AGRICULTURE DECISIONS

Volume 60

January – June 2001

UNITED STATES DEPARTMENT
OF AGRICULTURE

AGRICULTURE DECISIONS

Preface

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.

Beginning in Volume 60, each part of Agriculture Decisions has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index are included in a separate volume, entitled Part Four.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office

of Administrative Law Judges, U.S. Department of Agriculture, Room 1082 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

AGRICULTURE DECISIONS

Volume 60

January - June 2001
Part One (General)
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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

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This Sixtieth Edition of Agriculture Decisions honors the three Judicial Officers who have served in that capacity since publication of the first edition in 1942. The Office of Judicial Officer has the delegated authority from the Secretary of Agriculture to make final decisions for the Department in adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 and other proceedings listed in 7 C.F.R. § 2.35.

Thomas J. Flavin, Judicial Officer 1946-73; Asst. to Sec. of Agric., 1942-43; Asst. to War Food Adm'r.1943-46; A.B., Boston College, 1926, A.M. 1927; L.L.B., Georgetown U., 1932; Instructor, Assoc. Prof. classical literature-Georgetown U., 1927-32; admitted to D.C. bar, 1932 & Mass. bar, 1933; practiced in Boston, 1932-34, Served as attorney for USDA, 1934-42.

Donald A. Campbell, Judicial Officer, 1971-96; Mercer U., 1945, Ga. Inst. of Technology, 1945-46; J.D. George Wash. U., 1949; admitted to D.C. bar and U.S. Dist. Ct., D.C. 1949; U.S. Court of App. (D.C. Cir.) 1951; U.S. Supr. Ct. 1955. Served as attorney in Office of Gen. Counsel USDA, Wash., 1949-62; Asst. Gen. Counsel USDA, 1959-62; Dir. Packers & Stockyards Div. Consumer and Marketing Service, 1962-67; Adm. Packers & Stockyards Admin., 1967-71. Served with USNR, World War II; Lt. Comdr. Res. Ret.

William G. Jenson, Judicial Officer, 1996- Present; B.A. Hobart College 1970; J.D. Suffolk University Law School 1975; admitted to Mass. bar, 1975; Vice-chair, A.B.A. Sec. of Admin. Law and Regulatory Practice-Agriculture; Instructor and Paralegal committee mem. at USDA Graduate School. Served as attorney for Regulatory Div. Office of the General Counsel USDA 1976-96; Served with U.S. Army, 1970- 72.

James P. Hurt, Editor - Agriculture Decisions

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

STEW LEONARD'S v. DANIEL GLICKMAN, UNITED STATES SECRETARY OF AGRICULTURE.
No. 3:00CV627 (TPS)
Decided March 21, 2001.

(Cite as 199 F.R.D. 48 (D. Conn.).

Milk - Handler - Producer-handler - Lease - Equal protection.

The United States District Court for the District of Connecticut affirmed the Secretary of Agriculture's classification of Stew Leonard's as a handler, and not a producer-handler under Federal Milk Order No. 1 (7 C.F.R. pt. 1001). The Court stated it must afford substantial deference to the agency's interpretation of its own regulations and give the interpretation controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation. The Court held the Secretary of Agriculture's narrow construction of the definition of the term "producer-handler" is consistent with the plain language of the regulation and also faithful to the Secretary of Agriculture's intent at the time of the regulation's promulgation. The Court further held substantial evidence exists to support the Secretary of Agriculture's conclusion that Stew Leonard's is a handler and not a producer-handler. The Court rejected Stew Leonard's claim that the Secretary of Agriculture violated equal protection guarantees of the Fifth Amendment by granting producer-handler status to operations that lease a portion of their dairy herd, without assuming a significant portion of the risks involved, and by refusing to grant producer-handler status to Stew Leonard's, who leased a herd that fulfills all its processing demands, while assuming a significant portion of the risks involved.

United States District Court
District of Connecticut

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

SMITH, Magistrate J.

I. INTRODUCTION

Pending before the court[1] are the parties' cross motions for summary judgment (docs. 17 & 18). Petitioner, Stew Leonard's Dairy ("Stew Leonard's"), brings this action pursuant to the judicial review provision of the Agricultural Marketing

[1]The parties consented to jurisdiction by a United States Magistrate Judge, and this case was transferred to the undersigned pursuant to 28 U.S.C. § 636(c)(1) (docket no. 15).

Agreement Act of 1937, 7 U.S.C. § 608c(15)(B), against respondent, Dan Glickman, United States Secretary of Agriculture, seeking reversal of the Secretary's March 16, 2000 decision to deny Stew Leonard's "producer-handler" status under Federal Milk Order No. 1, 7 C.F.R. §§ 1001 *et seq.* (1999). Petitioner claims that the Secretary's decision is "not in accordance with the law," 7 U.S.C. § 608c(15)(B), because the Secretary's decision was arbitrary and capricious. For the reasons set forth below, the Secretary's decision is **AFFIRMED**, petitioner's motion for summary judgment is **DENIED**, and defendant's motion for summary judgment is **GRANTED**.

II. DISCUSSION

A. FACTS AND PROCEDURAL BACKGROUND

The facts giving rise to this petition are not in dispute, and are set forth in the administrative record filed with the court in this matter.

In order to view the facts in the proper context, an explanation of the underlying regulatory scheme is essential. In the United States, the milk industry is beleaguered by two unique characteristics. One characteristic is the existence of "a basic two-price structure that permits a higher return for the same product, depending on its ultimate use." *Zuber v. Allen*, 396 U.S. 168, 172 (1969). Milk, regardless of whether it is produced for consumer drinking or product manufacture, is produced in the same manner. The difference lies in the price the end product can fetch in the consumer market; a handler[2] can sell fluid milk at a higher price, thereby allowing the producer to charge the handler a premium for milk destined for drinking. This premium fosters intense competition amongst the producers to sell their milk at the premium price.

The other unique characteristic is "that production yield varies seasonally, resulting in oversupply in the summer months." *Minnesota Milk Producers Ass'n v. Glickman,* 153 F.3d 632, 638 (8th Cir. 1998). Because the consumer demand for milk remains relatively constant throughout the year, and the animals' production fluctuates with the animals' nutrition supply during the year, producers must maintain a herd of animals that is able to meet the peak demand in the lean months. The effect of maintaining a herd that can meet the consumer demand in the winter months leaves the producers with a surplus of highly perishable milk in the summer,

[2]Generally speaking, a "producer" is a person or entity who collects the milk directly from the animals, and a "handler" is a person or entity who takes this milk and turns it into an end product, and then resells it to either consumers or manufacturers.

when the animals are the most productive. Historically, this glut allowed handlers to demand bargain prices because they could obtain their milk from an increased variety of sources because all the producers, both far and near, had a surplus they were anxious to dispose of.

After the milk market, as well as the market for other commodities, self-destructed under the strain of these two forces during the Great Depression, Congress stepped in and enacted the Agricultural Marketing Agreement Act of 1937 ("AMAA"), *codified at* 7 U.S.C. § 601 *et seq*. The purpose of the legislation was "to remove ruinous and self-defeating competition among the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered." *Zuber*, 396 U.S. at 180-81. In order to effectuate this purpose, the legislation was intended to "raise producer prices and to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers." *Minnesota Milk Producers Ass'n*, 153 F.3d at 637.

Specifically, the AMAA gives the Secretary of Agriculture the authority to issue orders governing the handling of agricultural commodities, *see* 7 U.S.C. § 608c(1), including milk, *see* 7 U.S.C. § 608c(5), through a system of marketing orders applicable to a designated region. To achieve equality among producers of milk, the marketing orders create a market-wide pricing pool for handlers. The marketing order sets minimum prices that the handlers may pay for the basic classes of milk. Handlers who deal primarily in high grade, or "fluid" milk, which is used to produce milk intended for drinking, pay into a pool that is then drawn on by the handlers of the lower grade milk, or "surplus." Producers then receive a uniform, or "blend,"[3] price from the handlers irrespective of the use to which their milk is eventually put. *See* 7 U.S.C. § 608c(5); *see generally Lehigh Valley Cooperative Farmers, Inc. v. U.S.*, 370 U.S. 76, 79-80 (1962) ("[T]he statute authorizes the Secretary to devise a method whereby uniform prices are paid by milk handlers to producers for all milk received, regardless of the form in which it leaves the plant and its ultimate use. Adjustments are then made among the handlers so that each eventually pays out-of-pocket an amount equal to the actual utilization value of the milk he has bought.").

The regulatory effect of this pool can be demonstrated by a simple example. Suppose Handler A purchases 100 units of Class I (fluid) milk from Producer A at the minimum value of $3.00 per unit. Assume further that Handler B purchases 100 units of Class II (soft milk products) milk from Producer B at the minimum value of $2.00 per unit, and that Handler C purchases 100 units of Class III (hard milk products) milk from Producer C at $1.00 per unit. Assuming that this constitutes

[3] The blend price is adjusted by a number of factors, none of which are germane to this proceeding.

the entire milk market for a regulatory district, during this period the total price paid for milk is $600.00, making the average price per unit of milk $2.00. Thus, under the regulatory scheme, Producers A, B, and C all receive $200.00 for the milk they supplied, irrespective of the use to which it was put. However, Handler A must, in addition to the $200.00 that it must tender to Producer A, pay $100.00 into the settlement fund because the value of the milk it purchased exceeded the regulatory average price. Along the same vein, Handler C will receive $100.00 from the settlement fund because it will pay Producer C more than the milk it received was worth. The pool achieves equality among producers, and uniformity in price paid by handlers.

Although, generally speaking, the regulatory scheme closely monitors the conduct of handlers, a certain category of handlers is exempt from participation in the pricing pool. The Secretary has chosen not require those entities that both produce and handle their own milk to make payments into the pool.[4] The regulations designate such entities as "producer-handlers." "Typically, a producer-handler conducts a small family-type operation, processing, bottling and distributing only his own farm production." Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders, 25 Fed. Reg. 7819, 7825 (Aug. 16, 1960). The rationale for this exemption is "that such businesses are so small that they have little or no effect upon the pool." *Id.*

The effects of this exemption are twofold. First, if the producer-handler uses all the milk it produces as Class I milk, it avoids having to make payments into the producer settlement fund; it merely sells the milk at the market price, which is tempered only by the production costs. Assuming all other conditions are equal, the exemption allows the producer-handler to make a greater profit because it sells Class I milk without having to pay the full Class I price into the settlement fund.

The second effect of the exemption is upon the pool as a whole. Because the total amount of Class I milk purchased in a marketing area is a factor in calculating the aggregate blend price for the marketing area, removing a handler's Class I purchases from the calculus brings the aggregate price down. Exemption of a handler who purchases a significant quantity of Class I milk from producers in the pool depresses the blend price in the region.

This exemption may also provide an additional windfall to producer-handlers

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[4]The basis for enacting the AMAA is the Commerce Clause, and the nexus to interstate commerce is the handlers and not the producers, whose operations are generally local. *See Dairylea Cooperative, Inc. v. Butz*, 504 F.2d 80, 83 (2d Cir. 1974) ("Though the act affects producers, it was designed to regulate handlers only."). Although a producer-handler is not subject to participation in the pool, it is an entity within the purview of the AMAA. *See id.* at 83 n.6 ("When a producer acts as a handler he is not so exempted.").

who "ride the pool." This term refers to a producer-handler who draws upon pool resources to compensate for any deficiency in its own supply during the lean production months, thereby allowing the producer-handler to maintain a relatively smaller supply of animals with a minimal surplus of milk in periods of greater production. Producer-handlers could also take advantage of the price regulation by "riding the pool" if they do dispose of any surplus because the milk they dispose of most likely is used as Class II or Class III milk, but the producer-handler is still able to collect the relatively higher blend price. Thus, in theory, producer-handlers who "ride the pool" could reap the benefits of the regulatory scheme without sharing the burdens.

The instant lawsuit concerns the scope of the producer-handler exemption from the regulatory pool in Connecticut. Petitioner, who operates a dairy retail store in Norwalk, Connecticut, because of a lease with Oakridge Farm executed on December 10, 1997, which was superseded by a subsequent lease executed on June 16, 1998, claims that it should be classified as a producer-handler. The lease provided that:

> 1. Stew Leonard's hereby leases from Oakridge Farm its entire herd of milking cows at the rate of $1.00 per cow per day. Payment will be made on a monthly basis. In determining whether a cow is deemed to be part of Oakridge Farm's herd of milking cows, a cow shall be so counted from the date it is first milked until it is culled or dies. Inventory will be established on the last day of each month and verified by the DHI (Dairy Herd Management Services) records. Stew Leonard's agrees to replace culls and/or attrition with newly bred heifers.
>
> 2. In addition to the foregoing lease rate, Stew Leonard's hereby leases from Oakridge Farm its barns, milking parlors, personal property and all equipment necessary to produce raw milk and its related products for $12,000 a month. Stew Leonard's agrees that it will transport the milk products from Oakridge Farm to its facilities for processing, packaging, sale and distribution at its own expense.
>
> 3. In addition to the foregoing lease rate, Stew Leonard's agrees to pay for all ordinary and necessary expenses related to the production, processing, or packaging of milk. Also, Stew Leonard's agrees to assume all risk, responsibility, and maintenance of the cows, equipment, buildings, and labor. The aforesaid risks and responsibilities include, but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and

> destruction resulting from employee negligence and/or malfeasance. Stew Leonard's agrees to buy corn silage from Bahler Farms, Inc. when needed. Stew Leonard's also agrees to pay Bahler Farms, Inc. a management fee of $2,000 per month.
>
> 4. The term of the agreement shall be for a term of two years. Advance written notice 60 days prior to change in ownership, or key management personnel by either Stew Leonard's or Oakridge Farm. If either Stew Leonard's or Oakridge Farm fails to approve of the aforementioned change, they will have the option to terminate the lease on the last day of the month of the change.

(Petition for Review of Agency Decision, Ex. G at 1-2). Petitioner believed that the lease transaction had the effect of creating one enterprise, which would then qualify petitioner for producer-handler status under the order.

In December of 1997, petitioner initially requested that the Market Administrator for the New England Marketing Order,[5] Erik Rassmussen, classify Stew Leonard's as a producer-handler under the order. Under the applicable provisions of this order, a producer-handler is defined as:

> any person who, during the month, is both a dairy farmer and a handler and who meets all of the following conditions:
>
> (a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.
>
> (b) The person's own route disposition constitutes the majority of the route disposition from the plant.
>
> (c) The quantity of route disposition in the marketing area from the person's

[5] Since the initiation of the administrative proceedings, the Department of Agriculture has amended the nation-wide system of marketing orders by reducing the total number of marketing orders throughout the nation. *See* Milk in the New England and Other Marketing Areas; Order Amending the Orders, 64 Fed. Reg. 47898 (Sept. 1, 1999). Under this reorganization, the former New England Marketing Order became part of the Northeast Marketing Area. *See* 7 C.F.R. § 1001.2 (2000).

plant is greater than in any other Federal marketing area.

(d) The producer-handler receives no fluid milk products except from such handler's own production and from pool handlers, either by transfer or diversion pursuant to § 1001.15. If the producer-handler's receipts from own production and the total route disposition from the producer-handler's plant each exceed 4,300 pounds per day for the month, the producer-handler's receipts from pool plants are not in excess of 2 percent of receipts from own production. For the purposes of this paragraph, the producer-handler's receipts of fluid milk products shall include receipts from plants of other persons at all retail and wholesale outlets that are located in a Federal marketing area and operated by the producer-handler, an affiliate, or any person who controls or is controlled by the producer-handler.

7 C.F.R. § 1001.10 (1999) *amended by* Milk in the New England and Other Marketing Areas; Order Amending the Orders, 64 Fed. Reg. 47898 (Sept. 1, 1999).[6]

After a period of correspondence with the Market Administrator, concerning

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[6]This definition has been changed since the initiation of the administrative action in 1998. The new text reads as follows:

Producer-handler means a person who:

(a) Operates a dairy farm and a distributing plant from which there is monthly route disposition in the marketing area during the month;

(b) Receives milk solely from own farm production or receives milk that is fully subject to the pricing and pooling provisions of this or any other Federal order;

(c) Receives at its plant or acquires for route disposition no more than 150,000 pounds of fluid milk products from handlers fully regulated under any Federal order. This limitation shall not apply if the producer-handler's own farm production is less than 150,000 pounds during the month;

(d) Disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products; and

(e) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) and the processing and packaging operations are the producer-handler's own enterprise and at its own risk.

7 C.F.R. § 1001.10 (2000). The parties have not suggested that this version of the regulation applies. Therefore, the court will apply the prior version of the regulation.

various proposed changes to drafts of the leases, the Market Administrator declined to re-classify petitioner as a producer-handler in a letter dated February 6, 1998:

> The office has reviewed the various leases you have proposed. The stated purpose of the leases is to change the regulatory status of Stew Leonard's Dairy from a handler operating a pool distributing plant that purchases milk from producers to status as a producer-handler.
>
> There is precedent by this office to approve farm leases for a producer-handler. These approvals follow the needs of currently operating producer-handlers to utilize additional sites for expansion purposes.
>
> The situation at Stew Leonard's Dairy is distinct from proposals received by some producer-handlers. You propose to construct a legal framework, with our assistance, that would allow you to circumvent the Agricultural Marketing Agreement Act, 7 U.S.C. 608(c)(5) [sic]. The determination has been made that the means you propose to meet the producer-handler qualification under Section 1001.10(a) violate the letter and intent of the Act and this section.
>
> Stew Leonard's Dairy must continue to file handler reports as a pool distributing plant. If you wish to challenge this decision, refer to 7 U.S.C. (608(c)(15)(A) [sic].

(Administrative Record, Ex. 100, PX 14). On February 17, 1998, petitioner commenced the administrative action by filing a petition for relief from the Market Administrator's February 6, 1998 determination pursuant to 7 U.S.C. § 608c(15)(A).[7]

The Secretary affirmed the Market Administrator's February 6, 1998

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[7]Such section provides:

> 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 the 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 the 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 the law.

7 U.S.C. § 608c(15)(A).

determination. On January 11 and 12, 1999, the parties presented evidence and testimony before an Administrative Law Judge ("ALJ"), who dismissed the petition and affirmed the decision of the Market Administrator. Petitioner then appealed to the Secretary of Agriculture, who, through a designated Judicial Officer, after modifying the ALJ's decision in some areas, also affirmed the decision of the Market Administrator on March 16, 2000.[8] Petitioner then commenced the instant action on April 4, 2000 pursuant to 7 U.S.C. § 608c(15)(B).[9]

B. REVIEW OF THE SECRETARY'S DECISION

The question before the court is whether the Market Administrator's classification of Stew Leonard's as a handler, and not a producer-handler, which was adopted by the Secretary after completion of the administrative review process, was "in accordance with the law" under 7 U.S.C. § 608c(15)(B). The Secretary held that

> 1. Petitioner is a "handler," as defined in section 1001.9 of the New England Marketing Order (7 C.F.R. § 1001.9).
>
> 2. Petitioner is not a dairy farmer.
>
> 3. Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the dairy herd or other resources and facilities used to produce milk, which Petitioner leases from Oakridge Farm.
>
> 4. Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Marketing Order (7 C.F.R. § 1001.10).

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[8] The administrative petition was amended to reflect the superseding lease executed on June 16, 1998. This version was the subject of the administrative review proceedings, and, consequently, is the subject of this court's review as well.

[9] This provision states, in pertinent part, that:

> The District Courts of the United States . . . are vested with jurisdiction in equity to review [the Secretary's] ruling. . . . If the court determines that such ruling is not in accordance with the law, it shall remand such proceedings to the Secretary with directions. . . .

7 U.S.C. § 608c(15)(B).

> 5. The Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Marketing Order (7 C.F.R. § 1001.10), is in accordance with the law.

(Administrative Record, Ex. 88 at 62-63). Petitioner contends that the Secretary's decision was not in accordance with the law because it is arbitrary and capricious, in that the Secretary's ultimate decision is not supported by the weight of the evidence, and flies in the face of its prior action concerning classification of entities as producer-handlers.

The scope of the court's review is set forth in the Administrative Procedure Act, which states that

> [t]he reviewing court shall decide all relevant questions of law, interpret constitutional or statutory provisions, and determine the meaning or applicability of terms of an agency action. The court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . [or] unsupported by substantial evidence. . . .

5 U.S.C. § 706(2)(A) & (E). Cognizant of this standard, the court now turns to the precise issues in dispute.

1. SECRETARY'S INTERPRETATION OF 7 C.F.R. § 1001.10

A threshold issue is whether the law the Secretary eventually applied to reach his decision is a valid exercise of agency power. Petitioner states that

> [t]he administrator admitted under oath that the term "dairy farmer" is not defined anywhere in the regulations. Tr. at 298. The administrator has the sole power, without regulatory guidance, to decide what is and is not a dairy farmer. By failing to define a critical term within the definition of "producer-handler," the regulations themselves cede unlimited arbitrary authority to the administrator.

(Petitioner's Cross-Mot. for S.J. at 3 n. 3). In addition, petitioner contends that respondent's interpretation of the regulation is contrary to the purpose of the governing statutory scheme. (See Petitioner's Cross-Mot. for S.J. at 22-23). Thus, petitioner argues that respondent's construction of the regulation is legally

deficient.[10]

When determining if an agency's construction of a regulation is legally permissible, the analysis is governed by the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *See New York Currency Research Corp. v. Commodity Futures Trading Comm'n,* 180 F.3d 83, 88 (2d Cir. 1999) ("Although *Chevron* dealt only with an agency's interpretation of relevant federal statutes, similar principles apply to judicial review of an agency's interpretation of its own regulations."). Pursuant to this framework, the reviewing court asks two questions. *See id.* at 842. First "is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If this first question is answered in the negative, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The agency's interpretation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Because the governing statute, 7 U.S.C. § 608c(5), is silent on the determination of exemptions to the regulatory pricing pool, it is the second inquiry set forth in *Chevron* that applies here. In such a situation, the court must afford "substantial deference to the agency's interpretation of its own regulations," and must give the interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512 (1994) (internal quotation marks omitted). "In other words, [the court] must defer to the Secretary's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Id.* (internal quotation marks omitted). This deference to the agency is especially important when "the regulation concerns a complex and highly technical regulatory program. . . ." *Id.* (internal quotation marks omitted).

The Secretary has narrowly construed the definition of producer-handler set forth in the regulations. The pertinent part of the regulation reads as follows:

> [p]roducer-handler means any person who, during the month, is both a dairy

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[10] The ALJ, despite affirming the Market Administrator's decision, alluded to the fact that the degree of discretion afforded the Market Administrator in defining the precise contours of the producer-handler exemption to the regulatory pricing pool may not be legally permissible. (See Petition for Review of Agency Decision, Ex. I at 37 ("Lack of specificity in the regulations allow unlimited authority to the Market Administrator and provide fertile ground of uncertainty for those subject to his regulation.")).

> farmer and a handler and who meets all of the following conditions:
>
> (a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

7 C.F.R. § 1001.10 (1999) *amended by* Milk in the New England and Other Marketing Areas; Order Amending the Orders, 64 Fed. Reg. 47898 (Sept. 1, 1999). On its face, the regulation requires that, in order to be considered a producer-handler, an entity must be a dairy farmer, and must produce milk through its own enterprise and at its own risk.

When considering the criteria listed in the regulation as applied to leases, the Secretary has declined to state that a handler entering into a lease transaction with a producer can never pass muster, but has consistently held that such arrangements do not warrant re-classification of a handler as a producer-handler. The Secretary maintains that such transactions, despite the fact that they often appear to meet the criteria in the regulation, do not in fact meet the test because they are often constructed for the purpose of escaping regulation, and therefore it must interpret the regulation strictly, in order to avoid the circumvention of the regulatory scheme. (See Petition for Review of Agency Decision, Ex. J at 27-28, 36 ("[A] handler that tries to circumvent the milk pricing regulations by claiming to lease or purchase a farm, while in reality simply buying milk, does not obtain producer-handler status.")).

This interpretation of the regulation is consistent with the plain language and also is faithful to the Secretary's intent at the time of the regulation's promulgation. In 1960, when the producer-handler concept as it now stands was promulgated, the Secretary offered the following explanation:

> Typically, a producer-handler conducts a small family-type operation, processing, bottling and distributing only his own farm production. Full regulation of such individuals provides considerable administrative difficulties. Normally, exemption from regulated status is made in a Federal order for such individuals on the grounds that such businesses are so small that they have little or no effect on the pool.
>
> * * * *
>
> In order to maintain producer-handler status, it is provided that the

> maintenance, care and management of the dairy animals and other resources necessary to produce the milk, and the processing, packaging and distribution of the milk shall be the personal enterprise of and the personal risk of the person involved. These standards are intended to distinguish the family-type operation normally involved, and to bring under full regulation operations which attempt to masquerade as those of producer-handlers in their normal concept through leases, rental arrangements, and other devices designed to circumvent regulation by the order.

Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders, 25 Fed. Reg. 7819, 7825 (Aug. 16, 1960). This explanation provides conclusive support for the Secretary's careful policing of its regulatory pricing scheme by strictly construing the definition of producer-handler.

Petitioner maintains that the Secretary's interpretation of the regulations is not consistent with the purpose of the legislation because the Secretary's strict construction of the requirements hinders petitioner's stated purpose for entering the lease transaction: to exercise control over the production of the milk so that it may implement a rigorous quality control program that far exceeds any mandatory regimen. Petitioner presented a great deal of evidence to this effect at the administrative hearing, and now argues that

> [t]he market administrator effectively seeks to penalize Stew Leonard's by making it bear the cost of a regulatory program even though such regulation of Stew Leonard's–a self-contained enterprise that simply produces milk and sells it at retail–would not serve the purpose of the program. The administrator seeks to bring Stew Leonard's back into the fold, such that Stew Leonard's would presumably resume purchasing lower quality milk from the dairy cooperative that once supplied its milk, and Oakridge Farm would resume selling its high-quality milk to the dairy cooperative to be blended with and diluted by the lower-quality milk of other farms.

(Petitioner's Cross-Mot. for S.J. at 24). As such, petitioner claims that failing to interpret the definition of producer-handler to include arrangements such as the one in the instant case serves as a deterrent to handlers such as Stew Leonard's inventing creative solutions to produce a higher quality product.

The fact that petitioner can meet its quality-control objectives under its current classification, albeit at a higher production cost, fatally undermines this argument. The evidence in the record demonstrates that conferring producer-handler status upon petitioner is not necessary to achieve the high quality product desired by Stew Leonard's; indeed, the fact that the present arrangement results in the production of

a superior product was not disputed at any time in the hearing, but the fact that petitioner has been able to manufacture this superior product while still participating in the pricing pool precludes any causal connection between the status of producer-handler and the statutory objective of producing wholesome milk. Reprieve from the regulatory pool would lower the production costs for Stew Leonard's, but the purpose of the act is to promote the production of wholesome milk, and not to promote the production of wholesome milk at the lowest possible cost to the handler.

The Secretary's construction of the applicable regulation is in accordance with the law. It follows the plain language of the text, is consistent with the expressly stated purpose for the exemption, and does not betray the purpose of the AMAA.

2. SECRETARY'S APPLICATION OF THE REGULATIONS

Having decided that the construction of the law the Secretary was charged with applying was in accordance with the law, the court now turns to the question of whether the Secretary properly applied the evidence to the law.

The court reviews the agency's on-the-record findings in such cases under the "substantial evidence" test, as set forth in 5 U.S.C. § 706(2)(E): "[t]he court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence. . . ."[11] "[S]ubstantial evidence is more than a mere scintilla," and "must do more than create a suspicion of the existence of the fact to be established." *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 477 (1951) (citations, internal quotation marks omitted). The quantum of evidence, viewing the record as a whole, must be such that "it would have been possible for a reasonable jury to reach the [Secretary's] conclusion." *Allentown Mack Sales & Service, Inc. v. N.L.R.B.,* 522 U.S. 359, 366-67 (1998). Thus, "[e]ven if a court could draw different conclusions from those drawn by the agency, that would not prevent the agency's decision from being supported by substantial evidence." *Kinney Drugs, Inc. v. N.L.R.B.,* 74 F.3d 1419, 1427 (2d Cir. 1996) (citations, internal quotation marks omitted); *see also Allentown Mack Sales & Service, Inc.,*

[11] The type of on-the-record adjudication present in this case, where the court's review is confined to the formidable administrative record developed below, warrants application of the "substantial evidence" standard of review, to the extent it differs in substance from the "arbitrary and capricious" standard. *See, e.g., In re Gartside,* 203 F.3d 1305, 1314 (Fed. Cir. 2000) (applying the more specific "substantial evidence" standard rather than the general "arbitrary and capricious" standard because "our review of the Board's decision is confined to the factual record compiled by the Board in the underlying adjudicative proceeding"); *Ass'n of Data Processing v. Bd. Of Governors,* 745 F.2d 677, 683-86 (D.C. Cir. 1984) (characterizing the difference between the two standards as "largely semantic").

522 U.S. at 377 (noting that the substantial evidence standard "requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree which *could* satisfy a reasonable factfinder.").

Petitioner contends that the Secretary's decision should be reversed for two reasons. First, it argues that the Secretary's finding that petitioner did not meet the requirements of the definition of producer-handler is not supported by the weight of the evidence in the record. Second, petitioner maintains that the Secretary's decision is disingenuous because it flies in the face of prior departmental precedent.

The gravamen of petitioner's first contention is that the evidence shows that the lease in question gives it a great degree of control over the farming operations, and shifts a significant amount of risk from the Bahlers, the family who owns Oakridge Farm, to Stew Leonard's. Also, petitioner points out that it operates in the intuitively precarious position of paying rent for animals and equipment at a monthly rate, in addition to the monthly expenses of running the farm, and then has to conduct its accounting in such a way that complies with the federal regulatory pricing scheme. Petitioner maintains that, because of the logistics of this arrangement, and the fact that it contractually assumes much of the risks of conducting a farming operation, it should be considered one enterprise under the marketing order.

However, the Secretary's decision is supported by substantial evidence. The Secretary adequately considered both the evidence that supported petitioner's contention, and the evidence that bolstered the Market Administrator's decision. He examined the terms of the effective lease, which provides that "Stew Leonard's agrees to pay for all ordinary and necessary expenses related to the production, processing and packaging of milk," and that "Stew Leonard's agrees to assume all risk, responsibility and maintenance of the cows, equipment, buildings, and labor," (Petition for Review of Agency Decision, Ex. G, ¶ 3). He also noted the fact that Stew Leonard's "has paid the cost of fertilizing cows, hardware maintenance and repair, equipment repair, feed, payroll, veterinary services, and services to keep track of animals," (Petition for Review of Agency Decision, Ex. J, ¶ 23 at 19), and that Stew Leonard's maintains insurance on Oakridge Farm, (*see id.*). The Secretary's findings to this effect were consistent with the evidence produced at the hearing.[12]

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[12] Petitioner argues that the Secretary erroneously refused to adopt the ALJ's finding that "Stew Leonard's has also assumed, pursuant to the June 16, 1998, lease, all risks arising from the operation of Oakridge Farm." (Petition for Review of Agency Decision, Ex. I, ¶ 25). The Secretary was free to examine the evidence and decline to adopt this finding, and properly did so. The court is obligated to consider this disagreement when reviewing the evidence in the record, *see Universal Camera Corp. v.*
(continued...)

In spite of these findings, substantial evidence exists to support the conclusion of the Secretary. Specifically, the Secretary found that, despite the indicia of control discussed above, petitioner was not a dairy farmer who operated his own enterprise at his own risk. (See Petition for Review of Agency Decision, Ex. J at 27 ("The evidence establishes that Petitioner is not a dairy farmer . . . and that Petitioner does not provide, at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm Dairy herd and other resources and facilities used to produce milk. . . .")). The Secretary found that Stew Leonard's has no interest in the land itself under the terms of the lease. (See id., ¶ 30). In addition, the Secretary found that Oakridge Farm, which is the entity with which Stew Leonard's entered into the lease, retains a significant connection to Bahler Farms, Inc. an adjacent farm operation, in that the principals of Bahler Farms, Inc., are authorized to write checks for Stew Leonard's (*see id.,* ¶ 25), records for Oakridge Farms are maintained at Bahler Farms, Inc. (*see id.,* ¶ 27), the two operations purchase supplies jointly (*see id.,* ¶ 26), and the two entities share "equipment and a full-time calf raiser, a mechanic, and full-time milkers," (*see id.,* ¶ 24). Oakridge and Bahler also pledged security for a loan together (*see id.,* ¶ 28), and jointly insure against a loss resulting from the joint operation (*see id.,* ¶ 29). Finally, the evidence shows that Stew Leonard's does not know how to operate a dairy farm (*see id.,* ¶ 33), and that the day-to-day operation of Oakridge Farm did not change at all after the execution of the lease (*see id.,* ¶ 37).[13]

This evidence is sufficient for a reasonable jury to conclude that Stew Leonard's does not operate a dairy farm as its own enterprise and at its own risk. Although, without question, the lease places Stew Leonard's in a position to take a more active role in the production of the milk it sells, the evidence supports the conclusion that the lease had very little practical effect upon the symbiotic operation of Oakridge Farm and Bahler Farms, Inc. In this respect, the scenario closely resembles the ordinary purchase and sale of milk. Given the evidence presented, a reasonable conclusion to draw would be that, despite the fact that the lease was not a sham, Stew Leonard's is actually a handler posing as a producer-handler.

Petitioner, in a vigorous cross-examination of Erik Rassmussen, the Market

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[12](...continued)
N.L.R.B., 340 U.S. 474, 496 (1951), yet finds that the evidence supports the Secretary's conclusion.

[13]Petitioner argues that the evidence connecting Bahler Farms, Inc. to Oakridge Farm should not be considered because the Market Administrator was not aware of these facts and consequently could not have based his initial determination upon this evidence. However, the statute clearly states that the court is to review the Secretary's decision, and not the Market Administrator's initial determination. Therefore, the court will consider the disputed evidence.

Administrator of the New England Marketing Order at the time of the hearing, explored, at length, the limits and legal ramifications of the Market Administrator's knowledge and views concerning how much control and assumption of the risk of loss is necessary to be classified as a producer-handler. Although informative, the testimony elicited during the hearing from Mr. Rassmussen does not detract from his ultimate conclusion. Counsel for the petitioner asked pointed questions about complicated legal intricacies regarding the forms of business organizations and the distinctions between a lease and a transfer of property. Mr. Rassmussen admitted that he was not a lawyer, and, indeed, familiarity with these legal concepts is not qualification of his position; his job is to look at the circumstances as a whole, under the guidance of the provisions and purpose of the regulatory scheme, in order to make an informed practical determination. He does not have to explore every legal consequence of the transaction, or refute all indicia of control, rather he must use his knowledge and experience to determine if, practically speaking, the entity in question is a dairy farmer who conducts his operation at his own risk, or a handler who has donned a clever disguise as a producer-handler. *See Elm Spring Farm, Inc. v. U.S.,* 127 F.2d 920, 926 (1st Cir. 1942) ("The regulatory scheme embodied in the Order is an intensely practical business, and the question now before us is not to be determined by a purely abstract inquiry as to who had 'title' to the cows which produced the milk.").

This emphasis on the practical effect is faithful to the purpose of the producer-handler exemption. The Secretary found that classifying Stew Leonard's as a producer-handler would have an impact upon the market as a whole.[14] Specifically, the Secretary found that Stew Leonard's would enjoy a competitive advantage over its rival milk handlers in the area by avoiding the pool equalization payments. (See Petition for Review of Agency Decision, Ex. J, ¶ 34). Furthermore, the Secretary found that this advantage would effect the market as a whole, (*see id.,* ¶ 34), and that the size of Stew Leonard's operation could not be considered small, (*see id.* at 31). As previously noted, the purpose of the exemption was to forgo the regulation of smaller family-type operation because these operations do not have a significant effect upon the pricing pool, and therefore the burdens of regulating them outweigh the benefits to the regulatory pool. When an entity does have an effect upon the pricing pool, as a reasonable conclusion from the evidence suggests Stew Leonard's does, the purpose of the exemption would be defeated.

Petitioner's second contention is that the Secretary's application of the

[14] This effect does not include "riding the pool" as discussed elsewhere in this opinion. No evidence suggests that Stew Leonard's would take unfair advantage of being awarded producer-handler status by "riding the pool."

producer-handler definition contradicts prior departmental decisions. In particular, petitioner presented evidence that three entities currently classified as producer-handlers lease a portion of their dairy herd, yet assume significantly less risk than that assumed under the terms of petitioner's lease. Petitioner argues that, because "[t]he Market Administrator concedes these leases do not provide, as their own enterprise and at their own risk, the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk from the leased cows," (Petition for Review of Agency Decision, Ex. J, ¶ 32), that respondent's finding that petitioner is not a producer-handler is contradictory to prior departmental actions.

The basis of petitioner's argument is that because the producer-handler lessees in the three other leases assume a lesser degree of risk than petitioner, petitioner should be granted producer-handler status. However, petitioner dismisses one key fact: the three producer-handler lessees were classified as producer-handlers prior to the execution of the leases. (See id.). This is certainly a credible reason for distinguishing between the other three leases and petitioner's; the three producer-handler lessees could not be accused of constructing a legal framework to avoid payments into the pricing pool, because, as producers and dairy farmers,[15] they were never subject to the pricing pool in the first place. Allowing existing producer-handlers to lease a portion of their dairy herd is entirely consistent with the express purpose of the producer-handler exemption because regulation of smaller dairy farms would have a nominal effect upon the pricing pool, even if they do supplement their milk production to some degree.[16]

Petitioner also cites a previous decision by the Secretary that classified an entity as a producer-handler despite the fact that its entire dairy herd was leased, and claims that, under this precedent, the Secretary's decision not to classify Stew Leonard's as a producer-handler would be unreasonable. Petitioner contends that there is no foundation for the Secretary's conclusion that an existing producer-handler can lease a herd, but a handler may not become a producer-handler through

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[15] The Secretary found that "[e]very producer-handler in the New England Milk Marketing Order is a dairy farmer who owns a dairy farm ." (Petition for Review of Agency Decision, Ex. J, ¶ 31).

[16] Petitioner challenges the Market Administrator's determination that a producer-handler who lease more than twenty-five percent of his dairy herd can no longer be considered a producer-handler, (*see* Petition for Review of Agency Decision, Ex. J, ¶ 32), and claims that this ad hoc determination is exemplary of the alleged abuse of the Market Administrator's power. This court is concerned with review of Stew Leonard's petition, which does not turn on the validity of the twenty-five percent line. For the purposes of this review, the court finds a substantial justification for drawing such a line in general, and does not pass on precisely where it should be drawn.

a lease transaction. Because there is a substantial basis for distinguishing the case in question, petitioner's argument fails.

In the case in question, *In re Jerome Klocker,* 26 Agric. Dec. 1050 (Oct. 30, 1967), the petitioner had "been the sole owner of all land, buildings, machinery, equipment and facilities of both the dairy farm and milk processing plant located thereon," *id.* at 1051, until he engaged in a sale and leaseback arrangement with a herdmaster in which petitioner sold his heifers to one Rausch, who then leased the herd back to petitioner, *see id.* The Secretary found that the transaction had no practical effect upon the operation of the farm; the herd was never moved off petitioner's property, Rausch was essentially an employee of the petitioner, and all the milk was produced from this herd in petitioner's facilities. *See id.* at 1051, 1055, 1057.

Upon consideration of these facts, the Secretary reversed the decision of the market administrator and retained petitioner's classification as a producer-handler. In so finding, the Secretary noted that "[a]dmittedly, the use of milk from a leased herd is not determinative of the question of satisfaction of the requirements of the 'producer-handler' definition contained in the order," and held that, "[p]etitioner exercised the powers of management, supervision, direction and control of the dairy herd and farm and such farm was his investment or risk," and "the production of the milk utilized at petitioner's plant continued to be the enterprise and risk of petitioner subsequent to the [leaseback] . . . ." *Id.* at 1057-58.

The factual differences between *Klocker* and this case are manifest. In *Klocker,* the petitioner operated his own dairy farm and processing plant, but had a peculiar method of paying his herdmaster, a method that had no practical effect upon the operation of the farm for the purpose of the administration of the marketing order. In the instant case, petitioner never owned a dairy farm, and then leased the animals and fixtures, in addition to assuming some risk associated with the farm's operation, but the practical effect upon the operation of the farm for the purpose of the administration of the marketing order did not change. A fair reading of the case suggests that the Secretary should not elevate form over substance, and should, instead, look to the practical effect upon the regulatory scheme with which he is charged to implement. Viewed in this light, the state of affairs prior to the lease transaction, contrary to petitioner's assertions, is certainly a critical issue, and a permissible basis for differentiating between the cases. Such a reading supports the Secretary's decision in this case.

In sum, the Secretary's application of the governing regulation is supported by substantial evidence and therefore is "in accordance with the law." The Secretary has a duty to enforce the provisions of the AMAA, in such a way that adheres to the purpose of the act: to avoid ruinous pricing practices in the several market areas. The Secretary's decision in this case was faithful to that purpose, and also was

consistent with prior departmental action. The Secretary found that Stew Leonard's, under the terms of the operative lease, was not the type of entity deserving of exemption from the regulatory pricing pool because it had a cognizable impact upon the pricing pool, and the evidence showed that it did not assume the degree of risk necessary to be deemed a producer-handler.

As an aside, petitioner raises some concerns, echoed somewhat by the ALJ, regarding the determination of producer-handler status, in particular the gaps left in the text of the regulations regarding the lack of a definition of "dairy farmer" and the process for ascertaining where the line should be drawn with respect to the permissible percentage of outside milk handling by existing producer-handler leases. However, petitioner's concerns merely re-state a familiar problem: because Congress, or even the Secretary of Agriculture, cannot construct a legislative solution to every conceivable issue, much of the classification process is left to administrative discretion. Although some may lament this reality, courts have consistently held that it is lawful:

> [a] statute may be ambiguous, for the purposes of *Chevron* analysis, without being inartful or deficient. The present case exemplifies the familiar proposition that Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect.

U.S. v. Haggar Apparel Co., 526 U.S. 380, 392 (1999). A reviewing court must confine its review to the legality, and not the desirability, of the agency's action.

C. EQUAL PROTECTION

Petitioner claims that the Secretary's decision to deny Stew Leonard's producer-handler status is unconstitutional. It claims that the Secretary violated the equal protection guarantees of the Fifth Amendment when it granted producer-handler status to operations that lease a portion of their dairy herd, without assuming a significant portion of the risks involved, and refused to grant producer-handler status to petitioner, who leased a herd that fulfills all its processing demands, while assuming a significant portion of the risks involved.

The Fourteenth Amendment of the United States Constitution states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the

laws."[17] U.S. Const. Amend. XIV, § 1. This constitutional guarantee ensures that "all similarly situated persons are treated similarly under the law," such that "[i]f a [regulation] classified people, the classification must be based on criteria related to the [regulation's] objective." *Vermont Assembly of Home Health Agencies, Inc. v. Shalala,* 18 F. Supp.2d 355, 363 (D. Vt. 1998).

In determining if this guarantee has been infringed, a reviewing court must apply the appropriate standard. The Supreme Court instructs reviewing courts as follows:

> In areas of social and economic policy, a [ ] classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification.

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). Since the case before the court concerns areas of social and economic policy, and does not involve suspect classifications or fundamental constitutional rights, the court will apply the minimum rationality standard. *See id.*

When applying the minimum rationality standard, a regulatory classification "is accorded a strong presumption of validity." *Heller v. Doe,* 509 U.S. 312, 319 (1993). The Secretary has no obligation to promulgate evidence in support of its decision, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* at 320 (internal quotation marks omitted), *see also Able v. U.S.,* 155 F.3d 628, 632 (2d Cir. 1998) (applying the same standard). In sum, "[w]here there are plausible reasons for [the Secretary's] action, our inquiry is at an end." *Beach Communications,* 508 U.S. at 314 (internal quotation marks omitted).

The court finds a plausible and legitimate reason for the difference in treatment. As discussed herein, the Secretary's decision was based upon substantial evidence. As such, petitioner cannot sustain its burden of disproving any rational explanation for the difference in treatment.

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[17] "We approach equal protection claims under the Fifth Amendment in the same way as we would such claims under the Fourteenth Amendment." *General Media Communications, Inc. v. Cohen,* 131 F.3d 273, 285 (2d Cir. 1997), *cert. denied,* 118 S. Ct. 2367 (1998) (citing *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975)).

IV. CONCLUSION

Petitioner has failed to demonstrate that the defendant's decision to deny it producer-handler status under the applicable regulations is not supported by substantial evidence, and therefore "not in accordance with the law," 7 U.S.C. § 608c(15)(B). Likewise, petitioner has not shown that defendant's application of the statutory scheme lacks a rational basis. Therefore, the decision of the Secretary of Agriculture is **AFFIRMED**, petitioner's motion for summary judgment is **DENIED**, and respondent's motion for summary judgment is **GRANTED**. The Clerk of the Court shall enter judgment for the respondent on all counts.

IT IS SO ORDERED.

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ANIMAL WELFARE ACT

COURT DECISION

HAROLD P. KAFKA v. SECRETARY OF AGRICULTURE.
No. 99-5313.
Filed May 25, 2001.

(Cite as 259 F.3d 716 (3d Cir.)).

Animal Welfare Act - Default - Jurisdiction of Judicial Officer - Prior violation - Final decision - Untimely appeal.

The United States Court of Appeals, Third Circuit, upheld the Judicial Officer's (JO) decision. The JO found that under the regulations at 7 C.F.R. § 1.145, the Administrative Law Judge's (ALJ) decision became final and effective after 35 days and the JO was without jurisdiction to review the ALJ's decision when the Respondent's appeal petition was not timely filed.
Respondent was *Pro se* and failed to file a timely response to the underlying Complaint whereupon, the ALJ entered a default decision against him. Respondent had a civil penalty from a prior Complaint which was suspended and which was re-instituted as a result of this case.

United States Court of Appeals
Third Circuit

Before: SCIRICA, RENDELL and FUENTES, CIRCUIT JUDGES

PER CURIAM

On July 7, 1998, the Administrator of the Animal and Plant Health Inspection Service (the "Administrator") filed a complaint alleging that Petitioner Harold Kafka exhibited animals without a license in violation of the Animal Welfare Act. 7 U.S.C. §§ 2131-2159 (1999), and the regulations thereunder, 9 C.F.R. §§ 1.1-4.11 (1999). The complaint directed Petitioner to file a timely answer and stated that a failure to do so would be an admission of the allegations in the complaint.

In serving the complaint, the hearing clerk notified Petitioner by letter that he had twenty days from its receipt to answer and that a failure to do so would be an admission of the allegations and would waive his right to a hearing. The hearing clerk provided Petitioner a copy of the Rules of Practice governing the proceedings. These documents were served on Petitioner, as shown by a certified mail receipt,

on September 18, 1998.[1] On October 14, 1998, the hearing clerk notified Petitioner that the Department did not receive a timely answer to the complaint. On October 21, 1998, the hearing clerk received a letter from Petitioner stating, "At this time I am responding to Complaint and am not guilty and I am sure I will hear from you soon."

The Administrator filed a Motion for Adoption of Proposed Decision and Order on October 29, 1998. The Administrator asserted that the hearing clerk served the complaint and the Rules of Practice on Petitioner and informed him that the failure to answer any allegation in the complaint would be an admission of that allegation and Petitioner failed to file a timely answer. Since Petitioner admitted the allegations by default, the Administrator moved for the adoption of an order assessing a civil penalty of $5,000 for violation of the Animal Welfare Act. In addition, Respondent sought the assessment of a civil penalty of $22,500 which was imposed upon Petitioner in a prior proceeding but was suspended upon the condition that Petitioner not violate the Animal Welfare Act for a period of twenty years. On November 2, 1998, the hearing clerk sent Petitioner by certified mail a copy of the motion and proposed decision and order and informed him that he had twenty days from their receipt to file objections. Petitioner received the documents on November 5 as shown by a certified mail receipt.

Having received no objections, on December 1, 1998, an Administrative Law Judge ("ALJ") ruled that Petitioner failed to timely answer the complaint and its allegations were deemed admitted. The ALJ thus found that Petitioner exhibited animals without a license in violation of the Animal Welfare Act and the regulations thereunder and assessed the civil penalties of $5,000 and $22,500. The order stated that it would be effective after becoming final thirty-five days after service, pursuant to the Rules of Practice. The hearing clerk sent Petitioner by certified mail a copy of the decision and order and notified him that he had thirty days from their service to appeal to a Judicial Officer. The hearing clerk also informed Petitioner that if he did not appeal, the ALJ's decision is binding and effective thirty-five days after its service and that no decision is final for purposes of judicial review except a final order issued by the Secretary of the Department of Agriculture or a Judicial Officer pursuant to an appeal. The documents were returned marked "unclaimed" and on January 14, 1999, a legal technician served them by regular mail pursuant to the Rules of Practice.

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[1] This was the second time the hearing, clerk served these documents. They were initially served by certified mail and returned marked "unclaimed." On August 4, 1998, they were served by regular mail pursuant to the Rules of Practice. On August 27, 1998, the hearing clerk notified Petitioner that the Department did not receive a timely answer to the complaint.

On February 2, 1999, the hearing clerk received a letter from Petitioner requesting an appeal and stating that while he had previously plead not guilty, he did not hear from the hearing clerk until he received the ALJ's decision. Petitioner requested information about how to file an appeal. On February 3, 1999, a hearing clerk sent Petitioner a letter enclosing a copy of his filing, and stating, that the Administrator had twenty days to respond. The Administrator filed a memorandum arguing that since Petitioner failed to timely answer the complaint, the ALJ's decision and order were properly entered. The Administrator described its filing as opposition to Petitioner's motion to set aside the default decision.

On March 1, 1999, a Judicial Officer ruled that Petitioner's February 2 letter did not conform to the requirements for an appeal petition and did not move to vacate the ALJ's decision. Rather, the letter was a request for information. The Judicial Officer granted the request and directed Petitioner to the applicable provision of the Rules of Practice. The Judicial Officer also advised Petitioner that a default decision becomes final thirty-five days after service and since the record indicates that he was served on January 14, 1999, the ALJ's decision became final on February 18. Citing, numerous agency decisions, the Judicial Officer stated that he has no jurisdiction to hear an appeal that is filed after a decision becomes final. He stated that he could only consider an appeal petition if Petitioner showed that the record does not accurately reflect when he was served with the ALJ's decision and that he filed an appeal petition within thirty-five days of the date on which he was served.

On March 5, 1999, Petitioner responded by letter stating that he believed he had twenty days from February 15 to appeal, that he has been trying to file an appeal and that he was denied his right to a hearing. Petitioner also submitted a document allegedly supporting that he did not violate the Animal Welfare Act. On the same date, the hearing clerk sent Petitioner a letter enclosing a copy of his filing and stating that the Administrator would have twenty days to respond. The Administrator again argued in response that since Petitioner failed to file a timely answer to the complaint, the ALJ's decision was proper and further argued that the appeal petition is untimely.

On April 5, 1999, the Judicial Officer ruled that Petitioner's appeal petition is untimely. In response to his contention that he had twenty days from February 15 to appeal, the Judicial Officer found that the correspondence sent to Petitioner at this time was the letter informing him that the Administrator had twenty days to respond to his February 2 letter. While Petitioner stated that he had been trying to file his appeal, the Judicial Officer found that despite any efforts that Petitioner may have made, he did not file an appeal petition until March 5. The Judicial Officer concluded again that since the ALJ's decision was served on January 14, 1999 and became final on February 18, he no longer has jurisdiction to consider the appeal.

The Judicial Officer found this construction of the Rules of Practice consistent with the construction of Federal Rules of Appellate Procedure and further stated that the matter should not be considered by a reviewing court since under § 1.139 of the Rules of Practice, no decision is final for purposes of judicial review except a final decision of the Judicial Officer on appeal. The Judicial Officer ordered that the ALJ's decision is the final decision in this proceeding. Petitioner filed a timely petition for review.

This Court has jurisdiction to review a final order of the Secretary of Agriculture pursuant to 7 U.S.C. § 2149(c) and 28 U.S.C. § 2342. While the petition for review refers to the ALJ's decision that Petitioner violated the Animal Welfare Act, this Court has no jurisdiction to review that decision. The only issue before this Court is whether the Judicial Officer[2] erred in finding that he does not have jurisdiction to hear Petitioner's appeal.

The Rules of Practice governing Department of Agriculture proceedings address the time for filing an appeal to a Judicial Officer. The regulations provide:

> 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. The Rules of Practice further provide that the ALJ's decision becomes final and effective thirty-five days after the date it is served. *Id*. § 1.139. The Department of Agriculture has consistently held that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the ALJ's decision becomes final. *See*, *e.g.*, *In re Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., et al.*, 55 Agric. Dec. 78, 83 (1996)(citing cases). The Department has found this construction of the Rules of Practice consistent with the rule of law that federal courts of appeals are without jurisdiction to review a decision where a notice of appeal is untimely. *See id.* at 84; *see also Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988)(stating rule regarding untimely notice of appeal under the Federal Rules of Appellate Procedure).

