become effective on the eleventh day after this Decision becomes final. Pursuant to the Rules of Practice Governing Proceedings Under the Act, this Decision shall become final without further proceedings within 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 September 26, 2000.-Editor]

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In re: PREFERRED PRODUCE COMPANY.
PACA Docket No. D-00-0015.
Decision and Order filed August 31, 2000.

Mary Kyle Hobbie, 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 May 11, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1997, through September 1998, Respondent failed to make full payment promptly to 6 sellers in the total amount of $269,476.00 for 26 lots of perishable agricultural commodities it purchased, received and accepted in interstate commerce.

A copy of the complaint was mailed to the Respondent by certified mail on May 12, 2000. This 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, Preferred Produce Company, is a corporation organized and existing under the laws of the State of Virginia. Its business address is 2558 Paterson Avenue, Roanoke, Virginia 24016. Its mailing address was Post Office Box 3041, Roanoke, Virginia 24015.

2. At all times material herein, Respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 930351 was issued to Respondent on December 10, 1992. The license terminated on December 10, 1998, when Respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph 3 of the complaint, during the period of November 1997, through September 1998, Respondent purchased, received, and accepted in interstate commerce from 6 sellers, 26 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 $269,476.00.

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(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), 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 October 27, 2000.-Editor]

In re: JOHNNY S. TAWIL, d/b/a DISCOUNT WHOLESALE PRODUCE.
PACA Docket No. D-00-0013.
Decision and Order filed September 14, 2000.

Kimberly D. Hart, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, 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 March 30, 2000, by the Associate Deputy

Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period March through May 1999, Respondent, Johnny S. Tawil, doing business as Discount Wholesale Produce [hereinafter "Respondent"], failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $645,975.51 for 106 lots of fruits and vegetables, which it received, accepted, and sold in interstate commerce.

A copy of the Complaint was served upon Respondent on May 26, 2000. This 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. Johnny S. Tawil is an individual doing business as Discount Wholesale Produce [hereinafter referred to as "Respondent"] whose business address is 2182 E. 10th Street, Los Angeles, California 90021.

2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 971872 was issued to Respondent on July 23, 1997. This license was suspended on June 9, 1999, pursuant to Section 13(a) of the PACA (7 U.S.C. § 499m(a)), when Respondent failed to allow access to its business records. This license terminated on July 23, 1999, 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. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph III of the Complaint, Respondent, during the period of March through May 1999, purchased, received, and accepted in interstate commerce from 15 sellers, 106 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 $645,975.51.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, constitutes willful, flagrant, and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant, and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above shall be published.

This Order shall become effective 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, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 26, 2000.-Editor]

In re: ALEX FARM CORPORATION.
PACA Docket No. D-00-0009.
Decision and Order filed September 22, 2000.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, 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 March 15, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1997 through February 1999, Respondent failed to make full payment promptly to 16 sellers of the agreed purchase prices in the total amount of $419,922.50 for 229 lots of perishable agricultural commodities, that Respondent purchased, received and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent, and it 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

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. Alex Farm Corporation [hereinafter "Respondent"] is a corporation organized and existing under the laws of the State of Florida. Its mailing address is P.O. Box 524143, Miami, Florida 33152, and its business address is 1160 N.W. 21st Terrace, Miami, Florida 33127.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 941025 was issued to Respondent on April 18, 1994. This license terminated on April 18, 1999, 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. As more fully set forth in paragraph 3 of the complaint, Respondent, during the period December 1997 through February 1999, failed to make full payment promptly to 16 sellers of the agreed purchase prices in the total amount of $419,922.50 for 229 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), 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 thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final November 2, 2000.-Editor]

In re: MATOS PRODUCE CORP.
PACA Docket No. D-00-0017.
Decision and Order filed October 20, 2000.

Mary Kyle Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, 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 June 7, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period October 1998 through May 1999, Respondent Matos Produce Corp. [hereinafter "Respondent"] failed to make full payment promptly to 17 sellers of the agreed purchase prices, or balances thereof, in the total amount of $591,424.00 for 186 shipments of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. The complaint also noted that on June 3, 1999, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Southern District of New York, New York Division pursuant to Chapter 7 of the Bankruptcy Code (7 U.S.C. § 700 *et seq*.), designated Case No. 99B43551. Complainant requested that a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499(4)), and that such findings be published.