An agency's interpretation of the statute it administers is entitled to deference, provided that its interpretation is a permissible construction of the statute. *Dep't of the Navy v. Federal Labor Relations Authority*, 836 F.2d 1409, 1410 (3d Cir. 1988). An agency decision may only be overturned if "arbitrary, capricious, an

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[2] Judicial Officers are delegated their authority by the Secretary. See 7 C.F.R. § 2.35.

abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)(A)). The Judicial Officer's findings that Petitioner received service of the ALJ's decision on January 14, 1999 and filed his appeal petition on March 5 are supported by the record.[3] In addition, the March 5 filing is untimely under § 1.14 5 of the Rules of Practice. We cannot find that the Judicial Officer's decision that he was without jurisdiction to review the ALJ's decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. Accordingly, we will deny the petition for review.[4]

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[3]Because this Court's jurisdiction is confined to a review of the Judicial Officer's April 5 order, we do not address the Judicial Officer's ruling on March 1 that Petitioner's February 2 letter was not an appeal petition.

[4]Petitioner filed a document in this Court which has been construed as a motion for appointment of counsel and filed a motion to proceed *in forma pauperis* in connection therewith. Based upon the financial information provided by Petitioner, the motion to proceed *in forma pauperis* is granted. However, because Petitioner's claim does not have merit, the motion for appointment of counsel is denied. *See Tabron v. Grace*, 6 F.3d 147, 155 (3d Cir. 1993)(before court exercises discretion in favor of appointing counsel, it must first appear that the claim has some merit).

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: BILL E. DeLOZIER, AN INDIVIDUAL; BILL MURCHISON, AN INDIVIDUAL; BETTY MURCHISON, AN INDIVIDUAL; J.F. MURCHISON, AN INDIVIDUAL; W.M. MURCHISON, AN INDIVIDUAL; AND THREE BEARS GIFT SHOP, a/k/a THREE BEARS GIFTS, a/k/a CHRISTMAS SHOPPE, AN UNINCORPORATED ASSOCIATION.
AWA Docket No. 98-0036.
Decision and Order filed November 7, 2000.

Cease and desist order - Civil penalty - Exhibitor status - Jurisdiction - Violations of AWA - Preponderance of the evidence.

The Administrative Law Judge assessed a civil penalty of $4,000 and issued a cease and desist penalty against Respondents for violating the Animal Welfare Act and the Regulations and Standards by not providing adequate shelter, clean enclosures, clean water containers, clean food receptacles, adequate water drainage, and proper housekeeping for exhibited Himalayan bears. Persons named on the license application were all presumed to be exhibitors within the meaning of the AWA. Complainant did not prove by a preponderance of the evidence alleged space violations and alleged failure to provide potable water. The Secretary has jurisdiction under the AWA over persons exhibiting animals to the public for compensation without a showing that the persons are engaged in interstate commerce.

Colleen Carroll, for Complainant.
Respondent, Bill E. DeLozier, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This disciplinary proceeding brought under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.)* ("Act"), and the Regulations (9 C.F.R. § 1.1 *et seq.*), was instituted by a complaint filed on August 27, 1998, and an amended complaint filed on March 1, 1999, by the Administrator Animal Plant Health and Inspection Service ("APHIS"), United States Department of Agriculture ("USDA" or "Department").

The complaint and amended complaint (both hereafter referred to jointly as "complaint") alleges that Respondents wilfully violated the Act, Regulations (9 C.F.R. § 2.100(a)) and Standards (Part 3 of the Regulations, 9 C.F.R. § 3.1 *et seq.*). Respondents filed answers and a hearing was held before Administrative Law Judge Edwin Bernstein in Knoxville, Tennessee, on January 19, 2000. Complainant was represented by Colleen A. Carroll, Esq. Respondent Bill E. DeLozier represented himself, *Pro se*, and the other Respondents. Jill R. Talley, Esq., who had entered an appearance for Respondent J.F. Murchison, did not appear at the hearing. Judge Bernstein thereafter retired before issuing a decision. The parties

were then asked to show cause why the case should not be assigned to another administrative law judge for a decision. When the parties did not file objections or show cause why the matter should not be reassigned, the case was reassigned to the undersigned for a decision. The record and briefs have been considered in making the following decision.

Statement of the Case

The complaint, paragraph 1, states that Respondent Bill E. DeLozier is an individual whose mailing address is P.O. Box 1348, Pigeon Forge, Tennessee 37863; that he is a principal or proprietor of Respondent Three Bears Gift Shop, a/k/a Three Bears Gifts and a/k/a Christmas Shoppe, a partnership, association or sole proprietorship, located at 2855 and 2861 Parkway, Pigeon Forge, Tennessee 37838; and that at all times relevant to this proceeding he was licensed by APHIS as an exhibitor as defined in the Act. Respondents did not respond to this allegation in their answers. It is therefore deemed, pursuant to the Rules of Practice, to be an admission of fact. (7 C.F.R. § 1.136.)

The complaint, paragraph 2, further alleges, and Respondents do not deny, that Respondents Bill Murchison, Betty Murchison, J.F. Murchison, and W.M. Murchison are individuals whose mailing address is 3051 Buckhorn Way, Sevierville, Tennessee 37876.

The record shows that Respondent DeLozier exhibits Himalayan bears at Three Bears Gift Shop which sells bread and apples to the public to feed to the bears. (Tr. 25, 56).

The facility was inspected by APHIS Veterinary Medical Officer John Michael Guedron on January 15, August 25, and October 20, 1997, and on August 28, 1998. He found instances of non-compliance with the Regulations and Standards which led to the complaint and hearing in this proceeding. The hearing and briefs also raised a jurisdictional issue and the exhibitor status of Respondents Bill Murchison, Betty Murchison, J.F. Murchison, and W.M. Murchison.

Jurisdiction

Complainant asserts that it has jurisdiction over Respondents' operation on the ground that the animals involved were purchased in commerce. Section 2132(c) of the Act (7 U.S.C. § 2132(c)) defines commerce as "trade, traffic, transportation, or other commerce -- (1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia; (2) which affects trade, traffic, transportation, or other commerce described in paragraph (1)."

The record shows that the bears involved in this proceeding were acquired in 1988 in what appears to have been a transaction that occurred entirely in the state of Tennessee. (CX 1) There is no showing that the bears were ever moved interstate, or for that matter, whether any of Respondents' activities affect interstate commerce. However, the Department has held that it has jurisdiction over all persons engaged in the activities of an "exhibitor" as defined by the Act without regard to whether their activities affect interstate commerce. *Ronnie Faircloth and JR's Auto & Parts, Inc.,* 52 Agric. Dec. 171 (1993).

The Act defines "exhibitor" broadly as any person exhibiting animals for compensation whether for profit or not, excluding pet shops, state and county fairs, livestock shows, purebred dog and cat shows, rodeos, and fairs and exhibitions to advance agriculture (7 U.S.C. § 2132(h)). The record shows that Respondent DeLozier charges for exhibiting the bears to the public and that Respondent Three Bears Gift Shop sells food to the public to feed the bears (Tr. 56, 75). As Respondents DeLozier and Three Bears Gift Shop receive compensation from the exhibition of the bears and the sale of bear food they are therefore exhibitors within the meaning of the Act. The Department accordingly has jurisdiction in this proceeding.

Exhibitor Status of the Murchisons

Respondents Bill Murchison, Betty Murchison, J.F. Murchison, and W.M. Murchison contend that they are not exhibitors. They argue that Respondents Bill E. DeLozier and Three Bears Gift Shop manage and control the facility exhibiting the bears and that they lack control over the care and treatment of the bears. DeLozier testified that he leases the bears from Bill Murchison and pays him $4,000 a year. (Tr. 164). Respondent J.F. Murchison states in his brief that he had no knowledge about the operation of the facility, that he tried to have his name removed from a lease, and that he derived no economic benefit from the exhibition of the bears.

The record shows that during the times relevant to this proceeding, Respondent Bill Murchison had applied for, and received, an APHIS class "B" dealer's license under the business name of Respondent Three Bears Gift Shop and listed Respondents Betty Murchison, J. F. Murchison, and W.M. Murchison on the application as "owners, partners, and officers." (CX 6).

This license application, containing the Murchisons' names and stating that they were doing business as Respondent Three Bears Gift Shop, which is a compensated exhibitor through the sale to the public of food to feed the bears, raises the presumption that they were exhibitors. They presented arguments but no evidence

to rebut this presumption. I therefore find that Bill E. DeLozier, Three Bears Gift Shop, Bill Murchison, Betty Murchison, J. F. Murchison, and W. M. Murchison were exhibitors as defined in the Act.

Alleged Violations

Space and shelter requirements. The complaint alleges, and Dr. Guedron found at inspections he conducted of Respondents' facility on January 15, August 25, and October 20, 1997, and August 28, 1998, that the bear enclosures failed to provide adequate shelter from sunlight and inclement weather as required by Section 3.127(a) and (b) of the Standards for the care of animals and failed to provide sufficient space as required by Section 3.128.

Section 3.127(a) and (b) of the Standards provides:

> (a) *Shelter from sunlight.* When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight.
>
> (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.

9 C.F.R. § 3.127(a) and (b).

Section 3.128 provides:

> Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

9 C.F.R. § 3.128.

Dr. Guedron testified that at the inspection on January 15, 1997, there were six bears. He said one enclosure contained two female bears, that another had three bears and that each enclosure had only one 5 feet by 16 feet den which he said was too small for the number of bears in each enclosure. The third enclosure contained

one male bear. (Tr. 28, 97). The two female bears in the one enclosure were described as "inseparable" twins, while the other enclosure with three bears included a female bear and her cub. (Tr. 97, 144). Dr. Guedron testified that he estimated the length of the adult bears to be "from five to six feet" (Tr. 118), but did not indicate their width or how much den space each bear required in order to make normal postural adjustments. He testified as follows:

Q. Would a five- to six-foot bear be able to turn around comfortably and make postural adjustments in a den that is five feet in width?

A. (Guedron). "Assuming that he's crossways in the den, it would be tight, but he would be able to turn around if he was only five -- he or she were only five feet in length.

Q. Anything more than five feet?

A. Would have to make accommodations in turning around rather than just normally and comfortably being able to turn around.

Q. And would even a five-foot bear have to make an adjustment to turnaround in five feet?

A. I don't know that I can answer that.

(Tr. 127).

. . . .

Q. Would two bears be able to make postural adjustments comfortably and easily in a five-foot by 16-foot den, such as is located to the right of cage A on RX 8, as a shelter?

A. As a sheltered area? There were three bears that were to use that den.

Q. Okay. Let's use three.

A. No, that's why I cited it.

(Tr. 128).

. . . .

Q. Would there be room for two -- for two bears?

A. I think you would probably have to see the two bears in there to be able to answer definitively. I would say at a maximum, two bears, as a sheltered area.

(Tr. 131).

Dr. Guedron testified that access to a den was needed to provide the bears with shelter from inclement weather and to "have a method of escape from another aggressive or incompatible animal." (Tr. 38). He did not indicate that any of the bears suffered from malnutrition, poor condition, debility, or were otherwise mistreated. However, at the inspection on August 25, 1997, he observed "[Two bears] fussing or fighting with each other in the larger enclosure. And then I noted four of the bears showing a stereotypical behavior in that they were pacing constantly and continuously in the same pattern back and forth in the enclosure.

Q. What does this indicate; or what did that indicate to you?

A. It generally indicates a type of neurotic behavior that you often see in captive animals, possibly out of boredom.

(Tr. 53).

Dr. Guedron found that the singly housed bear was in an open-top enclosure and did not have access to a den at the inspection on January 25, 1997; that three bears were denied access to a den during exhibition hours at the inspections on August 25, and October 29, 1997, and at the inspection on August 28, 1998.

Complainant has the burden of proving by a preponderance of the evidence the violations alleged in the complaint. The Standards, cited above, do not specifically require that bears have dens and do not set forth the space requirements for dens or enclosures.[1] Dr. Guedron was offered as Complainant's expert witness to provide this essential information. However, while the record shows that he is a doctor of veterinary medicine, it does not show that he had any specific training in or knowledge of the behavior or needs of wild animals, specifically Himalayan bears.

[1] The Standards provide minimum space requirements for some animals. *See,* e.g., 9 C.F.R. § 3.80.

He concluded that Respondents' bears lacked adequate space but he provided few facts on which his conclusion is based and said he made his determination on "visual observation" rather than on measurements. (Tr. 43). He indicated that some bears were demonstrating neurotic behavior but then attributed it, not to inadequate space, but to the boredom of captivity. He further seemed to express some uncertainty about whether the adult bears were five or six feet in length. Still, his opinions are entitled to some deference. It is probably common knowledge that bears use dens in the wild and that they should therefore have them in some form in captivity for shelter from the elements. Thus, I find that Respondents were required to provide shelter for the bears in the form of dens. As for the size of the dens, Dr. Guedron seemed to testify that, in his opinion, Respondents' 5 feet by 16 feet dens were big enough for two adult bears but not big enough for three. Assuming that his opinion is accurate, the den for the two bears would therefore be adequate. As for the den with three bears, one of the bears was only a cub which would require less space than a full grown bear. Dr. Guedron implied, however, in expressing the opinion that the den was not adequate to accommodate three bears, that he was contemplating adult bears that were five or six feet in length rather than a small cub. In these circumstances I find that Complainant has failed to show by a preponderance of the evidence that the enclosure containing two bears and a cub was insufficient to provide them with the space required by the Standards.

However, the failure to provide adequate shelter for the singly housed bear, which DeLozier admitted (Tr. 83), and the failure to allow the bears access to their dens during exhibition hours are violations of the requirements in Section 3.127(a) and (b) of the Standards to provide them with adequate shelter from sunlight and inclement weather.

Failure to clean enclosures. At his inspection on January 15, 1997, Dr. Guedron found that an accumulation of feces in the drainage troughs at the back of the enclosures was not in compliance with the cleaning requirements of Section 3.131(a). (CX 11) This Section provides:

> 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 wetting involuntarily.

9 C.F.R. § 3.131(a).

In his answer DeLozier appears to admit this allegation but states that it was corrected. Under Department policy, a condition found by an inspector not to be in compliance with the Standards is a violation even though promptly corrected. *Big Bear Farm, Inc.,* 55 Agric. Dec. 107, 142 (1996). Respondents' failure to clean the enclosure was a violation of Section 3.131(a).

Failure to provide adequate water drainage. The water and feces in the drainage trough on January 15, 1997, is also cited by Complainant as not in compliance with Section 3.127(c) of the Standards because the water in the trough was frozen. (CX 11; Tr. 26) Guedron also observed standing water in an enclosure at his inspection on October 20, 1997. Section 3.127(c) states:

> A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State and local laws and regulations relating to pollution control or the protection of the environment.

9 C.F.R. § 3.127(c).

DeLozier said that the problem with frozen water solved itself when it thawed and Guedron testified that there were no bears in the enclosure when he observed the standing water. (Tr. 58). Still, the Standards literally require that water drain away "rapidly." Frozen water indicates that the water had not drained rapidly and, although standing water in an enclosure that had no bears appears to be a *de minimis* violation, it is nonetheless a failure to comply with the standards.

Failure to provide potable water. At the inspection on January 15, 1997 (CX 11), Guedron found that the water receptacles had a dirty film which constituted a failure keep them clean in violation of Section 3.130 of the Standards. However, the complaint, paragraph 6, alleges a failure to provide the bears with access to potable water. Section 3.130 provides

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

9 C.F.R. § 3.130.

In his answer DeLozier appears to admit that there was a film on the water but with the demurrer that the film was due to the weather. As for access to potable water, he suggested at the hearing that ponds at the facility also served as a water

receptacle. (Tr. 116). Guedron testified that the ponds were not considered water receptacles because the bears could sit in the water and that the water was not potable because it was only circulated. (Tr. 125-27). He did not find that the ponds were in fact unclean or unsanitary. Respondents provided testimony that the water in the ponds was potable: the ponds were frequently cleaned, drained and filled with "city water" and the bears could drink from the ponds as well as from other water receptacles. (Tr. 145). Thus, the bears did have access to potable water. However, Section 3.130 also provides that "all" water receptacles must be kept clean and sanitary. Therefore to the extent that Guedron found some of the receptacles were unclean there was a violation of Section 1.130 of the Standards even though this was not specifically alleged in the complaint.

Lack of veterinary care. Guedron's August 25, 1997, inspection report states that a "program of veterinary care was not available for inspection" (CX 25) and his August 28, 1998, report states that "the new Attending Vet has not filled out a new Program of Vet Care," (Tr. 27) as required by Section 2.40(b) of the Regulations which states that

> (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;

9 C.F.R. § 2.40(b).

In his answer DeLozier stated that the facility had a program of veterinary care and that it was available from the attending veterinarian. Guedron, agreeing in his testimony that Respondents had an attending veterinarian, testified that he had cited Respondents for not having the veterinary program available for inspection at the facility, "not," he said, "that there was not one." (Tr. 50, 64-65).

The Standards, while requiring exhibitors to have a program of veterinary care, do not require that one be kept at the facility. DeLozier also attached to his answer to the complaint a copy of his program of veterinary care which is on an APHIS form 7002. It states that the form may be used by licensees as a guideline to prepare a program. It states that the veterinarian and licensee "should" retain a copy for their files, but like the Regulations it does not specifically require that the licensee/exhibitor keep a copy on the premises. The program could have been available to Guedron for inspection by contacting the attending veterinarian or having DeLozier obtain one from the veterinarian. Thus, the evidence is insufficient to establish that Respondents did not have a program of veterinary care as required by the Regulations.

Accumulated trash. At his inspection on October 20, 1997, Guedron found that garbage and trash had accumulated in an enclosure construction area and that a garbage can without a lid was attracting flies. He said this was a failure to comply with Section 3.131(c) of the Standards. (CX 26; Tr. 56). This section states:

> (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.

DeLozier admitted the violation in his answer but said that the problem had been corrected. As discussed before, a violation occurs even though later corrected. Respondents therefore violated Section 3.131(c) of the Standards.

Failure to properly store food supplies. At inspections on October 20, 1997, and August 28, 1998, Guedron observed that food was not stored in compliance with Section 3.125(c) of the Standards. This standard provides:

> 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.

9 C.F.R. § 3.125(c).

Guedron said he saw a bag of dry food on the floor in proximity to a pesticide bottle, fire extinguishers, and paint, and observed fly-infested bread and sliced apples which were intended to be sold to customers to feed to the bears. (CX 26, 27; Tr. 56). In his answer DeLozier admitted these facts but said the matter had

been corrected. This failure to properly store food constitutes a violation of Section 3.125(c).

Failure to keep food receptacles clean. Guedron found on October 20, 1997, that the receptacles that contained the apples that were fed to the bears were reused and had dried food on them which showed that they were not properly cleaned as required by Section 3.129. (CX 28; Tr. 70). Section 3.129 states that:

> (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.

9 C.F.R. § 3.129 (a) and (b).

DeLozier neither admitted nor denied this allegation in his answer. He stated that the receptacles were styrofoam. As he failed to deny the allegation it is deemed admitted. The failure to clean food receptacles is a violation of Section 3.129(b) regardless of the material from which they are made.

Sanction

Complainant seeks a $10,000 penalty and a thirty-day suspension. It is based in part on Respondents alleged failure to comply with a prior consent order. (CX 8) However, an examination of that order reveals that Respondents apparently complied with many provisions in the order (since the same incidents were not alleged in this proceeding), while other alleged violations in the order were found in this proceeding not to have been violations, such as the alleged failure to have a program of veterinary care and the alleged failure to provide adequate space for the bears. The record in this proceeding shows that at times the bears were denied access to their dens but does not otherwise show that the animals were treated inhumanely. Considering all the circumstances and that there were some instances

of repeated violations, I find that a penalty of $4,000 is appropriate.

Findings of Fact

1. Respondent Bill E. DeLozier, an individual whose mailing address is P.O. Box 1348, Pigeon Forge, Tennessee 37863, is a principal or proprietor of Respondent Three Bears Gift Shop, a/k/a Three Bears Gifts and a/k/a Christmas Shoppe, a partnership, association or sole proprietorship, located at 2855 and 2861 Parkway, Pigeon Forge, Tennessee 37838. At all times relevant, Respondent DeLozier was licensed as an exhibitor, as that term is defined in the Act and the Regulations, under the name "Bill E. DeLozier d/b/a Three Bears Gift Shop."

2. Respondents Bill Murchison, Betty Murchison, J.F. Murchison, and W.M. Murchison are individuals whose mailing address is 3051 Buckhorn Way, Sevierville, Tennessee 37876. At all times relevant, said Respondents were licensed as dealers, as that term is defined in the Act and the Regulations, under the name "Bill Murchison d/b/a Three Bears Gift Shop," and were exhibitors, as that term is defined in the Act. Respondent Bill Murchison owns six Himalayan bears which he leased to Respondent Bill E. DeLozier.

3. APHIS conducted inspections of the Three Bears Gift Shop premises and records on January 15, August 25, and October 20, 1997, and on August 28, 1998.

4. On January 15, 1997, Respondents failed to clean enclosures for bears as required.

5. On January 15, 1997, Respondents failed to keep all potable water receptacles clean and sanitary.

6. On October 20, 1997, and August 28, 1998, Respondents failed to adequately store and protect supplies of food.

7. On October 20, 1997, Respondents failed to maintain food receptacles in a clean and sanitary condition.

8. On January 15 and October 20, 1997, Respondents failed to provide a suitable method of drainage to eliminate excess water.

9. On January 15, August 25 and October 20, 1997, Respondents failed to provide animals with adequate shelter from sunlight and inclement weather.

Conclusions of Law

1. On January 15, 1997, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to clean enclosures for bears as required, in violation of section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)).

2. On January 15, 1997, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to provide potable water to animals in

clean and sanitary water receptacles, in violation of section 3.130 of the Standards (9 C.F.R. § 3.130).

3. On October 20, 1997, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a), by failing to keep their premises clean, in good repair and free of accumulations of trash and to facilitate prescribed husbandry practices, in violation of section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)).

4. On October 20, 1997, and August 28, 1998, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to adequately store supplies of food, to protect them from contamination by vermin in violation of section 3.125(c) of the Standards (9 C.F.R. § 3.125(c)).

5. On October 20, 1997, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to maintain food receptacles in clean and sanitary condition, in violation of section 3.129 of the Standards (9 C.F.R. § 3.129).

6. On January 15 and October 20, 1997, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to provide a suitable method of drainage to eliminate excess water, in violation of section 3.127(c) of the Standards (9 C.F.R. § 3.127(c)).

7. On January 15, August 25 and October 20, 1997, and August 28, 1998, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to provide animals with adequate shelter from sunlight and inclement weather, in violation of section 3.127(a) and (b) of the Standards (9 C.F.R. §§ 3.127(a) and (b)).

Order

1. Respondents are assessed a civil penalty of $4,000, to be paid within 120 days of service of this order to the Treasurer of the United States, and forwarded to Colleen A. Carroll, United States Department of Agriculture, Office of the General Counsel, Room 2343, South Building, Washington, DC 20250-1400.

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

(a) Failing to maintain water and food receptacles in clean and sanitary condition;

(b) Failing to clean enclosures for bears as required.

(c) Failing to keep their premises clean, in good repair and free of accumulations of trash, in order to facilitate prescribed husbandry practices;

(d) Failing to adequately store supplies of food, to protect them from contamination by vermin;

(e) Failing to provide animals with adequate shelter from sunlight and inclement weather.

This decision will become final and effective without further proceedings 35 days after the date of service upon Respondents, unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service, as provided in Section 1.145 of the Rules of Practice. (7 C.F.R. § 1.145.)

[This Decision and Order became final on December 18, 2000, as to Bill Murchison, Betty Murchison, and J.F. Murchison; on January 12, 2001, as to W.M. Murchison; and on January 18, 2001, as to Bill E. DeLozier.--Editor]

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In re: GEORGE RUSSELL.
AWA Docket No. 99-0023.
Decision and Order filed January 23, 2001.

Failure to maintain a written program of veterinary care - Failure to make facility available for unannounced inspections - Failure to maintain the physical facility in compliance - Failure to designate a responsible person to accompany APHIS inspectors in his absence - Cease and desist order - Civil penalty - License disqualification.

Administrative Law Judge Dorothea A. Baker imposed a civil penalty of $2,000.00, issued a cease and desist order, and disqualified Respondent from becoming licensed for a period of one year and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act, the regulations and standards issued thereunder. Judge Baker found that Respondent willfully violated the Animal Welfare Act, and the regulations and standards issued pursuant thereto, by: failing to store supplies of food to protect against contamination; failing to provide sufficient potable water; failing to maintain facilities in good repair; failing to keep primary enclosures clean; failing to maintain records as required; and failing to establish and maintain adequate programs and veterinary care under supervision and assistance of a doctor of veterinary medicine. Judge Baker did not impose the Complainant's recommended penalty but instead reduced the monetary penalty because although lacking a written veterinarian program, the evidence shows that there was an established program of veterinary care, and Respondent maintained employment away from his house and he tried to work it out so the inspector would call him at work and meet him at his house. So there was an effort of good faith by Respondent as to the unannounced inspection visits.

Robert A. Ertman, for Complainant.
R. David Ray, West Plains, Missouri, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 *et seq.*) ("Act"), instituted by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), on May 7, 1999. The Complaint alleges that the Respondent willfully violated the Act and the regulations and standards issued under the Act (9 C.F.R. §§ 1.1 *et seq.*). An administrative hearing was held in West Plains, Missouri, on May 17, 2000, before Administrative Law Judge Dorothea A. Baker. Complainant was represented by Robert A. Ertman, Esquire, Office of the General Counsel, United States Department of Agriculture. Respondent was represented by R. David Ray, Esquire, West Plains, Missouri. In due course, the parties filed briefs.

Discussion

Respondent resists the contention that he has violated the Act and regulations by asserting that no willful violations occurred; that upon being advised of non-conforming conditions, Respondent repaired and remedied them but the inspector did not return to determine if Respondent had in fact complied. Respondent further maintains that the Complaint is deficient in not alleging that what Respondent was accused of was failure to maintain a written program of veterinary care. In its Reply Brief, Complainant moved to amend the Complaint to conform to the evidence, citing cases decided by the Judicial Officer where such amendments were allowed. Therefore, the motion to amend is granted.

Respondent argues that since the evidence shows, through his testimony, that he corrected each deficiency, such corrections demonstrate that the violations were not willful. He contends that if the inspectors had returned they would have become aware of the corrective measures.

At the oral hearing the Government requested that the record be left open for Respondent to provide proof that he had maintained a program of veterinary care. Subsequently the Respondent obtained and filed an Affidavit of J. W. Brewer, DVM, which states in part:

. . . .

3. George Russell has maintained programs of disease control and prevention, euthanasia, and veterinary care for many years under the direct

supervision and participation of the undersigned as Veterinarian. Specifically, the undersigned provided veterinary care and inspection to the animals owned by Mr. Russell from January 1997 through August 1998, and before and after that time period.

. . . .

6. Neither the undersigned nor Mr. Russell maintained a printed program of regular veterinary care, but such did in fact occur under the knowledge and supervision of the undersigned.

Thus, without contradiction, the aforementioned evidence shows that even though there was no "printed program of regular care" such a program did in fact occur.

The Government, however, now asks that Respondent be held to have violated the Act by failing to maintain a written program of veterinary care.

Section 2.40 of the regulations provide, in part:

§ 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. . . .

The Complainant, in framing its alleged violations against Respondent, did not plead failure to maintain a written program. In fact, Respondent has demonstrated that he did maintain a program of veterinary care, and has fairly rebutted the allegations made in the Complaint without amendment. However, because of Departmental precedent set forth hereinabove, I feel compelled to permit the Complainant to enlarge the pleadings to allege the violation in a different way and thus find that Respondent did not have a written program of veterinary care.

A violation is willful under the Administrative Procedure Act (7 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.

The Respondent's violations were willful as applied to this administrative proceeding. A willful act is one which is done intentionally, irrespective of evil motive or intent, or done with careless disregard of statutory requirements. *See, In re: Big Bear Farm, Inc., et al.,* 55 Agric. Dec. 107, 138-39 (1996); *In re: Craig Lesser and Marilyn Lesser,* 52 Agric. Dec. 155, 167 (1993), *aff'd,* 34 F.3d 1301 (7th Cir. 1994); *In re: Pet Paradise, Inc.,* 51 Agric. Dec. 1047, 1067-70 (1992), *aff'd,* 61 F.3d 907 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)). As herein applied, all of the acts, resulting in violations, were done intentionally or with careless disregard of statutory requirements, and, accordingly, the violations resulting from these acts were willful.

The Complainant's brief correctly sets forth the position of the Department with respect to Respondent's contentions. The Respondent was not given a "grace period" for correcting violations. Although corrective actions may be mitigating factors, such does not eliminate the violation. "It is well settled that a correction date does not exculpate a respondent from the violation, and while corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, a correction does not eliminate the fact that a violation occurred and does not provide a basis for dismissal of the alleged violation." *In re: Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998), citing *In re: John D. Davenport d/b/a King Royal Circus*, 57 Agric. Dec. 189, 219 (1998), *In re: David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, No. 97-3414 (3d Cir. May 26, 1998) (unpublished); *In re: Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-273 (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: Big Bear Farm, Inc., supra*; *In re: Pet Paradise, Inc., supra*.

The Respondent did not make the premises available for inspection as contemplated by the regulations. The Respondent contends that he did not "willfully prevent" any employee from inspecting his premises. "Exhibitors, dealers and other regulated persons are required to give access to their premises and animals: '[D]uring normal business hours, some employee or agent has to be available at each facility . . ., to give full and ready access to it and its records, for any unannounced APHIS inspection.'" *In re: S.S. Farms Linn County, Inc., et al.,* 50 Agric. Dec. 476, 492 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), quoted in *In re: Otto Berosini,* 54 Agric. Dec. 886, 908." It is not enough for the Respondent to say that APHIS inspectors could have climbed over a locked gate and inspected the premises, or to have

waited from twenty minutes to an hour for him to have returned from his outside employment.

The Respondent failed and refused, repeatedly and willfully, to make his facility available for unannounced inspections. Between November, 1995, and July, 1998, APHIS was able to inspect the Respondent's facility twice. (CX 9). And on the first of those two occasions, the Respondent's inventory and acquisition records were not available. (CX 1). "The importance of all records, particularly those showing the source of all animals and their disposition, being made immediately available at the time of an unannounced inspection, cannot be overstated." *In re: S.S. Farms Linn County, Inc., et al., supra*.

On no fewer than four occasions, January 14, 1997, January 30, 1997, May 13, 1998, and July 22, 1998, access was denied even though a responsible adult, the Respondent's wife, was present. Such a situation has been addressed and found to be a violation: *In re: Otto Berosini, supra*.

It is not asserted that the Animal Welfare Act and its regulations impose obligations on the spouses of dealers and exhibitors. It is the obligation of the exhibitor or dealer to make the facilities available for inspection. They may do this personally, or through an agent, employee, or representative, but they must do it. Respondent maintains that the Animal Plant and Health Inspection Service employees elected not to conduct an inspection on the aforesaid dates because Respondent was not present on the premises. The Respondent was given a written warning on February 14, 1997, about his failures to make his facility available for inspection on January 14 and January 30, 1997. (CX 8). Finally, the Respondent flatly refused to designate a responsible person to accompany APHIS inspectors in his absence because he trusted no one. (CX 6).

"The principal purpose of the Animal Welfare Act is to provide for the humane care of animals." *In re: Craig Lesser and Marilyn Lesser,* 52 Agric. Dec. 155, 160 (1993), *aff'd,* 34 F.3d 1301 (7th Cir. 1994). The regulations requiring dealers and exhibitors to maintain a written program of veterinary care with regularly scheduled visits to the facility is an important tool for providing humane care. The veterinary care program needs to be written so that it can be evaluated; visits to the facility need to be regularly scheduled so that the veterinarian can regularly review the facility and its operations. A visit to the facility to issue a health certificate for a specific animal (or an examination of a specific animal elsewhere) does not serve this purpose. Since the Respondent's post hearing submission shows that he did in fact use a veterinarian's services, the Complainant requests that the civil penalty be reduced to $4,500.00 from $5,000.00 as requested at the hearing.

The Respondent also violated the regulations and standards in numerous ways by failing to maintain the physical facility in compliance. On the second occasion that APHIS was able to inspect the premises, conditions were described as slightly

worse than before (Tr. 14), but there is not sufficient evidence to make such a comparison with the first visit. The photographs (CX 5, A through M), show a pattern of neglect: animal enclosures with uncut weeds, fallen tree limbs, junk, fences and gates loose and in need of repair, and broken wire. On the occasion of the inspection on February 25, 1997, the water bowls in a bear pen were covered with algae. Although the Respondent attempted to dismiss this situation by stating that the bears were hibernating (Tr. 56), such testimony is not credible.

Complainant has discharged its burden of proof by a preponderance of the evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983).

A careful review of the record as a whole supports the following findings of fact.

Findings of Fact and Conclusion

1. George Russell, hereinafter referred to as Respondent, is an individual whose mailing address is RR2, Box 2283, Thayer, Missouri 65791. (Answer, ¶ I-A).

2. The Respondent, at all times material hereto, was licensed and operating as an exhibitor as defined in the Act and the regulations. (Answer, ¶ I-B; CX 7 (Application for License Renewal); CX 10A, B, C, and D (photographs of signage); Tr. 53-55).

3. On February 25, 1997, APHIS inspected the Respondent's premises and found that the Respondent had failed to establish and maintain a written program of veterinary care with regularly scheduled visits by a veterinarian. (CX 1; Tr. 11-12, and Respondent's post-hearing submission (affidavit item 6)). Such failure constituted a willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

4. On February 25, 1997, the Animal and Plant Health Inspection Service employees were not permitted to conduct a complete inspection of the Respondent's inventory and acquisition records (CX 1; Tr. 12-13) which was in willful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations.

5. On February 25, 1997, the Animal and Plant Health Inspection Service employees inspected the Respondent's facility and found the following conditions:

A. The facilities for the Respondent's animals were not structurally sound so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (CX 1; Tr. 11) and constituted a willful violation of 9 C.F.R. § 3.125(a).

B. Supplies of food were not stored so as to adequately protect them against deterioration, molding, or contamination by vermin (CX 1; Tr. 11) in willful violation of 9 C.F.R. § 3.125(c).

C. Water receptacles were not kept clean and sanitary (CX 1; Tr. 11) in

willful violation of 9 C.F.R. 3.130.

D. The premises (buildings and grounds) were not kept clean and in good repair and free of accumulations of trash (CX 1; Tr. 11) in willful violation of 9 C.F.R. § 3.131(c).

6. The Animal and Plant Health Inspection Service personnel specified that such non-compliant items were to be corrected by certain future dates as specified in Exhibit 1. Respondent testified that he corrected each non-compliant items as specified in Exhibit 1. APHIS admitted they did not make a follow-up inspection to determine whether Respondent had complied.

7. On August 31, 1998, the Animal and Plant Health Inspection Service personnel inspected the Respondent's premises and found that the Respondent had failed to establish and maintain a written program of veterinary care with regularly scheduled visits by a veterinarian (CX 4; Tr. 14, Respondent's post-hearing submission (affidavit item 6)) in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

8. On August 31, 1998, the Animal and Plant Health Inspection Service employees inspected the Respondent's premises and records and found that the Respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals (CX 4; Tr. 14) 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)).

9. On August 31, 1998, APHIS inspected the Respondent's facility and found the following conditions:

A. The facilities for the Respondent's animals were not structurally sound so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals. (CX 4, CX 5-B, 5-C, 5-E, 5-F, 5-H, 5-I; Tr. 15-18). This was a willful violation of 9 C.F.R. § 3.125a.

B. The premises (buildings and grounds) were not kept clean and in good repair and free of accumulations of trash. (CX 5-A, 5-D, 5-G, 5-K, 5-L, 5-M), which constituted a willful violation of (9 C.F.R § 3.13(c)).

10. The Animal and Plant Health Inspection Service personnel specified that such non-compliant items were to be corrected by certain future dates as specified in Exhibit 4. Respondent testified he corrected each non-compliant item and the Animal and Plant Health Inspection Service personnel acknowledged and admitted they did not make a follow-up inspection to determine if Respondent had complied.

11. On January 14, 1997, January 30, 1997, May 13, 1998, and July 22, 1998, the Animal and Plant Health Inspection Service employees were not permitted to conduct a complete inspection of the Respondent's animal facilities (CX 6; Tr. 18-19, 21) 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).

Conclusions

The record as a whole shows that Respondent was in willful violation of the Act and of the regulations on numerous occasions. He made good faith attempts to correct the deficiencies, but, he was not successful in coming into compliance with the regulatory requirements.

The Complainant requests sanctions.

In imposing sanctions there are four factors to be considered: the size of Respondent's business, the gravity of the violations, good faith, and history of previous violations. The size of the Respondent's business is relatively small. The Respondent's failures to make his facility available for inspection are described by Complainant as "grave violations" and the other violations are "significant." The testimonial evidence shows that Dr. Brewer, the Veterinarian, is at Respondent's facility "normally once a month." (Tr. 58). Respondent has been in business since 1982. There are no prior adjudicated violations by the Respondent.

Because Respondent is required to conform to the Act and regulatory requirements, and the evidence establishes that he did not, I am issuing the following Order. I have reduced the monetary penalty sought by Complainant because, although lacking a written veterinarian program, nevertheless, the evidence shows that there was an established program of veterinary care. There was an effort of good faith by Respondent as to the unannounced inspection visits which he tried to work in around his regular employment. Respondent maintained employment away from his house and he tried to work it out so the inspector would call him at work and meet him at his house. He also indicated the photographs in evidence were of the "holding area" and not where any animals were penned or confined and thus the inspector's description of the property was inaccurate.

A. It is an area off of the barnyard where I keep all my supplies.

Q. And do you mean that it is for holding animals or holding supplies?

A. No, it is for holding supplies. It is where I park my tractor and my pickup and stuff like that, away from the animals.

Q. The animals are not allowed to come in there?

A. No.

Q. And are not ordinarily kept in there?

A. No.

Q. Are there any piles of junk like that out with the animals –

A. No.

Q. -- or were there any --

A. No.

Q. -- piles of junk like that out in the animal confinement areas?

A. No.

(Tr. 62).

Respondent is no longer licensed and in business. I am imposing a $2,000.00 monetary penalty because I believe it carries out the purposes of the Act, and is a significant amount for Respondent.

All contentions, suggestions and motions of the parties have been duly considered and to the extent not adopted are deemed irrelevant, immaterial, or not supported by the evidence.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to store supplies of food so as to adequately protect them against contamination;

(b) Failing to provide animals with adequate potable water;

(c) 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;

(d) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes;

(e) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required; and

(f) 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.

2. The Respondent is assessed a civil penalty of $2,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

3. The Respondent is disqualified from becoming licensed for a period of one year and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service 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.

This Decision and Order shall become final and effective thirty-five (35) days after service upon Respondent unless appealed to the Judicial Officer within thirty (30) days, all or more fully set forth in the Rules of Practice and Procedure, 7 C.F.R. § 1.142.

[This Decision and Order became final on March 5, 2001.-Editor]

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In re: JOSE L. CRUZ-AYALA.
AWA Docket No. 01-0013.
Decision and Order filed April 20, 2001.

AWA - Default - Failure to Answer - Dangerous Animals.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Decision 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 willfully violated the Act and the regulations and standards issued pursuant to the Act (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 by the Hearing Clerk on Jose L. Cruz-Ayala on November 25, 2000. The 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 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 as set forth herein by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

A. Jose L. Cruz-Ayala, hereinafter referred to as respondent, is an individual, whose address is 4202 Anice, Houston, Texas 77039.

B. The respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations.

II

A. On August 18, 1997, APHIS inspected the respondent's facility and found the following willful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standard specified below:

The facilities for respondent's animals were not structurally sound so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals, because the facility was not constructed in a manner appropriate for the animals involved in that it lacked a suitable perimeter fence or equivalent safeguards, necessary for the safe containment of dangerous, carnivorous wild animals (9 C.F.R. § 3.125(a)).

B. On April 23, 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:

1. The facilities for respondent's animals were not structurally sound so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals, because the facility was not constructed in a manner appropriate for the animals involved in that it lacked the proper safeguards, necessary for the safe containment of dangerous, carnivorous wild animals (9 C.F.R. § 3.125(a)); and

2. Primary enclosures for animals were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement (9 C.F.R. § 3.128).

C. On September 20, 1999, 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:

1. The facilities for respondent's animals were not structurally sound so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals, because the facility was not constructed in a manner appropriate for the animals involved in that it lacked a suitable perimeter fence or equivalent safeguards, necessary for the safe containment of dangerous, carnivorous wild animals (9 C.F.R. § 3.125(a)); and

2. Primary enclosures for animals were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement (9 C.F.R. § 3.128).

D. On November 9, 1999, 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:

1. The facilities for respondent's animals were not structurally sound so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals, because the facility was not constructed in a manner appropriate for the animals involved in that it lacked a suitable perimeter fence or equivalent safeguards, necessary for the safe containment of dangerous, carnivorous wild animals (9 C.F.R. § 3.125(a)); and

2. Primary enclosures for animals were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement (9 C.F.R. § 3.128).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease

and desist from:

(a) Failing to provide primary enclosures that were strong enough to contain the dogs securely and comfortably, and to withstand the normal rigors of transportation;

(b) Failing to clean primary enclosures at least once for every 24 hours of continuous travel;

(c) Failing to provide immediate veterinary care at the closest available veterinary facility to animals that were in obvious physical distress during transportation.

2. 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 the United States.

3. Respondents' license is suspended for a period of thirty (30) days and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service 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 this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final on June 5, 2001.-Editor]

In re: BETH LUTZ.
AWA Docket No. 00-0017.
Decision and Order filed January 24, 2001.

Failure to file timely answer – Animal welfare – Dealer – License – Civil penalty – License disqualification – Cease and desist order.

The Judicial Officer affirmed the Default Decision issued by Chief Administrative Law Judge James W. Hunt (Chief ALJ) assessing the Respondent a $5,000 civil penalty, permanently disqualifying the Respondent from obtaining an Animal Welfare Act license, and ordering the Respondent to cease and desist from violating the Regulations (9 C.F.R. §§ 1.1-2.133). The Judicial Officer deemed the Respondent's failure to file a timely answer to the Complaint an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and a waiver of hearing (7 C.F.R. § 1.139). The Judicial Officer rejected the Respondent's contentions that no one read the Respondent's filings and that the proceeding was designed to harass the Respondent. The Judicial Officer stated that he had read the entire record,

including all of the Respondent's filings, and that the Complainant's responses to the Respondent's filings and the Chief ALJ's filings indicated that the Complainant and the Chief ALJ had read the Respondent's filings. The Judicial Officer also found that the proceeding reflected the Complainant's good faith effort to properly administer and enforce the Animal Welfare Act and the Regulations.

Frank Martin, Jr., 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.

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 December 29, 1999. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [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].

Complainant alleges that, on or about October 10, 1998, and October 20, 1998, Beth Lutz [hereinafter Respondent] operated as a dealer as defined in the Animal Welfare 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) (1998)) (Compl. ¶ II(A)).

On May 31, 2000, Mark A. Westrich, a United States Department of Agriculture employee, personally served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a copy of the Hearing Clerk's December 29, 1999, service letter.[1] Respondent failed to answer the 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 June 21, 2000, the Hearing Clerk sent a letter to Respondent informing her that Respondent's answer to the Complaint had not been received within the time required in the Rules of Practice (Letter dated June 21, 2000, from Joyce A. Dawson, Hearing Clerk, to Ms. Beth Lutz). On June 23, 2000, Respondent filed an answer denying the allegations in the Complaint.

On August 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 Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Motion for

[1]See United States Department of Agriculture Certificate of Personal Service filed June 8, 2000.

Default Decision] and a proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision on September 15, 2000.[2] On September 26, 2000, Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On September 29, 2000, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] filed an Order to Show Cause directing Complainant to identify the circumstances Complainant considered when Complainant proposed assessing Respondent a $10,000 civil penalty in Complainant's Proposed Default Decision. On October 20, 2000, Complainant filed Complainant's Response to Order to Show Cause and Revised Proposed Order. On October 26, 2000, Respondent filed a response to Complainant's Response to Order to Show Cause and Revised Proposed Order.

On December 4, 2000, the Chief ALJ issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Initial Decision and Order]: (1) finding that, at all times material to this proceeding, Respondent was operating as a dealer as defined in the Animal Welfare Act and the Regulations; (2) finding that, on or about October 10, 1998, and October 20, 1998, Respondent willfully violated section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (1998)) by operating as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed; (3) finding that Respondent sold, in commerce, at least 284 dogs for resale for use as pets and that the sale of each animal constitutes a violation of the Regulations; (4) concluding that Respondent has violated the Regulations; (5) directing Respondent to cease and desist from violating the Regulations; (6) assessing Respondent a $5,000 civil penalty; and (7) permanently disqualifying Respondent from obtaining an Animal Welfare Act license (Initial Decision and Order at 2-3).

On January 3, 2001, Respondent appealed to the Judicial Officer. On January 17, 2001, Complainant filed Complainant's Response to Respondent's Appeal. On January 18, 2001, 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 Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusions, as restated.

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[2]See Memo to File from Tonya Fisher, Legal Technician, dated September 15, 2000.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

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—

. . . .

(f) The term "dealer" means 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, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

§ 2134. Valid license for dealers and exhibitors required

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

§ 2149. Violations by licensees

. . . .

(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(f), 2134, 2149(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.

. . . .

Dealer means 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; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the APHIS, REAC Sector Supervisor in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where the animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the APHIS, REAC Sector Supervisor.

9 C.F.R. §§ 1.1, 2.1(a)(1) (1998).

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

On May 31, 2000, a United States Department of Agriculture employee personally served Respondent with a copy of the Complaint, a copy of the Rules of

Practice, and a copy of the Hearing Clerk's December 29, 1999, service letter.[3] Respondent failed to file an answer within the time required by 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 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 an individual whose address is 5580 Boster Road, Houston, Missouri 65483.

2. Respondent, at all times material to this proceeding, was operating as a dealer as defined in the Animal Welfare Act and the Regulations.

3. On or about October 10, 1998, and October 20, 1998, Respondent willfully violated section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (1998)) by operating as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed. Respondent sold, in commerce, at least 284 dogs for resale for use as pets. The sale of each animal constitutes a separate violation.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact, Respondent has violated the Regulations.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

On January 3, 2001, Respondent filed a letter dated December 26, 2000 [hereinafter Respondent's Appeal Petition]. Respondent raises three issues in Respondent's Appeal Petition.

First, Respondent asserts that no one has read her filings in this proceeding (Respondent's Appeal Pet. at first unnumbered page). Respondent fails to identify any basis for her assertion that no one has read her filings. I have read the entire record, including all of Respondent's filings. I find nothing on the record to support

[3]See note 1.

Respondent's assertion that no one has read her filings. Complainant's responses to Respondent's filings and the Chief ALJ's filings indicate that Complainant and the Chief ALJ read Respondent's filings.

Second, Respondent asserts the United States Department of Agriculture is harassing her by maintaining this proceeding more than 2 years after the date of the violations alleged in the Complaint. Respondent asserts this harassment is the cause of her continued high blood pressure. (Respondent's Appeal Pet. at first and second unnumbered pages.)

I empathize with Respondent's frustration over the length of time necessary for this proceeding. However, this proceeding must be conducted in accordance with the due process clause of the Fifth Amendment to the Constitution of the United States and the applicable procedural requirements in the Animal Welfare Act, the Administrative Procedure Act, and the Rules of Practice. Often these procedural requirements necessitate a lengthy proceeding. If I found that this proceeding was instituted and maintained to harass Respondent, rather than instituted and maintained as part of an effort to properly administer and enforce the Animal Welfare Act and the Regulations, I would dismiss the proceeding. However, I find nothing in the record that indicates that this proceeding is designed to harass Respondent or to cause Respondent's continued high blood pressure. Instead, I find that the record reflects Complainant's good faith effort to properly administer and enforce the Animal Welfare Act and the Regulations.

Third, Respondent denies that she violated the Regulations as alleged in the Complaint (Respondent's Appeal Pet. at first through third unnumbered pages).

Respondent's denial comes too late to be considered. Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because Respondent failed to file an answer within 20 days after a United States Department of Agriculture employee personally served Respondent with the Complaint.

A United States Department of Agriculture employee personally served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a copy of the Hearing Clerk's December 29, 1999, service letter on May 31, 2000.[4] 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.

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[4]See note 1.

(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 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 Complaint clearly informs Respondent of the consequences of failing to file a timely answer, as follows:

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

Compl. at second unnumbered page.

Similarly, the Hearing Clerk informed Respondent in the December 29, 1999, service letter 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 Complaint would constitute an admission of that allegation, as follows:

> December 29, 1999
>
> Ms. Beth Lutz
> 5580 Boster Road
> Houston, Missouri 65483
>
> Dear Ms. Lutz:
>
> Subject: In re: Beth Lutz - Respondent
> AWA Docket No. 00-0017
>
> Enclosed is a copy of a complaint, which has been filed with this office under the Animal Welfare Act, as amended.
>
> Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.
>
> The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny

the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

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

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

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

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On June 21, 2000, the Hearing Clerk sent a letter to Respondent informing her that Respondent's answer to the Complaint had not been received within the time required in the Rules of Practice (Letter dated June 21, 2000, from Joyce A. Dawson, Hearing Clerk, to Ms. Beth Lutz). On June 23, 2000, Respondent, filed an answer denying the allegations in the Complaint.

On August 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 Respondent's failure to file a timely answer. The Hearing Clerk served Respondent with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision on

September 15, 2000.[5] On September 26, 2000, Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On September 29, 2000, the Chief ALJ filed an Order to Show Cause directing Complainant to identify the circumstances Complainant considered when Complainant proposed assessing Respondent a $10,000 civil penalty in Complainant's Proposed Default Decision. On October 20, 2000, Complainant filed Complainant's Response to Order to Show Cause and Revised Proposed Order. On October 26, 2000, Respondent filed a response to Complainant's Response to Order to Show Cause and Revised Proposed Order. On December 4, 2000, the Chief ALJ issued an Initial Decision and Order.

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,[6] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[7]

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[5]See note 2.

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

[7]*See generally In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months and 5 days after they were served with the complaint and 5 months and 16 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the (continued...)

[7](...continued)
Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding 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 holding 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 the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding 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 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 holding 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 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 holding 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 the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding 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 Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding 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 the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding 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 the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding 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 the default decision was properly issued where the respondent failed to file an answer and holding 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 the default decision was properly issued where the respondent failed to file an answer and holding 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 the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding 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 holding the respondent is deemed, by his failure to file a timely answer, to have admitted the
(continued...)

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)). Respondent's answer was filed 23 days after Respondent was served with the Complaint and 3 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint 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.

Accordingly, the Chief ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive Respondent of her rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[8]

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

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[7](...continued)
violations of the Animal Welfare Act and the Regulations and Standards alleged in the 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 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 holding 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 the default decision was properly issued where the respondents failed to file a timely answer and holding 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 the default decision was properly issued where the respondent failed to file an answer and holding 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 the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

[8]*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).

Order

1. Respondent, her agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Regulations, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations.

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 $5,000 civil penalty, which is suspended provided that Respondent, after notice and opportunity for hearing, is not found to have violated the Animal Welfare Act or the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) during the period of Respondent's disqualification from obtaining an Animal Welfare Act license. The period of Respondent's disqualification from obtaining an Animal Welfare Act license is set forth in paragraph 3 of this Order.

3. Respondent is permanently disqualified from obtaining an Animal Welfare Act license.

The Animal Welfare Act license disqualification provision of this Order shall become effective on the day after service of this Order on Respondent.

4. 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 January 24, 2001.

In re: BETH LUTZ.
AWA Docket No. 00-0017.
Order Denying Petition for Reconsideration filed May 7, 2001.

Petition for reconsideration – Late-filed petition for reconsideration.

The Judicial Officer denied Respondent's Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Chief 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 December 29, 1999. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [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].

Complainant alleges that, on or about October 10, 1998, and October 20, 1998, Beth Lutz [hereinafter Respondent] operated as a dealer as defined in the Animal Welfare 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) (1998)) (Compl. ¶ II(A)).

On May 31, 2000, Mark A. Westrich, a United States Department of Agriculture employee, personally served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a copy of the Hearing Clerk's December 29, 1999, service letter.[1] Respondent failed to answer the 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 June 21, 2000, the Hearing Clerk sent a letter to Respondent informing her that Respondent's answer to the Complaint had not been received within the time required in the Rules of Practice.[2] On June 23, 2000, Respondent filed an answer denying the allegations in the Complaint.

On August 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 Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Motion for Default Decision] and a proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision on September 15, 2000.[3] On September 26, 2000, Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

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[1]See United States Department of Agriculture Certificate of Personal Service filed June 8, 2000.

[2]See letter dated June 21, 2000, from Joyce A. Dawson, Hearing Clerk, to Ms. Beth Lutz.

[3]See Memo to File from Tonya Fisher, Legal Technician, dated September 15, 2000.

On September 29, 2000, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] filed an Order to Show Cause directing Complainant to identify the circumstances Complainant considered when Complainant proposed assessing Respondent a $10,000 civil penalty in Complainant's Proposed Default Decision. On October 20, 2000, Complainant filed Complainant's Response to Order to Show Cause and Revised Proposed Order. On October 26, 2000, Respondent filed a reply to Complainant's Response to Order to Show Cause and Revised Proposed Order.

On December 4, 2000, the Chief ALJ issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Initial Decision and Order]: (1) finding that, at all times material to this proceeding, Respondent was operating as a dealer as defined in the Animal Welfare Act and the Regulations; (2) finding that, on or about October 10, 1998, and October 20, 1998, Respondent willfully violated section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (1998)) by operating as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed; (3) finding that Respondent sold, in commerce, at least 284 dogs for resale for use as pets and that the sale of each animal constitutes a violation of the Regulations; (4) concluding that Respondent has violated the Regulations; (5) directing Respondent to cease and desist from violating the Regulations; (6) assessing Respondent a $5,000 civil penalty; and (7) permanently disqualifying Respondent from obtaining an Animal Welfare Act license (Initial Decision and Order at 2-3).

On January 3, 2001, Respondent appealed to the Judicial Officer. On January 17, 2001, Complainant filed Complainant's Response to Respondent's Appeal. On January 18, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision. On January 24, 2001, I issued a Decision and Order in which I adopted the Chief ALJ's Initial Decision and Order as the final Decision and Order. *In re Beth Lutz*, 60 Agric. Dec. ___ (Jan. 24, 2001).

On February 10, 2001, the Hearing Clerk served Respondent with the Decision and Order.[4] On April 12, 2001, Respondent filed a letter dated March 1, 20001 [sic] [hereinafter Petition for Reconsideration]. On May 4, 2001, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration, and the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the January 24, 2001, Decision and Order.

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[4]See Domestic Return Receipt 4579 4950.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, 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).

Respondent's Petition for Reconsideration, which was filed 2 months and 2 days after the date the Hearing Clerk served the Decision and Order on Respondent, was filed too late, and, accordingly, Respondent's Petition for Reconsideration must be denied.[5]

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[5] *See In re Mary Meyers*, 58 Agric. Dec. 861 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 years 5 months and 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 Agric. Dec. 855 (1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months and 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. 875 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 302 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. 349 (1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-
(continued...)

Moreover, even if Respondent's Petition for Reconsideration had been timely filed, it would be denied because Respondent raises no meritorious basis for finding the Decision and Order erroneous. Respondent's sole contention is that the United States Department of Agriculture agreed to conclude this proceeding only after Respondent signs a document which sets forth the sanction to be imposed on her. Respondent cites as the basis for this contention a letter the United States Department of Agriculture purportedly sent to Senator Bond. (Pet. for Recons.)

The record in this proceeding does not contain any letter from the United States Department of Agriculture to Senator Bond. Further, Respondent has not raised any other basis for finding that this disciplinary administrative proceeding may only be concluded after Respondent signs a document which sets forth the sanction to be imposed on her. This disciplinary administrative proceeding was concluded by the issuance of the January 24, 2001, Decision and Order. Respondent has the right to seek judicial review of the Order in the January 24, 2001, Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350.[6]

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

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[5](...continued)
filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

[6]*See* 7 U.S.C. § 2149(c).

ORDER

Respondent's Petition for Reconsideration is denied.

———————

In re: FRED HODGINS, JANICE HODGINS, AND HODGINS KENNEL, INC.
AWA Docket No. 95-0022.
Decision and Order on Remand filed April 4, 2001.

Animal welfare – Records – Housing – Food storage – Space – Cease and desist order – Civil penalty – Sanction policy.

The Judicial Officer assessed the Respondents a $325 civil penalty and directed the Respondents to cease and desist from violating the Animal Welfare Act (Act) and the Regulations and Standards issued under the Act. The Judicial Officer's Decision and Order on Remand was precipitated by *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), in which the Court vacated *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997), and remanded the proceeding to the Judicial Officer. The Court found that the Respondents committed 15 violations of the Act and the Regulations and Standards, but that none of the Respondents' violations were willful and all of the Respondents' violations were minor. The Court found that the Respondents violations would, at most, support a small civil penalty.

Sharlene A. Deskins, for Complainant.
Nancy L. Kahn, Farmington, Michigan, for Respondents.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order on Remand issued by William G. Jenson, Judicial Officer.

Procedural History

The Acting 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 22, 1995. Complainant instituted the 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].

Complainant alleges that Fred Hodgins, Janice Hodgins, and Hodgins Kennel, Inc. [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards (Compl.). On April 14, 1995, Respondents filed an Answer denying the material allegations in the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the ALJ] presided over a hearing in Detroit, Michigan, on September 27-October 4 and October 18-19, 1995. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Nancy L. Kahn, Farmington Hills, Michigan, represented Respondents.

On May 31, 1996, the ALJ issued an Initial Decision and Order. Complainant and Respondents appealed to the Judicial Officer. On July 11, 1997, I issued a Decision and Order in which I: (1) concluded Respondents committed 58 violations of the Animal Welfare Act and the Regulations and Standards; (2) assessed Fred Hodgins and Janice Hodgins, jointly and severally, a $13,500 civil penalty; (3) directed Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (4) suspended Respondents' Animal Welfare Act license for 14 days. *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997).

On appeal, the United States Court of Appeals for the Sixth Circuit vacated the July 11, 1997, Decision and Order and remanded the case for further agency proceedings consistent with the Court's opinion. *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000). The Court concluded that Respondents violated: (1) section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75 of the Regulations (9 C.F.R. § 2.75) as alleged in paragraphs III(B), IV(B), V(B), VI(B), and VII(B) of the Complaint; (2) section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) as alleged in paragraphs II(C)(9), III(D)(1), IV(D)(1), V(C)(1), VIII(C)(1), and IX(B)(1) of the Complaint; (3) section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) as alleged in paragraphs IV(D)(2) and VIII(C)(4) of the Complaint; (4) section 3.6(a)(2)(xi) of the Standards (9 C.F.R. § 3.6(a)(2)(xi)) as alleged in paragraph III(D)(6) of the Complaint; and (5) section 3.15 of the Standards (9 C.F.R. § 3.15) as alleged in paragraph IX(B)(10) of the Complaint. Further, the Court concluded that Respondents did not willfully violate the Animal Welfare Act or the Regulations and Standards. Based on these conclusions, the Court held that the suspension of Respondents' Animal Welfare Act license and most, if not all, of the $13,500 civil penalty assessed jointly and severally against Respondents were improper. *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000).

On February 1, 2001, I held a telephone conference with counsel for Complainant and counsel for Respondents. The parties informed me that they do not intend to seek further judicial review of *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997). I informed the parties that I would issue a decision and order on remand. Both parties requested the opportunity to brief the issue of the sanction to be imposed on Respondents for the violations found in *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000). I

granted Complainant's and Respondents' requests for the opportunity to brief the issue of the sanction to be imposed on Respondents for the violations found in *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000).

On February 23, 2001, Complainant filed Complainant's Recommendation for Sanctions. On March 5, 2001, Respondents requested a telephone conference and dismissal of the case or, in the alternative, an opportunity for Complainant to file a supplemental brief and an extension of time for Respondents' reply brief (Letter dated March 5, 2001, from Nancy L. Kahn to William G. Jensen). Pursuant to Respondents' request, I held a telephone conference with counsel for Complainant and counsel for Respondents on March 7, 2001. During the March 7, 2001, telephone conference, I denied Respondents' request that I dismiss the case, I offered Complainant the opportunity to file a supplemental brief, which opportunity Complainant declined, and I granted Respondents an extension of time for filing Respondents' reply to Complainant's Recommendation for Sanctions. On March 27, 2001, Respondents filed Reply of Respondents to Complainant's Recommendation for Sanctions. On March 28, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision on remand.

Applicable Statutory and Regulatory Provisions

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—

. . . .

(f) The term "dealer" means 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, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

§ 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.

§ 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(f), 2140, 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.

. . . .

Dealer means 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; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

PART 2–REGULATIONS

. . . .

SUBPART G–RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer . . . 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.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(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 a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

. . . .

(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.

PART 3–STANDARDS

SUBPART A–SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

(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.

. . . .

(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.

§ 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.

TRANSPORTATION STANDARDS

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

. . . .

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

9 C.F.R. §§ 1.1; 2.75(a)(1), (b)(1), .100(a); 3.1(a), (e), .6(a)(2)(xi), .15(g) (1995) (footnote omitted).

Complainant's Recommendation for Sanctions

Complainant recommends that I order Respondents to cease and desist from

further violations of the Animal Welfare Act and the Regulations and Standards that the United States Court of Appeals for the Sixth Circuit found Respondents violated and assess Respondents a $2,500 civil penalty based on the violations found in *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000). Complainant also recommends that I order Respondents to cease and desist from further violations of the Animal Welfare Act and the Regulations and Standards "in which it is unclear whether the Sixth Circuit held that there was substantial evidence" of Respondents' violations. (Complainant's Recommendation for Sanctions.)

Reply of Respondents to Complainant's Recommendation for Sanctions

Respondents urge that I impose no sanction against Respondents and dismiss the case (Reply of Respondents to Complainant's Recommendation for Sanctions at 3-5, 23-24). Respondents raise 11 issues in Reply of Respondents to Complainant's Recommendation for Sanctions.

First, Respondents contend that "if a fine is to be pursued at this point, there must be a record upon which the justification for imposition of the fine can be explained and, if necessary, reviewed by a higher tribunal." (Reply of Respondents to Complainant's Recommendation for Sanctions at 1.) The record in this proceeding is extensive and provides a sufficient basis for determining the civil penalty to be assessed against Respondents. Further, in *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit not only has identified Respondents' violations, which are supported by substantial evidence, but also has addressed the gravity of each of Respondents' violations. Therefore, I reject Respondents' contention that the record in this proceeding is not sufficient to determine the civil penalty to be assessed against Respondents.

Second, Respondents assert Complainant declined two opportunities to identify the violations which the United States Court of Appeals for the Sixth Circuit found were supported by substantial evidence and to offer justification for the assessment of Complainant's recommended $2,500 civil penalty. Respondents contend that, based on Complainant's failure to file a brief identifying Respondents' violations found by the Court in *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), and justifying the assessment of a civil penalty, the case should be dismissed. (Reply of Respondents to Complainant's Recommendation for Sanctions at 1-5.)

As an initial matter, Complainant cited *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), as the basis for its

recommended $2,500 civil penalty (Complainant's Recommendation for Sanctions). Moreover, Complainant's failure to file a brief, which Respondents find acceptable, is not a basis for dismissing this proceeding.

Third, Respondents contend that, in the absence of Complainant's justification for Complainant's recommended $2,500 civil penalty, the Judicial Officer's justification for the assessment of a civil penalty places the Judicial Officer in the role of an advocate for Complainant (Reply of Respondents to Complainant's Recommendation for Sanctions at 3-6).

As an initial matter, Complainant cited *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), as justification for its recommendation that I assess Respondents a $2,500 civil penalty (Complainant's Recommendation for Sanctions). Moreover, the Judicial Officer is not an advocate for either party. Pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), also called 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 Animal Welfare Act (7 C.F.R. § 2.35). Neither the Schwellenbach Act nor the delegation of authority from the Secretary of Agriculture to the Judicial Officer describes the Judicial Officer's role as that of an advocate.

The mission of the Judicial Officer is to issue final decisions in United States Department of Agriculture adjudicatory proceedings. 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.[1] Even if Complainant had provided no justification for its recommended $2,500 civil penalty, my articulation of my reasons for the assessment of a civil penalty does not transform my role into that of an advocate for Complainant.

Fourth, Respondents contend, in order to justify the assessment of a civil penalty for Respondents' recordkeeping violations (7 U.S.C. § 2140; 9 C.F.R. § 2.75), Complainant must establish that the failure to keep perfect, up-to-the-moment records is a violation of the recordkeeping requirements (Reply of Respondents to Complainant's Recommendation for Sanctions at 6-12). I disagree with Respondents' contention. The United States Court of Appeals for the Sixth Circuit concluded that Respondents violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75 of the Regulations (9 C.F.R. § 2.75) as alleged in paragraphs III(B), IV(B), V(B), VI(B), and VII(B) of the Complaint. *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), slip op. at 36-38, 2000 WL

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[1] Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 GEO. WASH. L. REV. 277, 284 (1957).

1785733, at *16-17 (6th Cir. 2000). Therefore, the issue of Respondents' violations of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75 has been decided. At this point in the proceeding, Complainant is not required to prove Respondents' violations of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75.

Fifth, citing *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), slip op. at 46, 2000 WL 1785733, at *21 (6th Cir. 2000), Respondents contend the United States Court of Appeals for the Sixth Circuit dismissed the allegations of "structural violations" (Reply of Respondents to Complainant's Recommendation for Sanctions at 12). I disagree with Respondents. The United States Court of Appeals for the Sixth Circuit concluded that Respondents violated section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) (entitled "*Structure; construction*") as alleged in paragraphs II(C)(9), III(D)(1), IV(D)(1), V(C)(1), VIII(C)(1), and IX(B)(1) of the Complaint. *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), slip op. at 38-40, 2000 WL 1785733, at *17-18 (6th Cir. 2000).

Sixth, Respondents contend no civil penalty should be assessed for Respondents' sole violation of the 9 C.F.R. § 3.6(a)(2)(xi). Respondents assert the violation was *de minimis*, the violation was found only once during eight inspections over the course of 13 months, and the violation was corrected immediately after it was identified by an Animal and Plant Health Inspection Service inspector. (Reply of Respondents to Complainant's Recommendation for Sanctions at 13-15.) The United States Court of Appeals for the Sixth Circuit stated the methodology for determining the amount of space required for dogs and cats by 9 C.F.R. § 3.6(a)(2)(xi) is not published in the *Federal Register* and the process of calculating the space necessary to comply with 9 C.F.R. § 3.6(a)(2)(xi) is cumbersome and confusing. While the United States Court of Appeals for the Sixth Circuit stated a small fine might be supportable, the Court described Respondents' violation of 9 C.F.R. § 3.6(a)(2)(xi) as "at worst, a temporary and accidental oversight." *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), slip op. at 52-54, 2000 WL 1785733, at *22-23 (6th Cir. 2000). Under these circumstances, I agree with Respondents that no civil penalty should be assessed for Respondents' violation of 9 C.F.R. § 3.6(a)(2)(xi).

Seventh, Respondents contend the conclusions of the United States Court of Appeals for the Sixth Circuit do not support the assessment of a civil penalty for Respondents' three violations of 9 C.F.R. § 3.1(e) (Reply of Respondents to Complainant's Recommendation for Sanctions at 15-16).

As an initial matter, I do not find that the United States Court of Appeals for the Sixth Circuit concluded that Respondents violated 9 C.F.R. § 3.1(e) on January 18, 1994, as alleged in paragraph III(D)(3) of the Complaint. However, I do find that the United States Court of Appeals for the Sixth Circuit concluded that Respondents

violated 9 C.F.R. § 3.1(e) on March 1, 1994, and September 13, 1994, by storing food next to paint and gasoline. *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), slip op. at 41-43, 2000 WL 1785733, at *18-19 (6th Cir. 2000). Storage of food near paint and gasoline could result in contamination of the food and could endanger the health of Respondents' animals. Therefore, I assess Respondents a civil penalty for Respondents' two violations of 9 C.F.R. § 3.1(e).

Eighth, Respondents contend no civil penalty should be assessed for Respondents' sole violation of 9 C.F.R. § 3.15. Respondents assert the violation was *de minimis*, the violation was found only once, and the violation was corrected immediately after it was identified by an Animal and Plant Health Inspection Service inspector. (Reply of Respondents to Complainant's Recommendation for Sanctions at 16-17.) The United States Court of Appeals for the Sixth Circuit stated Respondents' violation of 9 C.F.R. § 3.15 could not possibly have harmed Respondents' dogs and Respondents' violation of 9 C.F.R. § 3.15 was not willful. *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), slip op. at 62-63, 2000 WL 1785733, at *27 (6th Cir. 2000). Under these circumstances, I agree with Respondents that no civil penalty should be assessed for Respondents' violation of 9 C.F.R. § 3.15.

Ninth, Respondents contend that no civil penalty may be assessed for Respondents' violations of 9 C.F.R. § 3.11(d) (Reply of Respondents to Complainant's Recommendation for Sanctions at 18-19). I agree with Respondents. *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), does not clearly indicate that the Court concluded that Respondents violated 9 C.F.R. § 3.11(d). Therefore, giving Respondents the benefit of my doubt about the Court's conclusions regarding Respondents' violations of 9 C.F.R. § 3.11(d), I find the United States Court of Appeals for the Sixth Circuit dismissed the violations of 9 C.F.R. § 3.11(d) alleged in paragraphs IV(D)(8), VII(C)(6), and VIII(C)(10) of the Complaint.

Tenth, Respondents contend I should not issue a cease and desist order (Reply of Respondents to Complainant's Recommendation for Sanctions at 19-21). Respondents state no cease and desist order should be issued for violations dismissed in *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000) (Reply of Respondents to Complainant's Recommendation for Sanctions at 19-20). I agree with Respondents. The cease and desist order in this Decision and Order on Remand relates only to those violations which the United States Court of Appeals for the Sixth Circuit concluded Respondents committed.

Respondents also contend no cease and desist order should be issued because of the effects a cease and desist order may have on Respondents' business. Specifically, Respondents speculate that animal rights activists will submit the cease

and desist order to Respondents' suppliers and customers with a demand that these suppliers and customers terminate all business relationships with Respondents. (Reply of Respondents to Complainant's Recommendation for Sanctions at 20.) Potential collateral effects of a cease and desist order are not relevant to issuance of a cease and desist order. Therefore, I reject Respondents' argument that I consider the potential effects of a cease and desist order on Respondents' business.

Respondents further contend a cease and desist order is not necessary because during the past 4 years Complainant has not alleged that Respondents have violated the Animal Welfare Act or the Regulations and Standards (Reply of Respondents to Complainant's Recommendation for Sanctions at 21). Respondents' compliance with the Animal Welfare Act and the Regulations and Standards during the past 4 years is not relevant to the issuance of a cease and desist order. The purpose of a cease and desist order is to deter future violations of the Animal Welfare Act and the Regulations and Standards not only by the violator, but also by other potential violators.

Eleventh, Respondents contend in light of *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), and the factors required by section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) to be considered when determining the amount of a civil penalty, Complainant's recommendation that I assess a $2,500 civil penalty against Respondents must be rejected (Reply of Respondents to Complainant's Recommendation for Sanctions at 21-23). I agree with Respondents. For the reasons set forth in this Decision and Order on Remand, *infra*, I assess a $325 civil penalty against Respondents.

Conclusions on Remand by the Judicial Officer

In *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit concluded that Respondents committed the following violations of the Animal Welfare Act and the Regulations and Standards:

1. On January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, and June 23, 1994, Respondents violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75 of the Regulations (9 C.F.R. § 2.75) by failing to maintain complete records showing the acquisition, disposition, and identification of animals;

2. On November 16, 1993, January 18, 1994, March 1, 1994, April 5, 1994, September 13, 1994, and November 22, 1994, Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) by failing to maintain housing facilities for dogs in

good repair, so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering;

3. On March 1, 1994, and September 13, 1994, Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) by failing to store supplies of food in a manner that protects them from spoilage, contamination, and vermin infestation;

4. On January 18, 1994, Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(2)(xi) of the Standards (9 C.F.R. § 3.6(a)(2)(xi)) by failing to construct primary enclosures for dogs, so as to provide sufficient space for each animal; and

5. On November 22, 1994, Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.15 of the Standards (9 C.F.R. § 3.15) by failing to keep clean the interior of a van used to transport animals.

Therefore, the only issue that remains for this Decision and Order on Remand is the sanction to impose on Respondents for violations of the Animal Welfare Act and the Regulations and Standards which the United States Court of Appeals for the Sixth Circuit concluded Respondents committed.

As an initial matter, the Court found that none of Respondents' violations of the Animal Welfare Act and the Regulations and Standards were willful. Further, the Court stated: (1) Respondents' violations of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75 "seem to be nothing more than temporary and remediable discrepancies" and only a "minimal" civil penalty for these violations "might be supportable"; (2) Respondents' violations of 9 C.F.R. § 3.1(a) might only support a "minimal" civil penalty; (3) Respondents' violations of 9 C.F.R. § 3.1(e) "were corrected immediately"; (4) Respondents' violation of 9 C.F.R. § 3.6(a)(2)(xi) "was, at worst, a temporary and accidental oversight" and "[a] small" civil penalty "might be supportable"; and (5) Respondents' violation of 9 C.F.R. § 3.15 could not have harmed Respondents' dogs. *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), slip op. at 38, 40, 42, 54, 63, 2000 WL 1785733, at *17, 18, 23-24, 27 (6th Cir. 2000).

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that four factors must be considered when determining the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations and Standards: (1) the size of the business of the person involved; (2) the gravity of the violations; (3) the person's good faith; and (4) the history of previous violations.

The United States Department of Agriculture's 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.

Respondents sold 4,795 animals in 1994, and the gross amount derived from the sale of those animals was $458,966.65 (Complainant's Exhibit No. 3 at 7). During the time relevant to this proceeding, Hodgins Kennel, Inc., had two locations: 1) the Lange Road facility, consisting of five buildings; and 2) the Judd Road facility, 4 miles from the Lange Road facility, consisting of one large building. Normally, between 225-250 dogs and cats reside at Hodgins Kennel, Inc., on a given day (Transcript at 64-65). At various times relevant to this proceeding, Hodgins Kennel, Inc., also housed a few goats, pigs, sheep, rabbits, and calves. I find, based on this evidence, that Respondents operate a large facility.

There is no evidence that Respondents deliberately harmed their animals. Moreover, while Respondents repeatedly violated the Animal Welfare Act, the United States Court of Appeals for the Sixth Circuit found that the violations were minor and described a number of Respondents' violations as temporary and accidental discrepancies. Therefore, I find that none of Respondents' violations were grave.

Further, Respondents' history of correction of violations indicates Respondents' good faith.

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.[2]

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[2] *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *appeal docketed*, No. 00-60844 (5th Cir. Nov. 30, 2000); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table) (8th Cir. 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 Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In* (continued...)

Respondents could be assessed a maximum civil penalty of $37,500 for Respondents' 15 violations of the Animal Welfare Act and the Regulations and Standards.[3] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, the recommendations of the administrative officials, and *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), I conclude that a cease and desist order and a $325 civil penalty[4] are appropriate and necessary to ensure Respondents' compliance with the Animal Welfare Act and the Regulations and Standards 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.[5]

For the foregoing reasons and the reasons in *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), the following Order should be issued.

Order

1. Respondents are assessed a $325 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the

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[2](...continued)
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).

[3]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.

[4]I assess Respondents a civil penalty of $325 for 13 of the 15 violations found by the United States Court of Appeals for the Sixth Circuit in *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000). I assess no civil penalty for Respondents' violations of 9 C.F.R. §§ 3.6(a)(2)(xi) and 3.15 for the reasons set forth in this Decision and Order on Remand, *supra*.

[5]Complainant recommends that I order Respondents to cease and desist from further violations of the Animal Welfare Act and the Regulations and Standards "in which it is unclear whether the Sixth Circuit held that there was substantial evidence" of Respondents' violations (Complainant's Recommendation for Sanctions). I reject Complainant's recommendation. The cease and desist order in this Decision and Order on Remand is based upon Respondents' violations, which I conclude the Court clearly found in *Hodgins v. United States Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000).

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
Room 2343-South Building
Washington, DC 20250-1417

The certified check or money order 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 AWA Docket No. 95-0022.

2. Respondents, their agents, 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 issued under the Animal Welfare Act, and in particular, shall cease and desist from:

(a) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required;

(b) Failing to maintain for dogs, housing facilities that are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(c) Failing to store supplies of food in a manner that protects them from spoilage, contamination, and vermin infestation;

(d) Failing to construct primary enclosures for dogs so as to provide sufficient space for each animal; and

(e) Failing to keep animal cargo space in motor vehicles clean.

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

3. Respondents have 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. Respondents 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 April 4, 2001.

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In re: KARL MITCHELL, AN INDIVIDUAL; AND ALL ACTING ANIMALS, A SOLE PROPRIETORSHIP OR UNINCORPORATED ASSOCIATION.
AWA Docket No. 01-0016.
Decision and Order filed June 13, 2001.

Failure to file timely answer – Exhibitor – Animal welfare – Interference with inspectors – Access to facilities – Recordkeeping – Housekeeping – Shelter – Perimeter fence – Space – Food storage – Water – Pest control – Adequacy of complaint – Extension of time – Sanction policy – Civil penalty – Cease and desist order – License revocation.

The Judicial Officer affirmed, except with respect to three conclusions of law, the Default Decision issued by Administrative Law Judge Dorothea A. Baker (ALJ) assessing Respondents a civil penalty, revoking Respondents' Animal Welfare Act (AWA) license, and ordering Respondents to cease and desist from violating the AWA and the Regulations and Standards issued under the AWA. The Judicial Officer deemed Respondents' failure to file a timely answer to the Complaint an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and a waiver of hearing (7 C.F.R. § 1.139). The Judicial Officer rejected Respondents' contention that Complainant's counsel granted Respondents an extension of time within which to file Respondents' answer. The Judicial Officer held that under 7 C.F.R. § 1.147(f) only an administrative law judge or the Judicial Officer may grant extensions of time. The Judicial Officer also stated that Respondents' reliance on the Federal Rules of Civil Procedure for their contention that they should be allowed to file a late answer, was misplaced. The Judicial Officer stated that the Federal Rules of Civil Procedure are not applicable to administrative proceedings instituted under the AWA and the Rules of Practice. The Judicial Officer also rejected Respondents' contention that the Complaint did not provide Respondents with adequate notice of the facts involved in the proceeding. The Judicial Officer found the Complaint met the requirements of 5 U.S.C. § 554(b) and 7 C.F.R. § 1.135(a) and complied with the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The Judicial Officer concluded that, as a matter of law, Respondents could not have committed three of the violations alleged in the Complaint. Based on the conclusion that Respondents did not commit all the violations alleged in the Complaint, the size of Respondents' business, and the lack of any allegation that Respondents' animals actually suffered injury, dehydration, or malnutrition, the Judicial Officer reduced the $27,500 civil penalty assessed by the ALJ to $15,250.

Colleen A. Carroll, for Complainant.
J. Oscar Shaw, Las Vegas, Nevada, 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, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary

administrative proceeding by filing a Complaint on December 6, 2000. Complainant instituted the 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].

Complainant alleges that, during the period April 11, 2000, through December 4, 2000, Karl Mitchell and All Acting Animals [hereinafter Respondents] willfully violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ 3-12).

On January 5, 2001, the Hearing Clerk served each Respondent with the Complaint, the Rules of Practice, and a service letter dated December 7, 2000.[1] Respondents failed to answer the 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 13, 2001, the Hearing Clerk sent a letter to Respondents informing them that Respondents' answer to the Complaint had not been received within the time required by the Rules of Practice.[2]

On February 14, 2001, 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 [hereinafter Motion for Default Decision] and a proposed Decision and Order By Reason of Admission of Facts [hereinafter Proposed Default Decision].

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[1]The Hearing Clerk sent each Respondent the Complaint, the Rules of Practice, and the December 7, 2000, service letter by certified mail (See Domestic Return Receipt for Article Number 4579 5131 and Domestic Return Receipt for Article Number 4579 5155). The United States Postal Service marked each envelope containing the Complaint, the Rules of Practice, and the December 7, 2000, service letter "unclaimed" and returned the mailings to the Hearing Clerk. On January 5, 2001, in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), the Hearing Clerk remailed the Complaint, the Rules of Practice, and the December 7, 2000, service letter to each Respondent by ordinary mail (See two memoranda dated January 5, 2001, from "TMFisher").

[2]See letter dated February 13, 2001, from LaWuan Waring, Acting Hearing Clerk, to Karl Mitchell and All Acting Animals.

The Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on March 8, 2001.[3] Respondents failed to file objections to Complainant's Motion for Default Decision and 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 11, 2001, Respondents filed a Motion for Leave to File Late Answer to Complaint, an Answer to Complaint and Affirmative Defenses [hereinafter Answer], and a Response to Motion for Adoption of Proposed Decision and Order.

On April 25, 2001, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] filed an Order Granting Complainant's Motion for Adoption of Proposed Decision and Order filed February 14, 2001, and a Decision and Order by Reason of Admission of Facts [hereinafter Initial Decision and Order]. The ALJ: (1) concluded that Respondent Karl Mitchell is an owner or sole proprietor of Respondent All Acting Animals; (2) concluded that, at all times material to this proceeding, Respondents operated as exhibitors as defined in the Animal Welfare Act under Animal Welfare Act license number 88-C-0076; (3) concluded that Respondents violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (4) directed Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (5) assessed Respondents jointly and severally a $27,500 civil penalty; and (6) revoked Respondents' Animal Welfare Act license (Initial Decision and Order at 8-15).

On May 15, 2001, Respondents appealed to the Judicial Officer.[4] On May 21,

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[3] See Domestic Return Receipt for Article Number 4579 3922 signed by Respondent Karl Mitchell. The Hearing Clerk sent Respondent All Acting Animals Complainant's Motion for Default Decision and Complainant's Proposed Default Decision by certified mail (*See* Certified Mail Receipt 4579 3915). However, the record does not establish that anyone signed the Domestic Return Receipt for Article Number 4579 3915. Respondent Karl Mitchell is an owner or sole proprietor of Respondent All Acting Animals. Respondent Karl Mitchell and Respondent All Acting Animals have the same mailing address. Respondent Karl Mitchell and Respondent All Acting Animals operate as Animal Welfare Act exhibitors under the same Animal Welfare Act license (Animal Welfare Act license number 88-C-0076). (Decision and Order, *infra*.) Under these circumstances, I conclude that service of Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on Respondent Karl Mitchell also constitutes service on Respondent All Acting Animals.

[4] Respondents entitle their appeal to the Judicial Officer "Petition for Reconsideration of the Decision of the Judicial Officer." At the time Respondents filed their "Petition for Reconsideration of the Decision of the Judicial Officer," I had not issued a decision and order in this proceeding. Pursuant to section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)), a petition to reconsider the decision of the Judicial Officer may be filed within 10 days after the date of service of the Judicial Officer's decision upon the party filing the petition for reconsideration. A petition for reconsideration

(continued...)

2001, Complainant filed a response to Respondents' appeal petition. On May 23, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision. On May 29, 2001, Respondents filed a second appeal petition. The Hearing Clerk transmitted Respondents' second appeal petition to the Judicial Officer on May 30, 2001.[5] On June 11, 2001, Complainant filed a response to Respondents' second appeal petition,[6] and the Hearing Clerk transmitted Complainant's response to Respondents' second appeal petition to the Judicial Officer.

Based upon a careful consideration of the record, except with respect to three of the ALJ's conclusions of law and the amount of the civil penalty assessed by the ALJ, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with only

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[4](...continued)
filed prior to the Judicial Officer's decision is premature. *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1435 (1996) (Order Denying Late Appeal). Moreover, the Rules of Practice do not provide for a petition for reconsideration of an administrative law judge's decision. *In re Anna Mae Noell*, 58 Agric. Dec. 855, 858 (1999) (Order Denying The Chimp Farm Inc.'s Mot. to Vacate); *In re Peter A. Lang*, 57 Agric. Dec. 91, 97-101 (1998) (Order Denying Pet. for Recons.); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1435 (1996) (Order Denying Late Appeal); *In re Lincoln Meat Co.*, 48 Agric. Dec. 937, 938 (1989) (Mot. for Recons. Denied and Decision and Order). However, section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides for the appeal of an administrative law judge's decision to the Judicial Officer. Therefore, I infer that Respondents' "Petition for Reconsideration of the Decision of the Judicial Officer" is Respondents' appeal of the ALJ's Initial Decision and Order pursuant to section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)).

[5] Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that within 30 days after receiving service of the administrative law judge's decision, a party who disagrees with an administrative law judge's decision may appeal the administrative law judge's decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. The Rules of Practice do not provide that a party may file multiple appeal petitions, and Respondents did not request the opportunity to supplement their appeal petition filed May 15, 2001. Moreover, Respondents filed their second appeal petition 31 days after the Hearing Clerk served the Initial Decision and Order on Respondents. (See Domestic Return Receipt for Article Number 4579 3687.) Finally, Respondents raise the same issues in the second appeal petition as they raise in the appeal petition filed May 15, 2001. Based on these facts, I conclude Respondents' supernumerary, late-filed appeal petition is not part of the record of this proceeding, and I do not address Respondents' second appeal petition in this Decision and Order.

[6] On May 30, 2001, I instructed the Hearing Clerk to serve Complainant with Respondents' second appeal petition, but to inform Complainant that no response to Respondents' second appeal petition was necessary. I conclude Complainant's response to Respondents' supernumerary, late-filed second appeal petition, which Complainant filed despite my admonition that no response was necessary, is not part of the record of this proceeding, and I do not address Complainant's response to Respondents' second appeal petition.

minor modifications, the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's Conclusions of Law as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 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 country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

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

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

§ 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.

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 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)-(c), 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.

. . . .

Cat means any live or dead cat (Felis catus) or any cat-hybrid cross.

. . . .

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 A—LICENSING

. . . .

§ 2.4 Non-interference with APHIS officials.

A licensee or applicant for an initial license shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties.

SUBPART G–RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) . . . [E]ach 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 . . . 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 a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(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 a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

. . . .

(b)(1) Every . . . exhibitor shall make, keep, and maintain records or

forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that . . . 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 . . . exhibitor . . . 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.

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.

§ 3.127 Facilities, outdoor.

(a) *Shelter from sunlight*. When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight.

(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.

. . . .

(d) *Perimeter fence*. On or after May 17, 2000, all outdoor housing facilities (*i.e.*, facilities not entirely indoors) must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (*e.g.*, lions, tigers, leopards, cougars, bobcats, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fences less than 3 feet

in distance from the primary enclosure must be approved in writing by the Administrator. A perimeter fence is not required:

(1) Where the outside walls of the primary enclosure are made of sturdy, durable material, which may include certain types of concrete, wood, plastic, metal, or glass, and are high enough and constructed in a manner that restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(2) Where the outdoor housing facility is protected by an effective natural barrier that restricts the animals to the facility and restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(3) Where appropriate alternative security measures are employed and the Administrator gives written approval; or

(4) For traveling facilities where appropriate alternative security measures are employed; or

(5) Where the outdoor housing facility houses only farm animals, such as, but not limited to, cows, sheep, goats, pigs, horses (for regulated purposes), or donkeys, and the facility has in place effective and customary containment and security measures.

§ 3.128 Space requirements.

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

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.

§ 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.

. . . .

(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.

9 C.F.R. §§ 1.1, 2.4, .75(a)(1), (b)(1), .100(a), 3.125(a), (c), .127(a)-(b), (d), .128, .129(a), .130, .131(a), (c), (d) (2000).

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

On December 7, 2000, the Hearing Clerk sent to each Respondent, by certified mail, the Complaint, the Rules of Practice, and a service letter dated December 7, 2000.[7] The Hearing Clerk mailed the Complaint, the Rules of Practice, and the service letter to Respondents' current mailing address. The United States Postal

[7]See Domestic Return Receipt for Article Number 4579 5131 and Domestic Return Receipt for Article Number 4579 5155.

Service marked each mailing "unclaimed" and returned the mailings to the Hearing Clerk. On January 5, 2001, in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), the Hearing Clerk remailed the Complaint, the Rules of Practice, and the December 7, 2000, service letter to each Respondent by ordinary mail.[8] The Hearing Clerk informed each Respondent in the accompanying December 7, 2000, service letter that an answer must 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.

Complainant states that on January 22, 2001, Complainant's counsel spoke to Respondent Karl Mitchell by telephone. Mr. Mitchell stated he had received the Complaint and he wanted an extension of time in which to file an answer. Complainant further states Complainant's counsel told Mr. Mitchell that he would have to make the request for an extension of time to the Chief Administrative Law Judge and that Complainant would not oppose a request for a reasonable extension of time to file Respondents' answer. Complainant states Complainant's counsel provided Mr. Mitchell with the name and telephone number of the Chief Administrative Law Judge. (Complainant's Proposed Default Decision at 1-2.) The record does not indicate that a request for extension was made to, or granted by, the Chief Administrative Law Judge. After Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, Respondents filed a late Answer as well as a late Response to Motion for Adoption of Proposed Decision and Order.

Respondents have thus 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, with minor exceptions discussed in this Decision and Order *infra*, the material allegations in the Complaint are adopted as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

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[8]See two memoranda dated January 5, 2001, from "TMFisher."

Findings of Fact

1. Karl Mitchell is an individual whose mailing address is Post Office Box 1085, Pahrump, Nevada 89041. Respondent Karl Mitchell is an owner or sole proprietor of Respondent All Acting Animals. At all times material to this proceeding, Respondent Karl Mitchell operated as an exhibitor as that term is defined in the Animal Welfare Act under Animal Welfare Act license number 88-C-0076.

2. All Acting Animals is a sole proprietorship or unincorporated association whose mailing address is Post Office Box 1085, Pahrump, Nevada 89041. At all times material to this proceeding, Respondent All Acting Animals operated as an exhibitor as that term is defined in the Animal Welfare Act under Animal Welfare Act license number 88-C-0076.

3. On several occasions between April 11, 2000, and the present, Respondent Karl Mitchell has interfered with, threatened, abused, and harassed Animal and Plant Health Inspection Service officials in the performance of their duties.

4. On June 29, 2000, Respondents failed to allow Animal and Plant Health Inspection Service officials access to Respondents' facilities and animals and the records Respondents are required to maintain under the Animal Welfare Act and the Regulations.

5. On May 16, 2000, Respondents failed to allow Animal and Plant Health Inspection Service officials to examine the records Respondents are required to maintain under the Animal Welfare Act and the Regulations.

6. On July 24, 2000, the Animal and Plant Health Inspection Service inspected Respondents' records and found Respondents had failed to maintain records as required by the Regulations, as follows:

a. Respondents' records of the purchase of two cats did not contain the purchaser's address;

b. Respondents' records of the acquisition of animals from Betty Thomas did not contain Ms. Thomas' address; and

c. Respondents' records of the acquisition of animals from Betty Thomas did not contain Ms. Thomas' United States Department of Agriculture license number.

7. On the following dates, the Animal and Plant Health Inspection Service inspected Respondents' facility and found Respondents had failed to comply with the general requirements for animal facilities:

a. On May 16, 2000, the Animal and Plant Health Inspection Service found Respondents failed to maintain the kangaroo enclosure in good repair to

protect the animals housed in the enclosure from injury;

b. On May 16, 2000, the Animal and Plant Health Inspection Service found Respondents failed to maintain the liger enclosure in good repair to protect the animals housed in the enclosure from injury;

c. On May 16, 2000, the Animal and Plant Health Inspection Service found Respondents failed to maintain the enclosure housing a lion known as "Simba" in good repair to protect the animal housed in the enclosure from injury;

d. On May 16, 2000, the Animal and Plant Health Inspection Service found Respondents failed to maintain the enclosure housing a tiger known as "Sheba" in good repair to protect the animal housed in the enclosure from injury;

e. On May 16, 2000, the Animal and Plant Health Inspection Service found Respondents failed to maintain the door to the tiger enclosure in good repair to protect the animals housed in the enclosure from injury;

f. On May 16, 2000, the Animal and Plant Health Inspection Service found Respondents stored supplies of food for animals in freezers that would not adequately protect the supplies of food against deterioration or spoilage;

g. On July 24, 2000, the Animal and Plant Health Inspection Service found Respondents failed to maintain the kangaroo enclosure in good repair to protect the animals housed in the enclosure from injury;

h. On July 24, 2000, the Animal and Plant Health Inspection Service found Respondents failed to store supplies of frozen chicken so as to adequately protect the supplies of chicken from deterioration or contamination;

i. On July 24, 2000, the Animal and Plant Health Inspection Service found Respondents failed to maintain the juvenile animal enclosure in good repair to protect the animals housed in the enclosure from injury; and

j. On July 24, 2000, the Animal and Plant Health Inspection Service found Respondents failed to maintain the enclosure housing a lion known as "Nala" in good repair to protect the animal housed in the enclosure from injury.

8. On the following dates, the Animal and Plant Health Inspection Service inspected Respondents' facility and found Respondents had failed to construct and maintain outdoor facilities for animals as required:

a. On April 11, 2000, the Animal and Plant Health Inspection Service found Respondents housed a tiger known as "Rajah" in a cage without sufficient shade to provide the animal with protection from direct sunlight;

b. On April 11, 2000, the Animal and Plant Health Inspection Service found Respondents housed juvenile animals in a cage without natural or artificial shelter from inclement weather;

c. On May 16, 2000, the Animal and Plant Health Inspection Service found Respondents housed juvenile animals in a cage without natural or artificial shelter from inclement weather;

d. On May 16, 2000, the Animal and Plant Health Inspection Service found Respondents housed a tiger known as "Rajah" in a cage without sufficient shade to provide the animal with protection from direct sunlight;

e. On May 16, 2000, the Animal and Plant Health Inspection Service found Respondents housed a tiger known as "Rajah" in a cage without sufficient shelter to provide the animal with protection from inclement weather;

f. On May 16, 2000, the Animal and Plant Health Inspection Service found Respondents housed lions and tigers in cages without natural or artificial shelter from inclement weather;

g. On July 24, 2000, the Animal and Plant Health Inspection Service found Respondents housed lions and tigers in cages without natural or artificial shelter from inclement weather;

h. On July 24, 2000, the Animal and Plant Health Inspection Service found the shelter that Respondents provided for a juvenile camel did not provide sufficient shade so as to prevent discomfort to the animal;

i. On July 24, 2000, the Animal and Plant Health Inspection Service found Respondents housed juvenile animals in a cage without natural or artificial shelter from inclement weather;

j. On July 24, 2000, the Animal and Plant Health Inspection Service found Respondents housed animals in outdoor housing facilities that were not enclosed by any perimeter fence; and

k. On July 24, 2000, the Animal and Plant Health Inspection Service found Respondents' existing perimeter fence was not constructed so as to restrict the entrance of other animals.

9. On the following dates, the Animal and Plant Health Inspection Service inspected Respondents' facility and found Respondents' animal enclosures did not provide the animals with sufficient space in which to make normal postural and social adjustments:

a. On May 16, 2000, Respondents housed a lion known as "Nala" in an enclosure that did not meet section 3.128 of the Standards (9 C.F.R. § 3.128);

b. On July 24, 2000, Respondents housed two juvenile animals in an enclosure that did not meet section 3.128 of the Standards (9 C.F.R. § 3.128); and

c. On July 24, 2000, Respondents housed a single juvenile animal in an enclosure that did not meet section 3.128 of the Standards (9 C.F.R. § 3.128).

10. On July 24, 2000, the Animal and Plant Health Inspection Service inspected Respondents' facility and found Respondents thawed frozen poultry in a manner that did not ensure that the poultry would be wholesome, palatable, and free from contamination.

11. On the following dates, the Animal and Plant Health Inspection Service

inspected Respondents' facility and found Respondents failed to comply with the watering requirements in section 3.130 of the Standards (9 C.F.R. § 3.130):

a. On May 16, 2000, Respondents failed to provide a tiger cub known as "Valentino" with water as often as necessary for the health and comfort of the animal;

b. On May 16, 2000, Respondents failed to provide a tiger cub known as "Mustafa" with water as often as necessary for the health and comfort of the animal;

c. On July 24, 2000, Respondents failed to provide a tiger cub known as "Valentino" with water as often as necessary for the health and comfort of the animal;

d. On July 24, 2000, Respondents failed to provide a tiger cub known as "Mustafa" with water as often as necessary for the health and comfort of the animal;

e. On July 24, 2000, Respondents failed to provide a juvenile animal housed in front of residence with water as often as necessary for the health and comfort of the animal; and

f. On July 24, 2000, Respondents failed to provide a kangaroo with potable water as often as necessary for the health and comfort of the animal.

12. On the following dates, the Animal and Plant Health Inspection Service inspected Respondents' facility and found Respondents failed to comply with the sanitation and housekeeping requirements in section 3.131 of the Standards (9 C.F.R. § 3.131):

a. On May 16, 2000, Respondents failed to employ an effective program for the control of pests;

b. On May 16, 2000, Respondents failed to clean primary enclosures for felids as often as necessary to prevent contamination of the animals contained in the primary enclosures;

c. On May 16, 2000, Respondents failed to keep the premises clean and in good repair to protect exotic felids from injury and facilitate prescribed husbandry practices, and to remove trash as often as necessary;

d. On July 24, 2000, Respondents failed to employ an effective program for the control of pests;

e. On July 24, 2000, Respondents failed to clean primary enclosures for exotic felids as often as necessary to prevent contamination of the animals contained in the primary enclosures;

f. On July 24, 2000, Respondents failed to keep the premises clean and in good repair to protect exotic felids from injury and facilitate prescribed husbandry practices, and to remove trash as often as necessary;

g. On July 24, 2000, Respondents failed to clean a kangaroo enclosure

as often as necessary to prevent contamination of the animal contained in the enclosure; and

h. On July 24, 2000, Respondents failed to keep the premises near animal enclosures clean, and failed to prevent accumulation of excreta and bird feathers from entering animal areas from adjacent buildings.

Conclusions of Law

1. Karl Mitchell is an individual whose mailing address is Post Office Box 1085, Pahrump, Nevada 89041. Respondent Karl Mitchell is an owner or sole proprietor of Respondent All Acting Animals. At all times material to this proceeding, Respondent Karl Mitchell operated an exhibitor as that term is defined in the Animal Welfare Act under Animal Welfare Act license number 88-C-0076.

2. All Acting Animals is a sole proprietorship or unincorporated association whose mailing address is Post Office Box 1085, Pahrump, Nevada 89041. At all times material to this proceeding, Respondent All Acting Animals operated as an exhibitor as that term is defined in the Animal Welfare Act under Animal Welfare Act license number 88-C-0076.

3. On several occasions between April 11, 2000, and the present, Respondent Karl Mitchell interfered with, threatened, abused, and harassed Animal and Plant Health Inspection Service officials in the performance of their duties in willful violation of section 2.4 of the Regulations (9 C.F.R. § 2.4).

4. On June 29, 2000, Respondents failed to allow Animal and Plant Health Inspection Service officials access to Respondents' facilities and animals and the records Respondents are required to maintain under the Animal Welfare Act and the Regulations in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4).

5. On May 16, 2000, Respondents failed to allow Animal and Plant Health Inspection Service officials to examine the records Respondents are required to maintain under the Animal Welfare Act and the Regulations in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4).

6. On July 24, 2000, Respondents' records of the purchase of two cats did not contain the purchaser's address in willful violation of section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)).

7. On July 24, 2000, Respondents' records of the acquisition of animals from Betty Thomas did not contain Ms. Thomas' address in willful violation of section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)).

8. On July 24, 2000, Respondents' records of the acquisition of animals

from Betty Thomas did not contain Ms. Thomas' United States Department of Agriculture license number in willful violation of section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)).

9. On May 16, 2000, Respondents failed to maintain the kangaroo enclosure in good repair to protect the kangaroos housed in the enclosure from injury in willful violation of 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)).

10. On May 16, 2000, Respondents failed to maintain the liger enclosure in good repair to protect the ligers housed in the enclosure from injury in willful violation of 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)).

11. On May 16, 2000, Respondents failed to maintain the enclosure housing a lion known as "Simba" in good repair to protect the animal housed in the enclosure from injury in willful violation of 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)).

12. On May 16, 2000, Respondents failed to maintain the enclosure housing a tiger known as "Sheba" in good repair to protect the animal housed in the enclosure from injury in willful violation of 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)).

13. On May 16, 2000, Respondents failed to maintain the door to the tiger enclosure in good repair to protect the animals housed in the enclosure from injury in willful violation of 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)).

14. On May 16, 2000, Respondents stored supplies of food for animals in freezers that would not adequately protect the supplies of food against deterioration or spoilage in willful violation of 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)).

15. On July 24, 2000, Respondents failed to maintain the kangaroo enclosure in good repair to protect the animals housed in the enclosure from injury in willful violation of 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)).

16. On July 24, 2000, Respondents failed to store supplies of frozen chicken so as to adequately protect the supplies of chicken from deterioration or contamination in willful violation of 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)).

17. On July 24, 2000, Respondents failed to maintain the juvenile animal enclosure in good repair to protect the animals housed in the enclosure from injury in willful violation of 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)).

18. On July 24, 2000, Respondents failed to maintain the enclosure housing

a lion known as "Nala" in good repair to protect the animal from injury in willful violation of 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)).

19. On April 11, 2000, Respondents housed a tiger known as "Rajah" in a cage without sufficient shade to provide the animal with protection from direct sunlight in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(a) of the Standards (9 C.F.R. § 3.127(a)).

20. On April 11, 2000, Respondents housed juvenile animals in a cage without natural or artificial shelter from inclement weather in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)).

21. On May 16, 2000, Respondents housed juvenile animals in a cage without natural or artificial shelter from inclement weather in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)).

22. On May 16, 2000, Respondents housed a tiger known as "Rajah" in a cage without sufficient shade to provide the animal with protection from direct sunlight in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(a) of the Standards (9 C.F.R. § 3.127(a)).

23. On May 16, 2000, Respondents housed a tiger known as "Rajah" in a cage without sufficient shelter to provide the animal with protection from inclement weather in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)).

24. On May 16, 2000, Respondents housed lions and tigers in cages without natural or artificial shelter from inclement weather in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)).

25. On July 24, 2000, Respondents housed lions and tigers in cages without natural or artificial shelter from inclement weather in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)).

26. On July 24, 2000, the shelter Respondents provided for a juvenile camel did not provide sufficient shade so as to prevent discomfort to the animal in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(a) of the Standards (9 C.F.R. § 3.127(a)).

27. On July 24, 2000, Respondents housed juvenile animals in a cage without natural or artificial shelter from inclement weather in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)).

28. On July 24, 2000, Respondents housed animals in outdoor housing facilities that were not enclosed by any perimeter fence in willful violation of 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)).

29. On July 24, 2000, Respondents' existing perimeter fence was not constructed so as to restrict the entrance of other animals in willful violation of 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)).

30. On May 16, 2000, Respondents housed a lion known as "Nala" in an enclosure that did not provide the animal with sufficient space in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.128 of the Standards (9 C.F.R. § 3.128).

31. On July 24, 2000, Respondents housed two juvenile animals in an enclosure that did not provide the animals with sufficient space in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.128 of the Standards (9 C.F.R. § 3.128).

32. On July 24, 2000, Respondents housed a single juvenile animal in an enclosure that did not provide the animal with sufficient space in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.128 of the Standards (9 C.F.R. § 3.128).

33. On July 24, 2000, Respondents thawed frozen poultry in a manner that did not ensure that the poultry would be wholesome, palatable, and free from contamination in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.129(a) of the Standards (9 C.F.R. § 3.129(a)).

34. On May 16, 2000, Respondents failed to provide a tiger cub known as "Valentino" with water in willful violation of 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).

35. On May 16, 2000, Respondents failed to provide a tiger cub known as "Mustafa" with water in willful violation of 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).

36. On July 24, 2000, Respondents failed to provide a tiger cub known as "Valentino" with water in willful violation of 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).

37. On July 24, 2000, Respondents failed to provide a tiger cub known as "Mustafa" with water in willful violation of 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).

38. On July 24, 2000, Respondents failed to provide a juvenile animal housed in front of residence with water in willful violation of 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).

39. On July 24, 2000, Respondents failed to provide a kangaroo with potable water in willful violation of 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).

40. On May 16, 2000, Respondents failed to employ an effective program for the control of pests in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.131(d) of the Standards (9 C.F.R. § 3.131(d)).

41. On May 16, 2000, Respondents failed to clean primary enclosures for felids in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)).

42. On May 16, 2000, Respondents failed to keep the premises clean and in good repair in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)).

43. On July 24, 2000, Respondents failed to employ an effective program for the control of pests in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.131(d) of the Standards (9 C.F.R. § 3.131(d)).

44. On July 24, 2000, Respondents failed to clean primary enclosures for exotic felids in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)).

45. On July 24, 2000, Respondents failed to keep the premises clean and in good repair and to remove trash in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)).

46. On July 24, 2000, Respondents failed to clean a kangaroo enclosure in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)).