Respondent has admitted in documents filed in connection with its Chapter 7 bankruptcy proceeding entitled Scheduled F - Creditors Holding Unsecured Nonpriority Claims that it owes all of the 17 sellers listed in Paragraph III of the Complaint $579,700.10. The Complaint alleged debt to the same 17 sellers of $591,424.00. This admission warrants the immediate issuance of a Decision without Hearing by Reason of Admissions. Complainant has filed a Motion for the issuance of a Decision without Hearing by Reason of Admissions, and the following Decision is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practices (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation whose business address was 20-21 Bronx Terminal Market, Bronx, New York 10451.

2. Pursuant to the licensing provisions of the PACA, license number 980486 was issued to Respondent on January 20, 1998. This license terminated on January 20, 2000, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. The Deputy Administrator, Fruit and Vegetable Division, AMS filed a Complaint alleging that Respondent, during the period October 1998 through May 1999, on or about the dates and in the transactions set forth in paragraph III of the Complaint, purchased, received and accepted 186 shipments of perishable agricultural commodities with agreed purchase prices in the total of $591,424.00 from 17 sellers in interstate commerce.

5. On June 3, 1999, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (7 U.S.C. § 700 *et seq*.) in the United States Bankruptcy Court for the Southern District of New York, New York Division. This petition has been designated Case No. 99B43551.

6. Respondent has admitted in bankruptcy pleadings that it owes an amount that totals $579,700.10, an amount less than that which the Complaint alleged, to the same17 sellers that are alleged to be unpaid for purchases in the Complaint. Schedule F consists of a table reflecting the name and address of the creditor and the amount of the unpaid produce debt as shown in the Complaint and in Respondent's bankruptcy filing.

SELLER'S NAME & ORIGIN	**BANKRUPTCY PLEADING**	**COMPLAINT**
World Food Trade Inc.,Miami, FL	$ 10,220.00	$ 10,260.00
T.C. Tropical Products, Bronx, NY Origin: Costa Rica Columbia, Ecuador, Dominican Republic, Trinidad, Tobago, CA, FL, ID	$194,931.45	$164,910.45
C.H. Robinson Company Minneapolis, MN	$114,452.00	$122,124.00
Armeno Foods, Inc., Bergenfield, NJ	$ 11,969.50	$ 21,027.50
Del Monte Fresh Produce N.A., Inc., Coral Gables, FL	$ 63,870.80	$ 75,100.00

Dade South Fruits & Vegetables, Inc. Miami, FL	$ 36,625.00	$ 38,098.50
Yucatica S.A. Costa Rica	$ 21,261.00	$ 33,408.00
Gonzalez and Tapanes a/t/a La Fe Foods North Bergen, NJ	$ 3,505.00	$ 3,656.00
Maurice A. Auerbach, Inc. South Hackensack, NJ	$ 9,321.00	$ 9,321.00
Banana Distributors of New York, Inc. Bronx, NY Origin: Ecuador, Columbia, Costa Rica, CA	$ 13,713.00	$ 14,991.00
Reliable of Miami, Inc. Miami, FL	$ 2,174.00	$ 3,890.00
Nalosa, LLC Wesalco, TX	$ 1,932.00	$ 476.00

M & M Packaging, Inc. Goshen, NY Orgin: TX, OR, ND, ME, MI	$ 16,166.00	$ 21,334.30
K.V.K International Elmont, NY Orgin: Trinidad, Grenada	$ 3,824.75	$ 3,824.75
American Banana Co. Inc. Origin: Ecuador, Colombia, Costa Rica	$ 67,660.00	$ 65,394.50 Less Offset: - 4,536.00 $ 60,858.50
Lili Ochoa, Inc. Miami, FL	$ 7,889.00	$ 7,909.00
D'Amico Farm Allentown, NJ	$ 185.00	$ 235.00
	Total Amount: $579,700.10	Total Amount 591,424.00

Conclusions

Respondent has admitted in the petition and schedules that were filed in its bankruptcy proceeding that it still owed 17 sellers at least $579,700.10 for 186 shipments of perishable agricultural commodities on June 3, 1999. Respondent's admitted failures to make full payment promptly constitute willful, flagrant and

repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)). Accordingly, the following Order is issued.

Order

Respondent committed willful, flagrant and repeated violations of Section 2(4) 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 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 the parties.

[This Decision and Order became final December 3, 2000.-Editor]

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