47. On July 24, 2000, Respondents failed to keep the premises near animal enclosures clean in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise three issues in Respondents' Petition for Reconsideration of the Decision of the Judicial Officer [hereinafter Appeal Petition]. First, Respondents contend the Complaint fails to state specific acts that constitute violations of the Animal Welfare Act. Respondents contend the Complaint merely recites legal conclusions. (Appeal Pet. at 2-4.)

I disagree with Respondents' contention that the Complaint does not provide Respondents with adequate notice of the violations of the Animal Welfare Act and the Regulations and Standards which Complainant alleges Respondents committed.

The Administrative Procedure Act provides that notice of matters of fact and law asserted must be provided to those entitled to notice of an agency hearing, as follows:

§ 554. Adjudications

. . . .

(b) Persons entitled to notice of an agency hearing shall be timely informed of–

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) *the matters of fact and law asserted*.

5 U.S.C. § 554(b) (emphasis added).

Similarly, section 1.135(a) of the Rules of Practice requires that allegations of fact and provisions of law that form a basis for the proceeding must be included in a complaint, as follows:

§ 1.135 Contents of complaint or petition for review.

(a) *Complaint.* A complaint . . . shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, *the allegations of fact and provisions of law which constitute a basis for the proceeding*, and the nature of the relief sought.

7 C.F.R. § 1.135(a) (emphasis added).

It is well settled that the formalities of court pleading are not applicable in administrative proceedings.[9] It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in

[9] *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940); *NLRB v. International Bros. of Elec. Workers, Local Union 112*, 827 F.2d 530, 534 (9th Cir. 1987); *Citizens State Bank of Marshfield v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

controversy. A complaint is adequate and satisfies due process in the absence of a showing that some party was misled.[10] Therefore, in order to comply with the Administrative Procedure Act and the Rules of Practice, the Complaint must include allegations of fact and provisions of law that constitute a basis for the proceeding, and in order to comply with the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the Complaint must apprise Respondents of the issues in controversy.

I have carefully reviewed the Complaint. I find the Complaint apprises Respondents of the facts and provisions of law that constitute a basis for this proceeding and the issues in controversy.

Second, Respondents contend Complainant failed to submit evidence upon which the ALJ could base findings of fact and the imposition of sanctions (Appeal Pet. at 4).

I agree with Respondents that Complainant did not introduce any evidence in

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[10] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Rapp v. United States Dep't of Treasury*, 52 F.3d 1510, 1519-20 (10th Cir. 1995); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats v. United States Dep't Agric.*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union v. NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 277 (1998); *In re Peter A. Lang*, 57 Agric. Dec. 91, 104 (1998) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 200 n.9 (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, 132 (1996); *In re Jerald Brown*, 54 Agric. Dec. 537, 575 (1995); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1097-98 (1994); *In re James Petersen*, 53 Agric. Dec. 80, 92 (1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066 (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 SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 264-65 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Dr. John H. Collins*, 46 Agric. Dec. 217, 233-32 (1987); *In re H & J Brokerage*, 45 Agric. Dec. 1154, 1197-98 (1986); *In re George W. Saylor, Jr.*, 44 Agric. Dec. 2238, 2481 (1985) (Decision and Order on Remand); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1434 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (Ruling on Certified Questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re A.S. Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976); *In re David G. Henner*, 30 Agric. Dec. 1151, 1259 (1971).

this proceeding. However, based on Respondents' failure to file a timely answer, Respondents are deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint.

On January 5, 2001, the Hearing Clerk served the Complaint, the Rules of Practice, and a service letter on Respondents.[11] Sections 1.136(a), 1.136(c), and 1.139 of the Rules of Practice clearly state the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (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 may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. §§ 1.136(a), (c), .139.

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[11] See note 1.

Moreover, the Complaint 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.

Compl. at 9.

Similarly, the Hearing Clerk informed Respondents in the service letters, which accompanied the Complaint and the Rules of Practice, that a timely answer must be filed, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> December 7, 2000
>
> Mr. Karl Mitchell
> All Acting Animals
> Post Office Box 1085
> Pahrump, Nevada 89041
>
> Dear Sir/Madam:
>
> Subject: In re: Karl Mitchell, an individual; and All Acting Animals, a sole proprietorship or unincorporated association
> Respondents - AWA Docket No. 01-0016
>
> Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.
>
> Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.
>
> The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it

shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

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

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

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

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated December 7, 2000, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Karl Mitchell and All Acting Animals (emphasis in original).

Respondents were required to file their Answer no later than January 25, 2001. Respondents filed their Answer on April 11, 2001, 3 months and 6 days after the Hearing Clerk served Respondents with the Complaint. Respondents' failure to file

a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Therefore, Respondents are deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint.

Respondents state they did not receive the Complaint until January 22, 2000 (Response to Motion for Adoption of Proposed Decision and Order at 2). Complainant did not file the Complaint until December 6, 2000.[12] I infer Respondents' statement that they received the Complaint on "January 22, 2000," is a typographical error and Respondents intended to state that they received the Complaint on January 22, 2001. In any event, the date Respondents actually received the Complaint is not relevant to the determination of the date the Hearing Clerk served Respondents with the Complaint or the timeliness of Respondents' Answer. In accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), Respondents are deemed to have received the Complaint on January 5, 2001, the date the Hearing Clerk mailed the Complaint to Respondents by ordinary mail.

Moreover, even if I found the Hearing Clerk served Respondents with the Complaint on January 22, 2001 (which I do not so find), I would still conclude that Respondents' Answer was late-filed. Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) requires that an answer must be filed within 20 days after service of the complaint. Thus, if the Hearing Clerk had served Respondents with the Complaint on January 22, 2001, Respondents would have been required to file their Answer no later than February 12, 2001.[13] Thus, even if I found that the

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[12]See Hearing Clerk's time and date stamp on the Complaint (Compl. at 1).

[13]Twenty days after January 22, 2001, is February 11, 2001. However, February 11, 2001, was a Sunday, and section 1.147(h) of the Rules of Practice provides that when the time for filing expires on a Sunday, the time for filing shall be extended to the next business day, as follows:

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

. . . .

(h) *Computation of time*. Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h).

(continued...)

Hearing Clerk served Respondents with the Complaint on January 22, 2001, I would conclude Respondents' Answer, which was filed April 11, 2001, was late-filed.

Respondents further state they contacted Colleen Carroll, counsel for Complainant, and requested an extension of time within which to file an answer. Further, Respondents state they believe Ms. Carroll granted Respondents a 45-day extension of time within which to file Respondents' Answer. (Response to Motion for Adoption of Proposed Decision and Order at 2.) As an initial matter, section 1.147(f) of the Rules of Practice provides that extensions of time may be granted by the Judge or the Judicial Officer, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (f) *Extensions of time*. The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial Officer as provided in § 1.143, if, in the judgement of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of time shall be given to the other party with opportunity to submit views concerning the request.

7 C.F.R. § 1.147(f).

Therefore, I conclude Complainant's counsel had no authority under the Rules of Practice to grant Respondents' request for an extension of time for filing Respondents' Answer. Moreover, even if Complainant's counsel had authority to grant Respondents' request for an extension of time and did grant Respondents a 45-day extension of time,[14] I would still find that Respondents' Answer was

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[13](...continued)

Therefore, if I found the Hearing Clerk served Respondents with the Complaint on January 22, 2001, as Respondents urge, Respondents were required to file their Answer no later than February 12, 2001.

[14]Complainant contends Complainant's counsel did not grant Respondents an extension of time for filing an answer. Complainant states "[i]n late January, complainant's counsel spoke with respondent Karl Mitchell by telephone. Mr. Mitchell asked about obtaining an extension of time in which to file an answer to the complaint. Complainant's counsel advised Mr. Mitchell that he had to make that request to the Chief Administrative Law Judge, James W. Hunt, and provided Mr. Mitchell with the (continued...)

late-filed. Using the date Respondents contend they were served with the Complaint, January 22, 2001, Respondents' Answer would have been required to be filed no later than February 12, 2001.[15] Further, using the 45-day extension of time which Respondents believe Complainant's counsel granted to them, Respondents' Answer should have been filed no later than March 29, 2001. Thus, even using the date Respondents contend they were served with the Complaint and the extension Respondents believe they were granted, Respondents' Answer, filed April 11, 2001, was filed 13 days late.

Moreover, Respondents state their failure to file a timely answer was not Respondents' fault and was due to mistake, inadvertence, or excusable neglect and was not deliberate or willful. Respondents, relying on the Federal Rules of Civil Procedure and a number of cases,[16] contend the ALJ should have granted Respondents' Motion for Leave to File Late Answer to Complaint (Mot. for Leave to File Late Answer to Compl. at 4-6).

Respondents' reliance on the Federal Rules of Civil Procedure is misplaced. Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

> **Rule 1. Scope and Purpose of Rules**
>
> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

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[14](...continued)
Chief ALJ's office telephone number. Complainant's counsel told Mr. Mitchell that the complainant would not oppose a reasonable extension of time." (Complainant's Response to Respondents Petition for Reconsideration of Decision of the Judicial Officer at 2 n.1.)

[15]See note 13.

[16]*Leshore v. County of Worcester*, 945 F.2d 471 (1st Cir. 1991); *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808 (4th Cir. 1988); *New Field Int'l Sales, Inc. v. Salem*, 116 F.R.D. 215 (N.D. Ill. 1986); *Sprague & Rhodes Commodity Corp. v. M/V Procer Fulgencio Yegros*, 617 F. Supp. 911 (S.D.N.Y. 1985); *United States v. Continental Sports Corp.*, 4 OCAHO 640, 1994 WL 416100 (O.C.A.H.O.) (May 25, 1994); *United States v. Zoeb Enterprises, Inc.*, 2 OCAHO 356, 1991 WL 531867 (O.C.A.H.O.) (July 24, 1991).

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act and the Rules of Practice.[17] Moreover, unlike Rule 60(b) of

[17] *In re Anna Mae Noell*, 58 Agric. Dec. 130, 147 (1999), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000). *See also Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Fresh Prep, Inc.*, 58 Agric. Dec. 627, 636 (1999) (stating the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Perishable Agricultural Commodities Act, as amended, and the Rules of Practice); *In re Fresh Prep, Inc.*, 58 Agric. Dec. 683, 687 (1999) (Ruling on Certified Question) (stating the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Perishable Agricultural Commodities Act, as amended, and the Rules of Practice); *In re United Foods, Inc.*, 57 Agric. Dec. 329, 347-48 (1998) (stating the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs), *aff'd*, Nos. 96-01252, 98-01082 (W.D. Tenn. Aug. 3, 1998), *rev'd on other grounds*, 197 F.3d 221 (6th Cir. 1999), *cert. granted*, 121 S. Ct. 562 (2000); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 421-22 (1998) (Order Denying Pet. for Recons.) (stating the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted before the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, as amended, and the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. 1543, 1559 (1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating the Federal Rules of Civil Procedure are not applicable to the United States Department of Agriculture's disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before the United States Department of Agriculture); *In re James W. Hickey*, 47 Agric. Dec. 840, 850 (1988) (stating procedural and evidentiary rules applicable in court proceedings are not applicable in administrative proceedings and it is the United States Department of Agriculture's policy to make no effort to follow them), *aff'd*, (continued...)

the Federal Rules of Civil Procedure, the Rules of Practice do not provide that a default decision may be set aside for excusable neglect.

The cases cited by Respondents are inapposite. *Leshore v. County of Worcester*, 945 F.2d 471 (1st Cir. 1991); *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808 (4th Cir. 1988); *New Field Int'l Sales, Inc. v. Salem*, 116 F.R.D. 215 (N.D. Ill. 1986); and *Sprague & Rhodes Commodity Corp. v. M/V Procer Fulgencio Yegros*, 617 F. Supp. 911 (S.D.N.Y. 1985), concern the Federal Rules of Civil Procedure. *United States v. Continental Sports Corp.*, 4 OCAHO 640, 1994 WL 416100 (O.C.A.H.O.) (May 25, 1994); and *United States v. Zoeb Enterprises, Inc.*, 2 OCAHO 356, 1991 WL 531867 (O.C.A.H.O.) (July 24, 1991), concern the Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens, Unfair Immigration-Related Employment Practices, and Document Fraud (28 C.F.R. pt. 68).

On February 14, 2001, in accordance with 7 C.F.R. § 1.139, Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, based upon Respondents' failure to file a timely answer. On March 8, 2001, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter dated February 15, 2001.[18] The February 15, 2001, service letter states, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> February 15, 2001
>
> Mr. Karl Mitchell
> All Acting Animals
> Post Office Box 1085
> Pahrump, Nevada 89041
>
> Dear Mr. Mitchell:
>
> Subject: In re: Karl Mitchell, an individual; and All Acting Animals, sole

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[17](...continued)
878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989).

[18]See note 3.

proprietorship or unincorporated association -Respondents
AWA Docket No. 01-0016

Enclosed is a copy of Complainant's Motion for Adoption of Proposed Decision and Order, together with a copy of the Proposed Decision and Order By Admission of Facts, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

February 15, 2001, letter from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Karl Mitchell and All Acting Animals.

Respondents filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on April 11, 2001, 34 days after the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

Although on rare occasions default decisions have been set aside for good cause shown or where the complainant did not object,[19] generally there is no basis for

[19] *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 the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act, as amended, 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 (continued...)

setting aside a default decision that is based upon a respondent's failure to file a timely answer.[20] The Rules of Practice provide that an answer must be filed

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[19](...continued)
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).

[20]*See generally In re Beth Lutz*, 60 Agric. Dec. ___ (Jan. 24, 2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding 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 alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months and 5 days after they were served with the complaint and 5 months and 16 days after the respondents' answer was due and holding 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); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding 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 holding 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 the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards 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 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 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 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 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 the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and 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
(continued...)

within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondents filed their Answer 3 months and 6 days after the Hearing Clerk served Respondents with the Complaint. Respondents' failure to file a timely answer is deemed, for the purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139).

Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Accordingly, the ALJ properly issued the Initial Decision and Order. 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

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[20](...continued)
alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and 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 the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and 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 the default decision was properly issued where the respondent failed to file an answer and 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 the default decision was properly issued where the respondent failed to file an answer and 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 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 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), *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 the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny material allegations of the complaint and the respondent is deemed, by his failure to file a timely answer and 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 the default decision was properly issued where the respondents failed to file a timely answer and 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 the default decision was properly issued where the respondent failed to file an answer and 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 the default decision was properly issued where the respondent failed to file an answer and the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

Amendment to the Constitution of the United States.[21]

Third, Respondents contend the sanction imposed by the ALJ is excessive and request that I assess Respondents no more than a $5,000 civil penalty and impose no more than a 30-day suspension of Respondents' Animal Welfare Act license (Appeal Pet. at 4-6).

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that four factors must be considered when determining the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations and Standards: (1) the size of the business of the person involved; (2) the gravity of the violations; (3) the person's good faith; and (4) the history of previous violations.

Respondents contend: (1) they do not gross $100,000 per year; (2) there is no allegation in the Complaint that Respondents treated their animals inhumanely or that Respondents' animals suffered an injury, dehydration, or malnutrition; and (3) Respondents do not have a history of previous violations of the Animal Welfare Act (Appeal Pet. at 4-5).

Respondent Karl Mitchell states that the business includes around 20 exotic animals (Affidavit of Karl Mitchell in Support of Motion for Reconsideration of the Decision of the Judicial Officer in Denying the Mot. for Leave to File Late Answer to Compl. ¶ 3). Using the table for computing the annual license fee for Animal Welfare Act exhibitors (9 C.F.R. § 2.6(c)) as a guide, I find Respondents have a small business.

The gravity of Respondents' violations is clearly evident. Respondents chronically failed to comply with the Animal Welfare Act and the Regulations and Standards during the period April 11, 2000, through December 4, 2000.[22] While

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

[22] Complainant alleges and Respondents are deemed to have admitted that on several occasions between April 11, 2000, and the "present," Respondent Karl Mitchell interfered with, threatened, abused, and harassed Animal and Plant Health Inspection Service officials in the performance of their duties in willful violation of section 2.4 of the Regulations (9 C.F.R. § 2.4) (Compl. ¶ 3). Complainant (continued...)

there is no allegation in the Complaint that Respondents' animals actually suffered injury, dehydration, or malnutrition, many of Respondents' violations constitute threats to the health and well-being of the animals in Respondents' facility. Further, on several occasions Respondent Karl Mitchell interfered with, threatened, abused, and harassed Animal and Plant Health and Inspection Service officials in the performance of their duties. On one occasion Respondents failed to allow Animal and Plant Health Inspection Service officials access to Respondents' facilities and animals and on two occasions Respondents failed to allow Animal and Plant Health Inspection Service officials to examine records Respondents are required to maintain under the Animal Welfare Act and the Regulations. Interference with Animal and Plant Health Inspection Service officials' duties under the Animal Welfare Act and the failure to allow Animal and Plant Health Inspection Service officials access to facilities, animals, and records are extremely serious violations because they thwart the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act. I conclude that Respondents' violations are grave. Further, Respondents' conduct during the period April 11, 2000, through December 4, 2000, reveals consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. Thus, I conclude Respondents lacked good faith.

Moreover, contrary to Respondents' assertion that they do not have a history of Animal Welfare Act violations (Appeal Pet. at 5), Respondent Karl Mitchell has previously been found to have violated the Animal Welfare Act and the Regulations.[23]

The United States Department of Agriculture's 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

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[22](...continued)
issued the Complaint on December 4, 2000 (Compl. at 9). I infer the word "present" in paragraph 3 of the Complaint refers to the date Complainant issued the Complaint.

[23] *See In re Karl Mitchell*, 57 Agric. Dec. 972 (1998) (concluding that Karl Mitchell, doing business as All Acting Animals, violated the Animal Welfare Act and section 2.2(a) of the Regulations (9 C.F.R. § 2.2(a)), ordering Karl Mitchell to cease and desist from violating the Regulations, and assessing Karl Mitchell a $750 civil penalty).

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 less, or different, than that recommended by administrative officials.[24]

Complainant, one of the officials charged with administering the Animal Welfare Act, requests that I order Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, assess Respondents a $27,500 civil penalty, and revoke Respondents' Animal Welfare Act license. Complainant bases his sanction recommendation on the 48 violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint. I reject Complainant's recommendation of a $27,500 civil penalty and reduce the amount of the civil penalty requested by Complainant because, as a matter of law, Respondents could not have committed three of the violations alleged in the Complaint;[25] Respondents have a small business; and the limited record before me

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[24] *In re American Raisin Packers, Inc.*, 60 Agric. Dec. ___, slip op. at 39 n.8 (May 1, 2001); *In re Fred Hodgins*, 60 Agric. Dec. ___, slip op. at 24 (Apr. 4, 2001) (Decision and Order on Remand); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *appeal docketed*, No. 00-60844 (5th Cir. Nov. 30, 2000); *In re Greenville Packing Co.*, 59 Agric. Dec.194, 226-27 (2000), *appeal docketed*, No. 00-CV-1054 (N.D.N.Y. July 5, 2000); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 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 Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (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).

[25] Specifically, Complainant alleges and Respondents are deemed to have admitted that on July 24, 2000, Respondents failed to maintain records disclosing the acquisition of a new camel in willful violation of section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)) (Compl. ¶ 6b). Section 2.75(a) of (continued...)

does not establish that Respondents' animals actually suffered injury, dehydration, or malnutrition.

Respondents could be assessed a maximum civil penalty of $112,500 for Respondents' 45 violations of the Animal Welfare Act and the Regulations and Standards.[26] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and Complainant's sanction recommendation, I conclude that a cease and desist order, the revocation of Respondents' Animal Welfare Act license, and a $15,250 civil penalty[27] are appropriate and necessary to ensure

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[25](...continued)
the Regulations (9 C.F.R. § 2.75(a)) imposes recordkeeping requirements concerning dogs and cats. Thus, as a matter of law, Respondents' failure to maintain records disclosing the acquisition of a new camel is not a violation of 9 C.F.R. § 2.75(a). Complainant alleges and Respondents are deemed to have admitted that on July 24, 2000, Respondents failed to maintain records disclosing the reacquisition of a lion known as "Nala" in willful violation of section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)) (Compl. ¶ 6d). Section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)) imposes recordkeeping requirements concerning dogs and cats. The word "cat" is defined as Felis catus (9 C.F.R. § 1.1). A cat of the species Felis catus is a domestic house cat. (*See State v. Belk*, 150 S.E.2d 481, 484-85 (N.C. 1966) (indicating that a cat of the species Felis catus is a carnivorous mammal long domesticated and kept by man as a pet or for catching rats and mice); *P.B. v. C.C.*, 647 N.Y.S.2d 732, 735 (N.Y. App. Div. 1996) (Kupferman, J., dissenting) (stating the tiger and the kitten are both members of the family Felidae and, therefore, distant relatives, but the striped Asiatic carnivore (Leo tigris), the largest member of the family, is not at all like the furry mouser (Felis catus), the smallest).) Thus, as a matter of law, Respondents' failure to maintain records disclosing the reacquisition of a lion known as "Nala" is not a violation of 9 C.F.R. § 2.75(a). Complainant alleges and Respondents are deemed to have admitted that on July 24, 2000, Respondents failed to provide shelter for a juvenile camel that was not of sufficient height to allow the animal to stand without discomfort in willful violation of section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)) (Compl. ¶ 8i). Section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)) requires exhibitors to provide animals shelter from inclement weather. Thus, as a matter of law, Respondents' failure to provide shelter for a juvenile camel that was not of sufficient height to allow the animal to stand without discomfort is not a violation of 9 C.F.R. § 3.127(b).

[26]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.

[27]I assess: (1) a $2,500 civil penalty for Respondent Karl Mitchell's interference with, threats, abuse, and harassment of Animal and Plant Health Inspection Service officials in willful violation of section 2.4 of the Regulations (9 C.F.R. § 2.4); (2) a $1,250 civil penalty for Respondents' failure on June 29, 2000, to allow Animal and Plant Health Inspection Service officials access to Respondents' facilities, animals, and records in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4); (3) a $1,000 civil penalty for
(continued...)

Respondents' compliance with the Animal Welfare Act and the Regulations and Standards 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. Respondents, their agents, 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. 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 $15,250 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:

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. 01-0016.

3. Respondents' Animal Welfare Act license (Animal Welfare Act license number 88-C-0076) is revoked. The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this

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[27](...continued)
Respondents' failure on May 16, 2000, to allow Animal and Plant Health Inspection Service officials access to Respondents' records in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4); and (4) a $10,500 civil penalty for the remaining 42 willful violations of the Animal Welfare Act and the Regulations and Standards.

Order on Respondents.

4. Respondents have 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. Respondents 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 June 13, 2001.

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BEEF PROMOTION AND RESEARCH ACT

COURT DECISION

JERRY GOETZ, d/b/a JERRY GOETZ AND SONS, v. UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, INDIVIDUALLY AND AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; AND, THE ACTING ADMINISTRATOR OF THE AGRICULTURAL MARKETING SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 00-3173
Filed April 20, 2001.

(Cite as 2001 WL 401594).

Beef Promotion and Research - Civil penalties - Past due assessments - Late payments - Cease and desist - Limitations - Private treaty - Standard of review - Recordkeeping - Auditors - Arbitrary and capricious - Statistical sampling - Burden shifting - Due process - Equal protection - Swapping - Collecting person - Deference - Unpaid "checkoffs" - Multiple violations.

The United States Court of Appeals, Tenth Circuit, upheld the Memorandum and Order of the district court that the Judicial Officer (JO) did not err in:

(a) assessing a $69,804.99 civil penalty in addition to $66,913 in past-due assessments and late-payment charges;

(b) the use of independent auditors to determine the past-due assessment from a statistical basis to develop reliable and acceptable evidence;

(c) rejecting the beef producer's contention that the Collection/Compliance Guide relating to maintenance of records was a regulation and thereby established a 3-year limitation;

(d) rejecting the beef producer's contention that his cattle transactions were "swapping" operations whereby he was not liable on cattle purchases as a "collecting person";

(e) rejecting the beef producer's contention that he satisfied the three-pronged test in 7 C.F.R. § 1260.314(a)(2);

(f) finding the beef producer lacked credibility on the issue that mistakes made in official non-producer's status forms were not those of the producer;

(g) the determination that the beef producer's cattle transactions were not "private treaty sales" by giving deference to the Secretary's interpretation of his own regulations; and

(h) concluding that a penalty may be assessed for each violation of the Beef Promotion and Research Act of 1985.

United States Court of Appeals
Tenth Circuit

ORDER AND JUDGMENT [*]

Before **KELLY** and **McKAY**, Circuit Judges, and **BRIMMER**, District Judge.[**]

Plaintiff-Appellant Jerry Goetz ("Goetz") appeals the district court's May 23, 2000 Order affirming the Secretary of Agriculture's order to pay assessments, late charges and civil penalties under the Beef Promotion and Research Act ("BPA"), 7 U.S.C. § 2901 *et seq*. Our jurisdiction arises under 28 U.S.C. § 1291 and we affirm.

Background

In 1986, Congress passed the BPA to establish a procedure for financing a beef promotion and research program. The BPA authorized the Secretary of Agriculture ("Secretary") to issue a beef promotion and research order requiring that "each person making payment to a producer for cattle purchased from the producer shall . . . collect an assessment and remit the assessment to the [Cattlemen's Beef Promotion and Research] Board." 7 U.S.C. § 2904(8).

The Secretary thereafter issued the Beef Promotion and Research Order ("Order"), 7 C.F.R. § 1260.101 *et seq*. providing for an assessment of $1.00 per head of cattle sold. 7 C.F.R. § 1260.172(a). The assessment shall be collected by a "collecting person" meaning "the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act." 7 C.F.R. § 1260.106.

In 1987, the Kansas Beef Council sent a letter to Goetz containing the following paragraph:

> The Kansas Beef Council has been informed by producers selling cattle to you that you have collected from them a $1.00 per head assessment on cattle sold to you. The Kansas Beef Council has not received remittance of those dollars from you.

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[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[**] The Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, sitting by designation.

Aplt. App. at 998.

The letter also informed Goetz that he was required to remit a $1.00 assessment on all cattle purchased from a producer and that his failure to do so might result in a civil penalty. A similar letter was sent in February and June 1992. Despite these warnings, Goetz never submitted any assessments from 1986 until October 29, 1993 when the Acting Administrator of the Agricultural Marketing Service filed a Complaint against Goetz.

The Complaint alleged willful violations of the BPA by Goetz. On September 25 and 26, 1996, a hearing was held before an Administrative Law Judge ("ALJ"). On February 26, 1997, the ALJ issued a Decision and Order finding Goetz liable for violating the BPA and ordering Goetz to pay past due assessments, late payment charges, and a civil penalty. On April 7, 1997, Goetz appealed the ALJ's decision to the Judicial Officer to whom the Secretary had delegated authority to act as a final deciding officer. On November 3, 1997, the Judicial Officer issued a Decision and Order modifying the ALJ's order.

Both parties filed motions for reconsideration of the Judicial Officer's order and on April 3, 1998, the Judicial Officer filed an order on the motions for reconsideration. The Judicial Officer's final order (1) ordered Goetz to cease and desist from violating the BPA; (2) assessed a civil penalty of $69,804.49; and (3) required payment of past due assessments and late payment charges of $66,913.00. Goetz appealed the Judicial Officer's order to the United States District Court for the District of Kansas. The district court affirmed the Judicial Officer's order in all respects.

Goetz now appeals to this Court and raises the following issues: (1) Did the district court err in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties in the amount of $71,788.89 for the period of October 1, 1986 through December 31, 1989; (2) Did the district court err in affirming the Judicial Officer's decision that the Collection - Compliance Reference Guide did not establish a three year statute of limitations under the BPA; (3) Did the district court err in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on cattle which Goetz sold at sale barns; (4) Did the district court err in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on the cattle purchases listed on page 1032 of Appellant's Appendix in which Goetz had signed a non-producer status form; (5) Did the district court err in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on private treaty sales; and (6) Did the district court err in affirming the

Judicial Officer's assessment of civil penalties.

Discussion

"When reviewing a district court's decision affirming an agency action, we employ the identical standard of review utilized by the district court." *American Colloid Co. v. Babbitt*, 145 F.3d 1152, 1154 (10th Cir. 1998) (citation omitted). While the district court's decision is not given any deference, we do give deference to the agency's decision. *Id.* The agency's decision will be set aside "only if it is arbitrary, capricious, otherwise not in accordance with law, or not supported by substantial evidence." *Id.* (citing 5 U.S.C. § 706). "The court's function is exhausted where a rational basis is found for the agency action taken." *Sabin v. Butz*, 515 F.2d 1061, 1067 (10th Cir. 1975).

A. Violations Arising Between October 1986 and December 1989

Goetz first challenges the Judicial Officer's determination of liability for past due assessments, late payment charges, and civil penalties for the period of October 1, 1986 through December 31, 1989. The amount of assessments, late payment charges, and civil penalties levied during this period were based on an auditor's estimates of the number of cattle Goetz had purchased during that period. The auditor estimated "these numbers based upon the average numbers for the period January 1, 1999 through June 30, 1994." Aplt. App. at 1005.

Goetz claims a regular business practice of keeping records for only three years. As a result, Goetz claims there is no relevant evidence which shows to what extent, if any, Goetz may be liable for unpaid assessments under the BPA prior to January 1, 1990. He contends that the auditor's estimation is only a speculative inference and is therefore not "substantial evidence" which could support the agency's determination. *See* 5 U.S.C. § 706(2)(E).

Goetz's arguments fail to take into account the other evidence considered by the Judicial Officer. In particular, the Kansas Beef Council notified Goetz in a June 1, 1987 letter of his failure to remit the $1.00 assessments that he had collected from various producers. A similar letter was sent again in February 1992. In addition, the auditor testified that he arrived at his estimates after comparing Goetz's tax returns for the 1986 to 1989 period with those from 1991 to 1994. The auditor found that "[b]ased upon income tax records, there was no significant difference in [Goetz's] operations for these periods." Aplt. App. at 1005.

We find substantial evidence to support the Judicial Officer's determination of Goetz's liability for past due assessments, late payment charges, and civil penalties for the period of October 1, 1986 through December 31, 1989. The June 1987 and

February 1992 letters provide substantial evidence of Goetz's failure to remit the $1.00 assessments. Further, in light of the auditor's review of Goetz's tax records and upon his finding that there was no significant difference in Goetz's operations during the years of 1986 through 1994, the auditor's estimation is more than a speculative inference.

We also find that the Judicial Officer's reliance upon the auditor's estimation was not arbitrary or capricious. *See Michigan Dept. of Educ. v. United States Dept. of Educ.,* 875 F.2d 1196, 1205-06 (6th Cir. 1989) (concluding that agency's use of a statistical sample as a basis for its findings of fact was not arbitrary or capricious). "[M]athematical and statistical methods are well recognized as reliable and acceptable evidence in determining adjudicative facts." *Id.*

Goetz also contends that allowing this estimation to shift the burden to Goetz violates his right to Due Process under the Fifth Amendment. Goetz offers only the following to support this proposition: "[d]ue process is ordinarily absent if a party is deprived of his or her property or liberty without evidence having been offered against him or her in accordance with established rules." 16B AM. JUR. 2D *Constitutional Law* § 960 (1998). However, the Court has already found substantial evidence to support the Judicial Officer's determination. Further, Goetz has failed to establish that reliance upon such evidence violated any established rules. Therefore, this Court finds no violation of due process.

B. Collection - Compliance Reference Guide

Goetz next contends that the district court erred in affirming the Judicial Officer's decision that the Collection - Compliance Reference Guide ("Guide") did not establish a three year statute of limitations. The Guide requires that a collecting person "maintain records and documentation pertaining to the [assessment] for at least three years following each transaction." Aplt. App. at 1129. Goetz argues that this provision should be deemed to establish a three year statute of limitations.

"An action on behalf of the United States in its governmental capacity is subject to no time limitation, in the absence of congressional enactment clearly imposing it." *United States v. Telluride Co.*, 146 F.3d 1241, 1244 (10th Cir. 1998) (citation omitted). Goetz does not direct the Court to any congressional enactment which establishes a statute of limitations on collection of assessments under the BPA. Goetz only points to the above provision of the Guide. However, as the Judicial Officer and the district court noted, the Guide is not a regulation which is binding upon the Secretary, collecting persons, or producers. Instead, it is merely a reference designed to assist the state beef councils in their collection procedures. The Court concludes there is no "congressional enactment clearly imposing" a

statute of limitations concerning collection of assessments under the BPA. *See id.* Therefore, we find no error in the Judicial Officer's determination that the Guide does not establish a statute of limitations.

Goetz also argues that allowing enforcement proceedings to extend beyond three years violates his equal protection rights under the Fifth Amendment. Goetz claims he is being punished for not keeping records longer than the Guide required and therefore more is required of him than of other producers. In order to show an equal protection violation, Goetz would first have to show that he was treated differently than other "similarly situated persons." *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1152 (10th Cir. 1999). However, Goetz offers no evidence that he was treated differently than anyone else. Therefore, we must reject Goetz's equal protection claim.

C. Sale Barns

Goetz next claims the district court erred in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on cattle which Goetz sold at sale barns. While Goetz's characterization of the issue is limited to cattle *sold* at sale barns, he first argues that he is never required to collect assessments on cattle which he *buys* at sale barns. Goetz then contends that his cattle "swapping" operations, resulting in the *sale* of cattle at sale barns, qualify for an exemption from the BPA. The first argument addresses Goetz's liability for collecting assessments under the BPA as a collecting person. The second argument, however, asserts an exception under the BPA which relieves a seller from having to pay an assessment to the collecting person. We will address the issue of cattle purchased at sale barns before addressing the cattle swapping operations.

1. Cattle purchased at sale barns

Goetz argues that whenever he purchases cattle from a sale barn, he is never the collecting person, as the sale barn is always the designated collecting person. Goetz's only support for this assertion is a portion of the Guide providing that sale barns "can be collecting persons." Aplt. App. at 1127. As stated above, the Guide is not part of the regulations, and it is not binding on the Secretary, collecting persons, or producers. However, even if the Guide were held to create a binding rule, the language quoted cannot fairly be construed to mean that sale barns are always the collecting persons. The language itself only provides that a sale barn *can* be a collecting person. In addition, as discussed below, the Judicial Officer found at least one occasion where Goetz certified that he was collecting the

assessment despite the fact that he was purchasing cattle at a sale barn. Therefore, we find no error in the Judicial Officer's failure to deem all purchases from sale barns as exempt from collection responsibilities.

2. Cattle sold at sale barns

Goetz also contends that his cattle swapping operations relieve him from producer status under the BPA and therefore he does not owe any assessment under the BPA upon the sale of such cattle. An assessment will not be levied on cattle owned by a person who:

> (i) Certifies that the person acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party, (ii) Establishes that such cattle were resold not later than 10 days from the date on which the person acquired ownership; and (iii) Certifies that the assessment levied upon the person from whom the person purchased the cattle, if an assessment was due, has been collected and has been remitted, or will be remitted in a timely fashion.

7 C.F.R. § 1260.314(a)(2).

Here, Goetz claims his cattle swapping operations always qualify for this exemption. He refers to evidence in the record suggesting that such cattle are never brought to his feed lots, but are immediately transferred to another sale barn. In support of his claim, he contends that holding the cattle for a longer period of time would be far too costly.

Even assuming Goetz's claims regarding his cattle swapping operations as true, we would still not be persuaded by his arguments. The regulation is clear that three requirements must be met before one achieves the exemption of 7 C.F.R. § 1260.314(a)(2). Goetz's claim that the mere resale within ten days achieves the exemption is simply not supported by the plain language of the regulation. Therefore, the Court declines to write a wholesale exemption from assessment for those sale barn transactions involving Goetz's swapping business.

D. Non-Producer Status Forms

Goetz also contends the district court erred in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on certain cattle purchases where Goetz signed a Certification of

Non-Producer Status form.[1] In this case, the auditor obtained from the Kansas Beef Council several non-producer status forms signed by Goetz and submitted to various sale barns. On these forms, Goetz certified that he had collected $1.00 per head. Goetz claims that this was the sole basis for the Judicial Officer's determination of liability for these purchases.

Goetz challenges the Judicial Officer's findings on several grounds. First, he offers his own testimony that he did not collect the $1.00 assessment and that the forms had been erroneously completed by someone at the sale barn to show that an assessment had been collected. However, the ALJ and the Judicial Officer both rejected Goetz's argument denying collection of the $1.00 assessment and asserting the forms had been erroneously completed. The ALJ's decision was based on a credibility finding. The ALJ was in a far better position than this Court to judge the credibility of Goetz on this point. Therefore, it is proper to defer to the ALJ's judgment of credibility on this issue. *See Webco Indus., Inc. v. NLRB*, 217 F.3d 1306, 1311 (10th Cir. 2000) ("The ALJ's credibility resolutions deserve great weight to the extent they are based on testimonial evidence of live witnesses and the hearing judge has had the opportunity to observe their demeanor." (citation and quotation omitted)).

Goetz also contends that the auditor admitted that all of the cattle referred to in this section were resold within ten days of Goetz's purchase and should therefore be exempt from the BPA assessments. Goetz's arguments fail to address the issue at hand. The issue is not whether Goetz failed to pay assessments on the cattle he sold, but whether he failed to *remit* assessments collected on cattle he had purchased. Reselling cattle within ten days does not obviate the need to collect or remit assessments on cattle purchased from a producer. *See* 7 C.F.R. § 1260.314(a)(2)(iii). Rather, the non-producer exemption of 7 C.F.R. § 1260.314(a)(2) only means that Goetz would not be required to pay a collecting person an assessment upon Goetz's subsequent resale of the cattle. 7 C.F.R. § 1260.314(a). Here, the Judicial Officer, found that Goetz had collected the assessment on cattle he purchased, and that he failed to remit it to the proper beef council. The Judicial Officer found Goetz liable for these collections despite the fact that Goetz had resold the cattle within ten days. We find that the Judicial Officer's ruling was based upon a correct view of the regulation and Goetz's argument on this point is unpersuasive.

Next, Goetz argues that the cattle referred to in this section were part of his cattle swapping operations and he reargues the points asserted in the previous section. The Court has already fully addressed Goetz's arguments on this issue.

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[1]These forms allow a buyer to obtain the 7 C.F.R. § 1260.314 exemption referred to above.

For the reasons stated above, we reject this argument.

Finally, Goetz contends the purchase invoices for the cattle at issue do not indicate any deduction was withheld for the assessments. However, this evidence is not sufficient for this Court to alter the Judicial Officer's findings on this issue. It is not our duty to reweigh the evidence, our review is limited to determining whether substantial evidence exists to support the Judicial Officer's decision. *N. Coal Co. v. Dir., Office of Workers' Comp. Programs*, 100 F.3d 871, 873 (10th Cir. 1996). We hold that the certification of non-producer status provides substantial evidence to support the Judicial Officer's conclusion that Goetz had collected, but failed to remit, the assessments.

E. Private Treaty Sales

Private treaty sales are defined by the Guide as a sale between producers. Aplt. App. at 1133. Goetz argues there is never a designated collecting person in a private treaty sale and therefore he cannot be held liable for unpaid assessments from such a sale until the Secretary proves that the seller failed to remit the proper assessments for these transactions.

The regulations provide for the collection of assessments as follows:

> (a) A $1.00 per head assessment on cattle sold shall be paid by the producer of the cattle in the manner designated in § 1260.311.
>
> . . . .
>
> (c) Failure of the collecting person to collect the assessment on each head of cattle sold as designated in § 1260.311 shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or the Cattlemen's Board as required in § 1260.312.

7 C.F.R. § 1260.310.

According to the Guide, "[f]or private treaty sales, either the buyer or the seller may be the collecting person." Aplt. App. at 1129. However, "both are responsible for ensuring that the [assessment] is collected and remitted. *Id.*

The Judicial Officer, as well as the ALJ, found that Goetz was the designated collecting person under the regulations in the private treaty sales which were at issue. "'Collecting person' means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board

and approved by the Secretary." 7 C.F.R. § 1260.106. Upon reviewing the agency's determination on this issue, the Court is reminded that

> [W]e must give substantial deference to [the agency's] interpretation of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Rocky Mountain Radar, Inc. v. F.C.C., 158 F.3d 1118, 1123 (10th Cir. 1998) (citation omitted).

Under the BPA, the buyer is generally regarded as the collecting person. *See* 7 C.F.R. § 1260.172(a) ("Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person"); 7 C.F.R. § 1260.311 ("Collecting persons for purposes of collecting and remitting the $1.00 per head assessment shall be . . . each person making payment to a producer for cattle purchased"). The provisions of the Guide providing that the buyer or the seller can be a collecting person do not change the general provisions found in the regulations. The fact that either may be a collecting person does not affect the notion that buyers are generally regarded as the collecting person.

Nor does the Guide's statement that both the buyer and seller are responsible for the collection and remission of assessments alter the general assumption. The regulations provide that the collecting persons failure to remit the assessments does not alter the liability of the producer for paying the assessment. *See* 7 C.F.R. § 1260.310. Therefore, the Guide's provision that both the buyer and seller in private treaty sales are responsible for the unpaid checkoffs until they are remitted does not alter the regulations as Goetz suggests.

Goetz, as the person making payment for the cattle, is reasonably considered to be a collecting person. *See* 7 C.F.R. § 1260.172(a). In light of the deference we must give to the agency's interpretation of its regulations, we find that the Judicial Officer's finding that Goetz was the collecting person in these private treaty sales was not plainly erroneous or inconsistent with the regulations. *See Rocky Mountain Radar*, 158 F.3d at 1123.

F. Civil Penalties

Finally, Goetz challenges the assessment of penalties in the amount of $69,804.49. The statute provides: "If the Secretary believes that the administration

and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may . . . (2) assess a civil penalty of not more than $5,000 for violation of such order." 7 U.S.C. § 2908(a)(2). Goetz argues that this allows only one $5,000 penalty after any administrative hearing. The Judicial Officer and the District Court held that this allowed a $5,000 penalty for each violation of the statute. Our analysis of this situation is guided by the following:

> In interpreting a statute, the starting point is the statutory language. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. In other words, unless the statutory language is ambiguous or would lead to absurd results, the plain meaning of the statute must control.

Long v. Bd. of Governors of the Fed. Reserve Sys., 117 F.3d 1145, 1157 (10th Cir. 1997).

We find that the statutory penalty provision is not ambiguous. Goetz correctly perceives that a penalty may be assessed only after an administrative hearing. However, the statute does not say that only one $5,000 fine is allowed per hearing. On the contrary, it allows a penalty of not more than $5,000 for violation of an order.

Neither do we believe this interpretation would lead to absurd results. Allowing a $5,000 fine for each violation of the order helps to ensure that purposes of the BPA are attained, namely organizing "an orderly procedure for financing . . . a coordinated program of promotion and research." 7 U.S.C. § 2901(b). Goetz's interpretation (allowing only one $5,000 fine after any administrative hearing) would have little effect in deterring prospective violators of the BPA who, like Goetz buy and sell up to 200 cattle per day.

In this case, Goetz was found in be in violation of the BPA order on several different occasions. Therefore, the Secretary's assessment of $69,804.49 in penalties for Goetz's multiple violations of the BPA complies with the plain language of the statute.

Conclusion

In sum, we hold that the judgment of the Judicial Officer should not be set aside. Therefore, the district court's Memorandum and Order is **AFFIRMED**.

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HORSE PROTECTION ACT

COURT DECISION

DAVID TRACY BRADSHAW v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 00-60582.
Filed May 14, 2001.

(Cite as 254 F.3d 1081 (5th Cir.)).

Horse Protection Act - Adequacy of evidence - Soring - Diagnosis.

Respondent Bradshaw appealed Judicial Officer's final decision to Fifth Circuit alleging error in finding the existence of "soring" based solely on evidence of "digital palpation." The Court reversed the Judicial Officer's decision and cited with approval *Young v. United States Dep't of Agriculture* in finding that "soring" was not supported by substantial evidence.

United States Court of Appeals
Fifth Circuit

Before: JONES, DeMOSS, and BENAVIDES, Circuit Judges.
PER CURIAM:[*]

David Bradshaw petitions this Court for review of the Department of Agriculture's (DOA) final administrative decision finding that Bradshaw entered a "sore" Tennessee walking horse in an exhibition in violation of § 1824(2)(D) of the Horse Protection Act, 15 U.S.C. §§ 1821-1831. The HPA vests this Court with jurisdiction over such final orders. *See* 15 U.S.C. 1825(b)(2).

In *Young v. United States Dep't of Agriculture*, we determined that a diagnosis of "soreness" based solely on digital palpation was not substantial evidence sufficient to support a violation of the HPA. 53 F.3d 728, 731 (5th Cir. 1995). We expressed concern in *Young* over the reliability of digital palpation and noted indicia in Congressional reports that digital palpation should not used as the sole means to determine whether "soring" had occurred. *Id.* (*citing* Pub. L. No. 102-341, 106 Stat. 873, 881-82 (1992); H.R. Rep. No. 617, 102d Cong., 2d Sess. 48 (1992); S. Rep. No. 334, 102d Cong.2d Sess. 49 (1992)). We find this case

[*]Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

sufficiently analogous to our decision in *Young*. Although counsel for the DOA attempted to distinguish *Young*, counsel conceded that there was little other evidence in the record besides digital palpation to support the finding of "soring." The DOA's determination was thus not supported by substantial evidence. Accordingly, we GRANT the petition for review and REVERSE and RENDER judgment in favor of the petitioner.

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MUSHROOM PROMOTION, RESEARCH, AND CONSUMER INFORMATION ACT

COURT DECISION

UNITED STATES v. UNITED FOODS, INC.
No. 00-276.
Decided June 25, 2001.

(Cite as 121 S. Ct. 2334 (2001)).

Mushroom Promotion, Research, and Consumer Information Act - First Amendment - Commercial speech - Compulsory subsidy - Comprehensive regulatory scheme - Generic advertisement - Non-voluntary association.

The Supreme Court affirmed the Sixth Circuit Court of Appeals which found that a compulsory subsidy (assessment) collected primarily for the purpose of generic advertisement promoting mushrooms sales was a violation of First Amendment right of free speech.
The Mushroom Promotion, Research, and Consumer Information Act of 1990 (Act), as amended, 7 U.S.C. §§ 6101-6112, required that Respondent, a fresh mushroom producer, contribute to a fund which was primarily for the purpose of generic advertisement to the general public to promote fresh mushrooms. Respondent objected to the content of the advertisement and to the assessment although Respondent was free to engage in advertisement promoting its own brand. The Secretary of Agriculture filed an enforcement action to collect the assessment. The Court found that the principal purpose of the assessment was for the advertisement. Because the assessment was not ancillary to a more comprehensive marketing program restricting the market autonomy of producers similar to Respondent, an affected party may not be compelled to pay into the subsidy under the Act.
The Court distinguished this case from *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997).

Supreme Court of the United States

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined. STEVENS, J., and THOMAS, J., filed concurring opinions. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, and in which O'CONNOR, J., joined as to Parts I and III.

Justice KENNEDY delivered the opinion of the Court.

Four Terms ago, in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), the Court rejected a First Amendment challenge to the constitutionality of a series of agricultural marketing orders that,

as part of a larger regulatory marketing scheme, required producers of certain California tree fruit to pay assessments for product advertising. In this case a federal statute mandates assessments on handlers of fresh mushrooms to fund advertising for the product. The Court of Appeals for the Sixth Circuit determined the mandated payments were not part of a more comprehensive statutory program for agricultural marketing, thus dictating a different result than in *Glickman*. It held the assessment requirement unconstitutional, and we granted certiorari. 530 U.S. 1009, 121 S.Ct. 562, 148 L.Ed.2d 482 (2000).

The statute in question, enacted by Congress in 1990, is the Mushroom Promotion, Research, and Consumer Information Act, 104 Stat. 3854, 7 U.S.C. § 6101 *et seq*. The Act authorizes the Secretary of Agriculture to establish a Mushroom Council to pursue the statute's goals. Mushroom producers and importers, as defined by the statute, submit nominations from among their group to the Secretary, who then designates the Council membership. 7 U.S.C. §§ 6104(b)(1)(B), 6102(6), 6102(11). To fund its programs, the Act allows the Council to impose mandatory assessments upon handlers of fresh mushrooms in an amount not to exceed one cent per pound of mushrooms produced or imported. § 6104(g)(2). The assessments can be used for "projects of mushroom promotion, research, consumer information, and industry information." § 6104(c)(4). It is undisputed, though, that most monies raised by the assessments are spent for generic advertising to promote mushroom sales.

Respondent United Foods, Inc., is a large agricultural enterprise based in Tennessee. It grows and distributes many crops and products, including fresh mushrooms. In 1996 respondent refused to pay its mandatory assessments under the Act. The forced subsidy for generic advertising, it contended, is a violation of the First Amendment. Respondent challenged the assessments in a petition filed with the Secretary. The United States filed an action in the United States District Court for the Western District of Tennessee, seeking an order compelling respondent to pay. Both matters were stayed pending this Court's decision in *Glickman*.

After *Glickman* was decided, the Administrative Law Judge dismissed respondent's petition, and the Judicial Officer of the Department of Agriculture affirmed. Respondent sought review in District Court, and its suit was consolidated with the Government's enforcement action. The District Court, holding *Glickman* dispositive of the First Amendment challenge, granted the Government's motion for summary judgment. App. to Pet. for Cert. 18a.

The Court of Appeals for the Sixth Circuit held this case is not controlled by *Glickman* and reversed the District Court. 197 F.3d 221 (1999). We agree with the Court of Appeals and now affirm.

A quarter of a century ago, the Court held that commercial speech, usually

defined as speech that does no more than propose a commercial transaction, is protected by the First Amendment. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).

We have used standards for determining the validity of speech regulations which accord less protection to commercial speech than to other expression. *See*, *e.g.*, *Ibid.*; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). That approach, in turn, has been subject to some criticism. See, *e.g.*, *Glickman*, *supra*, at 504, 117 S.Ct. 2130 (THOMAS, J., dissenting); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (THOMAS, J., concurring in part and concurring in judgment); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (STEVENS, J., concurring in judgment). We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case. It should be noted, moreover, that the Government itself does not rely upon *Central Hudson* to challenge the Court of Appeals' decision, Reply Brief for Petitioners 9, n. 7, and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test. The question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced.

Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, *see Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), or from compelling certain individuals to pay subsidies for speech to which they object. *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); *see* also *Glickman*, 521 U.S., at 469, n. 13, 117 S.Ct. 2130. Our precedents concerning compelled contributions to speech provide the beginning point for our analysis. The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection, as held in the cases already cited. The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete,

little noticed groups in a society which values the freedom resulting from speech in all its diverse parts. First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.

"[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield, supra*, at 767, 113 S.Ct. 1792. There are some instances in which compelled subsidies for speech contradict that constitutional principle. Here the disagreement could be seen as minor: Respondent wants to convey the message that its brand of mushrooms is superior to those grown by other producers. It objects to being charged for a message which seems to be favored by a majority of producers. The message is that mushrooms are worth consuming whether or not they are branded. First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

In the Government's view the assessment in this case is permitted by *Glickman* because it is similar in important respects. It imposes no restraint on the freedom of an objecting party to communicate its own message; the program does not compel an objecting party (here a corporate entity) itself to express views it disfavors; and the mandated scheme does not compel the expression of political or ideological views. *See Glickman*, 521 U.S., at 469-470, 117 S.Ct. 2130. These points were noted in *Glickman* in the context of a different type of regulatory scheme and are not controlling of the outcome. The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

In *Glickman* we stressed from the very outset that the entire regulatory program must be considered in resolving the case. In deciding that case we emphasized "the importance of the statutory context in which it arises." 521 U.S., at 469, 117 S.Ct. 2130. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." *Id.*, at 469, 117 S.Ct. 2130. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from the antitrust laws." *Id.*, at 461, 117 S.Ct. 2130. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices." *Ibid*. The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "d[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s

already constrained by the regulatory scheme." *Id.*, at 469, 117 S.Ct. 2130. The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

The features of the marketing scheme found important in *Glickman* are not present in the case now before us. As respondent notes, and as the Government does not contest, *cf.* Brief for Petitioners 25, almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising. Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions. As the Court of Appeals recognized, there is no "heavy regulation through marketing orders" in the mushroom market. 197 F.3d, at 225. Mushroom producers are not forced to associate as a group which makes cooperative decisions. "[T]he mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program," and "the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." *Id.*, at 222, 223.

It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity. *See*, *e.g.*, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990).

The Government claims that, despite the lack of cooperative marketing, the *Abood* rule protecting against compelled assessments for some speech is inapplicable. We did say in *Glickman* that *Abood* "recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" 521 U.S., at 471, 117 S.Ct. 2130 (*quoting Abood*, 431 U.S., at 235, 97 S.Ct. 1782). We take further instruction, however, from *Abood's* statement that speech need not be characterized as political before it receives First Amendment protection. *Id.*, at 232, 97 S.Ct. 1782. A proper application of the rule in *Abood* requires us to invalidate the instant statutory scheme. Before addressing whether a conflict with freedom of belief exists, a threshold inquiry must be whether there is some state imposed obligation which

makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place. In *Abood*, the infringement upon First Amendment associational rights worked by a union shop arrangement was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.*, at 222, 97 S.Ct. 1782. To attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association.

A similar situation obtained in *Keller v. State Bar of Cal.*, *supra*. A state-mandated, integrated bar sought to ensure that "all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts [were] called upon to pay a fair share of the cost." *Id.*, at 12, 110 S.Ct. 2228. Lawyers could be required to pay monies in support of activities that were germane to the reason justifying the compelled association in the first place, for example expenditures (including expenditures for speech) that related to "activities connected with disciplining members of the Bar or proposing ethical codes for the profession." *Id.*, at 16, 110 S.Ct. 2228. Those who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of monies to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity. The central holding in *Keller*, moreover, was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association.

The situation was much the same in *Glickman*. As noted above, the market for tree fruit was cooperative. To proceed, the statutory scheme used marketing orders that to a large extent deprived producers of their ability to compete and replaced competition with a regime of cooperation. The mandated cooperation was judged by Congress to be necessary to maintain a stable market. Given that producers were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in *Abood* and *Keller*, in furtherance of an otherwise legitimate program. Though four Justices who join this opinion disagreed, the majority of the Court in *Glickman* found the compelled contributions were nothing more than additional economic regulation, which did not raise First Amendment concerns. *Glickman*, 521 U.S., at 474, 117 S.Ct. 2130; *see id.*, at 477, 117 S.Ct. 2130 (SOUTER, J., dissenting).

The statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in *Glickman*; here the statute does not require group action, save to generate the very speech to which some handlers object. In contrast to the program upheld in *Glickman*, where the Government argued the compelled

contributions for advertising were "part of a far broader regulatory system that does not principally concern speech," Reply Brief for Petitioner, O.T. 1996, No. 95-1184, p. 4, there is no broader regulatory system in place here. We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself. Although greater regulation of the mushroom market might have been implemented under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. § 601 *et seq.*, the compelled contributions for advertising are not part of some broader regulatory scheme. The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance. The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.

Our conclusions are not inconsistent with the Court's decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), a case involving attempts by a State to prohibit certain voluntary advertising by licensed attorneys. The Court invalidated the restrictions in substantial part but did permit a rule requiring that attorneys who advertised by their own choice and who referred to contingent fees should disclose that clients might be liable for costs. Noting that substantial numbers of potential clients might be misled by omission of the explanation, the Court sustained the requirement as consistent with the State's interest in "preventing deception of consumers." *Id.*, at 651, 105 S.Ct. 2265. There is no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers.

The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply. As the Government admits in a forthright manner, however, this argument was "not raised or addressed" in the Court of Appeals. Brief for Petitioners 32, n. 19. The Government, citing *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), suggests that the question is embraced within the question set forth in the petition for certiorari. In *Lebron*, the theory presented by the petitioner in the brief on the merits was addressed by the court whose judgment was being reviewed. *Id.*, at 379, 115 S.Ct. 961. Here, by contrast, it is undisputed that the Court of Appeals did not mention the government speech theory now put forward

for our consideration.

The Government's failure to raise its argument in the Court of Appeals deprived respondent of the ability to address significant matters that might have been difficult points for the Government. For example, although the Government asserts that advertising is subject to approval by the Secretary of Agriculture, respondent claims the approval is pro forma. This and other difficult issues would have to be addressed were the program to be labeled, and sustained, as government speech.

We need not address the question, however. Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, see, *e.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 526, n. 11, 118 S.Ct. 1478, 140 L.Ed.2d 710 (1998), it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it. Just this Term we declined an invitation by an *amicus* to entertain new arguments to overturn a judgment, *see Lopez v. Davis*, 531 U.S. 230, 244, n. 6, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001), and we consider it the better course to decline a party's suggestion for doing so in this case.

For the reasons we have discussed, the judgment of the Court of Appeals is

Affirmed.

Justice STEVENS, concurring.

Justice BREYER has correctly noted that the program at issue in this case, like that in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), "does not compel speech itself; it compels the payment of money." *Post*, at 2345-2346 (dissenting opinion). This fact suffices to distinguish these compelled subsidies from the compelled speech in cases like *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), and *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). It does not follow, however, that the First Amendment is not implicated when a person is forced to subsidize speech to which he objects. *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). As we held in *Glickman*, *Keller*, and a number of other cases, such a compelled subsidy is permissible when it is ancillary, or "germane," to a valid cooperative endeavor. The incremental impact on the liberty of a person who has already surrendered far greater liberty to the collective entity (either voluntarily or as a result of permissible compulsion) does not, in my judgment, raise a significant constitutional issue if it is ancillary to the main purpose of the collective program.

This case, however, raises the open question whether such compulsion is

constitutional when nothing more than commercial advertising is at stake. The naked imposition of such compulsion, like a naked restraint on speech itself, seems quite different to me.* We need not decide whether other interests, such as the health or artistic concerns mentioned by Justice BREYER, *post*, at 2347, might justify a compelled subsidy like this, but surely the interest in making one entrepreneur finance advertising for the benefit of his competitors, including some who are not required to contribute, is insufficient.

Justice THOMAS, concurring.

I agree with the Court that *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), is not controlling. I write separately, however, to reiterate my views that "paying money for the purposes of advertising involves speech," and that "compelling speech raises a First Amendment issue just as much as restricting speech." *Id.*, at 504, 117 S.Ct. 2130 (THOMAS, J., dissenting). Any regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny.

Justice BREYER, with whom Justice GINSBURG joins, and with whom JUSTICE O'CONNOR joins as to Parts I and III, dissenting.

The Court, in my view, disregards controlling precedent, fails properly to analyze the strength of the relevant regulatory and commercial speech interests, and introduces into First Amendment law an unreasoned legal principle that may well pose an obstacle to the development of beneficial forms of economic regulation. I consequently dissent.

I

Only four years ago this Court considered a case very similar to this one, *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138

*The Court has held that the First Amendment is implicated by government regulation of contributions and expenditures for political purposes. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). Although it by no means follows that the reasoning in such cases would apply to the regulation of expenditures for advertising, I think it clear that government compulsion to finance objectionable speech imposes a greater restraint on liberty than government regulation of money used to subsidize the speech of others. Even in the commercial speech context, I think it entirely proper for the Court to rely on the First Amendment when evaluating the significance of such compulsion.

L.Ed.2d 585 (1997). The issue there, like here, was whether the First Amendment prohibited the Government from collecting a fee for collective product advertising from an objecting grower of those products (nectarines, peaches, and plums). We held that the collection of the fee did not "rais[e] a First Amendment issue for us to resolve," but rather was "simply a question of economic policy for Congress and the Executive to resolve." *Id.*, at 468, 117 S.Ct. 2130. We gave the following reasons in support of our conclusion:

> "First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views." *Id.*, at 469-470, 117 S.Ct. 2130.

This case, although it involves mushrooms rather than fruit, is identical in each of these three critical respects. No one, including the Court, claims otherwise. And I believe these similar characteristics demand a similar conclusion.

The Court sees an important difference in what it says is the fact that *Wileman's* fruit producers were subject to regulation (presumably price and supply regulation) that "'displaced competition,'" to the "extent that they were 'expressly exempted from the antitrust laws.'" *Ante*, at 2339 (quoting 521 U.S., at 461, 117 S.Ct. 2130). The mushroom producers here, it says, are not "'subjected to a uniform price, . . . restrictio[n] on supply,'" *ante*, at 2339 (quoting 197 F.3d 221, 222, 223 (C.A. 6 1999)), or any other "common venture" that "depriv[es]" them of the "ability to compete," *ante*, at 2340. And it characterizes this difference as "fundamental." *Ante*, at 2338.

But the record indicates that the difference to which the Court points could not have been critical. The Court in *Wileman* did not refer to the *presence* of price or output regulations. It referred to the fact that Congress had "*authorized*" that kind of regulation. 521 U.S., at 462, 117 S.Ct. 2130 (emphasis added). *See* also *id.*, at 461, 117 S.Ct. 2130 (citing agricultural marketing statute while noting that marketing orders issued under its authority "*may* include" price and quantity controls (emphasis added)). Both then-existing federal regulations and Justice SOUTER's dissenting opinion make clear that, at least in respect to some of *Wileman's* marketing orders, price and output regulations, while "authorized," were not, in fact, in place. *See* 7 C.F.R. pts. 916, 917 (1997) (setting forth container, packaging, grade, and size regulations, but not price and output regulations); 521 U.S., at 500, n. 13, 117 S.Ct. 2130 (SOUTER, J., dissenting) (noting that "the extent to which the Act eliminates competition varies among different marketing orders"). In this case, just as in *Wileman*, the Secretary of Agriculture is *authorized*

to promulgate price and supply regulations. *See ante*, at 2340 ("greater regulation of the mushroom market might have been implemented under the Agricultural Marketing Agreement Act of 1937"); 7 U.S.C. §§ 608c(2), (6)(A), (7). But in neither case has she actually done so. Perhaps that is why the Court in *Wileman* did not rely heavily upon the existence of the Secretary's authority to regulate prices or output. *See* 521 U.S., at 469, 117 S.Ct. 2130 (noting statutory scheme in passing).

Regardless, it is difficult to understand why the presence or absence of price and output regulations could make a critical First Amendment difference. The Court says that collective fruit advertising (unlike mushroom advertising) was the "logical concomitant" of the more comprehensive "economic" regulatory "scheme." *Ante*, at 2339. But it does not explain how that could be so. Producer price-fixing schemes seek to keep prices higher than market conditions might otherwise dictate, as do restrictions on supply. Antitrust exemptions are a "logical concomitant," for otherwise the price or output agreement might be held unlawful. But collective advertising has no obvious comparable connection. As far as *Wileman* or the record here suggests, collective advertising might, or might not, help bring about prices higher than market conditions would otherwise dictate. Certainly nothing in *Wileman* suggests the contrary. *Cf.* 521 U.S., at 477, 117 S.Ct. 2130 (SOUTER, J., dissenting) (criticizing the Court for not requiring advertising program to be "reasonably necessary to implement the regulation").

By contrast, the advertising here relates directly, not in an incidental or subsidiary manner, to the regulatory program's underlying goal of "maintain[ing] and expand[ing] existing markets and uses for mushrooms." 7 U.S.C. § 6101(b)(2). As the Mushroom Act's economic goals indicate, collective promotion and research is a perfectly traditional form of government intervention in the marketplace. Promotion may help to overcome inaccurate consumer perceptions about a product. *See* Hearings on H.R. 1776 et al. before the Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition of the House Committee on Agriculture, 101st Cong., 1st Sess., 99 (1989) (hereinafter Hearings) (statement of Rep. Grant) (noting need to overcome consumer fears about safety of eating mushrooms and that per capita mushroom consumption in Canada was twice that of United States). Overcoming those perceptions will sometimes bring special public benefits. *See* 7 U.S.C. §§ 6101(a)(1)-(3) (mushrooms are "valuable part of the human diet," and their production "benefits the environment"). And compelled payment may be needed to produce those benefits where, otherwise, some producers would take a free ride on the expenditures of others. See Hearings 95-96 (statement of James Ciarrocchi) ("The . . . industry has embarked on several voluntary promotion campaigns over the years. . . . [A] lesson from every one . . . has been unreliability, inefficiency, and inequities of voluntary participation").

Compared with traditional "command and control," price, or output regulation,

this kind of regulation–which relies upon self-regulation through industry trade associations and upon the dissemination of information–is more consistent, not less consistent, with producer choice. It is difficult to see why a Constitution that seeks to protect individual freedom would consider the absence of "heavy regulation," *ante*, at 2339, to amount to a special, determinative reason for refusing to permit this less intrusive program. If the Court classifies the former, more comprehensive regulatory scheme as "economic regulation" for First Amendment purposes, it should similarly classify the latter, which does not differ significantly but for the comparatively greater degree of freedom that it allows.

The Court invokes in support of its conclusion other First Amendment precedent, namely, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), and *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). But those cases are very different. The first two, *Abood and Keller*, involved compelled contributions by employees to trade unions and by lawyers to state bar associations, respectively. This Court held that the compelled contributions were unlawful (1) to the extent that they helped fund subsidiary activities of the organization, i.e., activities *other than* those that legally justified a compelled contribution; and (2) because the subsidiary activities in question were political activities that might "conflict with one's 'freedom of belief.'" *Wileman, supra*, at 471, 117 S.Ct. 2130 (quoting *Abood*, *supra*, at 235, 97 S.Ct. 1782). *See Keller*, *supra*, at 15, 110 S.Ct. 2228 (communications involving abortion, prayer in the public schools, and gun control); *Abood, supra*, at 213, 97 S.Ct. 1782 (communications involving politics and religion).

By contrast, the funded activities here, like identical activities in *Wileman*, do *not* involve this kind of expression. In *Wileman* we described the messages at issue as incapable of "engender[ing] any crisis of conscience" and the producers' objections as "trivial." 521 U.S., at 471, 472, 117 S.Ct. 2130. The messages here are indistinguishable. Compare Brief for Respondent 10-11 (objecting to advertising because it treats branded and unbranded mushrooms alike, associates mushrooms "with the consumption of alcohol and . . . tout[s] mushrooms as an aphrodisiac"), with *Wileman, supra*, at 467, n. 10, 117 S.Ct. 2130 (dismissing objections to advertising that suggested "'all varieties of California fruit to be of equal quality,'" and included "'sexually subliminal messages as evidenced by an ad depicting a young girl in a wet bathing suit'") (quoting District Court opinion). See also Appendix, *infra*. The compelled contribution here relates directly to the regulatory program's basic goal.

Neither does this case resemble either *Barnette* or *Wooley*. *Barnette* involved compelling children, contrary to their conscience, to salute the American flag. 319

U.S., at 632, 63 S.Ct. 1178. *Wooley* involved compelling motorists, contrary to their conscience, to display license plates bearing the State's message "Live Free or Die." 430 U.S., at 707, 97 S.Ct. 1428. In *Wileman* we found *Barnette* and *Wooley*, and *all* of "our compelled speech case law . . . clearly inapplicable" to compelled financial support of generic advertising. 521 U.S., at 470, 117 S.Ct. 2130. *See* also *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (refusing to apply *Wooley* and *Barnette* in a commercial context where "the interests at stake in this case are not of the same order"). We explained:

> "The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, *cf. West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), require them to use their own property to convey an antagonistic ideological message, *cf. Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 18, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion), force them to respond to a hostile message when they 'would prefer to remain silent,' *see ibid.*, or require them to be publicly identified or associated with another's message, *cf. Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 88, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). Respondents are . . . merely required to make contributions for advertising." *Wileman, supra*, at 470-471, 117 S.Ct. 2130.

These statements are no less applicable to the present case. How can the Court today base its holding on *Barnette*, *Wooley*, *Abood*, and *Keller*–the very same cases that we expressly distinguished in *Wileman*?

II

Nearly every human action that the law affects, and virtually all governmental activity, involves speech. For First Amendment purposes this Court has distinguished among contexts in which speech activity might arise, applying special speech-protective rules and presumptions in some of those areas, but not in others. *See*, *e.g.*, *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) (indicating that less restrictive rules apply to governmental speech); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (commercial speech subject to "mid-level" scrutiny); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20

L.Ed.2d 811 (1968) (applying special rules applicable to speech of government employees). Were the Court not to do so–were it to apply the strictest level of scrutiny in every area of speech touched by law–it would, at a minimum, create through its First Amendment analysis a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect. *Cf.* Post, The Constitutional Status of Commercial Speech, 48 UCLA L.Rev. 1, 9-10 (2000).

That, I believe, is why it is important to understand that the regulatory program before us is a "species of economic regulation," *Wileman*, 521 U.S., at 477, 117 S.Ct. 2130, which does not "warrant special First Amendment scrutiny," *id.*, at 474, 117 S.Ct. 2130. Irrespective of *Wileman* I would so characterize the program for three reasons.

First, the program does not significantly interfere with protected speech interests. It does not compel speech itself; it compels the payment of money. Money and speech are not identical. *Cf. Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 388-389, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000); *id.*, at 398, 120 S.Ct. 897 (STEVENS, J., concurring) ("Money is property; it is not speech"); *id.*, at 400, 120 S.Ct. 897 (BREYER, J., concurring) ("[A] decision to contribute money to a campaign is a matter of First Amendment concern–not because money is speech (it is not); but because it *enables* speech"). Indeed, the contested requirement–that individual producers make a payment to help achieve a governmental objective–resembles a targeted tax. *See Southworth*, 529 U.S., at 241, 120 S.Ct. 1346 (SOUTER, J., joined by STEVENS and BREYER, JJ., concurring in judgment) ("[T]he university fee at issue is a tax"). And the "government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties." *Id.*, at 229, 120 S.Ct. 1346 (majority opinion). *Cf. Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes").

Second, this program furthers, rather than hinders, the basic First Amendment "commercial speech" objective. The speech at issue amounts to ordinary product promotion within the commercial marketplace–an arena typically characterized both by the need for a degree of public supervision and the absence of a special democratic need to protect the channels of public debate, *i.e.*, the communicative process itself. *Cf. Post*, *supra*, at 2349-2350. No one here claims that the mushroom producers are restrained from contributing to a public debate, moving public opinion, writing literature, creating art, invoking the processes of democratic self-government, or doing anything else more central to the First Amendment's concern with democratic self-government.

When purely commercial speech is at issue, the Court has described the First Amendment's basic objective as protection of the consumer's interest in the free flow of truthful commercial information. *See*, *e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 766, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) ("First Amendment coverage of commercial speech is designed to safeguard" society's "interes[t] in broad access to complete and accurate commercial information"); *Zauderer*, 471 U.S., at 651, 105 S.Ct. 2265 ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information"); *Central Hudson*, 447 U.S., at 563, 100 S.Ct. 2343 ("The First Amendment's concern for commercial speech is based on the informational function of advertising"); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information'") (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)). Unlike many of the commercial speech restrictions this Court has previously addressed, the program before us promotes the dissemination of truthful information to consumers. And to sustain the objecting producer's constitutional claim will likely make less information, not more information, available. Perhaps that is why this Court has not previously applied "compelled speech" doctrine to strike down laws requiring provision of additional commercial speech.

Third, there is no special risk of other forms of speech-related harm. As I have previously pointed out, and *Wileman* held, there is no risk of significant harm to an individual's conscience. *Supra*, at 2344-2345. The program does not censor producer views unrelated to its basic regulatory justification. *Supra*, at 2343. And there is little risk of harming any "discrete, little noticed grou[p]." *Ante*, at 2344. The Act excludes small producers, 7 U.S.C. §§ 6102(6), (11) (exempting those who import or produce less than 500,000 pounds of mushrooms annually)–unlike respondent, a large, influential corporation. The Act contains methods for implementing its requirements democratically. See §§ 6104(b)(1)(B), (g)(2) (Mushroom Council, which sets assessment rate, is composed entirely of industry representatives); §§ 6105(a), (b) (referendum required before Secretary of Agriculture's order can go into effect and five years thereafter, and producers may request additional referenda). And the Act provides for supervision by the Secretary. § 6104(d)(3) (requiring Secretary to approve all advertising programs). *See* also *Wileman*, 521 U.S., at 477, 117 S.Ct. 2130 (refusing to upset "the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that [collective advertising] programs are beneficial"). These safeguards protect against abuse of the program, such as "making one entrepreneur

finance advertising for the benefit of his competitors." *Ante*, at 2342 (STEVENS, J., concurring). Indeed, there is no indication here that the generic advertising promotes some brands but not others. And any "debat[e]" about branded versus nonbranded mushrooms, *ante*, at 2339 (majority opinion), is identical to that in *Wileman*. *Supra*, at 2344-2345.

Taken together, these circumstances lead me to classify this common example of government intervention in the marketplace as involving a form of economic regulation, not "commercial speech," for purposes of applying First Amendment presumptions. And seen as such, I cannot find the program lacks sufficient justification to survive constitutional scrutiny. *Wileman, supra*, at 476-477, 117 S.Ct. 2130.

The Court, in applying stricter First Amendment standards and finding them violated, sets an unfortunate precedent. That precedent suggests, perhaps requires, striking down any similar program that, for example, would require tobacco companies to contribute to an industry fund for advertising the harms of smoking or would use a portion of museum entry charges for a citywide campaign to promote the value of art. Moreover, because of its uncertainty as to how much governmental involvement will produce a form of immunity under the "government speech" doctrine, *see ante*, at 2341, the Court infects more traditional regulatory requirements–those related, say, to warranties or to health or safety information–with constitutional doubt.

Alternatively, the Court's unreasoned distinction between heavily regulated and less heavily regulated speakers could lead to less First Amendment protection in that it would deprive the former of protection. *But see Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 534, n. 1, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (Even "heavily regulated businesses may enjoy constitutional protection") (citing, as an example, *Virginia Bd. of Pharmacy, supra*, at 763-765, 96 S.Ct. 1817).

At a minimum, the holding here, when contrasted with that in *Wileman*, creates an incentive to increase the Government's involvement in any information-based regulatory program, thereby unnecessarily increasing the degree of that program's restrictiveness. I do not believe the First Amendment seeks to limit the Government's economic regulatory choices in this way–any more than does the Due Process Clause. *Cf. Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

III

Even if I were to classify the speech at issue here as "commercial speech" and apply the somewhat more stringent standard set forth in the Court's commercial

speech cases, I would reach the same result. That standard permits restrictions where they "directly advance" a "substantial" government interest that could not "be served as well by a more limited restriction." *Central Hudson*, 447 U.S., at 564, 100 S.Ct. 2343. I have already explained why I believe the Government interest here is substantial, at least when compared with many typical regulatory goals. *Supra*, at 2345. It remains to consider whether the restrictions are needed to advance its objective.

Several features of the program indicate that its speech-related aspects, *i.e.*, its compelled monetary contributions, are necessary and proportionate to the legitimate promotional goals that it seeks. At the legislative hearings that led to enactment of the Act, industry representatives made clear that pre-existing efforts that relied upon voluntary contributions had not worked. Thus, compelled contributions may be necessary to maintain a collective advertising program in that rational producers would otherwise take a free ride on the expenditures of others. *See supra*, at 2345; *Abood*, 431 U.S., at 222, 97 S.Ct. 1782 (relying upon "free rider" justification in union context).

At the same time, those features of the program that led *Wileman's* dissenters to find its program disproportionately restrictive are absent here. *Wileman's* statutory scheme covered various different agricultural commodities and imposed a patchwork of geographically based limitations while "prohibit[ing] orders of national scope"–all for no apparent reason. 521 U.S., at 499, 117 S.Ct. 2130 (SOUTER, J., dissenting). The law at issue here, however, applies only to mushrooms, and says explicitly that "[a]ny" mushroom order "shall be national in scope." 7 U.S.C. § 6103(a). *Cf. Wileman, supra*, at 493, 117 S.Ct. 2130 (SOUTER, J., dissenting) ("[I]f the Government were to attack these problems across an interstate market for a given agricultural commodity or group of them, the substantiality of the national interest would not be open to apparent question . . .").

Nor has the Government relied upon "[m]ere speculation" about the effect of the advertising. *Wileman, supra*, at 501, 117 S.Ct. 2130 (SOUTER, J., dissenting). Rather, it has provided empirical evidence demonstrating the program's effect. See Food Marketing & Economics Group, Mushroom Council Program Effectiveness Review, 1999, p. 6 (Feb. 2000), lodging for United States (available in Clerk of Court's case file) (finding that "for every million dollars spent by the Mushroom Council . . . the growth rate [of mushroom sales] increases by 2.1%"). In consequence, whatever harm the program may cause First Amendment interests is proportionate. *Cf. Bartnicki v. Vopper*, 532 U.S. ____, 121 S.Ct. 1753, ____ L.Ed.2d ____ (2001) (BREYER, J., concurring).

The Court's decision converts "a question of economic policy for Congress and the Executive" into a "First Amendment issue," contrary to *Wileman*. 521 U.S., at 468, 117 S.Ct. 2130 (internal quotation marks and citation omitted). Nor can its holding find support in basic First Amendment principles.

For these reasons, I dissent.

[Appendix to Opinion of BREYER, J., not included-Editor].

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INSPECTION AND GRADING

DEPARTMENTAL DECISION

In re: AMERICAN RAISIN PACKERS, INC., A CALIFORNIA CORPORATION.
I & G Docket No. 99-0001.
Decision and Order filed May 1, 2001.

Raisin inspection – Withdrawal of inspection services – Willful – Warning letter – Eighth Amendment – Excessive fines clause – Sanction policy – Sanction testimony.

The Judicial Officer affirmed the Initial Decision and Order of Chief Administrative Law Judge James W. Hunt (Chief ALJ) ordering Respondent debarred for 1 year from receiving inspection services under the Agricultural Marketing Act of 1946 (Act) and the Regulations issued pursuant to the Act (7 C.F.R. pt. 52). The Judicial Officer rejected Respondent's arguments (1) that debarment was erroneously ordered because the required willfulness was not shown under the controlling Regulation (7 C.F.R. § 52.54); (2) that a warning letter was erroneously admitted and considered by the Chief ALJ; and (3) that debarment would end Respondent's business, which is an excessive penalty, in violation of the Eighth Amendment to the Constitution of the United States. The Judicial Officer held that willfulness is not required under 7 C.F.R. § 52.54(a)(1)(ii); that warning letters are routinely admitted into evidence and considered in fashioning sanctions; and that a 1-year debarment is not an excessive fine under the Eight Amendment to the Constitution of the United States. Complainant raised three arguments on appeal: (1) that Respondent should not be allowed to consider a debarment from government contracting to be part of the sanction in the proceeding; (2) that the Chief ALJ erroneously did not find willfulness; and (3) that the evidence should result in a 4-year debarment. The Judicial Officer rejected these arguments because the Chief ALJ did not confuse government contracting debarment with the sanction in the proceeding, willfulness was correctly not found, and the Chief ALJ's 1-year debarment sanction is appropriate.

Sharlene Deskins, for Complainant.
Brian C. Leighton, Clovis, California, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this debarment proceeding by filing a Complaint on December 3, 1998. Complainant instituted the proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632 (1994)) [hereinafter the Agricultural Marketing Act]; the regulations and standards issued under the Agricultural Marketing Act (7 C.F.R. pt. 52) [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) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

Complainant alleges: (1) between approximately August 5, 1998, and August 11, 1998, American Raisin Packers, Inc. [hereinafter Respondent], caused the issuance of false inspection certificates with respect to raisins purchased by the United States Department of Agriculture from Respondent by misrepresenting Golden seedless raisins as natural Thompson seedless raisins and shipping the Golden seedless raisins as U.S. Grade B natural Thompson seedless raisins, in willful violation of section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h) (1994)) and section 52.54(a)(2) of the Regulations and Standards (7 C.F.R. § 52.54(a)(2)); (2) between approximately August 5, 1998, and August 11, 1998, Respondent packed and shipped Golden seedless raisins and represented that the Golden seedless raisins had been inspected and graded as U.S. Grade B natural Thompson seedless raisins, when in fact the Golden seedless raisins had not been so graded and inspected, in willful violation of section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h) (1994)) and section 52.54(a)(2) of the Regulations and Standards (7 C.F.R. § 52.54(a)(2)); (3) between approximately August 5, 1998, and August 11, 1998, Respondent engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the application or filing for an application for inspection and grading services and the submission of samples for inspection and grading, in violation of section 52.54 of the Regulations and Standards (7 C.F.R. § 52.54); and (4) Respondent's acts and practices, as alleged in paragraphs 5, 6, and 7 of the Complaint, constitute sufficient cause for debarment of Respondent from the benefits of the Agricultural Marketing Act, including inspection and grading services, in accordance with section 52.54 of the Regulations and Standards (7 C.F.R. § 52.54) (Compl. ¶¶ 5-8).

On December 23, 1998, Respondent filed an Answer to Complaint, in which Respondent denies the material allegations of the Complaint and proffers six affirmative defenses.

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided over a hearing in Fresno, California, on May 24, 2000. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Brian C. Leighton, Brian C. Leighton Law Offices, Clovis, California, represented Respondent. On September 8, 2000, Complainant filed Complainant's Findings of Fact, Conclusions of Law and Brief in Support Thereof [hereinafter Complainant's Brief]. On October 12, 2000, Respondent filed Respondent's Findings of Fact, Conclusions of Law and Brief in Support Thereof [hereinafter Respondent's Brief]. On October 25, 2000, Complainant filed

Complainant's Reply to the Respondent's Brief [hereinafter Complainant's Reply Brief].

On November 21, 2000,[1] the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that Respondent's failure to provide 100 percent Thompson seedless raisins[2] to the United States Department of Agriculture for sampling, as required by USDA Invitation No. 21, constitutes a misrepresentation and a violation of 7 C.F.R. § 52.54; and (2) ordering Respondent debarred for 1 year from receiving agricultural marketing inspection services (Initial Decision and Order at 12).

On January 5, 2001, Respondent filed Respondent's Appeal Petition from the Decision and Order of the Administrative Law Judge [hereinafter Respondent's Appeal Petition]. On February 2, 2001, Complainant filed: Complainant's Opposition to the Respondent's Appeal Petition and Request of Extension of Time to File a Brief in Opposition; Complainant's Appeal Petition; and Complainant's Brief in Support of Its Appeal Petition [hereinafter Complainant's Appeal Brief]. On February 5, 2001, Complainant filed Notice of Filing of Attachment. On February 12, 2001, Complainant filed Complainant's Brief in Support of Its Opposition to the Respondent's Appeal Petition [hereinafter Complainant's Reply to Respondent's Appeal Petition]. On March 5, 2001, Respondent filed Respondent's Response to Complainant's Appeal Petition and Reply to Complainant's Opposition to the Respondent's Appeal Petition [hereinafter Respondent's Reply to Complainant's Appeal Brief]. On March 6, 2001, the Hearing Clerk transmitted the record of the 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. Therefore, pursuant to section 1.145(i) of the Rules of

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[1]The Hearing Clerk's time and date stamp indicates that the Chief ALJ filed the Initial Decision and Order on November 21, 2001. Based on the record, I infer the Hearing Clerk erroneously indicated the Chief ALJ filed the Initial Decision and Order on November 21, 2001, and the correct date on which the Chief ALJ filed the Initial Decision and Order is November 21, 2000.

[2]The Chief ALJ stated in the Initial Decision and Order that "Respondent's failure to provide one percent Thompson seedless raisins to USDA for sampling as required by Invitation No. 21 constitutes a misrepresentation and a violation of 7 C.F.R. § 52.54" (Initial Decision and Order at 12). Based on my review of the entire Initial Decision and Order, I infer the Chief ALJ's conclusion that Respondent failed to provide "one percent" Thompson seedless raisins to the United States Department of Agriculture is a typographical error and the Chief ALJ concluded that Respondent's failure to provide 100 percent Thompson seedless raisins to the United States Department of Agriculture for sampling, as required by USDA Invitation No. 21, constitutes a misrepresentation and a violation of section 52.54 of the Regulations and Standards (7 C.F.R. § 52.54).

Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order with minor modifications. Additional conclusions by the Judicial Officer follow the Chief ALJ's Initial Decision and Order, as restated.

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

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7–AGRICULTURE

. . . .

CHAPTER 38–DISTRIBUTION AND MARKETING OF AGRICULTURAL PRODUCTS

. . . .

§ 1622. Duties of Secretary relating to agricultural products

The Secretary of Agriculture is directed and authorized:

. . . .

(h) Inspection and certification of products in interstate commerce; credit and future availability of funds; investment; certificates as evidence; penalties

To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe[.]

7 U.S.C. § 1622(h) (1994).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B–REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I–AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER C–REGULATIONS AND STANDARDS UNDER THE AGRICULTURAL MARKETING ACT OF 1946

. . . .

PART 52–PROCESSED FRUITS AND VEGETABLES, PROCESSED PRODUCTS THEREOF, AND CERTAIN OTHER PROCESSED FOOD PRODUCTS

SUBPART–REGULATIONS GOVERNING INSPECTION AND CERTIFICATION

. . . .

MISCELLANEOUS

. . . .

§ 52.54 Debarment of service.

(a) The following acts or practices, or the causing thereof, may be deemed sufficient cause for the debarment, by the Administrator, of any person, including any agents, officers, subsidiaries, or affiliates of such person, from any or all benefits of the Act for a specified period. The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130 through 1.151 of this title and the Supplemental Rules of Practice in part 50 of this chapter shall be applicable to such debarment action.

(1) *Fraud or misrepresentation.* Any misrepresentation or deceptive or fraudulent practice or act found to be made or committed in connection with:

(i) The making or filing of an application for any inspection service;

(ii) The submission of samples for inspection;

(iii) The use of any inspection report or any inspection certificate, or appeal inspection certificate issued under the regulations in this part;

(iv) The use of the words "Packed under continuous inspection of the U.S. Department of Agriculture," any legend signifying that the product has been officially inspected, any statement of grade or words of similar import in the labeling or advertising of any processed product;

(v) The use of a facsimile form which simulates in whole or in part any official U.S. certificate for the purpose of purporting to evidence the U.S. grade of any processed product.

(2) *Wilful violation of the regulations in this subpart.* Wilful violation of the provisions of this part of the Act.

(3) *Interfering with an inspector, inspector's aid, or licensed sampler.* Any interference with, obstruction of, or attempted interference with, or attempted obstruction of any inspector, inspector's aide, or licensed sampler in the performance of his duties by intimidation, threat, assault, bribery, or any other means–real or imagined.

. . . .

SUBPART–UNITED STATES STANDARDS FOR GRADES OF PROCESSED RAISINS

. . . .

§ 52.1843 Summary of types (varieties) of processed raisins.

(a) Type I–Seedless Raisins.
(1) Natural.
(2) Dipped, Vine-dried, or similarly processed raisins.
(b) Type II–Golden Seedless Raisins.
(c) Type III–Raisins with Seeds.
(1) Natural.
(i) Seeded (seeds removed).
(ii) Unseeded-capstemmed (loose).
(iii) Unseeded-uncapstemmed (loose).
(iv) Layer (or Cluster).
(2) Dipped, Vine-dried, or other similarly processed raisins.
(i) Seeded (seeds removed).
(ii) Unseeded-capstemmed (loose).
(iii) Unseeded-uncapstemmed (loose).
(d) Type IV–Sultana Raisins.
(e) Type V–Zante Currant Raisins.
(i) Unseeded.

(ii) Seeded.

(f) Type VI–Mixed Types or Varieties of Raisins. A mixture of two or more different types (varieties) of raisins including sub-types outlined in this section but other than: (1) Mixtures containing Layer or Cluster Raisins with seeds; (2) Mixtures containing Unseeded-capstemmed and Unseeded-uncapstemmed Raisins with Seeds; and (3) mixture of Seeded and Unseeded Raisins with Seeds.

. . . .

TYPE I–SEEDLESS RAISINS

. . . .

§ 52.1846 Grades of seedless raisins.

. . . .

(b) "U.S. Grade B" is the quality of seedless raisins that have similar varietal characteristics; that have a reasonably good typical color; that have a good characteristic flavor; that show development characteristics of raisins prepared from reasonably well-matured grapes with not less than 70 percent, by weight, of raisins that are well-matured or reasonably well-matured; that contain not more than 18 percent, by weight, of moisture for all varieties of seedless raisins except the Monukka variety, which may contain not more than 19 percent, by weight, of moisture; and that meet the additional requirements outlined in Table I of this subpart.

. . . .

TYPE II–GOLDEN SEEDLESS RAISINS

. . . .

§ 52.1849 Grades of golden seedless raisins.

Except for color, the grades of Golden Seedless Raisins are the same as for Seedless Raisins (See § 52.1846 and Table I).

INITIAL DECISION AND ORDER (AS RESTATED)

Issue

Complainant alleges the following in Complainant's Reply Brief as the issue to be decided:

> The complaint charges the Respondent with violating Section 52.54 (7 C.F.R. § 52.54) of the regulations by engaging in misrepresentation, deception or fraudulent practices in connection with application for inspection services. Specifically, the Respondent added golden raisins that had been darkened to Natural Thompson Seedless (NTS) raisins that was [sic] pack [sic] for the school lunch program. The darkened golden raisins contained sulphur. The inspection standards for NTS do not provide for any sulphur to be included with NTS raisins. Thus, the Respondent by including darkened Golden raisins with NTS raisins violated Section 52.54.

Complainant's Reply Brief at 1.

Statement of the Case

Respondent, a California corporation, doing business as a producer, packer, and seller of processed raisins, is located at 2335 Chandler, Selma, California 93662 (Compl. ¶ 1; Answer to Compl. ¶ 1). Respondent sold raisins to the United States Department of Agriculture pursuant to USDA Invitation No. 21, issued on June 3, 1998, soliciting bids for "Processed Raisins U.S. Grade B (Thompson Seedless)" for domestic feeding programs (CX 2 at 1).

USDA Invitation No. 21 contained no specifications for Thompson seedless raisins except to state that they had to have been grown, packed, and processed in the United States pursuant to Announcement FV-107 (CX 2 at 1). Announcement FV-107 stated the raisins had to be inspected by United States Department of Agriculture representatives (Announcement FV-107 XI.A.; CX 1 at 7), the raisins had to meet the Good Manufacturing Practice Regulations in 21 C.F.R. pt. 110 (Announcement FV-107 XI.C.; CX 1 at 7), and the raisins had to be U.S. Grade B as defined in the United States Standards for Grades of Processed Raisins (Announcement FV-107 XII.A.1.; CX 1 at 8, CX 2 at 1). Susan Proden, Chief of the Commodity Procurement Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, testified that the United States Department of Agriculture was contracting for 100 percent Thompson seedless raisins (Tr. 30).

The parties did not cite the specific sections of the Good Manufacturing Practice Regulations referred to in Announcement FV-107. As for the types of processed

raisins, section 52.1843 of the Regulations and Standards (7 C.F.R. § 52.1843) identifies types of processed seedless raisins including: (1) Type I–natural and dipped, vine-dried, or similarly processed and (2) Type II–Golden seedless raisins.

Section 52.1846 of the Regulations and Standards (7 C.F.R. § 52.1846) provides for four grades of seedless raisins: "U.S. Grade A," "U.S. Grade B," "U.S. Grade C," and "Substandard." U.S. Grade A seedless raisins must contain not less than 80 percent well-matured or reasonably well-matured raisins, whereas U.S. Grade B seedless raisins must contain not less than 70 percent well-matured or reasonably well-matured raisins. U.S. Grade B seedless raisins--both Type I seedless raisins and Type II Golden seedless raisins--are allowed to contain more defects than U.S. Grade A seedless raisins, such as capstems, pieces of stem, damage, discoloration, and mold. (7 C.F.R. §§ 52.1846, .1849.) Neither the Regulations and Standards nor Announcement FV-107 refer to sulfur additives to raisins.

Respondent's bid to the United States Department of Agriculture to supply Thompson seedless raisins was accepted (CX 3, CX 4). Respondent packed the raisins in 1-pound cartons, as required by the contract, over a 3-day period beginning on August 5, 1998 (CX 19, CX 20; Tr. 35-36). United States Department of Agriculture inspector Oscar Garcia randomly selected, throughout the processing, cartons of raisins from the conveyor belt after the cartons had been sealed. He opened the cartons to conduct a visual inspection of the raisins for compliance with the Regulations and Standards. (Tr. 36-37). Mr. Garcia testified that the month before he had seen darkened Golden seedless raisins on Respondent's premises (Tr. 38-39). He said he could tell the difference between a Thompson seedless raisin and a darkened Golden seedless raisin and that he did not see any Golden seedless raisins in the cartons he inspected (Tr. 44). Mr. Garcia said the raisins he inspected met the U.S. Grade B standard and he certified that he "inspected the product and that the product meets the requirements of Announcement FV-107, which is the USDA contract" (Tr. 37-38; CX 7 at 2, CX 18). Respondent shipped 2,484 cases of raisins weighing 119,232 pounds. Each case contained 48 1-pound cartons. (CX 19).

Thereafter, Complainant, responding to a report from the Raisin Administrative Committee that the Raisin Administrative Committee had been told by an unnamed "whistle blower" that the raisins shipped by Respondent contained Golden seedless raisins (CX 10; Tr. 91), conducted further inspections of the raisins (Tr. 92-93). A visual inspection by inspectors of randomly selected cartons revealed that some cartons contained from one to seven darkened Golden seedless raisins ("one or two typically" (Tr. 109)), but that a majority of the cartons that were examined did not contain Golden seedless raisins (Tr. 98-99, 108-09). Golden seedless raisins are Thompson seedless raisins that are made into Golden seedless raisins by the application of sulfur dioxide to give the Thompson seedless raisins a golden color

and impart a "bite" (Tr. 88, 94). Thompson seedless raisins can also be lightened by dipping them in hot water (Tr. 88-89). Golden seedless raisins can be redarkened by exposing them to sunlight (CX 9 at 2). They also darken with age (Tr. 178).

Golden seedless raisins contain up to 3,000 parts per million of sulfur (Tr. 106-07, 178). Thompson seedless raisins also contain some sulfur which results from the residue from the sulfur that is put on grapes during the growing season to control powdery mildew (Tr. 105-07, 223-24). The sulfur on Thompson seedless raisins can range from less than one part per million up to five parts per million (Tr. 107, 224, 239).

Complainant conducted tests for sulfur on three randomly selected groups of samples of the raisins (Tr. 81-86). The first group revealed that 20 sample units had no sulfur and that 30 sample units had from 10 to 100 parts per million of sulfur dioxide (CX 15a). The second group revealed that 34 sample units had no sulfur and that two sample units had from 30 to 40 parts per million of sulfur dioxide (CX 15b). The third group revealed that 34 sample units had no sulfur and that two sample units had from 40 to 90 parts per million of sulfur dioxide (CX 15c). Complainant conducted additional tests in September 1998 and January 1999 to ensure that the amounts of sulfur dioxide in the raisins were accurately measured (Tr. 124; CX 31 at 1-7).

Respondent also had tests conducted on three groups of the raisins. One group of raisins revealed eight parts per million of sulfur dioxide. The second group of raisins revealed no sulfur dioxide. The third group of raisins revealed 15 parts per million of sulfur dioxide. (RX 5)

Susan Proden, Chief of the Commodity Procurement Branch, testified that, according to her understanding of the Regulations and Standards, Thompson seedless raisins are not to have any additives, such as sulfur, because some people are allergic to sulfur and that she believed that the tolerance level for sulfur in raisins is under 10 percent (Tr. 11, 24). Erik Palko, an agricultural commodity grader and inspector, stated that Thompson seedless raisins were allowed up to 10 parts per million of sulfur, which he said he believed was a Food and Drug Administration requirement, but added that under the terms of Announcement FV-107 there was to be no sulfur in the raisins (Tr. 126-27).

James Hurley, a chemist with the Dried Food Association, testified that he believed the Food and Drug Administration required labeling for products containing more than 10 parts per million of sulfur (Tr. 177).

Mickey Martinez, Assistant Officer in Charge for the United States Department of Agriculture's Fresno office and a former raisin inspector, testified that there is a "zero" tolerance for sulfur in Thompson seedless raisins and that he had never

heard of a 10-parts-per-million tolerance (Tr. 100). However, United States Department of Agriculture Laboratory Sample Submittal Sheets containing the results of tests for sulfur conducted in January 1999 contain the notation "pass" for those samples containing less than 10 parts per million of sulfur and the notation "fail" for those samples exceeding 10 parts per million of sulfur (CX 31 at 3, 6, 7).

Eric M. Forman, Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture, testified that the sulfur in the raisins posed a risk to human health (Tr. 191). He did not refer to any authoritative source to substantiate this assertion. James Hurley, the chemist for the Dried Food Association, said that some people are allergic to sulfur and that is why the Food and Drug Administration requires that products that contain in excess of 10 parts per million of sulfur be labeled (Tr. 186).

Hubert Riedele, former vice president and general manager of the Dried Fruit Association, testified that he has had experience with inspection programs and sulfur testing in raisins (Tr. 214-15). He said that while some persons are allergic to sulfur and the Food and Drug Administration requires that products that contain over 10 parts per million of sulfur be labeled, the Food and Drug Administration does not have a maximum limit for sulfur dioxide in a product because it considers sulfur dioxide to be safe (Tr. 221, 227).

[BY MS. DESKINS:]

Q. Okay. Let's get back to my question, sir. If I have an allergy to sulfur and I open up one of those boxes and I eat a couple of those darkened golden raisins, what affect [sic] would that have on me?

[BY MR. RIEDELE:]

A. Probably very little.

Q. Even if I have an allergy to it?

A. You can eat the whole box and you wouldn't have that much.

Q. Okay. And you have knowledge, you're familiar with the reactions that people with allergies to sulfur have?

A. I have a lot of experience with sulfur dioxide with air pollution people, people that have been exposed to sulfur dioxide working in plants and everything else, and I frankly don't see how anybody could eat a

product with one or two parts per million of sulphur dioxide and have a reaction, unless you're extremely allergic to it.

Q. Okay. So, the FDA labeling requirements are nonsense in your opinion?

A. No, it doesn't mean nonsense.

Q. You just--

A. They set the ten parts per million because that was generally safe for people with asthmatic conditions.

Q. Okay. But you just said that, you know, you've never seen any problems with that, even with people that have sulfur allergies?

A. Well, I've never seen any problem with you or anybody else that had problems.

Q. Okay. So, you really can't say what affect [sic] it would have on someone that has a sulfur allergy?

A. No, I don't think anybody else could because there hasn't been any scientific data and testing done on that, except the FDA does say that anything under ten parts per million is not going to be -- doesn't have to be labeled for asthmatic people, or people that are allergic to SO2. Now, that's the law.

Tr. 227-28.

The Food and Drug Administration's regulations at 21 C.F.R. § 182.3862 provide that sulfur dioxide is generally recognized as safe.[3] Despite the testimony

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[3] **§ 182.3862 Sulfur dioxide.**

(a) *Product*. Sulfur dioxide.
(b) [Reserved]
(c) *Limitations, restrictions, or explanation*. This substance is generally recognized as safe when used in accordance with good manufacturing practice, except that it is not used in

(continued...)

of Eric Forman that sulfur is a risk to human health (Tr. 191), another United States Department of Agriculture official reported that he was aware that the Food and Drug Administration considered sulfur dioxide to be generally recognized as safe (CX 14).

Terry W. Kaiser, a compliance officer employed by the Agricultural Marketing Service, United States Department of Agriculture, testified that in September 1998, Respondent's reports to the Raisin Administrative Committee indicated that Respondent had approximately 30,000 pounds of Golden seedless raisins in reserve for which Respondent could not accurately account (Tr. 162-63).

Greg Paboojian, Respondent's general manager, offered several reasons to account for these raisins: the reports sent to the Raisin Administrative Committee were based only on an average of the estimated amount of raisins in bins (Tr. 257-58), raisins are lost due to shrinkage (Tr. 255), and the reports did not take into account the darkened raisins that Respondent sold for bird food (Tr. 245). Raisins sold for non-human consumption, such as bird feed, do not have to be inspected for compliance with the Regulations and Standards (Tr. 51). Greg Paboojian said he did not know how the Golden seedless raisins got mixed with the Thompson seedless raisins, but that this might have occurred inadvertently because darkened Golden seedless raisins were stored in bins in the same room with bins of Thompson "tailings." (Tr. 249-50). He said that during the processing, when raisins are vacuumed and screened, some good raisins accumulate with stems and bad raisins (Tr. 268). These "tailings" are then rerun through the process to salvage the good raisins which are then blended with the raisins being packed (Tr. 269). Greg Paboojian said that because the tailings were in the same room with Golden seedless raisins a forklift operator moving the bins may not have known the difference between Thompson seedless raisins and darkened Golden seedless raisins (Tr. 249-50, 268-70).

Another reason offered for the Golden seedless raisins being mixed with the Thompson seedless raisins was presented by Hubert Riedele, who testified that he had had experience in the past where Golden seedless raisins were mixed with other raisins because machinery was not properly cleaned after Golden seedless raisins were processed (Tr. 235-36).

Eric Forman, however, stated that the mixing of Golden seedless raisins with Thompson seedless raisins was willful and fraudulent because Respondent had an economic motive to mix the raisins and that Respondent caused the United States

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[3](...continued)
meats; in food recognized as a source of vitamin B_1; on fruits or vegetables intended to be served raw to consumers or sold raw to consumers, or to be presented to consumers as fresh.

Department of Agriculture inspector to issue a false inspection certificate by misleading the inspector with the type of raisins presented for inspection (Tr. 190-92, 200). However, a United States Department of Agriculture report in September 1998 stated "there would normally be no reason for raisin handlers to commingle Golden raisins with Natural Thompson Seedless raisins, as Golden raisins of good quality are worth much more than Natural Thompson Seedless." (CX 8).

Discussion

Complainant contends that because USDA Invitation No. 21 called only for Thompson seedless raisins, Respondent engaged in fraud, misrepresentation, and deceptive practices by including sulfur and Golden seedless raisins with the Thompson seedless raisins it provided to the United States Department of Agriculture for inspection. Complainant contends that this fraudulent practice is shown by Respondent's actions in darkening the Golden seedless raisins, placing the Golden seedless raisins where they could be blended with the Thompson seedless raisins for the purpose of making it difficult for Respondent's employees to distinguish Golden seedless raisins from Thompson seedless raisins, failing to fully account for the disposition of 30,000 pounds of Golden seedless raisins, engaging in the practice of mixing poor quality raisins with better quality raisins, deceiving purchasers of raisins for bird feed by darkening Golden seedless raisins to have them resemble Thompson seedless raisins, and failing to provide measures to prevent Golden seedless raisins from being mixed with Thompson seedless raisins. (Complainant's Brief at 5-9.) Complainant also contends Respondent could have blended Golden seedless raisins with Thompson seedless raisins when the United States Department of Agriculture inspector was not taking samples (Complainant's Brief at 9).

Complainant's arguments are speculative. There is a lack of substantial evidence showing that Respondent engaged in a deceptive or fraudulent practice or act. Further, the evidence does not support Complainant's contentions that sulfur is a risk to human health and that the Regulations and Standards and Announcement FV-107 do not allow any sulfur in raisins. Rather, the record shows that sulfur is generally recognized as safe and Thompson seedless raisins may have up to five parts per million of sulfur.

Nevertheless, the amount of sulfur present in the raisins is relevant. The record shows that Thompson seedless raisins could account for up to five parts per million of sulfur. The record also shows, at least in this case, that only Golden seedless raisins could account for the raisins having more than five parts per million of

sulfur. Thus, it can be assumed that the test samples showing more than five parts per million of sulfur was due to the presence of Golden seedless raisins.

USDA Invitation No. 21 called only for Thompson seedless raisins. However, Golden seedless raisins, a different variety according to the Regulations and Standards, were present with the Thompson seedless raisins. Respondent's failure to provide 100 percent Thompson seedless raisins is a failure to comply with USDA Invitation No. 21 and Announcement FV-107. Respondent's inclusion of any amount of Golden seedless raisins with the Thompson seedless raisins, for whatever reason, is a misrepresentation of the variety of raisins Respondent had agreed to supply. Accordingly, regardless of the relatively small number of Golden seedless raisins, Respondent violated section 52.54(a)(1)(ii) of the Regulations and Standards (7 C.F.R. § 52.54(a)(1)(ii)).

While Respondent's violation was not of the gravity that Complainant alleges, Complainant also cited a prior instance where Respondent was warned about an alleged failure to comply with the Regulations and Standards (CX 5). Considering all the circumstances, I find a 1-year debarment of Respondent from inspection services is appropriate.

Findings of Fact

1. Respondent is a California corporation, doing business as a producer, packer, and seller of processed raisins. It is located at 2335 Chandler, Selma, California 93662.

2. On June 3, 1998, the United States Department of Agriculture issued USDA Invitation No. 21, soliciting bids for "Processed Raisins U.S. Grade B (Thompson Seedless)" for domestic feeding programs. USDA Invitation No. 21 incorporated by reference Announcement FV-107. Announcement FV-107 provided that sellers of raisins to the United States Department of Agriculture had to comply with the United States Standards for Grades of Processed Raisins (7 C.F.R. §§ 1841-1858).

3. The Regulations and Standards provide that Thompson seedless raisins are a different type or variety than Golden seedless raisins.

4. USDA Invitation No. 21 required that sellers provide 100 percent Thompson seedless raisins to the United States Department of Agriculture.

5. Respondent made a bid to sell Thompson seedless raisins to the United States Department of Agriculture pursuant to USDA Invitation No. 21 and Announcement FV-107. The United States Department of Agriculture accepted the bid. Respondent provided 2,484 cases of raisins weighing 119,232 pounds to the United States Department of Agriculture pursuant to USDA Invitation No. 21.

6. The raisins provided by Respondent for sampling contained Golden seedless raisins.

7. Respondent did not provide 100 percent Thompson seedless raisins to the United States Department of Agriculture as required by USDA Invitation No. 21.

Conclusion of Law

Respondent's failure to provide 100 percent Thompson seedless raisins to the United States Department of Agriculture for sampling, as required by USDA Invitation No. 21, constitutes a misrepresentation and a violation of 7 C.F.R. § 52.54(a)(1)(ii).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Both Respondent and Complainant appeal the Chief ALJ's Initial Decision and Order, but their appeal petitions contain no real disagreement with the Chief ALJ's explication of the facts. Rather, the parties characterize, explain, and argue the facts to support their respective views of how the Chief ALJ's Initial Decision and Order should be changed to suit their respective viewpoints, and what the sanction should be.

Respondent's Appeal

Respondent makes three major arguments on appeal. First, Respondent argues the Chief ALJ committed error by ordering debarment, because the Chief ALJ did not find willfulness, and section 52.54 of the Regulations and Standards (7 C.F.R. § 52.54) allows debarment only for intentional acts of fraud, misrepresentation, or deceptive practices (Respondent's Appeal Pet. at 2). Respondent is incorrect that the Regulations and Standards require willfulness as a basis before there can be a debarment.

An examination of 7 C.F.R. § 52.54 reveals three bases for debarment: (1) fraud or misrepresentation (7 C.F.R. § 52.54(a)(1)); (2) willful violation of 7 C.F.R. pt. 52 or the Agricultural Marketing Act (7 C.F.R. § 52.54(a)(2)); and (3) interfering with an inspector, inspector's aid, or licensed sampler (7 C.F.R. § 52.54(a)(3)). Although Respondent argues that "willful" applies in all three categories, the plain language displays "willful"only in 7 C.F.R. § 52.54(a)(2), which is quite clear that a *willful* violation of the Regulations and Standards or the Agricultural Marketing Act is cause for debarment. Neither the word "willful," nor any synonym of "willful,"is displayed in 7 C.F.R. § 52.54(a)(1) or in 7 C.F.R. § 52.54(a)(3).

These distinctions are important because the Complaint has two allegations based upon willfulness (Compl. ¶¶ 5, 6) and two allegations based not upon

willfulness, to wit, a violation of 7 C.F.R. § 52.54(a)(1)(i) and a violation of 7 C.F.R. § 52.54(a)(1)(ii) (Compl. ¶ 7). Moreover, the Chief ALJ found that the record supported only part of paragraph 7 of the Complaint, implicating only one part of one paragraph of 7 C.F.R. § 52.54, to wit, "misrepresentation" in 7 C.F.R. § 52.54(a)(1)(ii). That the Chief ALJ's analysis is correct is best shown by looking at 7 C.F.R. § 52.54 in reverse order from paragraph (a)(3), as follows.

Paragraph (a)(3) has no application in this proceeding because paragraph (a)(3) proscribes interference with a United States Department of Agriculture inspector, which offense neither has been alleged in the Complaint nor has been raised anywhere in the record.

Paragraph (a)(2), covering "willful violation," was alleged in paragraphs 5 and 6 of the Complaint, but, the Chief ALJ did not find that this record supported willfulness in any of Respondent's actions. I agree with the Chief ALJ on willfulness.

Paragraph (a)(1) has two discrete parts: "misrepresentation" and "deceptive or fraudulent practice or act." However, the Chief ALJ inadvertently inverted the wording of 7 C.F.R. § 52.54(a)(1) in a conflated sentence in the Initial Decision and Order, as follows: "There is a lack of substantial evidence showing that there was *a practice of fraudulent misrepresentation or deception*." (Initial Decision and Order at 9 (emphasis added).) In this Decision and Order, I modify the above italicized wording to read *a deceptive or fraudulent practice or act,* which brings the Chief ALJ's Initial Decision and Order, as restated, into conformity with 7 C.F.R. § 52.54(a)(1). Also, I find the Chief ALJ's conflation insignificant, and not even approaching reversible error. Section 52.54(a)(1) of the Regulations and Standards is clearly written in the disjunctive: "[a]ny misrepresentation **or** deceptive or fraudulent practice or act" (7 C.F.R. § 52.54(a)(1) (emphasis added)). I find that this case hinges on only the first part, "misrepresentation," and the second part, "deceptive or fraudulent practice or act," is irrelevant to my decision.

Nevertheless, Respondent points to the conflation and argues that the Chief ALJ found "a lack of substantial evidence showing intentional, willful or fraudulent behavior by the Respondent" (Respondent's Appeal Pet. at 2). Respondent's willfulness argument is correct, as far as Respondent's argument goes, but Respondent's willfulness argument misses the point. The violation for which the Chief ALJ debarred Respondent is neither dependent on willfulness nor based in a "deceptive or fraudulent practice or act." Rather, the Chief ALJ found a misrepresentation in connection with Respondent's submission of samples for inspection in violation of 7 C.F.R. § 52.54(a)(1)(ii) as alleged in one part of paragraph 7 of the Complaint. I agree with the Chief ALJ that Respondent's violation is misrepresenting samples for inspection.

Complainant correctly argues that Respondent may be debarred not only for

willful violations, but also for non-willful misrepresentation under 7 C.F.R. § 52.54 (Complainant's Reply to Respondent's Appeal Pet. at 2). However, Complainant also argues in reply to Respondent's first argument on appeal that Respondent's actions were willful (Complainant's Reply to Respondent's Appeal Pet. at 2-3). The Chief ALJ looked at Complainant's case on willfulness, and adjudged it "speculative" (Initial Decision and Order at 9). I have very carefully examined the record in search of evidence of willful violations. Although Respondent's actions would raise the suspicions of any reasonable observer that Respondent's shortcomings were intentional, I still agree with the Chief ALJ on willfulness. The record evidence is not strong enough to take to a reviewing court with any degree of confidence that the court would agree that willfulness was supported by the record.

Second, Respondent argues the Chief ALJ erred by admitting and considering a warning letter (CX 5), dated September 24, 1996, from the Agricultural Marketing Service, United States Department of Agriculture, informing Respondent of two alleged violations of Raisin Marketing Order No. 989: (1) using off-grade raisins to fulfill a United States Department of Agriculture contract, and (2) misrepresenting processed raisins as natural condition raisins (Respondent's Appeal Pet. at 4). The warning letter reads as follows:

> September 24, 1996
>
> Mr. John Paboojian
> American Raisin Packers, Inc.
> 2335 Chandler Street
> P.O. Box 30
> Selma, Ca 93662
>
> Dear John:
>
> This letter is to bring to your attention two prior incidents which were investigated concerning American Raisin Packers, Inc.'s, (American Raisin) alleged violations of the Raisin Marketing Order No. 989.
>
> The first incident was when American Raisin received an award under contract #120212191 to pack 19,200 cases of 48/1 lb. cartons of raisins for government distribution. While American Raisin was packing raisins under this contract on April 26, 1991, six pallets of off-grade raisins were placed on hold by USDA inspectors. On May 2, 1991, USDA found that the six

pallets of off-grade raisins had disappeared. The USDA inspectors were informed by American Raisin that the pallets of off-grade raisins were dumped on April 27, 1991, by your employees without notifying the USDA Inspection Service. During a subsequent destination review of product delivered by American Raisin, shipping containers of raisins from Contract #120212191 were examined and opened by USDA at USDA storage warehouses in Sioux Falls, South Dakota; Orlando, Florida; and Denver, Colorado. It was apparent that the off-grade raisins packed on April 26, 1991, which were allegedly dumped on April 27, 1991, were not dumped. One pound packages of raisins marked with codes corresponding to the off-grade raisins, which were allegedly dumped, were found at destination commingled with one pound cartons of "meeting" raisins, packed in shipping cases exhibiting code dates of the meeting raisins. The raisins in question, bearing the codes of the raisins which were allegedly dumped, were later inspected and failed to meet the U.S. Grade B. requirements.

This is not only a violation of the FV-973 Contract Specifications, but also a violation of the Raisin Marketing Order issued pursuant to the Agricultural Marketing Agreement Act of 1937. Shipping raisins which are not packed in shipping containers that represent the date packed is in violation of Section 989.159(b) of the Administrative Rules and Regulations. Also shipping raisins that did not meet the minimum grade requirements is in violation of Section 989.59 of the Raisin Order and Section 989.702 of the Administrative Rules and Regulations.

The second incident at American Raisin was "Misrepresentation of Product". American Raisin did not officially request USDA Inspection Service for delivery of reserve raisins to distilleries. An on-site inspector had to call the USDA inspection office on May 6, 1992, to ask for assistance when he found that your firm needed this service. During the inspection at American Raisin on May 6, 1992, USDA found that the bins of raisins offered had processed raisins layered with natural condition raisins and were topped off with natural condition raisins. The pallet control cards on these bins indicated that the raisins should have been natural condition raisins.

The USDA found five loads (200 bins) in which natural condition raisins were blended with processed raisins. When the USDA inspectors found the misrepresented product, the Raisin Administrative Committee (RAC) was contacted and the blended raisins were then fully inspected rather than USDA just performing surveillance as is normally required for delivery of

natural condition raisins when coming out of the reserve pool stacks. Pursuant to a memo dated January 8, 1992, the RAC finally accepted American Raisin's blended raisins for delivery to distilleries because packers could deliver graded raisins if they had full inspection.

Section 989.66(b)(1) of the Raisin Order requires handlers to store reserve tonnage raisins in natural condition without the addition of moisture and in the same condition as when acquired. Under Section 989.66(b)(4), the RAC may arrange for such delivery of reserve raisins to consist of packed raisins. It appears that American Raisin violated Section 989.66(b)(1) of the Order.

John, the Department believes that you need to be made aware of these violations, but does not plan to take legal action at this time. However, I want to stress the need for American Raisin to adhere to all USDA laws, regulations and procedures. Future incidents of this nature could jeopardize American Raisin's eligibility to participate in USDA contracts. Also legal action may be taken to enforce any violations of the Raisin Marketing Order.

Sincerely

Richard P. Van Diest
California Marketing Field Office

CX 5.

Specifically, Respondent argues the Chief ALJ violated due process by admitting and considering the warning letter (CX 5) because the letter is hearsay, lacks proper foundation and support, and has unproven underlying facts (Respondent's Appeal Pet. at 4-5). Respondent argues that since there was no testimony offered on this letter at the hearing which substantiates any of the allegations in the warning letter, and since no legal action was ever taken on the allegations, the letter cannot be utilized as evidence to fashion a sanction (Respondent's Appeal Pet. at 4).

Complainant replies that Respondent had every opportunity at the hearing to introduce evidence concerning this warning letter and chose not to do so (Complainant's Reply to Respondent's Appeal Pet. at 4). I agree with Complainant that Respondent cannot use a lack of evidence--which Respondent could have provided, but did not provide--as a reason to exclude the warning letter.

Complainant argues that the Rules of Practice militate against approval of

Respondent's argument that the warning letter is not admissible (Complainant's Reply to Respondent's Appeal Pet. at 4). Complainant points out that the Rules of Practice only provides for the exclusion of evidence which is immaterial, irrelevant, unduly repetitious, or not of the sort upon which responsible persons are accustomed to rely (7 C.F.R. § 1.141(h)(iv)). I agree.

Complainant argues that a warning letter, which shows that Respondent had knowledge that some of its procedures and practices were considered to be a misrepresentation by the regulatory agency in charge of such behavior, is certainly probative and relevant in determining a sanction for the same behavior (Complainant's Reply to Respondent's Appeal Pet. at 4). Again, I agree.

Complainant argues, moreover, that the Judicial Officer has determined that prior warnings can be considered in determining sanctions (Complainant's Reply to Respondent's Appeal Pet. at 4). Complainant is once again correct in that warning letters may be admitted and considered to fashion a sanction.[4] Therefore, Respondent's second argument is rejected.

Third, Respondent argues that a 1-year debarment constitutes excessive punishment in violation of the Eighth Amendment to the Constitution of the United States (Respondent's Appeal Pet. at 5-6).

The Eighth Amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Excessive Fines Clause of the Eighth Amendment limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.[5] Debarment is the act of precluding someone from

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[4] *See In re Richard Lawson*, 57 Agric. Dec. 980, 1013 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 264 (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 Hutto Stockyard, Inc.*, 48 Agric. Dec. 436, 488 (1989), *aff'd in part, rev'd in part, vacated in part, and remanded*, 903 F.2d 299 (4th Cir. 1990), *reprinted in* 50 Agric. Dec. 1724 (1991), *final decision on remand*, 49 Agric. Dec. 1027 (1990).

[5] *See United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998) (stating the Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense; forfeitures, payments in kind, are fines if they constitute punishment for some offense); *Hudson v. United States*, 522 U.S. 93, 103 (1997) (stating the Eighth Amendment protects against excessive fines, including forfeitures); *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (stating the purpose of the Eighth Amendment, putting the Bail Clause to one side, is to limit the government's power to punish; the Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense); *Alexander v. United States*, 509 U.S. 544, 558 (1993) (stating the Excessive Fines Clause of the Eighth Amendment limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense; at the time of the ratification of
(continued...)

having or doing something.[6] Debarment does not extract payment in cash or in kind. Therefore, debarment is not subject to analysis as an excessive fine.[7] The 1-year debarment of Respondent from receipt of inspection services under the Agricultural Marketing Act and the Regulations and Standards, the sanction imposed in this proceeding, does not implicate the Excessive Fines Clause of the Eighth Amendment. Therefore, I reject Respondent's contention that the debarment imposed by the Chief ALJ violated the Excessive Fines Clause of the Eighth Amendment.

Complainant's Appeal

Complainant raises three major arguments on appeal. First, Complainant argues that the issue is Respondent's violation of 7 C.F.R. § 52.54 and not Respondent's violation of other government regulations (Complainant's Appeal Brief at 5). Complainant is concerned that the negative consequences inuring to Respondent,

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[5](...continued)
the Eighth Amendment the word "fine" was understood to mean a payment to the sovereign as punishment for some offense); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264-65 (1989) (stating that at the time of the ratification of the Eighth Amendment the word "fine" was understood to mean a payment to the sovereign as punishment for some offense); *United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725, 731 (C.D. Cal. 1994) (stating the purpose of the Excessive Fines Clause of the Eighth Amendment is to limit the government's power to extract payments as punishment for an offense).

[6]*See Printup v. Alexander & Wright*, 69 Ga. 553, 556 (Ga. 1882) (stating "to debar" is to cut off from entrance, to preclude, to hinder from approach, entry, or enjoyment, to shut out or exclude); *Haynesworth v. Hall Constr. Co.*, 163 S.E. 273, 277 (Ga. Ct. App. 1932) (stating "to debar" is to cut off from entrance, to preclude, to hinder from approach, entry, or enjoyment, to shut out or exclude); BLACK'S LAW DICTIONARY 407 (7th ed. 1999) (defining debarment as the act of precluding someone from having or doing something; exclusion or hindrance); WEBSTER'S COLLEGIATE DICTIONARY 296 (10th ed. 1997) (defining "debar" as to bar from having or doing something); 4 THE OXFORD ENGLISH DICTIONARY 308 (2d ed. 1991) (defining "debar" as to exclude or shut out from a place or condition; to prevent or prohibit from entrance or from having, attaining, or doing anything).

[7]*See United States v. Stoller*, 78 F.3d 710, 719 (1st Cir. 1996) (stating debarment does not come within the Excessive Fines Clause as we understand it), *cert. dismissed*, 519 U.S. 957 (1996). *Cf. Kim v. United States*, 121 F.3d 1269, 1276 (9th Cir. 1997) (holding the permanent disqualification of a grocery store owner from participating in the food stamp program is not a cash or in kind payment directly imposed by, and payable to, the government; therefore, the disqualification is not an excessive fine prohibited by the Eighth Amendment); *In re Sharp*, 674 A.2d 899, 900 (D.C. 1996) (stating disbarment resulting from an attorney's conviction of a crime does not involve payment of cash by way of fines or taxes for the purposes of the Eighth Amendment).

for failing to fulfill contractual requirements under USDA Invitation No. 21, will bleed over into the analysis for Respondent's concomitant, simultaneous violation of 7 C.F.R. § 52.54 (Complainant's Appeal Brief at 6).

I agree with Complainant that any repercussions, based upon Respondent's failure to deliver 100 percent Thompson seedless raisins under the terms and conditions of Respondent's contract, are separate and apart from this disciplinary proceeding, which arises not out of a contract, but rather, out of a violation of 7 C.F.R. pt. 52. This difference is easily understood. Respondent was given an opportunity under the contract to cure the deficiency, but Respondent chose not to do so (Tr. 18-20). Even if Respondent had cured the defect, Respondent would still have been subject to discipline under 7 C.F.R. § 52.54. I also find that this distinction is easily understood in the Initial Decision and Order, and a reviewing court should have no difficulty discerning that this proceeding turns solely and completely on 7 C.F.R. § 52.54, and not on contract terms.

Complainant is also concerned that the Chief ALJ's discussion of the Food and Drug Administration's food labeling requirements (21 C.F.R. § 101.100) is in error, and argues that the Initial Decision and Order should be modified to make clear that the debarment is in no way based upon Food and Drug Administration sulphur labeling requirements (Complainant's Appeal Brief at 6-7). While I agree with Complainant that this proceeding should only be based upon 7 C.F.R. § 52.54, I disagree that the Chief ALJ's Initial Decision and Order should be sanitized of the analysis of sulphur added to raisins.

That Golden seedless raisins contain up to 3,000 parts per million of sulphur and sulphur in Thompson seedless raisins can range from less than one part per million up to five parts per million are important facts in this case. It is not very likely that a reviewing court will misunderstand the role that sulphur played in this proceeding. I find the Chief ALJ correctly handled the sulphur issue.

Second, Complainant argues the evidence establishes that Respondent was involved in fraudulent and/or deceptive practices that caused the Agricultural Marketing Service to issue an inaccurate certificate (Complainant's Appeal Brief at 7). Complainant once again seizes on the Chief ALJ's conflation of the wording of 7 C.F.R. § 52.54, which I have already addressed, *supra*, to argue that the Chief ALJ misunderstands the purpose of the proceeding (Complainant's Appeal Brief at 7). But, it is clear from the Initial Decision and Order that the Chief ALJ understands the purpose of the proceeding.

Complainant argues that the Initial Decision and Order should be modified to indicate the substantial record evidence to support violations of 7 C.F.R. § 52.54, such as undisputed evidence of sulphur packed in Respondent's raisins; undisputed evidence that Respondent did not notify the Agricultural Marketing Service of the sulphur; record testimony that Golden seedless raisins were being darkened at

Respondent's facility in 1998; darkening raisins to pass for Thompson seedless raisins is a deceptive practice; not listing darkened raisins on Raisin Administrative Committee inventory is a deceptive practice; storing darkened raisins with trash raisins is a deceptive practice; and not correcting conditions allowing accidental mixing of Thompson seedless raisins and darkened Golden seedless raisins is a deceptive practice (Complainant's Appeal Brief at 8-10). I find that this list of items is actually just more argument for the intentionally "fraudulent or deceptive practice or act" portion of 7 C.F.R. § 52.54(a)(1). I reject the argument to modify the Initial Decision and Order to include these items because it would add nothing to the case. The evidence is not strong enough to find that Respondent willfully violated the Agricultural Marketing Act or the Regulations and Standards.

Complainant asks that the Initial Decision and Order be modified to clarify labeling requirements for sulphur and the effect of sulfites on human health (Complainant's Appeal Brief at 14).

I reject this request to modify the Chief ALJ's Initial Decision and Order. The sulfite issues in this proceeding are not crucial to this case. The only relevance sulphur has in this proceeding is that it just happens to be a marker for a non-conforming raisin in a contract for 100 percent Thompson seedless raisins. The marker could just as easily have been seeds, color, size, or some insect. It is pure coincidence that sulphur is also a labeling item with the Food and Drug Administration.

Third, Complainant argues the evidence supports a debarment for 4 years. Complainant contends the Chief ALJ misunderstood the issue as more of a contract dispute than a grading and certification violation causing the Chief ALJ not to weigh evidence of the damage to the integrity of Agricultural Marketing Service certificates in court cases under 7 U.S.C. § 1622(h) (1994). Complainant further contends Respondent manipulated the process for its own benefit; Respondent's violations cannot be considered incidental or inadvertent; Respondent did not heed the prior warning letter; people allergic to sulfites could have been seriously harmed by Respondent's sulfite raisins; and all of the above factors show the seriousness of the violation which requires a 4-year debarment to deter others from the same behavior. (Complainant's Appeal Brief at 15-18.)

I have already determined, *supra,* that the Chief ALJ was not confused that Respondent's violation was a contract dispute. Further, the record does not support a finding that Respondent manipulated the inspection process for its own benefit. Complainant's argument that Respondent's violations cannot be considered incidental or inadvertent is a reverse way of saying that the violation was intentional. The Chief ALJ correctly found on the record that Respondent's violation of 7 C.F.R. § 52.54(a)(1)(ii) was not willful, and I agree. Complainant is

correct that Respondent did not heed the warning letter (CX 5), but the Chief ALJ admitted and considered the warning letter and factored it into the sanction. I have carefully considered all Complainant's sanction arguments, and I conclude that these arguments are not sufficient to increase the Chief ALJ's sanction of a 1-year debarment to a 4-year debarment.

Respondent replies that it was only just barely in violation; there was no damage to the regulatory program; no allergic consumers got sick; the violations were not willful; and there were no prior violations or warnings. Respondent also argues that a 4-year debarment would be a death penalty, and regardless whether the Judicial Officer finds willfulness, there should not be a debarment of even 1 year, but only a warning against future violations. (Respondent's Reply to Complainant's Appeal Brief at 17.)

Respondent admits the violation, "barely" or not, and damage to the regulatory program does not have to be shown for a sanction of debarment. Respondent here catches a break on willfulness, because, to use Respondent's term, Respondent "barely" escapes being found to have intentionally blended two varieties of raisins when Respondent was required to provide 100 percent Thompson seedless raisins.

Moreover, Respondent is not correct that there were no prior warnings since Respondent did get a warning letter covering two alleged violations. Further, the Regulations and Standards are silent on the effect of a debarment on the business of a respondent, but, in any event, this record gives me no basis to conclude that Respondent would go out of business because of a 1-year debarment.

Sanction

The United States Department of Agriculture's 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.

In light of this sanction policy, the sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purposes of the Agricultural Marketing Act 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 fruit and vegetable industries. Eric M. Forman, Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture, is an administrative official charged with the responsibility for achieving the congressional purposes of the Agricultural Marketing Act. Therefore, Mr. Forman's testimony regarding any sanction to be imposed on Respondent is highly relevant.

However, Mr. Forman's sanction recommendation is not controlling, and the Chief ALJ has the discretion to impose any sanction on Respondent warranted in law and justified in fact.[8] The reasons why I am affirming the Chief ALJ's sanction are rife throughout my additional conclusions. I find that it is appropriate that Respondent be debarred for 1 year for its violation of 7 C.F.R. § 52.54(a)(1)(ii). Had the record supported a finding of willfulness, the full 4-year debarment sought by Complainant would have been imposed.

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

ORDER

Respondent, American Raisin Packers, Inc., its agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, are debarred for 1 year from receiving inspection services under the Agricultural Marketing Act and the Regulations and Standards.

This Order shall become effective 30 days after service of this Order on Respondent.

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[8] The recommendation of administrative officials as to the sanction to be imposed is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials. *In re Fred Hodgins*, 60 Agric. Dec. ___, slip op. at 24 (Apr. 4, 2001) (Decision and Order on Remand); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *appeal docketed*, No. 00-60844 (5th Cir. Nov. 30, 2000); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *appeal docketed*, No. 00-CV-1054 (N.D.N.Y. July 5, 2000); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 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 Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (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).

PLANT QUARANTINE ACT

In re: CYNTHIA TWUM BOAFO.
P.Q. Docket No. 00-0014.
Decision and Order filed February 21, 2001.

Default – Failure to file timely answer – Beef – Avocados – Yams – Settlement – Ability to pay – Civil penalty – Sanction policy.

The Judicial Officer affirmed the Default Decision issued by Chief Administrative Law Judge James W. Hunt (Chief ALJ): (1) concluding that Respondent imported 8 pounds of beef from Ghana into the United States in violation of 9 C.F.R. § 94.1; (2) concluding that Respondent imported 20 pounds of yams from Ghana into the United States in violation of 7 C.F.R. § 319.56-2; (3) concluding that Respondent imported 5 pounds of avocados from Ghana into the United States in violation of 7 C.F.R. § 319.56-2; and (4) assessing Respondent a $250 civil penalty. The Judicial Officer rejected Respondent's contention that she had settled the proceeding with the payment of $50 and held that Respondent failed to prove, by producing documents, that she was not able to pay the $250 civil penalty. The Judicial Officer rejected Respondent's assertion that her violations occurred on or about January 6, 2000. The Judicial Officer stated that, under the Rules of Practice (7 C.F.R. § 1.136(c)), Respondent's failure to file a timely answer is deemed an admission, for the purposes of the proceeding, that her violations occurred on or about February 29, 2000, as alleged in the complaint.

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.

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 July 7, 2000. Complainant instituted this proceeding under the Act of February 2, 1903, as amended [hereinafter the Act of February 2, 1903] (21 U.S.C. § 111); 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 Act of February 2, 1903, the Plant Quarantine Act, and the Federal Plant Pest Act (7 C.F.R. § 319.56-2 and 9 C.F.R. § 94.1); 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].[1]

Complainant alleges that: (1) on or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Cynthia Twum Boafo [hereinafter Respondent] imported approximately 8 pounds of beef from Ghana into the United States in violation of 9 C.F.R. § 94.1 because the importation of fresh, chilled, or frozen beef from Ghana, a country where rinderpest or foot-and-mouth disease exists, is prohibited; (2) on or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported approximately 20 pounds of yams from Ghana into the United States without a permit in violation of 7 C.F.R. § 319.56-2 because the importation of yams without a permit is prohibited; and (3) on or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported approximately 5 pounds of avocados from Ghana into the United States without a permit in violation of 7 C.F.R. § 319.56-2 because the importation of avocados without a permit is prohibited (Compl. ¶¶ II-IV).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 3, 2000.[2] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter, dated October 27, 2000, stating that an answer to the Complaint had not been filed within the allotted time.

On December 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 sent Respondent a copy of Complainant's Motion for Adoption of Proposed Decision and Order and a service letter, dated December 13, 2000. The Hearing Clerk's service letter states Respondent has 20 days from the date of the service letter to file objections to Complainant's Motion for Adoption of Proposed Decision and Order. Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order within 20 days from the date of the Hearing Clerk's December 13, 2000, service letter. The Hearing Clerk sent Respondent a letter, dated January 10, 2001, stating that objections to Complainant's Motion for

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[1]Section 438(a) of the Plant Protection Act, enacted June 20, 2000, repealed the Plant Quarantine Act and the Federal Plant Pest Act. However, section 438(c) of the Plant Protection Act states "[r]egulations issued under the authority of a provision of law repealed by subsection (a) shall remain in effect until such time as the Secretary [of Agriculture] issues a regulation under section 434 that supercedes the earlier regulation."

[2]See August 3, 2000, Memorandum to the File from Regina Paris, Hearing Clerk's Office.

Adoption of Proposed Decision and Order had not been filed within the allotted time and that the record was being referred to an administrative law judge for consideration of a decision.

On January 11, 2001, 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) finding that on February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 8 pounds of beef from Ghana into the United States; (2) finding that on February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 20 pounds of yams from Ghana into the United States without a permit; (3) finding that on February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 5 pounds of avocados from Ghana into the United States without a permit; (4) concluding that Respondent violated the Act of February 2, 1903, the Plant Quarantine Act, the Federal Plant Pest Act, 7 C.F.R. § 319.56-2, and 9 C.F.R. § 94.1; and (5) assessing Respondent a $250 civil penalty (Initial Decision and Order at 2-5).

On January 29, 2001, Respondent appealed to the Judicial Officer. On February 14, 2001, Complainant filed Complainant's Response to Respondent's Appeal. On February 15, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a decision.

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

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's mailing address is 14 I Blue Hill Commons, Orangeburg, New York 10962.

2. On or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 8 pounds of beef from Ghana into the United States.

3. On or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 20 pounds of yams from Ghana into the United States without a permit.

4. On or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 5 pounds of avocados from Ghana into the United States without a permit.

Conclusions of Law

By reason of the facts contained in the Findings of Fact, I conclude Respondent violated the Act of February 2, 1903, the Plant Quarantine Act, the Federal Plant Pest Act, 7 C.F.R. § 319.56-2, and 9 C.F.R. § 94.1.

Discussion

The United States Department of Agriculture's 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 animal diseases and plant pests is dependent upon the compliance of individuals, such as Respondent, with laws and regulations designed to prevent the introduction of animal diseases and plant pests into the United States. A failure to comply with these laws and regulations greatly increases the risk of the introduction of animal diseases and plant pests into the United States and the spread of animal diseases and plant pests within the United States. The

imposition of sanctions in cases, such as this case, is extremely important to the prevention of the introduction and spread of animal diseases and plant pests. Sanctions must be sufficiently substantial to deter the violator and other potential violators from future violations of the laws and regulations designed to prevent the introduction and spread of animal diseases and plant pests.

A single violation of the Act of February 2, 1903, the Plant Quarantine Act, or the Federal Plant Pest Act 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. The maximum civil penalty that could be assessed against Respondent for her three violations of the Act of February 2, 1903, the Plant Quarantine Act, and the Federal Plant Pest Act is $3,000. (See 7 U.S.C. §§ 150gg(b), 163; 21 U.S.C. § 122.)

Complainant believes the assessment of a $250 civil penalty against Respondent will deter Respondent and other potential violators from future violations of the Act of February 2, 1903, the Plant Quarantine Act, the Federal Plant Pest Act, 7 C.F.R. § 319.56-2, and 9 C.F.R. § 94.1 (Complainant's Motion for Adoption of Proposed Decision and Order at 3). Complainant's recommendation as to the appropriate sanction is entitled to great weight in view of the experience gained by Complainant during Complainant's day-to-day supervision of the regulated industry. Civil penalties imposed by the Secretary of Agriculture for violations of laws designed to prevent the introduction and spread of animal diseases and plant pests must be sufficiently large to serve as an effective deterrent not only to the violator, but also to other potential violators.[3] Furthermore, if the violator cannot pay the assessed civil penalty, arrangements can be made to allow the violator to pay the civil penalty over a period of time.[4]

In order to achieve the congressional purpose of the Act of February 2, 1903, the Plant Quarantine Act, and the Federal Plant Pest Act and to prevent the introduction and spread of animal diseases and plant pests, violators are held responsible for any violation irrespective of their lack of evil motive or intent to violate the Act of February 2, 1903, the Plant Quarantine Act, and the Federal Plant Pest Act.[5]

I find the assessment of a $250 civil penalty against Respondent for her

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[3] *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 629 (1988).

[4] *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 633 (1988).

[5] *In re Mercedes Capistrano*, 45 Agric. Dec. 2196, 2198 (1986); *In re Rene Vallalta*, 45 Agric. Dec. 1421, 1423 (1986).

violations of the Act of February 2, 1903, the Plant Quarantine Act, the Federal Plant Pest Act, 7 C.F.R. § 319.56-2, and 9 C.F.R. § 94.1 warranted in law, justified by the facts, and consistent with the United States Department of Agriculture's sanction policy.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in Respondent's note to the Hearing Clerk [hereinafter Appeal Petition]. First, Respondent contends she already paid a $50 fine for her violations. As proof of payment, Respondent includes, as part of her Appeal Petition, a copy of a United States Postal Service Customer's Receipt for a $50 money order issued on November 16, 2000, payable to the United States Department of Agriculture. The United States Postal Service Customer's Receipt indicates that the money order is from Respondent and used for P.Q. Docket No. 00-0014. (Appeal Pet.).

Complainant asserts that, prior to filing the Complaint, Complainant made three offers to Respondent to settle the alleged violations, which are the subject of this proceeding, for $50. Complainant admits that Complainant is now in possession of a $50 United States Postal Service money order sent by Respondent in connection with this proceeding.[6] However, Complainant asserts that, in Complainant's third and last offer to settle the alleged violations prior to Complainant's filing the Complaint, Complainant notified Respondent that if Respondent failed to pay $50 by April 28, 2000, Complainant would seek higher civil or criminal penalties. (Complainant's Response to Respondent's Appeal at 1-3.)

I find that Complainant's settlement offer terminated on April 29, 2000, by the lapse of time specified in Complainant's settlement offer. The United States Postal Service Customer's Receipt for the $50 money order indicates that the United States Postal Service issued the money order on November 16, 2000, more than 6 months after Complainant's offer to settle the proceeding for $50 had terminated. An attempted acceptance of a settlement offer after the offer terminates has no effect. Therefore, I find that, while Respondent did send Complainant a $50 United States Postal Service money order in an effort to accept Complainant's settlement offer and Complainant received the money order, Complainant's receipt of the money

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[6]Complainant does not state when Complainant acquired possession of the $50 money order. Complainant asserts the Hearing Clerk received the $50 money order on November 27, 2000 (Complainant's Response to Respondent's Appeal at 1). Complainant also asserts Respondent mailed the $50 money order on January 23, 2001 (Complainant's Response to Respondent's Appeal at 3). Complainant fails to explain how the Hearing Clerk received the money order before Respondent mailed the money order.

order after April 28, 2000, did not operate as Respondent's acceptance of Complainant's offer to settle the alleged violations, which are the subject of this proceeding. Thus, Respondent's payment of $50 to Complainant has no effect on this proceeding.

Complainant also asserts that, in a letter to Respondent, dated July 18, 2000, after Complainant filed the Complaint, Complainant offered to dispose of this proceeding by the entry of a consent decision in accordance with section 1.138 of the Rules of Practice (7 C.F.R. § 1.138). Complainant asserts that Respondent never accepted the offer to agree to the entry of a consent decision. (Complainant's Response to Respondent's Appeal at 2 n.2.) The record establishes that no consent decision has been entered.

Second, Respondent states the dates of the violations alleged in the Complaint are not correct. Respondent indicates that her violations could not have occurred on February 29, 2000, as alleged in the Complaint, because she "traveled on January 5th." (Appeal Pet.) Complainant agrees with Respondent. Complainant asserts that Complainant incorrectly alleged and the Chief ALJ incorrectly found that Respondent's violations occurred on February 29, 2000. Instead, Complainant asserts that a review of the investigative file reveals that Respondent's violations occurred on January 6, 2000. (Complainant's Response to Respondent's Appeal at 2.)

Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that failure to file a timely answer shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Therefore, Respondent is deemed, for the purposes of this proceeding, to have admitted that Respondent's violations occurred on or about February 29, 2000. Even if I found that Respondent's violations occurred on or about January 6, 2000, that finding would not change the disposition of this proceeding or the amount of the civil penalty which I assess against Respondent.

Third, Respondent contends that she is not able to pay a $250 civil penalty (Appeal Pet.).

A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be assessed in animal quarantine cases and plant quarantine cases.[7] However, the burden is on the respondents in animal quarantine cases and plant quarantine cases

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[7] *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 912-13 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

to prove, by producing documentation, the lack of ability to pay the civil penalty.[8] Respondent has failed to produce any documentation supporting her assertion that she lacks the ability to pay a $250 civil penalty. Respondent's undocumented assertion that she lacks the ability to pay a $250 civil penalty falls far short of the proof necessary to establish an inability to pay the civil penalty.[9] Nonetheless, in view of Respondent's assertion regarding her inability to pay a $250 civil penalty, I am providing for payment of the civil penalty over a period of time.

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

ORDER

Respondent is assessed a $250 civil penalty. The civil penalty shall be paid by certified checks or money orders, 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

Respondent shall make payments of $50 each month for 5 consecutive months. Respondent's initial payment of $50 shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting

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[8] *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[9] *See In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919-20 (1998) (holding that undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998) (holding that undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding that undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

Section, within 60 days after service of this Order on Respondent. If Respondent is late in making any payment or misses any payment, then all remaining payments become immediately due and payable in full. Respondent shall state on each certified check or money order that payment is in reference to P.Q. Docket No. 00-0014.

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In re: RAFAEL DOMINGUEZ, d/b/a LA BODEGA WHOLESALE FOODS & LATINA AMERICAN GROCERY.
P.Q. Docket No. 00-0017.
Decision and Order filed February 26, 2001.

Default – Failure to file timely answer – Avocados – Ability to pay – Statutes at large constructive notice – 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): (1) concluding that the Respondent moved 6 boxes of Mexican Hass avocados from Illinois to Missouri 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 the Respondent a $6,000 civil penalty. The Judicial Officer rejected the Respondent's contention that his lack of knowledge of the Plant Quarantine Act and the Federal Plant Pest Act should affect the disposition of the proceeding. The Judicial Officer stated the Plant Quarantine Act and the Federal Plant Pest Act are published in the statutes at large and the United States Code and the Respondent is presumed to know the law. The Judicial Officer also stated the regulations prohibiting the movement of Mexican Hass avocados from Illinois to Missouri are published in the *Federal Register*; thereby constructively notifying the Respondent of the prohibition on the movement of Mexican Hass avocados from Illinois to Missouri. The Judicial Officer held that the Respondent's intention to close his business and start a new business are neither defenses to his violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff nor mitigating circumstances to be taken into account when determining the amount of the civil penalty to assess against the Respondent. The Judicial Officer also held that the Respondent failed to prove, by producing documents, that he was not able to pay the $6,000 civil penalty.

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.

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 August 15, 2000. 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)(2) 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].[1]

Complainant alleges that: (1) on or about November 24, 1999, Rafael Dominguez, d/b/a La Bodega Wholesale Foods & Latina American Grocery [hereinafter Respondent], moved one box of Mexican Hass avocados from Chicago, Illinois, to La Bodega Wholesale Foods, St. Louis, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; (2) on or about November 29, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to Cancun Restaurant, Arnold, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; (3) on or about November 30, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to La Mexicana Grocery, St. Anns, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; and (4) on or about December 7, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to Latina American Grocery, St. Louis, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff (Compl. ¶¶ II-V).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 21, 2000.[2] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter, dated October 12, 2000, stating that an answer to the Complaint had not been filed within the allotted time.

On October 19, 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. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Decision and Order and a service letter on October 27, 2000.[3] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order within 20 days after service, as required by section

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[1]Section 438(a) of the Plant Protection Act, enacted June 20, 2000, repealed the Plant Quarantine Act and the Federal Plant Pest Act. However, section 438(c) of the Plant Protection Act states "[r]egulations issued under the authority of a provision of law repealed by subsection (a) shall remain in effect until such time as the Secretary [of Agriculture] issues a regulation under section 434 that supercedes the earlier regulation."

[2]See Domestic Return Receipt for Article Number P368330859.

[3]See Domestic Return Receipt for Article Number P368327605.

1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent Respondent a letter, dated November 22, 2000, stating that objections to Complainant's Motion for Adoption of Proposed Decision and Order had not been filed within the allotted time and that the record was being referred to an administrative law judge for consideration and decision.

On December 1, 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) finding that on November 24, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to La Bodega Wholesale Foods, St. Louis, Missouri; (2) finding that on November 29, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to Cancun Restaurant, Arnold, Missouri; (3) finding that on November 30, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to La Mexicana Grocery, St. Anns, Missouri; (4) finding that on December 7, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to Latina American Grocery, St. Louis, Missouri; (5) concluding that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff; and (6) assessing Respondent a $6,000 civil penalty (Initial Decision and Order at 3, 5).

On January 4, 2001, Respondent appealed to the Judicial Officer. On February 20, 2001, Complainant filed Complainant's Response to Respondent's Appeal. On February 22, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order. 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. 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's mailing address is 2730 Cherokee Street, St. Louis, Missouri 63118.

2. On or about November 24, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to La Bodega Wholesale Foods, St. Louis, Missouri.

3. On or about November 29, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to Cancun Restaurant, Arnold, Missouri.

4. On or about November 30, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to La Mexicana Grocery, St. Anns, Missouri.

5. On or about December 7, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to Latina American Grocery, St. Louis, Missouri.

Conclusions 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 movement of each box of Mexican Hass avocados outside the states quarantined for Mexican Hass avocados is a separate violation of the Plant Quarantine Act and the Federal Plant Pest Act. Pursuant to section 10 of the Plant Quarantine Act (7 U.S.C. § 163) the Secretary of Agriculture may assess a civil penalty of $1,000 for each violation of the Plant Quarantine Act and pursuant to section 108(b) of the Federal Plant Pest Act (7 U.S.C. § 150gg(b)), the Secretary of Agriculture may assess a civil penalty of $1,000 for each violation of the Federal Plant Pest Act. Therefore, the maximum civil penalty which could be assessed

against Respondent is $6,000.[4]

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 laws and regulations designed to prevent the spread of plant pests. A failure to comply with 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 laws and regulations designed to prevent the spread of plant pests.

Respondent committed six 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 the Plant Quarantine Act, the Federal Plant Pest Act, 7 C.F.R. § 301.11(b), or 7 C.F.R. § 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 $6,000 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.

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[4]Section 438(a) of the Plant Protection Act, enacted June 20, 2000, repealed the Plant Quarantine Act and the Federal Plant Pest Act. However, 1 U.S.C. § 109 provides that "[t]he 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." The Plant Protection Act does not provide that the repeal of the Plant Quarantine Act and the Federal Plant Pest Act releases or extinguishes any penalty, forfeiture, or liability incurred under the Plant Quarantine Act or the Federal Plant Pest Act.

§§ 301.11(b) and 319.56-2ff (Complainant's Motion for Adoption of Proposed Decision and Order at 12). Complainant's recommendation as to the appropriate sanction is entitled to great weight in view of the experience gained by Complainant during Complainant's day-to-day supervision of the regulated industry. Civil penalties imposed by the Secretary of Agriculture for violations of laws designed to prevent the spread of plant pests must be sufficiently large to serve as an effective deterrent not only to the violator, but also to other potential violators. Furthermore, if the violator cannot pay the assessed civil penalty, arrangements can be made to allow the violator to pay the civil penalty over a period of time.[5]

In order to achieve the congressional purpose of the Plant Quarantine Act and the Federal Plant Pest Act and to prevent the spread of plant pests, violators are held responsible for any violation irrespective of their lack of evil motive or intent to violate the Plant Quarantine Act and the Federal Plant Pest Act.[6]

I find the assessment of a $6,000 civil penalty against Respondent for his violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff warranted in law, justified by the facts, and consistent with the United States Department of Agriculture's sanction policy.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in Respondent's December 29, 2000, letter to the United States Department of Agriculture [hereinafter Appeal Petition]. First, Respondent contends he was not aware of the Plant Quarantine Act or the Federal Plant Pest Act (Appeal Pet.).

The Plant Quarantine Act and the Federal Plant Pest Act are published in the statutes at large and the United States Code, and Respondent is presumed to know the law.[7] Moreover, the regulations prohibiting the movement of Mexican Hass avocados from Illinois to Missouri are published in the *Federal Register*; thereby constructively notifying Respondent of the prohibition on the movement of Mexican

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[5] *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 633 (1988).

[6] *In re Cynthia Twum Boafo*, 60 Agric. Dec. ___, slip op. at 8 (Feb. 21, 2001); *In re Mercedes Capistrano*, 45 Agric. Dec. 2196, 2198 (1986); *In re Rene Vallalta*, 45 Agric. Dec. 1421, 1423 (1986).

[7] *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).

Hass avocados from Illinois to Missouri.[8] Therefore, Respondent's lack of actual knowledge of the Plant Quarantine Act, the Federal Plant Pest Act, and 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.

Second, Respondent states that he will close his business and start a new business (Appeal Pet.).

Respondent's intention to close his business and start a new business are not defenses to the violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff.[9] Moreover, Respondent's intention to close his business and start a new business are not mitigating circumstances to be taken into account when determining the amount of the civil penalty to assess against Respondent for his violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff.

Third, Respondent contends that he is not able to pay a $6,000 civil penalty (Appeal Pet.).

A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be

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[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); *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).

[9] *Cf. In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997) (stating neither the respondent's disposal of all of her animals under the Secretary of Agriculture's jurisdiction under the Animal Welfare Act, as amended, nor the respondent's intention to "give up" her Animal Welfare Act license is a defense to the respondent's violations of the Animal Welfare Act, as amended, or the regulations and standards issued under the Animal Welfare Act, as amended); *In re Dora Hampton*, 56 Agric. Dec. 301, 320 (1997) (stating the respondent's intention to dispose of all animals in her possession under the jurisdiction of the Secretary of Agriculture under the Animal Welfare Act, as amended, is not a defense to the respondent's violations of the Animal Welfare Act, as amended, or the regulations and standards issued under the Animal Welfare Act, as amended).

assessed in animal quarantine cases and plant quarantine cases.[10] However, the burden is on the respondents in animal quarantine cases and plant quarantine cases to prove, by producing documentation, the lack of ability to pay the civil penalty.[11] Respondent has failed to produce any documentation supporting his assertion that he lacks the ability to pay a $6,000 civil penalty, and Respondent's undocumented assertion that he lacks the ability to pay the civil penalty falls far short of the proof necessary to establish an inability to pay the civil penalty.[12] Nonetheless, in view of Respondent's assertion regarding his inability to pay a $6,000 civil penalty, I am providing for payment of the civil penalty over a period of time.

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

Order

Respondent is assessed a $6,000 civil penalty. The civil penalty shall be paid by certified checks or money orders, made payable to the Treasurer of the United States, and sent to:

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[10] *In re Cynthia Twum Boafo*, 60 Agric. Dec. ___, slip op. at 12 (Feb. 21, 2001); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 912-13 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[11] *In re Cynthia Twum Boafo*, 60 Agric. Dec. ___, slip op. at 12 (Feb. 21, 2001); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[12] *See In re Cynthia Twum Boafo*, 60 Agric. Dec. ___, slip op. at 12 (Feb. 21, 2001) (holding that undocumented assertions by the respondent that she was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919-20 (1998) (holding that undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998) (holding that undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding that undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

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

Respondent shall make payments of $500 each month for 12 consecutive months. Respondent's initial payment of $500 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. If Respondent is late in making any payment or misses any payment, then all remaining payments become immediately due and payable in full. Respondent shall state on each certified check or money order that payment is in reference to P.Q. Docket No. 00-0017.

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In re: RAFAEL DOMINGUEZ, d/b/a LA BODEGA WHOLESALE FOODS & LATINA AMERICAN GROCERY.
P.Q. Docket No. 00-0017.
Order Denying Petition for Reconsideration filed April 19, 2001.

Petition for reconsideration – Avocados – Statutes at large constructive notice – Federal Register constructive notice.

The Judicial Officer denied the Respondent's Petition for Reconsideration. The Judicial Officer rejected the Respondent's contention that his lack of knowledge of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff should affect the disposition of the proceeding. The Judicial Officer stated the Plant Quarantine Act and the Federal Plant Pest Act are published in the United States Statutes at Large and the United States Code, and the Respondent is presumed to know the law. The Judicial Officer also stated the regulations prohibiting the interstate movement of Mexican Hass avocados from Illinois to Missouri are published in the *Federal Register*; thereby constructively notifying the Respondent of the prohibition on the movement of Mexican Hass avocados from Illinois to Missouri.

James D. Holt, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Chief 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 August 15, 2000. 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)(2) 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].[1]

Complainant alleges that: (1) on or about November 24, 1999, Rafael Dominguez, d/b/a La Bodega Wholesale Foods & Latina American Grocery [hereinafter Respondent], moved one box of Mexican Hass avocados from Chicago, Illinois, to La Bodega Wholesale Foods, St. Louis, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; (2) on or about November 29, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to Cancun Restaurant, Arnold, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; (3) on or about November 30, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to La Mexicana Grocery, St. Anns, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; and (4) on or about December 7, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to Latina American Grocery, St. Louis, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff (Compl. ¶¶ II-V).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 21, 2000.[2] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter, dated October 12, 2000, stating that an answer to the Complaint had not been filed within the allotted time.

On October 19, 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. The Hearing Clerk served Respondent with Complainant's Motion for

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[1]Section 438(a) of the Plant Protection Act, enacted June 20, 2000, repealed the Plant Quarantine Act and the Federal Plant Pest Act. However, section 438(c) of the Plant Protection Act states "[r]egulations issued under the authority of a provision of law repealed by subsection (a) shall remain in effect until such time as the Secretary [of Agriculture] issues a regulation under section 434 that supercedes the earlier regulation."

[2]See Domestic Return Receipt for Article Number P368330859.

Adoption of Proposed Decision and Order and a service letter on October 27, 2000.[3] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent Respondent a letter, dated November 22, 2000, stating that objections to Complainant's Motion for Adoption of Proposed Decision and Order had not been filed within the allotted time and that the record was being referred to an administrative law judge for consideration and decision.

On December 1, 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) finding that on November 24, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to La Bodega Wholesale Foods, St. Louis, Missouri; (2) finding that on November 29, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to Cancun Restaurant, Arnold, Missouri; (3) finding that on November 30, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to La Mexicana Grocery, St. Anns, Missouri; (4) finding that on December 7, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to Latina American Grocery, St. Louis, Missouri; (5) concluding that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff; and (6) assessing Respondent a $6,000 civil penalty (Initial Decision and Order at 3, 5).

On January 4, 2001, Respondent appealed to the Judicial Officer. On February 20, 2001, Complainant filed Complainant's Response to Respondent's Appeal. On February 22, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On February 26, 2001, I issued a Decision and Order: (1) finding that on or about November 24, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to La Bodega Wholesale Foods, St. Louis, Missouri; (2) finding that on or about November 29, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to Cancun Restaurant, Arnold, Missouri; (3) finding that on or about November 30, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to La Mexicana Grocery, St. Anns, Missouri; (4) finding that on or about December 7, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to Latina American Grocery, St. Louis, Missouri; (5) concluding that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and

[3]See Domestic Return Receipt for Article Number P368327605.

319.56-2ff; and (6) assessing Respondent a $6,000 civil penalty. *In re Rafael Dominguez*, 60 Agric. Dec. ___, slip op. at 9, 16 (Feb. 26, 2001).

On March 23, 2001, Respondent filed a petition for reconsideration. On April 16, 2001, Complainant filed Complainant's Response to Respondent's Request for Reconsideration. On April 18, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the February 26, 2001, Decision and Order.

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).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises one issue in his March 16, 2001, letter to Mr. William [hereinafter Petition for Reconsideration]. Respondent contends he was not aware of the Plant Quarantine Act or the Federal Plant Pest Act (Pet. for Recons.).

The Plant Quarantine Act and the Federal Plant Pest Act are published in the United States Statutes at Large and the United States Code, and Respondent is presumed to know the law.[4] Moreover, the regulations prohibiting the movement of Mexican Hass avocados from Illinois to Missouri are published in the *Federal Register*; thereby constructively notifying Respondent of the prohibition on the

[4]*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).

movement of Mexican Hass avocados from Illinois to Missouri.[5] Therefore, Respondent's lack of actual knowledge of the Plant Quarantine Act, the Federal Plant Pest Act, and 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 and the reasons set forth in *In re Rafael Dominguez*, 60 Agric. Dec. ___ (Feb. 26, 2001), 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.[6]

---

[5] *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).

[6] *In re William J. Reinhart*, 60 Agric. Dec. ___, slip op. at 35-36 (Jan. 23, 2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 647 (2000) (Order Denying Respondent's Pet. for Recons.); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re David Tracy Bradshaw*, 59 Agric. Dec. 790, 793 (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*
(continued...)

Respondent's Petition for Reconsideration was timely filed and automatically stayed the February 26, 2001, 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 February 26, 2001, is reinstated: except that the date within which payment of the civil penalty was required to be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, in the February 26, 2001, Order, is the date indicated in the Order in this Order Denying Petition for Reconsideration.

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

ORDER

Respondent is assessed a $6,000 civil penalty. The civil penalty shall be paid by certified checks or money orders, 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

Respondent shall make payments of $500 each month for 12 consecutive months. Respondent's initial payment of $500 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. If Respondent is late in making any payment or misses any payment, then all remaining payments become immediately due and payable in full. Respondent shall state on each certified check or money order that payment is in reference to P.Q. Docket No. 00-0017.

_____

[6](...continued)
& 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.).

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 as to Billy G. Turner, d/b/a Wes and Mom Trucking, filed June 12, 2001.

Default – Failure to file timely answer – Imported fire ant – Answer requirements – Attorney of record – Appearance.

The Judicial Officer affirmed the Default Decision issued by Chief Administrative Law Judge James W. Hunt (Chief ALJ): (1) concluding Respondent Billy G. Turner moved articles regulated to prevent the interstate spread of imported fire ant from the quarantined area of Montgomery County, Texas, into the nonquarantined area of Arizona without a certificate or limited permit in violation of 7 C.F.R. §§ 301.81-.81-10; and (2) assessing Respondent Billy G. Turner a $1,000 civil penalty. The Judicial Officer deemed Respondent Billy G. Turner's failure to file a timely answer to the Complaint an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)). The Judicial Officer rejected Respondent Billy G. Turner's contention that an answer that was not signed by Respondent Billy G. Turner or Respondent Billy G. Turner's attorney was Respondent Billy G. Turner's timely-filed answer (7 C.F.R. § 1.136(a)).

James A. Booth, for Complainant.
Respondent Billy G. Turner, d/b/a Wes and Mom Trucking, Pro se.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on June 1, 2000. 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. §§ 301.81-.81-10); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on or about August 25, 1998, Herman E. Hoffman, Jr., d/b/a Herman and Associates, and Billy G. Turner, d/b/a Wes and Mom Trucking, 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 in violation of 7 C.F.R. § 301.81-4(a) (Compl. ¶ III).

The Hearing Clerk served Billy G. Turner with the Complaint, the Rules of Practice, and a service letter at 110 3rd Street, Moore, Texas, on June 12, 2000.[1] Respondent Billy G. Turner 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)).[2] On July 19, 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 as to Billy G. Turner, d/b/a Wes and Mom Trucking [hereinafter Motion for Adoption of Proposed Decision and Order], and a Proposed Default Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking [hereinafter Proposed Decision and Order]. The Hearing Clerk served Billy G. Turner with Complainant's Motion for Adoption of Proposed Decision and Order, Complainant's Proposed Decision and Order, and a service letter on July 28, 2000.[3] Billy G. Turner 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, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent Billy G. Turner a letter dated August 18, 2000, stating that objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order had not been filed within the allotted time and that the record was being referred to an administrative law judge for consideration and decision.

On August 28, 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 Default Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking [hereinafter Initial Decision and Order as to Billy G. Turner]: (1) finding that on or about August 25, 1998, Billy G. Turner 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; (2) concluding that Billy G. Turner violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. § 301.81 *et seq.*; and (3) assessing Billy G. Turner a $1,000 civil penalty (Initial Decision and Order as to

---

[1] See Domestic Return Receipt for Article Number P093175253; Memorandum from "RAParis" dated June 6, 2000.

[2] Billy G. Turner contends he filed a timely Answer to the Complaint. I reject Billy G. Turner's contention that he filed a timely Answer. The basis for Billy G. Turner's contention that he filed a timely Answer and my reasons for rejecting Billy G. Turner's contention are discussed in this Decision and Order, *infra*.

[3] See Domestic Return Receipt for Article Number P093175280.

Billy G. Turner at 2).

The Hearing Clerk served Billy G. Turner with the Initial Decision and Order as to Billy G. Turner on September 7, 2000.[4] On October 2, 2000, Billy G. Turner appealed to the Judicial Officer. Billy G. Turner filed his appeal petition within 30 days after receiving service of the Initial Decision and Order as to Billy G. Turner as required by section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)). Thus, Billy G. Turner's appeal petition was timely filed. Nevertheless, on October 17, 2000, the Hearing Clerk issued a Notice of Effective Date of Default Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking, stating, as follows:

> The Decision and Order issued by Administrative Law Judge James W. Hunt on August 28, 2000, has not been appealed to the Secretary within the allotted time.
>
> In accordance with the applicable rules of practice, the decision became final on October 10, 2000, and effective on October 16, 2000.

On May 4, 2001, the Hearing Clerk issued a letter stating that Billy G. Turner's appeal petition was timely filed and providing Complainant with 20 days within which to file a response to Billy G. Turner's appeal petition.

On May 31, 2001, Complainant filed Complainant's Response to the Appeal of the Default Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking. On June 5, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order as to Billy G. Turner. 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 to Billy G. Turner as the final Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking, with minor modifications. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

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[4]See Domestic Return Receipt for Article Number Z 599 738 618.

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 FIRE ANT

QUARANTINE AND REGULATIONS

§ 301.81 Restrictions on interstate movement of regulated articles.

No person may move interstate from any quarantined area any regulated article except in accordance with this subpart.

§ 301.81-2 Regulated articles.

The following are regulated articles:

(a) Imported fire ant queens and reproducing colonies of imported fire

ants.

(b) Soil, separately or with other articles, except potting soil that is shipped in original containers in which the soil was placed after commercial preparation.

(c) Baled hay and baled straw stored in direct contact with the ground;

(d) Plants and sod with roots and soil attached, except plants maintained indoors in a home or office environment and not for sale;

(e) Used soil-moving equipment, unless removed of all noncompacted soil; and

(f) Any other article or means of conveyance when:

(1) An inspector determines that it presents a risk of spread of the imported fire ant due to its proximity to an infestation of the imported fire ant; and

(2) The person in possession of the product, article, or means of conveyance has been notified that it is regulated under this subpart.

§ 301.81-3 Quarantined areas.

(a) The Administrator will quarantine each State or each portion of a State that is infested.

. . . .

(e) The areas described below are designated as quarantined areas:

. . . .

TEXAS

. . . .

Montgomery County. The entire county.

§ 301.81-4 Interstate movement of regulated articles from quarantined areas.

(a) Any regulated article may be moved interstate from a quarantined area into or through an area that is not quarantined only if moved under the following conditions:

(1) With a certificate or limited permit issued and attached in accordance with §§ 301.81-5 and 301.81-9 of this subpart;

(2) Without a certificate or limited permit, provided that each of the following conditions is met:

(i) The regulated article was moved into the quarantined area from an

area that is not quarantined;

(ii) The point of origin is indicated on a waybill accompanying the regulated article;

(iii) The regulated article is moved through the quarantined area (without stopping except for refueling, or for traffic conditions, such as traffic lights or stop signs), or has been stored, packed, or parked in locations inaccessible to the imported fire ant, or in locations that have been treated in accordance with the methods and procedures prescribed in the Appendix to this subpart ("III. Regulatory Procedures"), while in or moving through any quarantined area; and

(iv) The article has not been combined or commingled with other articles so as to lose its individual identity; or

(3) Without a certificate or limited permit provided the regulated article is a soil sample being moved to a laboratory approved by the Administrator to process, test, or analyze soil samples.

7 C.F.R. §§ 301.81, .81-2, .81-3(a), (e), .81-4(a) (footnotes omitted).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER AS TO BILLY G. TURNER (AS RESTATED)

Billy G. Turner 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 as to Billy G. Turner, d/b/a Wes and Mom Trucking, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Billy G. Turner, d/b/a Wes and Mom Trucking, is an individual whose mailing address is 110 3rd Street, Moore, Texas 78057.

2. On or about August 25, 1998, Billy G. Turner, 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.

Conclusions of Law

By reason of the facts contained in the Findings of Fact, Billy G. Turner violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.81-.81-10.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Billy G. Turner raises one issue in his September 27, 2000, letter to the Hearing Clerk [hereinafter Appeal Petition]. Billy G. Turner contends he filed a timely Answer to the Complaint in June 2000, as follows:

> Sept. 27, 2000
>
> To: Hearing Clerk
>
> From: Herman E. Hoffman Jr.
> Billy G. Turner
>
> Docket 00-0010
>
> This was filed in June on behafe [sic] of Herman Hoffman and Billy Turner. Since we were doing business together and the docket number was the same Mr. Hoffman was handling the matter.
>
> Thank you
> Billy Turner

Appeal Pet.

Billy G. Turner attached to the Appeal Petition an Answer which was filed on June 27, 2000. The Answer reads as follows:

> June 26, 2000
>
> To: Hearing Clerk 202-720-9776

From: Herman E. Hoffman, Jr.

Docket: 00-0010

I. Deny the allegations.

A) No evidence was presented or made available for my evaluation.

B) No evidence said laws properly posted for public awarness [sic].

Herman
Hoffman
6-26-2000

The Answer, filed June 27, 2000, was filed within 20 days after the Hearing Clerk served Billy G. Turner with the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The only issue before me is whether the Answer filed June 27, 2000, is Billy G. Turner's Answer.

Section 1.136(a) of the Rules of Practice provides that an answer must be signed by the respondent or by the attorney of record in the proceeding, as follows:

§ 1.136 Answer.

(a) *Filing and service*. Within 20 days after the service of the complaint . . . , or such other time as may be specified therein, the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. The attorney may file an appearance of record prior to or simultaneously with the filing of the answer.

7 C.F.R. § 1.136(a).

Billy G. Turner did not sign the Answer filed June 27, 2000, and the Answer does not indicate in any other way that it is Billy G. Turner's Answer. Instead, the Answer appears to be solely Herman E. Hoffman, Jr.'s Answer. First, the heading of the Answer states that it is from only one of the parties to this proceeding, Herman E. Hoffman, Jr. Second, the Answer is signed by only one of the parties to this proceeding, Herman E. Hoffman, Jr. Third, the body of the Answer indicates that it was filed on behalf of only one of the parties to this proceeding. Specifically,

the Answer is written in the singular referring to "*my* evaluation."[5] (Answer filed June 27, 2000 (emphasis added).) The word "my" is the possessive form of the pronoun "I" used attributively to indicate possession, agency, or reception of an action by the speaker.[6] Had the Answer been filed on behalf of both Billy G. Turner and Herman E. Hoffman, Jr., as Billy G. Turner contends, the person drafting the Answer would be much more likely to have used the plural "our,"[7] the

[5] *See Texas Co. v. Globe Oil & Refining* Co., 225 F.2d 725, 732 (7th Cir. 1955) (indicating "my" is singular); *Yancey v. Northern Pac. Ry.,* 112 P. 533, 534 (Mont. 1910) (stating "I," "my," and "me" are singular pronouns); *Brown v. Cooper*, 514 S.E.2d 857, 861 (Ga. Ct. App. 1999) (stating "my" is singular), *cert. denied* (June 3, 1999); *Skokie Gold Standard Liquors, Inc. v. Joseph E. Segram & Sons, Inc.*, 452 N.E.2d 804, 807 (Ill. App. Ct. 1983) (indicating "my" is singular); *Bray v. Ellison*, 83 S.W. 96, 97 (Ky. Ct. App. 1904) (stating "I" and "my" are singular pronouns); *Matter of Estate of Lubins*, 656 N.Y.S.2d 851, 853 (N.Y. Surr. Ct. 1997) (stating "I," "my," and "me" are singular pronouns), *aff'd*, 673 N.Y.S.2d 204 (N.Y. App. Div. 1998).

[6] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE NEW COLLEGE EDITION 867 (1976). *See also Waters v. Hawkins*, 764 S.W. 2d 736, 739 (Mo. Ct. App. 1989) (stating "my" is the possessive form of the pronoun "I").

[7] *See Estate of Lidbury v. Commissioner*, 800 F.2d 649, 653 (7th Cir. 1986) (stating "we," "our," and "us" are plural); *Adkins v. Oppio*, 769 P.2d 62, 64 (Nev. 1989) (stating "we," "our," and "us" are plural pronouns); *In re Thompson's Estate*, 478 P.2d 174, 179 (Kan. 1970) (stating the use of plural pronouns (we, our, and us) is standard procedure dictated by the very nature of the joint execution of a single paper); *In re Estate of Chronister*, 454 P.2d 438, 442 (Kan. 1969) (stating "we" and "ours" are plural words); *Rich v. Mottek*, 226 N.Y.S.2d 428, 431 (N.Y. 1962) (stating "we" and "ours" are plural); *Kelly v. Gram*, 38 N.W.2d 460, 464 (S.D. 1949) (stating "we" and "ours" are plural); *Hill v. Godwin*, 81 So. 790, 791 (Miss. 1919) (stating "our" is a plural possessive pronoun); *Sinclair v. Investors' Syndicate*, 146 N.W. 1109, 1110 (Minn. 1914) (stating "we," "us," and "our" are plural pronouns); *Brown v. Cooper*, 514 S.E.2d 857, 861 (Ga. Ct. App. 1999) (stating "our" is plural), *cert. denied* (June 3, 1999); *Orso v. Lindsey*, 598 N.E.2d 1035, 1039 (Ill. App. Ct. 1992) (stating "we"and "our" are common plural terms); *Lappin v. Lane*, 120 Cal. 499, 502 (Cal. Ct. App. 1975) (stating "we" and "our" are plural pronouns); *State v. McClure*, 504 S.W.2d 664, 667 (Mo. Ct. App. 1974) (stating "we" and "our" are first person plural pronouns); *Lancaster v. Burris*, 352 S.W.2d 136, 138 (Tex. Civ. App. 1961) (stating "our" is a plural pronoun); *Dickerson v. Yarbrough*, 212 S.W.2d 975, 978 (Tex. Civ. App. 1948) (stating "our" is plural); *Kirkwood Trust Co. v. Joseph F. Dickmann Real Estate Co.*, 156 S.W.2d 54, 56 (Mo. Ct. App. 1941) (stating "our" and "we" are plural pronouns); *Bray v. Ellison*, 83 S.W. 96, 97 (Ky. Ct. App. 1904) (stating "we" and "our" are plural); *Matter of Estate of Lubins*, 656 N.Y.S.2d 851, 853 (N.Y. Surr. Ct. 1997) (stating "we," "our," and "us" are plural pronouns), *aff'd*, 673 N.Y.S.2d 204 (N.Y. App. Div. 1998); *Thompson v. Boyd*, 32 Cal. 513, 521 (Cal. Dist. App. 1963) (indicating "we" and "our" are plural).

possessive form of the pronoun "we."[8] I find that the use of the word "my" is a strong indication that the Answer was filed only on behalf of the party who signed the Answer, Herman E. Hoffman, Jr.

Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) also provides an answer may be signed by an attorney of record and the attorney may file an appearance of record prior to or simultaneous with the filing of the answer. The *sine qua non* which makes one an attorney of record is the execution and filing of an appearance (7 C.F.R. §§ 1.136(a), .141(c)). The filing of an appearance places all on notice that the person signing the appearance is the person who has authority to act for and bind his or her client in the pending proceeding. Herman E. Hoffman, Jr.'s only filing in this proceeding is the Answer which does not in any way indicate that it constitutes Herman E. Hoffman, Jr.'s appearance on behalf of Billy G. Turner. Moreover, Billy G. Turner's Appeal Petition, in which he contends the Answer filed June 27, 2000, was filed on his behalf, is not signed by Herman E. Hoffman, Jr.

I conclude that the Answer filed June 27, 2000, was not Billy G. Turner's Answer. Further, the record does not establish that Herman E. Hoffman, Jr., was, or is, an attorney of record appearing on behalf of Billy G. Turner. Instead, the record indicates that Herman E. Hoffman, Jr., appears for himself as a party in this proceeding. Therefore, Billy G. Turner did not file a timely answer; Billy G. Turner is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint; and the Chief ALJ properly issued the Initial Decision and Order as to Billy G. Turner.

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

ORDER

Billy G. Turner, d/b/a Wes and Mom Trucking, is assessed a $1,000 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:

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[8] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE NEW COLLEGE EDITION 932 (1976). *See also Waters v. Hawkins*, 764 S.W.2d 736, 739 (Mo. Ct. App. 1989) (stating "our" is the possessive form of the pronoun "we").

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

Billy G. Turner's payment of the civil penalty 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 Billy G. Turner. Billy G. Turner shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 00-0010.

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MISCELLANEOUS ORDERS

In re: EDWARD MARTIN, d/b/a EDWARD MARTIN ORCHARDS, A SOLE PROPRIETORSHIP.
AMAA Docket No. 00-0001.
Order Correcting Decision and Order filed February 15, 2001.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

The "Proposed Decision and Order Upon Admission of Facts by Reason of Default" filed herein on December 7, 2000, is ordered corrected as follows:

1. The caption is changed to read "Decision and Order Upon Admission of Facts by Reason of Default."

2. Paragraph 2 under "Conclusions" is changed to read "By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 916.11, 916.41, 917.37, 917.6 of the California Nectarine and Peach Orders (7 C.F.R. §§ 916.11, 916.41, 917.37, 917.6."

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In re: BIOLA RAISIN COMPANY, CARUTHERS RAISIN PACKING COMPANY, INC., CENTRAL CALIFORNIA PACKING COMPANY, CHOOLJIAN BROS. PACKING COMPANY, CHOOLJIAN & SONS, INC. d/b/a DEL REY PACKING COMPANY, ENOCH PACKING COMPANY, INC., NATIONAL RAISIN COMPANY, SUN-MAID GROWERS OF CALIFORNIA.
01 AMA Docket No. F&V 989-2.
Order Dismissing Petition filed April 10, 2001.

Gregroy Cooper, for Complainant.
Charles C. Manock, Fresno, CA, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

On March 26, 2001, Petitioners filed a "Dismissal of Petition to Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Set Final Reserve Percentages of Natural Seedless Raisins and Zante

Currant Raisins Pursuant to 7 C.F.R. § 989.54(d) Due to Unreasonable Delays in Setting Field Price and/or to Exempt Petitioners from Various Provisions in the Raisin Marketing Order and any Obligations Imposed in Connection Therewith that are not in Accordance with Law [7 U.S.C. § 608c(15)(a); 7 C.F.R. § 989.1 *et seq*.; 7 C.F.R. § 989.54(d)]. On March 30, 2001, Respondent filed a "Motion to Dismiss Petition."

Petitioners' "Dismissal" shall be considered a request to withdraw its Petition under § 900.53 of the Rules of Practice (7 C.F.R. § 900.53). Petitioners' request and Respondent's motion are granted. Accordingly, the Petition is dismissed.

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In re: REGINALD DWIGHT PARR.
AWA Docket No. 99-0022.
Stay Order filed January 25, 2001.

Brian Thomas Hill, for Complainant.
Greg Gladden, Houston, TX, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On August 30, 2000, I issued a Decision and Order: (1) concluding that Reginald Dwight Parr [hereinafter Respondent] willfully violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142); (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $7,050 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 3 years and 6 months. *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 611-15, 627-29 (2000). On September 15, 2000, Respondent filed a petition for reconsideration, which I denied. *In re Reginald Dwight Parr*, 59 Agric. Dec. 629 (2000) (Order Denying Respondent's Pet. for Recons.).

On January 2, 2001, Respondent filed a Motion for Stay Pending Review requesting a stay of the Order in *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000), pending the outcome of proceedings for judicial review. The Hearing Clerk served Respondent's Motion for Stay Pending Review on the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant]. Complainant failed to file a response to Respondent's Motion for Stay Pending Review. On January 24, 2001, the Hearing Clerk

transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Stay Pending Review.

Respondent filed a timely petition for review of *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000), with the United States Court of Appeals for the Fifth Circuit. *Parr v. United States Dep't of Agric.*, No. 00-60844 (5th Cir. Nov. 30, 2000). Complainant has not opposed Respondent's Motion for Stay Pending Review. Therefore, in accordance with 5 U.S.C. § 705, Respondent's Motion for Stay Pending Review is granted. The Order issued in *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: CHESTER GAITHER.
AWA Docket No. 01-0001.
Order Dismissing Complaint Without Prejudice filed January 30, 2001.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Wherefore, for good cause shown the complaint against the Respondent is dismissed without prejudice.

In re: STEVEN BOURK, CARMELLA BOURK, AND DONYA BOURK.
AWA Docket No. 01-0004.
Order Withdrawing Complaint as to Donya Bourk filed March 20, 2001.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

On March 15, 2001, Complainant filed a "Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk." The complaint against Respondent Donya Bourk, filed herein on October 17, 2000, is withdrawn without prejudice.

In re: JERRY GOETZ, d/b/a JERRY GOETZ AND SONS.
BPRA Docket No. 94-0001.
Ruling Denying Complainant's Motion to Lift Stay filed January 4, 2001.

Sharlene A. Deskins, for Complainant.
David R. Klaassen, Marquette, Kansas, for Respondent.
Ruling issued by William G. Jenson, Judicial Officer.

On November 3, 1997, I issued a Decision and Order: (1) concluding that Jerry Goetz, d/b/a Jerry Goetz and Sons [hereinafter Respondent], willfully violated the Beef Promotion and Research Order and the Rules and Regulations (7 C.F.R. §§ 1260.101-.316) [hereinafter the Beef Order]; (2) ordering Respondent to cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) [hereinafter the Beef Act] and the Beef Order; (3) assessing Respondent a civil penalty of $69,244.51; and (4) ordering Respondent to pay past-due assessments and late-payment charges of $66,577 to the Kansas Beef Council. *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997).

On November 12, 1997, Complainant filed Complainant's Motion for Reconsideration, and on November 17, 1997, Respondent filed a Petition for Reconsideration of the Decision of the Judicial Officer. On April 3, 1998, I issued an Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in Part Complainant's Petition for Reconsideration. *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). Based on my granting Complainant's Motion for Reconsideration in part, I did not reinstate the Order in the Decision and Order issued November 3, 1997, but, instead, issued a new Order: (1) ordering Respondent to cease and desist from violating the Beef Act and the Beef Order; (2) assessing Respondent a civil penalty of $69,804.49; and (3) ordering Respondent to pay past-due assessments and late-payment charges of $66,913 to the Kansas Beef Council. *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.).

On June 22, 1998, Respondent filed a Motion for an Order Staying Enforcement [hereinafter Motion for a Stay] requesting a stay pending proceedings for judicial review of *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), and pending final disposition of Respondent's appeal of *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996).

On June 24, 1998, the Acting Administrator, Agricultural Marketing Service,

United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to Motion for an Order Staying Enforcement stating "Complainant does not oppose the staying of the sanctions imposed by the Judicial Officer in [*In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.)]."

On June 25, 1998, I issued a Stay Order granting Respondent's Motion for a Stay pending the outcome of proceedings for judicial review of *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), and pending final disposition of Respondent's appeal of *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996). *In re Jerry Goetz*, 57 Agric. Dec. 445 (1998) (Stay Order).

Goetz v. Glickman, 920 F. Supp. 1173 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), is concluded. However, proceedings for judicial review of *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), are not concluded. The United States District Court for the District of Kansas affirmed *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). *See Goetz v. United States*, 99 F. Supp.2d 1308 (D. Kan. 2000). On June 14, 2000, Respondent filed a notice of appeal of the district court decision with the United States Court of Appeals for the Tenth Circuit. *Goetz v. United States*, No. 00-3173 (10th Cir. June 14, 2000).

On November 20, 2000, Complainant filed a Motion to Lift Stay. On December 21, 2000, Respondent filed Respondent's Objections to Complainant's Motion to Lift Stay, and the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Complainant contends the June 25, 1998, stay should be lifted because: (1) the public interest is not served by continuing the stay; (2) lifting the stay will not cause irreparable harm to Respondent; and (3) Respondent is extremely unlikely to prevail in his appeal to the United States Court of Appeals for the Tenth Circuit (Motion to Lift Stay at 2-4).

Complainant contends the public interest is not served by the June 25, 1998, stay because "there is a perception that the Respondent is attempting to avoid paying anything by continuing these proceedings as long as possible." Complainant asserts "[t]his perception encourages people to use legal proceedings as a mechanism to avoid paying assessments [required by the Beef Act and the Beef

Order] . . . and affects the ability of [the Agricultural Marketing Service] to obtain compliance with the Beef Act and [the Beef] Order. A stay issued by the Judicial Officer should not be used as a tool that a respondent can utilize to give him time and opportunity to shelter his assets so as to avoid paying assessments." (Motion to Lift Stay at 2.)

Complainant cites no instance in which persons have used legal proceedings to avoid paying assessments required by the Beef Act and the Beef Order. Since the issuance of the June 25, 1998, Stay Order, only one disciplinary administrative proceeding concerning violations of the Beef Act and the Beef Order has been appealed to the Judicial Officer.[1] The dearth of cases appealed to the Judicial Officer indicates that the June 25, 1998, Stay Order has not encouraged a significant number of people to use legal proceedings as a mechanism to avoid paying assessments required by the Beef Act and the Beef Order, as Complainant contends.

Moreover, Complainant cites no basis for the assertion that the June 25, 1998, Stay Order has affected the ability of the Agricultural Marketing Service to enforce the Beef Act and the Beef Order. The affidavit attached to Complainant's Motion to Lift Stay does not indicate that violations of the Beef Act and the Beef Order attributable to the June 25, 1998, Stay Order are occurring. Instead, the affiant merely speculates about possible future violations stating that the Kansas Beef Council's inability to collect assessments, late fees, and penalties from Respondent would encourage future non-compliance with the Beef Act and the Beef Order (Matt Teagarden's Affidavit ¶ 7).

Therefore, I find no merit in Complainant's contention that the June 25, 1998, Stay Order is adversely affecting the public interest.

Complainant also contends lifting the stay will not cause Respondent irreparable harm (Motion to Lift Stay at 3-4).

Monetary loss, even where substantial, does not, in and of itself, cause irreparable harm.[2] However, monetary loss may constitute irreparable harm where the loss threatens an ongoing business with destruction as opposed to mere disruption.[3] Complainant asserts, but does not provide support for finding,

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[1] *See In re Jeanne and Steve Charter*, 59 Agric. Dec. 650 (2000).

[2] *Mid-States Ag-Chem Co. v. Atchison Grain Co.*, 750 F. Supp. 465, 467 (D. Kan. 1990); *In re David R. Hostetter*, 52 Agric. Dec. 366, 368 (1993) (Order Lifting Stay Order).

[3] *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986); *Otero Savings & Loan Ass'n v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981); *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980); *Sprint Corp. v. DeAngelo*, 12 F. (continued...)

Respondent will only suffer a monetary loss. Respondent asserts payment of $136,717.49 required by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), would result in the destruction of Respondent's business (Respondent's Objections to Complainant's Motion to Lift Stay ¶ 5). Based on my review of the record, I find Respondent's payment of $136,717.49 in accordance with the April 3, 1998, Order would threaten Respondent's ongoing business with destruction. Therefore, I find that lifting the June 25, 1998, stay would cause Respondent irreparable harm.

Moreover, Complainant asserts, if the immediate payment of the civil penalty is sufficient to cause Respondent irreparable harm, the stay is still not necessary because the Judicial Officer can modify the Order issued in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), to allow Respondent to pay the civil penalty in installments (Motion to Lift Stay at 3-4).

I reject Complainant's contention that modification of the April 3, 1998, Order to allow Respondent to pay the $69,804.49 civil penalty in installments would be sufficient to eliminate the threat of destruction of Respondent's ongoing business. In addition to the civil penalty, the April 3, 1998, Order requires Respondent to pay the Kansas Beef Council past-due assessments and late-payment charges totaling $66,913. Based on my review of the record, Respondent's payment of past-due assessments and late-payment charges totaling $66,913 in accordance with the April 3, 1998, Order would threaten Respondent's ongoing business with destruction. Therefore, even if I modified the April 3, 1998, Order as urged by Complainant, lifting the June 25, 1998, stay would cause Respondent irreparable harm.

Moreover, I deny Complainant's request that I modify the Order in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). The modification of the April 3, 1998, Order urged by Complainant would not adversely affect Respondent. Further, a modification of the April 3, 1998, Order to allow Respondent to pay the $69,804.49 civil penalty in installments might be crafted so that it is not a significant modification. Nonetheless, I am reluctant to disturb any order while it is the subject of judicial review. Generally, courts should not be

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[3](...continued)
Supp.2d 1188, 1194 (D. Kan. 1998); *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F. Supp. 1172, 1181 (D. Kan. 1988); *In re David R. Hostetter*, 52 Agric. Dec. 366, 368 (1993) (Order Lifting Stay Order).

presented with a "moving target" when reviewing an order.

Complainant is free to renew the request to modify the Order in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), to allow Respondent to pay the civil penalty in installments if, after proceedings for judicial review have been concluded, the Order in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), is affirmed.

Complainant further contends irreparable harm cannot be construed as applying to the non-monetary sanctions in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.) (Motion to Lift Stay at 4).

The only non-monetary sanction in the April 3, 1998, Order requires Respondent to cease and desist from violating the Beef Act and the Beef Order. *In re Jerry Goetz*, 57 Agric. Dec. 426, 444-45 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). Complainant asserts Respondent has used the June 25, 1998, stay of the cease and desist provisions of the April 3, 1998, Order as an excuse to violate the Beef Act and the Beef Order. However, Complainant also asserts Respondent violated the Beef Act and the Beef Order during the entire period between the date Complainant filed the Complaint, October 29, 1993, and the date Complainant filed the Motion to Lift Stay, November 20, 2000 (Motion to Lift Stay at 4; Matt Teagarden's Affidavit ¶¶ 3-5). Therefore, I reject Complainant's assertion that Respondent has used the June 25, 1998, Stay Order as an excuse to violate the Beef Act and the Beef Order.

The June 25, 1998, stay of the cease and desist provisions of the Order in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), does not in any way make the Beef Act and the Beef Order inapplicable to Respondent. If Complainant has *prima facie* evidence that Respondent violated the Beef Act and the Beef Order during the period between October 29, 1993, and November 20, 2000, Complainant may institute an administrative proceeding against Respondent for violations of the Beef Act and the Beef Order that are not the subject of this proceeding.

Finally, Complainant asserts that, in light of the decision in *Goetz v. United States*, 99 F. Supp.2d 1308 (D. Kan. 2000), affirming *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), "it is extremely unlikely that the

Respondent will succeed in his appeal to the 10th Circuit." (Motion to Lift Stay at 4.)

A respondent need not establish a high probability of success on the merits in order to be granted a stay. The probability of success that must be shown to justify a stay is inversely proportional to the degree of irreparable harm a respondent will suffer absent a stay. Thus, a stay may be granted by showing either a high probability of success on the merits and some injury or *vice versa*.[4] I have applied this same principle to determine whether to grant Complainant's Motion to Lift Stay.

In my view, *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), and *Goetz v. United States*, 99 F. Supp.2d 1308 (D. Kan. 2000), are correctly decided. I do not find that there is a high probability that Respondent will succeed on the merits in his appeal to the United States Court of Appeals for the Tenth Circuit. However, I do not lift the June 25, 1998, stay. The record establishes that Respondent has some probability of success on the merits, and, as discussed in this Decision and Order, *supra*, the record establishes that lifting the June 25, 1998, stay would cause Respondent substantial and irreparable harm.

I have considered the following factors: (1) the threat of irreparable harm to Respondent posed by lifting the June 25, 1998, stay; (2) the state of balance between the harm that lifting the June 25, 1998, stay would cause Respondent and the injury that maintaining the June 25, 1998, stay causes Complainant; (3) the probability that Respondent will prevail on appeal to the United States Court of Appeals for the Tenth Circuit; and (4) the public interest in lifting the June 25, 1998, stay. After considering these four factors, I conclude, based on the record before me, that the June 25, 1998, Stay Order should not be disturbed.

For the foregoing reasons, I deny Complainant's November 20, 2000, Motion to Lift Stay.

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[4] *See generally Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987); *Cumo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam).

In re: FRANCIS-LEE CARTER.
DNS-FS Docket No. 01-0001.
Order Accepting Withdrawal of Appeal and Stipulation of Settlement filed April 18, 2001.

Lori Polin Jones, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

On April 11, 2001, the Respondent and the Nonprocurement Debarring Official, Forest Service, and Counsel for the Debarring Official, filed a Withdrawal of Appeal of Francis-Lee Carter and Stipulation of Settlement. Therein the parties agreed to resolve the Appeal for reasons more specifically set forth in said document.

A review of the record as a whole indicates the Appeal Withdrawal should be accepted and the Stipulation for Settlement recognized as the agreement reached between the parties.

It is so Ordered. Copies hereof shall be served upon the parties.

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In re: WILLIAM D. LEBLANC, d/b/a LEBLANC'S CAJUN BOUDIN & FOOD COMPANY.
FMIA Docket No. 99-0006.
Order Granting Motion to Withdraw Complaint filed January 22, 2001.

Rick D. Herdon, for Complainant.
Stephen P. Sheets, Gonzales, LA, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge .

Complainant's motion to withdraw its complaint is granted. The complaint, filed herein on February 25, 1999, is accordingly withdrawn.

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In re: STATE OF MICHIGAN.
FSP Docket No. 00-0005.
Dismissal of Proceeding filed March 7, 2001.

Charles Jones, Lansing, MI, for Appellant.
Gena Kochan, for Complainant.
Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

By letter dated February 20, 2001, I was informed by a representative of the State of Michigan that:

> " . . . the State of Michigan settled its claim with USDA, case #FSP 00-0005."

Accordingly the proceeding is dismissed. Copies hereof shall be served upon the parties.

In re: WILLIAM J. REINHART AND REINHART STABLES.
HPA Docket No. 99-0013.
Order Denying William J. Reinhart's Petition for Reconsideration filed January 23, 2001.

Horse protection – Petition for reconsideration – Filing date – Atlanta protocol – Entry – Admissible evidence – Palpation reliable – Due process – Bias – Commerce clause – New argument on appeal – Referral to court – Preponderance of evidence – Civil penalty – Disqualification – Soring.

The Judicial Officer denied William J. Reinhart's (Respondent) Petition for Reconsideration. The Judicial Officer rejected the Respondent's contentions that: (1) the administrative proceeding deprived him of property without due process of law; (2) the Secretary of Agriculture's authority under the Horse Protection Act is limited to presenting facts to a court; (3) Judge Bernstein (ALJ) and the Judicial Officer were biased against the Respondent; (4) the record contains overwhelming evidence that digital palpation is not a reliable method by which to determine whether a horse is "sore" as defined by the Horse Protection Act; (5) the ALJ erroneously excluded the Atlanta Protocol; (6) the United States Department of Agriculture (Department) relies on digital palpation as the only method by which to determine whether a horse is sore under the Horse Protection Act; (7) the examinations of Double Pride Lady (the Respondent's horse) by Department veterinarians were not in compliance with the Horse Protection Act because they were conducted while Double Pride Lady was standing still; (8) the Respondent did not violate the Horse Protection Act because he did not "present" Double Pride Lady in a "cruel or inhumane condition;" (9) the Horse Protection Act is an unconstitutional exercise of power under the Commerce Clause of the Constitution of the United States; (10) *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), is controlling; and (11) the Secretary of Agriculture has not enforced the Horse Protection Act within the jurisdiction of the United States Court of Appeals for

the Fifth Circuit since *Young* was decided on June 7, 1995. The Judicial Officer also rejected the Respondent's contention that "entry" under the Horse Protection is an event. The Judicial Officer stated that "entry" is a process which includes all activities required to be completed before a horse can be shown or exhibited and the process generally begins with the payment of the fee to enter a horse in a horse show and includes pre-show examinations by Designated Qualified Persons and Department veterinarians. The Judicial Officer found that the Respondent raised the issue of Double Pride Lady's "conditioned reflex" for the first time in his Petition for Reconsideration and held that new arguments cannot be raised for the first time on appeal to the Judicial Officer. The Judicial Officer also rejected the Respondent's contention that the evidence was not sufficient to conclude that the Respondent violated the Horse Protection Act. The Judicial Officer stated that the Complainant proved by a preponderance of the evidence that the Respondent violated 15 U.S.C. § 1824(2)(B) and that the Complainant need not prove that soring improved or would have improved Double Pride Lady's performance. The Judicial Officer denied the Respondent's request that the proceeding be dismissed. The Judicial Officer also denied the Respondent's request that the Judicial Officer refer the proceeding to a district court of the United States or to the United States Court of Appeals for the Sixth Circuit, stating that the Judicial Officer has no authority under the Rules of Practice (7 C.F.R. §§ 1.130-.151) to make such a referral.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
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 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 (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. Complainant alleges that on October 28, 1998, William J. Reinhart [hereinafter Respondent 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, Respondent Reinhart filed a Response to the Complaint. In his Response, Respondent 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, Respondent 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 the entry of Double

Pride Lady 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, Respondent 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 Respondent Reinhart's opposition to Complainant's Motion to Amend Complaint to be Respondent 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 section 5(2)(B) and (D) of the Horse Protection Act (15 U.S.C. § 1824(2)(B), (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. Respondent 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, Respondent 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

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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].

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 under which Respondent Reinhart does business; (3) assessed Respondent Reinhart a $2,000 civil penalty; and (4) disqualified Respondent 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 and Complainant's Appeal of Decision and Order. 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.

On November 9, 2000, I issued a Decision and Order: (1) concluding that on October 28, 1998, Respondent 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 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) concluding that Reinhart Stables is merely a name under which Respondent Reinhart does business; (3) assessing Respondent Reinhart a $2,000 civil penalty; (4) disqualifying Respondent 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,

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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 of Decision and Order. Therefore, I have not considered Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order.

or horse auction; (5) denying Respondents' motion requesting a list of citations; and (6) denying Respondents' motion requesting a transcript of the hearing. *In re William J. Reinhart*, 59 Agric. Dec. 721, 731, 765-66, 768-69 (2000).

On November 27, 2000, Respondent Reinhart filed a Petition for Reconsideration of Decision and Order by Judicial Officer [hereinafter Petition for Reconsideration]. On January 2, 2001, Complainant filed Complainant's Response to Respondent William J. Reinhart's Petition for Reconsideration. On January 4, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the November 9, 2000, Decision and Order.

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

APPLICABLE STATUTORY AND REGULATORY 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.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1824(2), 1825(b)(1)-(2), (c), 1828.

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 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

> For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected by definition in a standard dictionary, such as "Webster's."
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> . . . .
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> *Inspection* means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

9 C.F.R. § 11.1.

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Reinhart raises 24 issues in his Petition for Reconsideration. First, Respondent Reinhart contends the administrative proceeding deprives him of property in violation of the due process clause of the Constitution of the United States (Pet. for Recons. at 1, 19-20).

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of property without due process of law. I have reviewed the record in this proceeding. I find Respondent Reinhart was provided notice and an opportunity for a hearing and all the process Respondent Reinhart was due under the due process clause of the Fifth Amendment to the Constitution of the United States. Therefore, Respondent Reinhart was not deprived of property without due process of law.

Second, Respondent Reinhart contends "[t]he only legitimate function . . . that an administrative law tribunal has in cases where taking of property is involved is the accumulation of facts which may be presented to a court of competent jurisdiction as a basis for a determination of law on the taking of property by government action." (Pet. for Recons. at 2.)

The Horse Protection Act provides that the Secretary of Agriculture may assess

a civil penalty against any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824) and may disqualify a person who has been assessed a civil penalty from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The alleged violator must be given notice and an opportunity for a hearing before the Secretary of Agriculture. 15 U.S.C. § 1825(b), (c). Administrative proceedings under the Horse Protection Act are conducted in accordance with the Administrative Procedure Act which imposes a number of procedural requirements. One of these requirements is that, after the alleged violator is provided with an opportunity for an agency hearing, the agency must issue a decision which includes findings of fact, conclusions of law, and the reasons or basis for the findings of fact and conclusions of law, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; content of decisions; record**
>
> . . . .
> (c) . . . .
> All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of–
> (A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; and
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c).

Therefore, I disagree with Respondent Reinhart's contention that the only legitimate function of the United States Department of Agriculture in proceedings under the Horse Protection Act is "the accumulation of facts which may be presented to a court of competent jurisdiction as a basis for a determination of law on the taking of property by government action."

Third, Respondent Reinhart contends the ALJ and the Judicial Officer exhibited extreme bias by their failures to find facts concerning Charles L. Thomas' background, Charles L. Thomas' examination of Double Pride Lady, and Charles L. Thomas' determination that Double Pride Lady was not sore (Pet. for Recons. at 2-3).

Due process requires an impartial tribunal, and a biased decisionmaker unfairly

deprives the litigant of this impartiality.[3] However, a substantial showing of legal bias is required to disqualify an administrative law judge or judicial officer or to obtain a ruling that the hearing is unfair.[4] Even if I found that the ALJ and I

[3] *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).

[4] *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*
(continued...)

erroneously failed to find facts concerning Charles L. Thomas' background, Charles L. Thomas' examination of Double Pride Lady, and Charles L. Thomas' determination that Double Pride Lady was not sore, that finding alone would not cause me to conclude that the ALJ and I are biased against Respondent Reinhart.

Fourth, Respondent Reinhart contends the Judicial Officer erroneously found that Charles L. Thomas formed no opinion regarding whether Double Pride Lady was sore (Pet. for Recons. at 3-5). Respondent Reinhart cites page 130 of the transcript and the ALJ's Initial Decision and Order as support for his assertion that Charles L. Thomas was of the opinion that Double Pride Lady was not sore (Pet. for Recons. at 4-5).

I have reviewed page 130 of the transcript and cannot find any testimony which supports Respondent Reinhart's assertion that Charles L. Thomas was of the opinion that Double Pride Lady was not sore. Moreover, the ALJ does not cite the basis for his statement that Charles L. Thomas "was of the opinion that [Double Pride Lady] was not sore" (Initial Decision and Order at 8).

While it is possible to infer from some of Charles L. Thomas' testimony that he was of the opinion that Double Pride Lady was not sore (Tr. 127-36, 151), such an inference would be contrary to Charles L. Thomas' testimony in which he specifically addressed the issue regarding whether he formed such an opinion. Specifically, Charles L. Thomas testified that: he observed Double Pride Lady on October 28, 1998, but did not examine Double Pride Lady to determine whether she was sore under the Horse Protection Act; he formed no opinion regarding whether

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[4](...continued)
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 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).

Double Pride Lady was sore under the Horse Protection Act; and he could not state whether Double Pride Lady was sore under the Horse Protection Act (Tr. 138, 145-50). Therefore, I disagree with Respondent Reinhart's contention that my finding that Charles L. Thomas formed no opinion regarding whether Double Pride Lady was sore under the Horse Protection Act, is error.

Fifth, Respondent Reinhart asserts the Judicial Officer's statement that Charles L. Thomas formed no opinion regarding whether Double Pride Lady was sore when she was entered in the National Walking Horse Trainers Show demonstrates the Judicial Officer's great confusion. Respondent Reinhart states Double Pride Lady was entered 2 weeks before the National Walking Horse Trainers Show, and Charles L. Thomas did not see Double Pride Lady 2 weeks before the National Walking Horse Trainers Show. (Pet. for Recons. at 4.)

I agree with Respondent Reinhart that there is no evidence that Charles L. Thomas observed Double Pride Lady 2 weeks prior to the National Walking Horse Trainers Show. However, I disagree with Respondent Reinhart's assertion that I found that Charles L. Thomas observed Double Pride Lady 2 weeks prior to the National Walking Horse Trainers Show.

It is well settled that "entry" within the meaning of the Horse Protection Act is a process, not an event. The process of "entry" includes all activities required to be completed before a horse can be shown or exhibited. The process generally begins with the payment of the fee to enter a horse in a horse show and includes pre-show examination of the horse by Designated Qualified Persons or United States Department of Agriculture veterinarians or both.[5] The evidence establishes that

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[5] *In re Jack Stepp*, 57 Agric. Dec. 297, 309 (1998) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and includes pre-show examination by the Designated Qualified Person or the United States Department of Agriculture veterinarian or both), *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 Danny Burks*, 53 Agric. Dec. 322, 334 (1994) (rejecting the respondent's argument that "the mere act of submitting a horse for pre-show inspection does not constitute 'entering' as that term is [used in the Horse Protection] Act"); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 280 (1994) (rejecting the respondent's argument that "entering," as used in the Horse Protection Act, is limited to "doing whatever is specifically required by the management of any particular horse show to cause a horse to become listed on the class sheet for a specific class of that horse show"), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 293 (1993) (stating "entering" a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1183 (1993) (stating entry is a process that gives a status of being entered to a horse and entry includes filling out forms and presenting the horse to the Designated Qualified Person for inspection); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1146-47 (1993) (stating "entering," within the meaning of the Horse

(continued...)

Charles L. Thomas observed Double Pride Lady on October 28, 1998, just before Double Pride Lady's pre-show examination by two Designated Qualified Persons and two United States Department of Agriculture veterinarians (Tr. 140-49, 159-66). Thus, Charles L. Thomas observed Double Pride Lady when she was entered at the National Walking Horse Trainers Show. 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 (Tr. 145-50).

Sixth, Respondent Reinhart contends the Judicial Officer arbitrarily and capriciously found that Complainant's Post-Hearing Brief was timely filed (Pet. for Recons. at 5-6).

I disagree with Respondent Reinhart's contention that I arbitrarily and capriciously found that Complainant's Post-Hearing Brief was timely filed. Respondents raised this same issue in Respondents' Petition for Review [hereinafter Respondents' Appeal Petition] (Respondents' Appeal Pet. at 3). My reasons for finding that Complainant's Post-Hearing Brief was timely filed are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec. 721, 738-39 (2000).

Seventh, Respondent Reinhart contends the Judicial Officer arbitrarily and capriciously found that Respondent Reinhart's response to a motion to lift stay filed 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), was late-filed (Pet. for Recons. at 6).

I did find that Jack Stepp and William Reinhart failed to file a timely response to a motion to lift stay in *In re Jack Stepp*, 59 Agric. Dec. 260 (2000) (Order Lifting Stay). However, my finding that Jack Stepp and William Reinhart failed to file a timely response to a motion to lift stay in a prior proceeding is not relevant to this proceeding.

Respondent Reinhart alleges "[a] pattern of discriminatory rulings against [him] on filing deadlines in prior proceedings"and contends that this pattern "is sufficient evidence as part of an overall argument that [he] was not provided a fair trial in a fair tribunal" (Pet. for Recons. at 6).

I disagree with Respondent Reinhart's contention that there is a pattern of discriminatory rulings against him regarding filing deadlines in prior proceedings.

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[5](...continued)
Protection Act, is a process that begins with the payment of the entry fee); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 344 (1992) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and includes pre-show examination by the Designated Qualified Person or the United States Department of Agriculture veterinarians or both), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

Moreover, purported discriminatory rulings against Respondent Reinhart in prior proceedings are not relevant to this proceeding.

Respondents raised the issue of the disparate application of section 1.147(g) of the Rules of Practice (7 C.F.R. § 1.147(g)) (which concerns the effective date of filing in administrative proceedings instituted under the Rules of Practice) in Respondents' Appeal Petition (Respondents' Appeal Pet. at 3-5). My reasons for rejecting Respondents' contention that 7 C.F.R. § 1.147(g) was disparately applied to the litigants in this proceeding and 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), are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec. 721, 739-42 (2000).

Eighth, Respondent Reinhart contends the Judicial Officer completely misunderstands *Carroll v. C.I.R.*, 71 F.3d 1228 (6th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996). Respondent Reinhart asserts "the Judicial Officer believes the *Carroll* case imposes the common law mailbox rule to any filings with any federal court." Further, Respondent Reinhart asserts *Carroll* held "the mailbox rule generally applies to all federal circuits but specifically in the Sixth Circuit, the filing must be by certified mail as opposed to general delivery." (Pet. for Recons. at 6.)

As an initial matter, I did not state in the November 9, 2000, Decision and Order that *Carroll* "imposes the common law mailbox rule to any filings with any federal court," as Respondent Reinhart contends. Moreover, as fully discussed in the November 9, 2000, Decision and Order, *Carroll* is not applicable to this administrative proceeding. *In re William J. Reinhart*, 59 Agric. Dec. 721, 742 (2000).

Ninth, Respondent Reinhart asserts the record contains overwhelming evidence that digital palpation is not a reliable method by which to determine whether a horse is "sore" as defined in the Horse Protection Act (Pet. for Recons. at 7).

Respondent Reinhart does not cite any part of the record to support his assertion that the record contains overwhelming evidence that digital palpation is not a reliable method by which to determine whether a horse is sore. Moreover, I cannot locate evidence that supports Respondent Reinhart's assertion. Therefore, I reject Respondent Reinhart's assertion that the record contains overwhelming evidence that digital palpation is not a reliable method by which to determine whether a horse is "sore" as defined in the Horse Protection Act.

Tenth, Respondent Reinhart asserts Dr. Slauter and Dr. Smith testified that they could cite no scientific or clinical evidence that palpation is a reliable method for detecting sore horses (Pet. for Recons. at 7).

Respondent Reinhart does not refer to any part of the transcript to support his assertion that Dr. Slauter and Dr. Smith testified that they could not cite scientific

or clinical evidence that palpation is a reliable method for detecting sore horses. I find no testimony by Dr. Smith that he cannot cite scientific or clinical evidence that palpation is a reliable method for detecting sore horses. Moreover, I find no testimony by Dr. Slauter that he cannot cite clinical evidence that palpation is a reliable method for detecting sore horses. However, Dr. Slauter does indicate that he cannot cite scientific evidence of the connection between a horse's reaction to digital palpation and soring of that horse (Tr. 63). Both Dr. Slauter and Dr. Smith testified that digital palpation is a reliable method by which to detect sore horses under the Horse Protection Act (Tr. 29-30, 106-09). Therefore, even if Drs. Slauter and Smith had testified as Respondent Reinhart asserts, such testimony would not change the disposition of this proceeding.

Eleventh, Respondent Reinhart contends the ALJ erroneously excluded the Atlanta Protocol (RX 1) (Pet. for Recons. at 7).

I disagree with Respondent Reinhart's contention that the ALJ erroneously excluded the Atlanta Protocol. Respondents raised the issue of the ALJ's exclusion of the Atlanta Protocol in Respondents' Appeal Petition (Respondents' Appeal Pet. at 5-9). My reasons for concluding that the ALJ properly excluded the Atlanta Protocol (RX 1) are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec. 721, 742-47 (2000).

Respondent Reinhart also contends the Atlanta Protocol (RX 1) was admitted in a previous proceeding, *In re Bill Young*, 53 Agric. Dec. 1232 (1994), "even though the authors of that document were not present to testify" (Pet. for Recons. at 7 n.1). However, a review of *In re Bill Young*, 53 Agric. Dec. 1232 (1994), *rev'd*, 53 F.3d 728 (5th Cir. 1995), reveals that two of the authors of the Atlanta Protocol, Dr. Proctor and Dr. Miller, testified in the administrative proceeding.

Twelfth, Respondent Reinhart contends the United States Department of Agriculture has a "vested and biased interest in its reliance on digital palpation as the only procedure for detecting sore horses" (Pet. for Recons. at 8-11).

I disagree with Respondent Reinhart's contention that the United States Department of Agriculture has a "vested and biased interest in its reliance on digital palpation as the only procedure for detecting sore horses." The record does not reveal that the United States Department of Agriculture has a "vested and biased interest" in relying on palpation as the sole method to determine whether a horse is sore under the Horse Protection Act.

The Horse Protection Regulations (9 C.F.R. pt. 11) defines the term "inspection" as the examination of a horse by whatever means are deemed appropriate and necessary to determine compliance with the Horse Protection Act and the Horse Protection Regulations. The definition of the term "inspection" identifies a number of methods by which a horse may be inspected to determine whether the horse is "sore" as defined in the Horse Protection Act. 9 C.F.R. § 11.1.

This definition of the term "inspection" for the purpose of determining compliance with the Horse Protection Act and the Horse Protection Regulations clearly establishes that the United States Department of Agriculture does not rely on palpation as the sole means by which to determine whether a horse is sore under the Horse Protection Act.

Moreover, Dr. Slauter and Dr. Smith did not limit their inspection of Double Pride Lady to palpation. Drs. Slauter and Smith observed 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; Tr. 46, 108-09).

Thirteenth, Respondent Reinhart contends Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady were not in compliance with the Horse Protection Act because the examinations were conducted while Double Pride Lady was standing still (Pet. for Recons. at 11-12).

I disagree with Respondent Reinhart's contention that Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady were not in compliance with the Horse Protection Act because the examinations were conducted while Double Pride Lady was standing still. Respondents raised the issue of Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady in Respondents' Appeal Petition (Respondents' Appeal Pet. at 8). My reasons for rejecting Respondents' contention that Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady did not comply with the Horse Protection Act are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec. 721, 747-50 (2000).

Fourteenth, Respondent Reinhart asserts that when Drs. Slauter and Smith palpated Double Pride Lady, they observed Double Pride Lady's "conditioned reflex" to training, which had been activated by Charles L. Thomas' examination, not a reaction to pain (Pet. for Recons. at 12).

Respondents presented no evidence to support the claim that Double Pride Lady's response to digital palpation by Drs. Slauter and Smith was a "conditioned reflex" to training activated by Charles L. Thomas' examination. Moreover, Respondent Reinhart raises this argument for the first time in his Petition for Reconsideration. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[6] Respondent Reinhart has raised the issue

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[6] *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding), 59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers*, 58 Agric. Dec. 861, 866 (1999) (Order Denying Pet. for Recons.); *In re Anna Mae Noell*, 58 Agric. Dec. 855, 859-60 (1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); In *re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, (continued...)

of Double Pride Lady's "conditioned reflex" too late for me to consider the issue.

Even if I found that Respondent Reinhart had timely raised the issue of Double Pride Lady's "conditioned reflex," I would reject the argument because Dr. Slauter and Dr. Smith testified that they can distinguish a horse's response to pain from a horse's response to some other condition (Tr. 22-24, 29-30, 98-99). Moreover, Respondent Reinhart's theory of Double Pride Lady's "conditioned reflex" does not explain Double Pride Lady's poor locomotion (CX 9, CX 10; Tr. 46, 108-09).

Fifteenth, Respondent Reinhart contends he did not violate the Horse Protection Act because he did not present Double Pride Lady "in a cruel or inhumane condition" (Pet. for Recons. at 12-14).

Section 3 of the Horse Protection Act sets forth congressional findings (15 U.S.C. § 1822). One of these congressional findings is that the act of soring horses is cruel and inhumane (15 U.S.C. § 1822(1)). However, a finding that a respondent "presented" a horse in a "cruel or inhumane condition" is not a prerequisite to the conclusion that the respondent has violated the Horse Protection Act. Complainant proved by a preponderance of the evidence[7] that Respondent

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[6](...continued)
56 Agric. Dec. 1884, 1911 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, 111 F.3d 897 (11th Cir. 1997) (Table); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

[7]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 (continued...)

Reinhart entered Double Pride Lady 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, which is all that is necessary for a conclusion that Respondent Reinhart violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Therefore, I reject Respondent Reinhart's contention that he did not violate the Horse Protection Act because he did not present Double Pride Lady in a "cruel or inhumane condition."

Sixteenth, Respondent Reinhart contends the Horse Protection Act is an unconstitutional exercise of power under the Commerce Clause of the Constitution of the United States (Pet. for Recons. at 12-15).

I disagree with Respondent Reinhart's contention that the Horse Protection Act is an unconstitutional regulation of intrastate commerce. Respondents raised this same issue regarding the constitutionality of the Horse Protection Act in

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[7](...continued)
proof 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 Horse Protection Act is preponderance of the evidence. *In re David Tracy Bradshaw*, 59 Agric. Dec. 228, 234-35 (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).

Respondents' Appeal Petition (Respondents' Appeal Pet. at 16-27). My reasons for concluding that the Horse Protection Act is not an unconstitutional regulation of intrastate commerce are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec. 721, 735 (2000).

Seventeenth, Respondent Reinhart contends the conclusion that he violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) is error because Complainant failed to prove that Double Pride Lady's performance would have been improved by soring (Pet. for Recons. at 14).

Section 3 of the Horse Protection Act sets forth congressional findings (15 U.S.C. § 1822). One of these congressional findings is that "horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore" (15 U.S.C. § 1822(2)). However, a finding that soring improved or would have improved a respondent's horse's performance is not a prerequisite to the conclusion that the respondent has violated the Horse Protection Act. Complainant proved by a preponderance of the evidence[8] that Respondent Reinhart entered Double Pride Lady 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, which is all that is necessary to prove that Respondent Reinhart violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Therefore, I reject Respondent Reinhart's contention that the conclusion that he violated the Horse Protection Act is error because Complainant failed to prove that soring improved or would have improved Double Pride Lady's performance.

Eighteenth, Respondent Reinhart contends "the Judicial Officer states the ludicrous proposition that Drs. Slauter and Smith are more credible witnesses than Charles Thomas" (Pet. for Recons. at 15-16).

Respondent Reinhart does not cite any part of the November 9, 2000, Decision and Order in which I state that Drs. Slauter and Smith are more credible witnesses than Charles L. Thomas. Moreover, I cannot locate any part of the November 9, 2000, Decision and Order in which I state that Drs. Slauter and Smith are more credible than Charles L. Thomas. I found Drs. Slauter and Smith to be credible witnesses, but I also found Charles L. Thomas was a credible witness. *In re William J. Reinhart*, 59 Agric. Dec. 721, 730-31 (2000).

Nineteenth, Respondent Reinhart contends *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), is controlling (Pet. for Recons. at 15-16).

I disagree with Respondent Reinhart's contention that *Young* is controlling.

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[8]See note 7.

Respondents contended that *Young* is controlling in Respondents' Appeal Petition (Respondents' Appeal Pet. at 6, 8-9). My reasons for rejecting Respondents' contention that *Young* is controlling are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec. 721, 745-47 (2000).

Twentieth, Respondent Reinhart contends the United States Court of Appeals for the Fifth Circuit held in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), that palpation as a method for detecting sore horses is not reliable, that palpation as a method for detecting sore horses is illegal, and that 9 C.F.R. pt. 11 is illegal (Pet. for Recons. at 16).

A review of *Young* reveals that the United States Court of Appeals for the Fifth Circuit did not hold that digital palpation is illegal or that 9 C.F.R. pt. 11 is illegal, as Respondent Reinhart contends. However, the Court does state that there was significant evidence presented at the administrative hearing that "an observed reaction to digital palpation alone is not a reliable indicator of a sore horse." *Young*, 53 F.3d at 731.

None of the litigants in this proceeding presented significant evidence that an observed reaction to digital palpation alone is not a reliable indicator of a sore horse. 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 (CX 9, CX 10; Tr. 46, 108-09).

Twenty-first, Respondent Reinhart contends that, since the United States Court of Appeals for the Fifth Circuit decided *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), the Secretary of Agriculture has not enforced the Horse Protection Act within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. Respondent Reinhart contends that because he resides within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the Secretary of Agriculture's selective enforcement of the Horse Protection Act and 9 C.F.R. pt. 11 denies him equal protection of the law. (Pet. for Recons. at 16-17.)

Respondent Reinhart cites no basis for his contention that since the United States Court of Appeals for the Fifth Circuit decided *Young* on June 7, 1995, the Secretary of Agriculture has not enforced the Horse Protection Act within the jurisdiction of the United States Court of Appeals for the Fifth Circuit (Louisiana, Mississippi, and Texas). I cannot locate any evidence that supports Respondent Reinhart's contention. Complainant states Respondent Reinhart's contention that the Secretary of Agriculture has not enforced the Horse Protection Act in Louisiana, Mississippi, and Texas since June 7, 1995, is false (Complainant's Response to Respondent William J. Reinhart's Petition for Reconsideration at 22). Moreover, since June 7, 1995, I have issued decisions in three proceedings under the Horse Protection Act in which the respondents could appeal to the United States Court of

Appeals for the Fifth Circuit.[9] In two of these three proceedings, the horses found to be sore had been entered in horse shows conducted within the jurisdiction of the United States Court of Appeals for the Fifth Circuit.[10] Therefore, I reject Respondent Reinhart's contention that the Secretary of Agriculture has not enforced the Horse Protection Act in Louisiana, Mississippi, and Texas since June 7, 1995.

Twenty-second, Respondent Reinhart contends the United States Department of Agriculture has misstated the position of the United States Court of Appeals for the Sixth Circuit "which has only ruled that, evidence of soreness based on palpation is sufficient to invoke the presumption of soreness" and which "has specifically stated that evidence that can overcome this presumption is permissible and will be considered" (Pet. for Recons. at 17 (emphasis in original)).

The United States Court of Appeals for the Sixth Circuit has held that "a finding of 'soreness' based upon the results of digital palpation alone is sufficient to invoke the rebuttable presumption" that a horse is sore. *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1413 (6th Cir. 1995). In the November 9, 2000, Decision and Order, I cited *Bobo* stating the Sixth Circuit has held that a horse's reaction to digital palpation alone is sufficient to invoke the presumption that the horse is sore. *In re William J. Reinhart*, 59 Agric. Dec. 721, 732-33, 745-46 (2000). In my view, the November 9, 2000, Decision and Order accurately describes the Sixth Circuit's holding in *Bobo*. Therefore, I reject Respondent Reinhart's contention that the United States Department of Agriculture has misstated the position of the United States Court of Appeals for the Sixth Circuit.

Twenty-third, Respondent Reinhart contends the Secretary of Agriculture through the adoption of 9 C.F.R. pt. 11 has "completely changed the Horse Protection Act from an effort by the Congress to regulate interstate commerce to an effort by the [United States Department of Agriculture] to illegally assume responsibility for the enforcement of a federal law relating to cruelty to animals." Respondent Reinhart asserts that 9 C.F.R. pt. 11 violates the Commerce Clause of the Constitution of the United States (Pet. for Recons. at 17).

The Secretary of Agriculture is authorized to issue such regulations as the Secretary deems necessary to carry out the Horse Protection Act (15 U.S.C. § 1828). I have reviewed 9 C.F.R. pt. 11. I conclude that all of the regulations in 9 C.F.R. pt. 11 are designed to carry out the Horse Protection Act and none of the

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[9] *In re David Tracy Bradshaw*, 59 Agric. Dec. 228 (2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re Stephen Douglas Bolton* (Decision as to Stephen Douglas Bolton), 58 Agric. Dec. 254 (1999); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997).

[10] *In re Stephen Douglas Bolton* (Decision as to Stephen Douglas Bolton), 58 Agric. Dec. 254 (1999); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997).

regulations are beyond the authority granted to the Secretary of Agriculture under the Horse Protection Act. Moreover, 9 C.F.R. pt. 11 does not violate the Commerce Clause of the Constitution of the United States, as Respondent Reinhart asserts.

Twenty-fourth, Respondent Reinhart requests that I either dismiss the proceeding or refer the proceeding to a district court of the United States or to the United States Court of Appeals for the Sixth Circuit (Pet. for Recons. at 21).

Complainant proved by a preponderance of the evidence[11] that on October 28, 1998, Respondent 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 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. Therefore, I find no basis for dismissing this proceeding, as Respondent Reinhart requests.

Moreover, the Judicial Officer has no authority under the Rules of Practice to refer a proceeding to a district court of the United States or to the United States Court of Appeals for the Sixth Circuit.[12] Therefore, I deny Respondent Reinhart's request that I refer this proceeding to a district court of the United States or to the United States Court of Appeals for the Sixth Circuit.

For the foregoing reasons and the reasons set forth in *In re William J. Reinhart*, 59 Agric. Dec. 721(2000), Respondent Reinhart'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.[13]

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[11] See note 7.

[12] *In re William J. Reinhart*, 59 Agric. Dec. 721, 764-65 (2000); *In re Jack* Stepp, 59 Agric. Dec. 260, 262 (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 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).

[13] *In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 647 (2000) (Order Denying Respondent's Pet. for Recons.); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re David Tracy Bradshaw*, 59 Agric. Dec. 790, 793 (2000) (Order denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.);
(continued...)

Respondent Reinhart's Petition for Reconsideration was timely filed and automatically stayed the November 9, 2000, Decision and Order. Therefore, since Respondent Reinhart's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed November 9, 2000, is reinstated: except that (1) the date within which payment of the civil penalty was required to be forwarded to and received by Ms. Carroll in paragraph 1 of the November 9, 2000, Order; (2) the effective date in paragraph 2 of the November 9, 2000, Order; and (3) and the date of the Order in paragraph 3 of the November 9, 2000, Order, are the dates indicated in paragraphs 1, 2, and 3 of the Order in this Order Denying William J. Reinhart's Petition for Reconsideration.

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

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:

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[13](...continued)
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.).

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 January 23, 2001.

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In re: WILLIAM A. SCARBROUGH, III, a/k/a TOBY SCARBROUGH, AN INDIVIDUAL; AND MEADOWBROOK FARMS, LLC, A CORPORATION.
HPA Docket No. 00-0006.
Order filed January 24, 2001.

Frank Martin, Jr., for Complainant.
Bobby R. Wood, Corinth, Mississippi, for Respondent.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Upon the joint motion of the Complainant and Respondent, and for good cause shown, the complaint in HPA Docket No. 00-0006 is dismissed with prejudice.

In re: JUDITH ADELE PETERS AND PHIL PETERS, d/b/a ESCONDIDO STABLES; VICTOR MASTACHE, AND GAY H. NEVEU.
HPA Docket No. 99-0014
Complaint Against Gay H. Neveu Dismissed With Prejudice filed April 18, 2001.

Donald A. Tracy, for Complainant.
Respondent, Pro se.
Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to Motion therefore, filed March 19, 2001, the Complaint as to Gay H. Neveu is Dismissed With Prejudice.

In re: WADE CRUM, AN INDIVIDUAL; BOBBY E. EAST, AN INDIVIDUAL; AND RHONDA EAST, AN INDIVIDUAL.
HPA Docket No. 00-0015.
Dismissal of the Complaint as to Rhonda East and Cancellation of Oral Hearing filed June 1, 2001.

Donald A. Tracy, for Complainant.
Lee Ann Rikard, Jackson, Mississippi, for Respondent.
Dismissal issued by Jill S. Clifton, Administrative Law Judge

Complainant's Motion to Dismiss the Complaint as to Respondent Rhonda East, with prejudice, is hereby granted.

By reason of a Consent Decision as Bobby E. East, the only remaining Respondent, the oral hearing in the above-entitled case scheduled for July 25, 2001, in Memphis, Tennessee, is hereby canceled.

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In re: WILLIAM J. REINHART AND REINHART STABLES.
HPA Docket No. 99-0013.
Stay Order filed June 20, 2001.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On November 9, 2000, I issued a Decision and Order: (1) concluding that on October 28, 1998, William J. Reinhart, doing business as Reinhart Stables [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831), by entering for the purpose of showing or exhibiting a horse at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore; (2) assessing Respondent a $2,000 civil penalty; and (3) disqualifying Respondent for 5 years from exhibiting, showing, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. *In re William J. Reinhart*, 59 Agric. Dec. 721, 731, 768-69 (2000).

On November 27, 2000, Respondent filed a petition for reconsideration of the November 9, 2000, Decision and Order, which I denied. *In re William J. Reinhart*, 60 Agric. Dec. ___ (Jan. 23, 2001) (Order Denying William J. Reinhart's Pet. for Recons.).

On May 30, 2001, Respondent filed a letter [hereinafter Motion for Stay] requesting a stay of the Order in *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000), pending the outcome of proceedings for judicial review. The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], failed to file a timely response to Respondent's Motion for Stay. On June 20, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Stay.

Respondent filed a petition for review of *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000), with the United States Court of Appeals for the Sixth Circuit. *Reinhart v. United States Dep't of Agric.*, No. 01-3283 (6th Cir. Mar. 20, 2001).

In accordance with 5 U.S.C. § 705, Respondent's Motion for Stay is granted. The Order issued in *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000), is hereby stayed pending the outcome of proceedings for judicial review.

his Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

In re: EDWARD MARTIN, d/b/a EDWARD MARTIN ORCHARDS, A SOLE PROPRIETORSHIP.
AMAA Docket No. 00-0001.
Decision and Order filed December 7, 2000.

AMAA - Default - Untimely answer - Failure to obtain inspection - Failure to pay assessment.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq*. (the "Act"), and the Marketing Orders for Nectarines Grown in California, 7 C.F.R. Part 916 (the "Nectarine Order") and for Pears and Peaches Grown in California, 7 C.F.R. Part 917 (the "Peach Order"), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that respondent Edward Martin, doing business as Edward Martin Orchards, willfully violated the Nectarine Order and the Peach Order.

The Hearing Clerk mailed copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151) to the respondent by certified mail, return receipt requested. 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, or at all, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Edward Martin is an individual whose mailing address is 10187 Witworth, Gustine, California 95322. Respondent Martin does business as, and is the sole proprietor of, Edward Martin Orchards, located at the same address. At all

times mentioned herein, respondent Edward Martin was a handler of California peaches and nectarines as defined in the Act, 7 U.S.C. § 608c(1), and in the Peach and Nectarine Orders, 7 C.F.R. §§ 916.10 and 917.7.

2. Respondent willfully violated section 916.41 of the Nectarine Order and section 917.37 of the Peach Order, 7 C.F.R. §§ 916.41, 917.37, by failing to pay to the California Tree Fruit Agreement $2,921.36 in assessments owed in the 1998 marketing season.

3. Respondent willfully violated section 916.11 of the Nectarine Order and section 917.6 of the Peach Order (7 C.F.R. §§ 916.11, 917.6), by failing to obtain inspection of nectarines and peaches before shipping them outside of the production area.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 916.11, 916.41, 917.37, 917.6 of the Vidalia Onion Order (7 C.F.R. §§ 916.11, 916.41, 917.37, 917.6).

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent is assessed a civil penalty of $5,500, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

2. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, from failing to pay $2,921.36 in past due assessments for crop year 1998 to the required authorities as is specified by the Act.

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 February 14, 2001- Editor].

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FEDERAL CROP INSURANCE ACT

In re: WILLARD BARGERY.
FCIA Docket No. 00-0007.
Decision and Order filed May 4, 2001.

FCIA - Default - Untimely answer - Disqualification - False information.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of respondent, Willard Bargery, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act. (7 U.S.C. § 1506 (n), the Act).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of one year, from receiving any other benefit under the Act for a period of 5 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If 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 became final June 15, 2000. -Editor

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PLANT QUARANTINE ACT

In re: TIENDA MEXICANA EL CAPORAL GROCERY STORE.
P.Q. Docket No. 99-0025.
Decision and Order filed November 21, 2001.

PQA - Default - Untimely answer - Prohibited importation.

Sheila Hogan Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of Hass avocados into the United States from Mexico (7 C.F.R. §§ 301.11 (b)(2), 319.56-2ff), 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 by a complaint filed on April 1, 1999, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about November 18, 1998, November 24, 1998, December 8, 1998 and December 15, 1998, respondent moved Mexican Hass avocados from Chicago, Illinois, to Tienda Mexicana, El Caporal Grocery Store, Woodson Terrace, Missouri, in violation of 7 C.F.R. §§ 301.11 (b)(2) and 319.56-2ff because such movement is prohibited.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136 (c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136 (a) shall be deemed an admission of the allegations in the complaint. The failure to file an answer also constitutes a waiver of hearing. (7 C.F.R. § 1.139). Further, respondent's untimely response, filed on May 4, 1999, does not deny or otherwise respond to any of the allegations of the complaint or set forth any defense asserted by the respondent. Therefore, the response does not comply with the content requirements for an answer, as specified in 7 C.F.R. § 1.136 (b). Pursuant to 7 C.F.R. § 1.136 (c), respondent's failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, as an admission of the allegation. Accordingly, the material allegations 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. Tienda Mexicana, El Caporal Grocery Store, is a business whose mailing address is 10042 Natural Bridge Road, Woodson Terrace, Missouri.

2. On or about November 18, 1998, respondent moved 10 boxes of Mexican Hass avocados from Chicago, Illinois to Tienda Mexicana, El Caporal Grocery Store, Woodson Terrace, Missouri, in violation of 7 C.F.R. §§ 301.11 (b)(2) and 319.56-2ff because such movement is prohibited.

3. On or about November 24, 1998, respondent moved 1 box of Mexican Hass avocados from Chicago, Illinois to Tienda Mexicana, El Caporal Grocery Store, Woodson Terrace, Missouri, in violation of 7 C.F.R. §§ 301.11 (b)(2) and 319.56-2ff because such movement is prohibited.

4. On or about December 8, 1998, respondent moved 6 boxes of Mexican Hass avocados from Chicago, Illinois to Tienda Mexicana, El Caporal Grocery Store, Woodson Terrace, Missouri, in violation of 7 C.F.R. §§ 301.11 (b)(2) and 319.56-2ff because such movement is prohibited.

5. On or about December 15, 1998, respondent moved 8 boxes of Mexican Hass avocados from Chicago, Illinois to Tienda Mexicana, El Caporal Grocery Store, Woodson Terrace, Missouri, in violation of 7 C.F.R. §§ 301.11 (b)(2) and 319.56-2ff because such movement is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. §§ 301.11 (b)(2) and 319.56-2ff. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two thousand dollars ($2,000.00). 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 55403
Minneapolis, Minnesota 55403.

The certified check or money order shall include the docket number of this proceeding, P.Q. Docket No. 99-25.

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

[This Decision and Order became final January 4, 2001.-Editor]

In re: CORONA DISTRIBUTORS, INC., AND REYNA'S SUPERMARKET.
P.Q. Docket No. 99-0032.
Decision and Order filed October 24, 2001.

PQA - Default - Untimely answer - Prohibited importation - Civil penalty as effective deterrent.

James D. 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 the complainant], instituted this administrative proceeding under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-67), 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 April 20, 1999.

The complaint alleged that between November 15, 1998, and January 29, 1999, Corona Distributor, Inc. [herein respondent Corona] violated the Acts by moving

[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."

125 boxes of Mexican Hass avocados from Berwyn, Illinois to Kansas City, Kansas, 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 $125,000.[2]

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the complaint to the respondent Corona by certified mail on April 20, 1999. On July 9, 1999, the Hearing Clerk notified respondent Corona that an answer to the complaint had not been received within the required time. 7 C.F.R. § 1.136(a). Respondent Corona 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 Corona 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 Corona Distributor, Inc. is 1330 South Lombard,

[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."

Berwyn, Illinois 60402.

2. On November 15, 1998, respondent Corona moved 30 boxes of Mexican Hass avocados from Berwyn, Illinois to Kansas City, Kansas.

3. On January 23, 1999, respondent Corona moved 15 boxes of Mexican Hass avocados from Berwyn, Illinois to Kansas City, Kansas.

4. On January 29, 1999, respondent Corona moved 80 boxes of Mexican Hass avocados from Berwyn, Illinois to Kansas City, Kansas.

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 Respondent Corona. 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 Corona will not again violate the regulations, but that the sanction will also deter others in similar situations. These proceedings address one hundred and twenty-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 that compliance and deterrence can now be achieved only with the imposition of the $7,250 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 respondent Corona. *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 respondent Corona 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 respondent Corona has violated the Acts and the regulations (7 C.F.R. §§ 301.11(b), 319.56-2ff).

Therefore, the following Order is issued.

Order

Corona Distributor, Inc. is hereby assessed a civil penalty of seven thousand, two hundred and fifty dollars ($7,250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
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 Corona, unless there is an appeal to the Judicial Officer

pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final January 26, 2001.-Editor]

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In re: MAGDOLORA VALDEZ.
P.Q. Docket No. 00-0004.
Decision and Order filed September 12, 2000.

PQA - Default - Untimely answer - Prohibited importation.

Darlene Bolinger, 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 (7 C.F.R. § 301.11(b) and § 319.56-2ff), 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. §§ 151-54, 156-65 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on March 20, 2000, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was served by certified mail on the respondent on March 24, 2000. 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. Magdolora Valdez, hereinafter referred to as respondent, is an individual with a mailing address of 4718 Los Martine, Laredo, Texas 78040.

2. On or about July 18, 1998, respondent moved 350 avocados from Mexico into the United States at Laredo, Texas, in violation of 7 C.F.R. §§ 319.56(c) and 319.56-2ff because the importation of avocados from Mexico into the United States, during the month of July, was 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. 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. 00-0004.

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

[This Decision and Order became final January 26, 2001.-Editor]

In re: GUADALUPE RAMIREZ MAGANA.
P.Q. Docket No. 99-0041.
Decision and Order filed February 14, 2001.

PQA - Default - Admissions - Prohibited importation.

Sheila Hogan Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables into the United States from Mexico (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 by a complaint filed on May 18, 1999, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about July 8, 1998, at San Luis, Arizona, the respondent imported into the United States from Mexico, approximately eighteen (18) mangoes, in violation of 7 C.F.R. § 319.56-2(e) because the mangoes were not accompanied by a permit, as required.

The respondent filed a timely answer to the complaint which admitted the material allegations of fact contained in the complaint. Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that the admission of all the material allegations of fact contained in the complaint shall constitute a waiver of hearing. Accordingly, the material allegations 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).

By document filed February 7, 2001, the respondent sought reconsideration of the Proposed Default Decision and Order premised upon her financial situation. Among other things, it is stated:

> 4. She believes that the fine of $500.00 is excessive and even if she wanted too she would not be able to pay in a lump sum. She respectfully request that if the decision can not be changed that she be given the opportunity to pay in payments according to her income.

Whether or not respondent is to be permitted to pay in installments is a discretionary matter for complainant, although it is strongly suggested respondent be allowed to do so.

Findings of Fact

1. Guadalupe Ramirez Magana is an individual whose mailing address is 203 Cano Street, No. 1926, Somerton, Arizona 85350.

2. On or about July 8, 1998, at San Luis, Arizona, the respondent imported into the United States from Mexico, approximately eighteen(18) mangoes, in violation of 7 C.F.R. § 319.56-2(e) because the mangoes were not accompanied by a permit, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56-2(e). Therefore, the following order is issued.

Order

The respondent 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, unless an installment method of payment is worked out with complainant, 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. 99-0041.

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

[This Decision and Order became final March 28, 2001.-Editor]

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In re: LUIS TORAL GUERRERO AND MARIA OSEGUERA-GUERRERO.
P.Q. Docket No. 99-0051.
Decision and Order filed February 14, 2001.

PQA - Default - Untimely answer - Prohibited importation.

Sheila Hogan Novak, for Complainant.
Respondents, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables into the United States (7 C.F.R. § 319.56 *et seq*.), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted by a complaint filed on July 30, 1999, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about January 12, 1999, at Nogales, Arizona, the respondents imported into the United States from Mexico, approximately eight (8) avocados and six (6) guavas, in violation of 7 C.F.R. § 319.56-2(e) because the avocados and guavas were not accompanied by a permit, as required.

The discrepancies in spelling of respondents' names and as alleged in the complaint are not explained in the record. The respondents failed to file an answer to the complaint 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. The failure to file an answer also constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations 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. Luis Toral Guerrero and Maria Oseguera-Guerrero, hereinafter referred to as the respondents, are individuals with a mailing address of 1117 Willow Street #8, Yakima, WA 98902.

2. On or about January 12, 1999, at Nogales, Arizona, the respondents imported

into the United States from Mexico, approximately eight(8) avocados and six (6) guavas, in violation of 7 C.F.R. § 319.56-2(e) because the avocados and guavas were not accompanied by a permit, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondents have violated 7 C.F.R. § 319.56-2(e). Therefore, the following Order is issued.

Order

The respondents are hereby assessed a civil penalty of five hundred dollars ($500.00). The 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

Respondents shall indicate that payment is in reference to P.Q. Docket No. 99-0051.

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 April 18, 2001.-Editor]

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In re: ANGELINE F. GONZALES.
P.Q. Docket No. 99-0005.
Decision and Order filed March 1, 2001.

PQA - Default - Untimely answer - Prohibited importation.

Sheila Hogan Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables into the United States (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*., and 380.1 *et seq*.

This proceeding was instituted by a complaint filed on February 12, 1999, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about August 14, 1998, at Houston, Texas, the respondent imported into the United States from Costa Rica, approximately three (3) rambutan, in violation of 7 C.F.R. § 319.56-2(e) because the rambutan were not accompanied by a permit, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136 (c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136 (a) shall be deemed an admission of the allegations in the complaint. Further, the 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 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. Angeline F. Gonzales is an individual whose mailing address is 1672 Dover Street, #301, Lakewood, Colorado 80215.

2. On or about August 14, 1998, at Houston, Texas, the respondent imported into the United States from Costa Rica, approximately three (3) rambutan, in violation of 7 C.F.R. § 319.56-2(e) because the rambutan were not accompanied by a permit, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56-2(e). Therefore, the following Order is issued.

Order

The respondent 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 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 55403
Minneapolis, Minnesota 55403

Respondents shall indicate that payment is in reference to P.Q. Docket No. 99-005.

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 May 2, 2001.-Editor]

In re: NANCY LOPEZ-EQUILA.
P.Q. Docket No. 99-0043.
Decision and Order filed March 6, 2001.

PQA - Default - Untimely answer - Prohibited importation.

Sheila Hogan Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables into the United States (7 C.F.R. § 319.56 *et seq*.), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted by a complaint filed on May 28, 1999, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about August 28, 1998 at Rio Grande City, Texas, the respondent imported into the United States from Mexico, approximately five (5) fresh avocados, in violation of 7 C.F.R. § 319.56-2ff because such movement is prohibited.

The respondent failed to file an answer to complaint 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. The failure to file an answer also constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations 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. Nancy Lopez-Equila is an individual whose mailing address is 216 Rio Grande City, TX 78582.

2. On or about August 26, 1998, at Rio Grande City, Texas, the respondent imported into the United States from Mexico, approximately five avocados, in violation of 7 C.F.R. § 319.56-2ff because such movement is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56-2ff. Therefore, the following Order is issued.

Order

The respondent 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 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 55403
Minneapolis, Minnesota 55403

Respondents shall indicate that payment is in reference to P.Q. Docket No. 99-43.

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 May 11, 2001.-Editor]

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In re: RON LARSON.
P.Q. Docket No. 99-0053.
Decision and Order filed March 16, 2001.

PQA - Default - Untimely answer - Prohibited importation.

Sheila Hogan Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables into the United States from Hawaii (7 C.F.R. § 318.13 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*., and 380.1 *et seq*.

This proceeding was instituted by a complaint filed on August 27, 1999, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about August 20, 1998, the respondent offered to a common carrier, specifically the United States

Postal Service, raw or unprocessed green bananas for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. § 318.13-2 because such movement is prohibited.

The respondent failed to file an answer to complaint 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. The failure to file an answer also constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations 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. Ron Larson is an individual whose mailing address is P.O. Box 4063, Kona, Hawaii 96745.

2. On or about August 20, 1998, Ron Larson offered to a common carrier, specifically the United States Postal Service, raw or unprocessed green bananas for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. § 318.13-2 because such movement is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 318.13-2. Therefore, the following Order is issued.

Order

The respondent 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 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 55403
Minneapolis, Minnesota 55403

Respondents shall indicate that payment is in reference to P.Q. Docket No. 99-53.

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 May 11, 2001.-Editor]

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CONSENT DECISIONS

(Not published herein - Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Frank A. Logoluso Farms, Inc., a California corporation; Abe Kazarian, an individual; and Valley Sweet, LLC, a California Limited Liability Company (Consent order as to Frank A. Logoluso Farms Inc. only). AMAA Docket No. 00-0004. 6/29/01.

Frank A. Logoluso Farms, Inc., a California corporation; Abe Kazarian, an individual; and Valley Sweet, LLC, a California Limited Liability Company (Consent order as to Valley Sweet, LLC only). AMAA Docket No. 00-0004. 6/29/01.

ANIMAL QUARANTINE ACT

David E. Smith d/b/a Perry Hog Market, Hastings Pork Inc., Jimmie Rogers, Inc., Rodolfo Cabrera, Jr., Mary's Ranch, Inc., d/b/a Cabrera Slaughterhouse, and Raymond Hartman (Consent decision as to David E. Smith only). A.Q. Docket No. 99-0006. 1/19/01.

David E. Smith d/b/a Perry Hog Market, Hastings Pork Inc., Jimmie Rogers, Inc., Rodolfo Cabrera, Jr., Mary's Ranch, Inc., d/b/a Cabrera Slaughterhouse, and Raymond Hartman (Consent decision as to Hastings Pork, Inc. only). A.Q. Docket No. 99-0006. 4/19/01.

Kenneth Clarke Walburger. A.Q. Docket No. 01-0002. 5/4/01.

Leonid Dukhan. A.Q. Docket No. 01-0006. 6/7/01.

Selso Javier Lopez. A.Q. Docket No. 01-0004. 6/12/01.

ANIMAL WELFARE ACT

Mary and Rick Broderson. AWA Docket No. 99-0026. 1/9/01.

Charlotte L. Speegle. AWA Docket No. 96-0074. 1/11/01.

Clifton Shane Dabbs, d/b/a North Alabama Exotics. AWA Docket No. 01-0003. 1/29/01.

Harold Becker. AWA Docket No. 00-0003. 1/30/01.

Ronald J. Mokrzan, Eric John Vansen and Cayla Productions, Inc. AWA Docket No. 00-0042. 4/2/01.

David Sabo d/b/a New York Primate Center, Inc. AWA Docket No. 00-0001. 4/25/01.

Janice Ritsko d/b/a Best Friends Exotics Pet Store. AWA Docket No. 00-0016. 5/3/01.

Sam Groome, Odalis Groome, and Horse World Corporation, d/b/a Amazing Animals. AWA Docket No. 00-0038. 5/8/01.

Lancelot Kollman, a/k/a Lance Ramos. AWA Docket No. 01-0012. 5/10/01.

Goldie Rogers. AWA Docket No. 99-0012. 5/18/01.

The International Siberian Tiger Foundation, an Ohio corporation; Diana Cziraky, an individual; David Cziraky, an individual; The Siberian Tiger Foundation, an unincorporated association; and Tiger Lady, a/k/a Tiger Lady LLC, an unincorporated association (Consent decision as to David Cziraky only). AWA Docket No. 01-0017. 6/29/01.

BEEF PROMOTION AND RESEARCH ACT

John Streiff. BPRA Docket No. 01-0001. 2/20/01.

FEDERAL MEAT INSPECTION ACT

Heringer Meats, Inc., and Raymond F. Niemeyer, Jr. FMIA Docket No. 01-0002. 4/25/01.

Champlain Beef Company, Inc. FMIA Docket No. 96-0009. 4/27/01.

Preferred Freezer Services, Miami, Inc. FMIA Docket No. 00-0003. 5/8/01.

David Shayne Heine, d/b/a Shayne's Custom Beef. FMIA Docket No. 01-0003. 6/4/01.

HORSE PROTECTION ACT

William David Landrum, an individual d/b/a David Landrum Stables, LLC, a Tennessee corporation, Horse Sales, L.P., a Tennessee limited partnership, and D.K.L. Horse Transport. LLC, a Tennessee corporation. HPA Docket No. 00-0008. 2/1/01.

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 (Consent decision as to Charles Massey only). HPA Docket No. 00-0007. 3/5/01.

Kenneth Neely. HPA Docket No. 01-0004. 3/8/01.

Teddy Byrd. HPA Docket No. 01-0011. 3/8/01.

Ben L. Cate and Leslie L. Cate. HPA Docket No. 99-0030. 3/23/01.

Judith Adele Peters and Phil Peters, d/b/a Escondido Stables; Victor Mastache, and Gay H. Neveu (Consent decision as to Judith Adele Peters and Phil Peters only). HPA Docket No. 99-0014. 4/5/01.

Michael E. Blewett. HPA Docket No. 00-0002. 4/5/01.

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 (Consent decision as to John Lindahl only). HPA Docket No. 00-0007. 4/5/01.

Judith Adele Peters and Phil Peters, d/b/a Escondido Stables; Victor Mastache, and Gay H. Neveu (Consent decision as to Victor Mastache only). HPA Docket No. 99-0014. 4/18/01.

Wade Crum, an individual; Bobby E. East, an individual; and Rhonda East, an individual (Consent decision as to Bobby E. East only). HPA Docket No. 00-0015. 6/1/01. HPA Docket No. 00-0015. 6/1/01.

INSPECTION AND GRADING

Quality Fruit Products, Inc., and Moises Caraballo. I&G Docket No. 00-0001. 6/13/01.

PLANT QUARANTINE ACT

Terry Button, John Walker, Dennis Nowlin, Jr. and Timothy Robinson (Consent decision as to Timothy Robinson only). P.Q. Docket No. 00-0003. 2/20/01.

El Vaquero. P.Q. Docket No. 99-0029. 2/28/01.

Polos Video. P.Q. Docket No. 99-0020. 3/27/01.

Ham Produce and Seafood, Inc. P.Q. Docket No. 01-0007. 4/11/01.

Terry Button, John Walker, Dennis Nowlin, Jr. and Timothy Robinson (Consent decision as to Terry Button only). P.Q. Docket No. 00-0003. 6/4/01.

Victor Mendoza. P.Q. Docket No. 00-0013. 6/7/01.

La Estrella. P.Q. Docket No. 99-0021. 6/18/01.

POULTRY PRODUCT INSPECTION ACT

Heringer Meats, Inc. and Raymond F. Niemeyer, Jr. PPIA Docket No. 01-0002. 4/25/01.

Preferred Freezer Services, Miami, Inc. PPIA Docket No. 00-0002. 5/8/01.

Channel Fish Processing Co., Inc.; John T. Zaffiro; and Roy T. Zaffiro. PPIA Docket No. 01-0003. 5/23/01.

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AGRICULTURE DECISIONS

Volume 60

January - June 2001
Part Two (P & S)
Pages 295 - 302

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.

Beginning in Volume 60, each part of AGRICULTURE DECISIONS has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental Table of Decisions Reported.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1049 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6383, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

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Part Two - (P & S)
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JANUARY - JUNE 2001

MISCELLANEOUS ORDER

PACKERS AND STOCKYARDS ACT

IN RE: HINES AND THURN FEEDLOT, INC., d/b/a THURN & HINES LIVESTOCK, JAMES L. THURN AND DERYL D. HINES.
P&S Docket NO. D-96-0046.
Supplemental Order filed January 30, 2001.

Jane McCavitt, for Complainant.
William D. Werger, Manchester, IA, for Respondent.
Order issued by Dorothea A. Baker, Administrative Law Judge.

P&S - Default - Untimely answer - Inadequate Surety bond.

On August 24, 1998, a Decision and Order was issued by the Judicial Officer in the above-captioned matter, which, *inter alia,* suspended respondents Hines and Thurn Feedlot, Inc., James L. Thurn and Deryl D. Hines as registrants under the Act for a period of five (5) years. It was further provided that the order may be modified upon application to the Packers and Stockyards Programs to permit respondents James L. Thurn and Deryl D. Hines salaried employment by another registrant or packer after the expiration of the first two years of this suspension terms and upon demonstration of the circumstances warranting modification of the Order.

James L. Thurn and Deryl D. Hines have now served the two year period of suspension, and they have requested that they be permitted to work as salaried employees for Peace Livestock, Inc. in Edgewood, Iowa. Accordingly,

IT IS HEREBY ORDERED that James L. Thurn and Deryl D. Hines, having requested this supplemental order, may be employed by Peace Livestock, Inc. in Edgewood, Iowa during the remaining term of their suspension. The order of August 24, 1998 shall remain in full force and effect in all other respects.

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DEFAULT DECISIONS

PACKERS AND STOCKYARDS ACT

In re: ALEXANDER CARR SMITH.
P&S Docket NO. D-00-0011.
Decision and Order filed February 22, 2001.

Mary K. Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

P&S - Default - Untimely answer - Inadequate surety bond.

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 Governing Formal Adjudicatory Proceedings (7 C.F.R. §1.130 *et seq*.) under the Act were served upon Respondent by certified mail on September 19, 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. Alexander Carr Smith, hereinafter referred to as the Respondent, is a individual doing business in the State of Tennessee, and whose business mailing address is 551 Smith Place Road, Church Hill, Tennessee 37642.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying on commission, and

of a dealer buying and selling livestock in commerce for his own account;

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock on a commission basis, and as a dealer to buy and sell livestock in commerce for his own account.

3. On December 11, 1990, in P&S Docket No. D-90-057 Respondent consented to an Order to cease and desist from engaging in business in any capacity for which bonding is required under the Act and regulations without filing and maintaining a reasonable bond or its equivalent.

4. Respondent was served with a letter of notice on September 17, 1999, informing him that in view of the increased amount of his livestock purchases the $70,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was inadequate, and that it was necessary for him to increase his bond or bond equivalent to $80,000.00 before continuing his livestock operations subject to the Act.

Notwithstanding such notice, Respondent has continued to engage in the business of a market agency and a dealer without maintaining an adequate bond or its equivalent.

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 Alexander Carr Smith, 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 one thousand five hundred dollars ($1,500.00). 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 April 5, 2001. -Editor]

In re: BERT SMITH, III, AND EDDIE MCNALLY.
P&S Docket No. D-00-0013.
Decision and Order as to Bert Smith, III filed April 6, 2001.

Kimberly D. Hart, for Complainant.
C. Christopher Raines, Jr., Mt. Carmel, TN, for Respondent.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

P&S - Default - Untimely answer - Bad checks - Failure to maintain records.

This disciplinary proceeding brought pursuant to the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq*.), hereinafter the P&S Act, and the regulations promulgated thereunder (9 C.F.R. §201.1 *et seq*.), hereinafter the regulations, was instituted on September 28, 2000, by the Deputy Administrator, Packers and Stockyards Programs, Grain, Inspection, Packers and Stockyards Administration, United States Department of Agriculture, by a Complaint alleging that Respondents wilfully violated the P&S Act. The Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq*.), hereinafter the Rules of Practice, were served upon Respondent Bert Smith, III by certified mail on October 2, 2000. Respondent Bert Smith, III was notified, in a cover letter accompanying the Complaint, that an Answer must be filed within twenty (20) days of service and that failure to file an Answer would constitute an admission of all of the material allegations of fact in the Complaint and a waiver of the right to an oral hearing.

Respondent Bert Smith, III did not file an answer within the time period required by section 1.136 of the Rules of Practice (7 C.F.R. §1.136), which constitutes an admission to all of the material allegations of fact in the Complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default as to Respondent Bert Smith, III pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139). Accordingly, this decision is entered without hearing or further procedure.

Findings of Fact

1. Bert Smith, III (hereinafter referred to as Respondent Smith) is an individual whose mailing address is P.O. Box 725, Church Hill, Tennessee 37642.

2. Respondent Smith is and at all times material herein was:

a. Engaged in the business of a dealer buying and selling livestock in commerce for his own account and as a market agency buying livestock in commerce on a commission basis; and

b. Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

3. As set forth in section II of the Complaint, Respondent Smith continued to engage in the business of a market agency and a dealer without maintaining an adequate bond or its equivalent after being notified by the Agency that it was necessary for him to obtain a new bond or bond equivalent in the amount of $10,000.

4. As set forth in section III of the Complaint, Respondent misrepresented the nature of its livestock transactions for the purpose of misleading the sellers, their agents, and/or buyers of cattle into believing that Respondent Smith purchased the cattle for Respondent McNally and not for himself or as the agent of someone other than Respondent McNally. In addition, as set forth in section III(b) of the Complaint, Respondent Smith knowingly accepted, caused or authorized the preparation of misleading purchase invoices and/or other documents indicating that Respondent Smith purchased livestock on behalf of Respondent McNally when this was not the case.

5. As set forth in section IV(a) and IV(b) of the Complaint, Respondent Smith issued insufficient funds checks and failed to pay, when due and failed to pay the full purchase price of livestock totaling $192,015.00.

6. As set forth in section V of the Complaint, Respondent Smith's current liabilities exceed his current assets.

7. As set forth in section VI of the Complaint, Respondent Smith failed to keep and maintain accounts, records and memoranda which fully and accurately disclose all transactions.

Conclusions

1. By reason of the facts set forth above in Findings of Fact number 3, Respondent Smith 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).

2. By reason of the facts set forth above in Findings of Fact number 4,

Respondent Smith willfully violated section 312(a) and 401 of the Act (7 U.S.C. §213(a), 221).

3. By reason of the facts set forth above in Findings of Fact number 5, Respondent Smith willfully violated sections 312(a) and 409 of the Act (7 U.S.C. § 213(a), 228b).

4. By reason of the facts set forth above in Findings of Fact number 6, the financial condition of Respondent Smith does not meet the requirements of the Act (7 U.S.C. §204).

5. By reason of the facts set forth above in Findings of Fact number 7, Respondent Smith wilfully violated section 401 of the P&S Act (7 U.S.C. §204).

Accordingly, the following order is issued.

Order

Respondent Bert Smith, III, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. 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;

2. Purchasing livestock while his financial condition does not meet the requirements of the Act;

3. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented;

4. Failing to pay, when due, the full purchase price of livestock;

5. Failing to pay the full purchase price of livestock;

6. Misleading sellers, their agents, and/or other buyers of cattle into believing that Respondent Smith is purchasing cattle for another and not for himself when, in fact, Respondent Smith is purchasing cattle for himself; and

7. Knowingly accepting, causing or authorizing the preparation of purchase invoices and/or other documents representing that Respondent Smith is purchasing cattle for another and not for himself when, in fact, Respondent Smith is purchasing cattle for himself.

Respondent Bert Smith, III shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his operations subject to the Act, including, but not limited to check book registers, check numbers, returned, canceled, voided and reissued checks and bank statements.

Respondent Bert Smith, III is suspended as a registrant under the Act for a period of ten (10) years and thereafter until solvency is demonstrated, *provided*, however, that upon application to the Packers and Stockyards Programs and demonstration that current liabilities no longer exceed current assets and that all unpaid livestock sellers identified in the complaint have been paid in full, a supplemental order may be issued terminating the suspension in this proceeding at any time after the expiration of two (2) years of this suspension. *Provided further*, that upon application to the Packers and Stockyards Programs and demonstration of circumstances warranting modification of this order, this order may be modified to permit the salaried employment of Respondent Bert Smith, III by another registrant or packer after the expiration of two (2) years of the suspension in this proceeding.

This decision shall become final and effective without further proceedings 35[1] days after the date of service upon the Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 29, 2001.-Editor]

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[1]This Decision supercedes the Decision issued on December 26, 2000 and corrects the effective date to 35 days after the date of service. - Editor.

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(Not Published herein.-Editor)

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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.

Beginning in Volume 60, each part of AGRICULTURE DECISIONS has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental Table of Decisions Reported.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1049 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6383, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

JSG TRADING CORP. v. DEPARTMENT OF AGRICULTURE.
Docket No. 00-1011.
Decided January 5, 2001.

(Cite as 235 F.3d 608 (D.C. Cir.)).

Perishable agricultural commodities – Commercial bribery – License revocation.

The United States Court of Appeals for the District of Columbia Circuit held that a produce seller commits commercial bribery in violation of the Perishable Agricultural Commodities Act (PACA) when the produce seller pays or offers to pay a buyer's agent or employee more than *de minimis* consideration, without the knowledge of the principal or employer, with the intent to induce the agent or employee to purchase the seller's product. The Court concluded that substantial evidence supported the Judicial Officer's determination that JSG Trading Corp. engaged in commercial bribery in violation of the PACA. The Court also found that JSG Trading Corp.'s violations of the PACA were willful, flagrant, and repeated and held that revocation of JSG Trading Corp.'s PACA license was not an excessive penalty.

United States Court of Appeals
District of Columbia Circuit

Before: SENTELLE, RANDOLPH, and ROGERS, Circuit Judges.
Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

This case returns to us after remand on JSG Trading Corp.'s petition for review of a Department of Agriculture order adjudging it guilty of commercial bribery and revoking its license to sell produce under the Perishable Agricultural Commodities Act. We outlined many of the financial dealings at issue here in *JSG Trading Corp. v. United States Dep't of Agric.,* 176 F.3d 536 (D.C. Cir. 1999), and will assume familiarity with that opinion. This time around JSG challenges the sufficiency of the evidence and raises three questions: (1) did the Department apply the wrong legal standard for commercial bribery? (2) were the payees principals in the victim companies, thereby precluding a finding of commercial bribery? and (3) is license revocation excessive? We answer no to each and deny the petition.

I.

Section 2(4) of the Perishable Agricultural Commodities Act of 1930 (PACA) forbids "any commission merchant, dealer or broker * * * to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such [produce] transaction." 7 U.S.C. § 499b(4).[1] The Department has drawn from this language a duty of produce sellers not to corrupt agents and employees of their buyers, and has styled the breach of this duty "commercial bribery." In brief, this duty is breached–and commercial bribery results–when a seller offers consideration to a buyer's agent or employee, without the knowledge of the principal or employer, with intent to induce purchase of the seller's product. *See In re Sid Goodman & Co.,* 49 Agric. Dec. 1169 (1990), *aff'd,* 945 F.2d 398 (4th Cir. 1991) (table), and *In re Tipco, Inc.,* 50 Agric. Dec. 871 (1991), *aff'd,* 953 F.2d 639 (4th Cir. 1992) (table).

JSG Trading Corp. is a New Jersey-based PACA licensee engaged in buying and selling produce. L&P and American Banana are produce dealers at the Hunts Point Market in New York City. L&P and American Banana purchased tomatoes from JSG through purchasing agents–Anthony Gentile for L&P; Albert Lomoriello for American Banana. In early 1993, the Department began investigating whether JSG sought to covertly influence Anthony Gentile and Albert Lomoriello to purchase more tomatoes from JSG on behalf of their respective principals in violation of PACA § 2(4), as interpreted in *Goodman* and *Tipco*. The Department identified what it considered questionable transactions and accounting practices, several of which an Administrative Law Judge found were commercial bribes. The ALJ ordered JSG's license revoked. *See In re JSG Trading Corp.,* 56 Agric. Dec. 1800 (1997). The Department's Judicial Officer affirmed the ALJ's findings and order. *See In re JSG Trading Corp.,* 57 Agric. Dec. 640 (1998).

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[1] Title 7, U.S.C. § 499b(4) states in full:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce [f]or any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under subsection 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

II.

A. Substantial Evidence

An agency's adjudicative orders must be supported by "substantial evidence," 5 U.S.C. § 706(2)(E), which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" when taking "into account whatever in the record fairly detracts from its weight." *See AT&T Corp. v. FCC,* 86 F.3d 242, 247 (D.C. Cir. 1996) (quoting *NLRB v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300, 59 S.Ct. 501, 83 L.Ed. 660 (1939), and *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951)); *McCarty Farms, Inc. v. Surface Transp. Bd.,* 158 F.3d 1294, 1300-01 (D.C. Cir. 1998). There is substantial evidence to support the Judicial Officer's finding that JSG's payments, described below, to Anthony Gentile, to his wife Gloria Gentile, and to Albert Lomoriello were commercial bribes under *Goodman* and *Tipco*.

The payments at issue here consisted of: 35 checks to Anthony Gentile totaling $62,535.60; payments to Gloria Gentile, including an unjustified gain on a stock sale; a check for $5,600 to G&T Enterprises, a company Gloria Gentile set up for tax purposes; and seven checks to Albert Lomoriello totaling $9,733.45.[2]

JSG tendered numerous "innocent" explanations for these transactions and the bizarre accounting practices surrounding them, none of which is persuasive. For instance, JSG insists that the checks made out to Anthony Gentile were "circular" because they were redeposited in JSG's accounts with no money ever reaching the payee. According to JSG, "none of the monies reflected by these checks ever reached Mr. Gentile or [was] otherwise paid by JSG to any person (or any entity) for his benefit." Final Brief of Petitioner at 18. The checks, JSG claims, functioned as "clips," a mechanism to reconcile accounts: "these 'clips' were used . . . in order to permit L&P to pay less than JSG's invoiced prices in order to make up for a loss on prior purchases." *Id.* at 20 n.19. But writing checks payable to another company's purchasing agent and then re-depositing them into one's own account is hardly a recognized or plausible way to reconcile accounts between a seller and the payee's principal, the buyer. The normal function of checks is to move money from one account to another, not to keep it in place. Making checks payable to L&P's purchasing agent and then re-depositing them does not appear, as JSG

[2]On remand, the Judicial Officer found that JSG's lease of a Mercedes to Anthony Gentile, paid for in part by JSG; its sale of a boat to Mr. Gentile for a fraction of its value; and its gift of a $3,317 Rolex watch to Mr. Gentile were not commercial bribes because they were not intended to induce him to purchase tomatoes and L&P was aware of the transactions. *See In re JSG Trading Corp.,* 58 Agric. Dec. 1041, 1061 (1999).

claims, to "permit L&P to pay less than JSG's invoiced prices." The Judicial Officer had ample evidence for finding JSG's explanations chimerical, particularly in light of the inability of JSG's officers to give a coherent explanation of this unusual accounting procedure; JSG's treatment of the payments in its records as profit-sharing with Mr. Gentile and as reductions in Mr. Gentile's debt to JSG; and the apparent relationship between the amount of each check and a per-box commission noted in JSG's records.[3] *See* 58 Agric. Dec. at 1064-77.

The Judicial Officer was also on solid ground in rejecting JSG's explanations for its payments to Mrs. Gentile and Mr. Lomoriello. No evidence indicates the payments were compensation for any legitimate service rendered. Much evidence tends to show that the payments were secret per-box commissions intended to induce the purchase of more tomatoes from JSG. *See* 58 Agric. Dec. at 1061-64 & 1081-88. We have doubts, however, about the $5,600 check to Mrs. Gentile's company, G&T. In its opposition to JSG's motion to dismiss the case on remand, the Department appeared to concede that the payment to G&T was not a commercial bribe, a statement inconsistent with its position in this court. *See* Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment at 5 & n.2; Joint Appendix at 389. At any rate, we cannot see how the $5,600 payment could affect the outcome of this case. The remaining payments to Mr. and Mrs. Gentile and Mr. Lomoriello amply support revocation of JSG's PACA license.

B. Legal Standard for Commercial Bribery

JSG claims the Judicial Officer misapplied the commercial bribery standard articulated in *Goodman* and *Tipco*. In our first opinion in this case, we held that the Judicial Officer erred in substituting a per se test for *Goodman's* and *Tipco's* intent-to-induce and secrecy standard. *See* 176 F.3d at 543-46. Under the per se test, any payment to a purchasing agent above a *de minimis* threshold constituted a commercial bribe, regardless of intent and secrecy. We remanded for the Judicial Officer either to justify or to abandon the per se test. He adopted the latter course.

On remand, the Judicial Officer interpreted PACA's duty requirement as imposing on "each commission merchant, dealer, and broker . . . an obligation . . . to avoid making or offering a payment to a purchasing agent to encourage that agent to purchase produce from the commission merchant, dealer, or broker on behalf of the agent's principal or employer, without fully informing the purchasing agent's principal or employer of the offer or payment." 58 Agric. Dec. at 1051. He

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[3] JSG stated at oral argument that it was not challenging the Judicial Officer's finding that 16 of the 35 checks were used to reduce Mr. Gentile's debt to JSG.

disaggregated this obligation into a four-part test:

> Proof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent's principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent, raises the rebuttable presumption that the commission merchant, dealer, or broker making the payment or offer violated section 2(4) of the PACA.

58 Agric. Dec. at 1051. The presumption is rebutted by the absence of any one element. *See id.*

JSG perceives in this phrasing of the test three substantial and unexplained departures from *Goodman, Tipco,* and our opinion in *JSG Trading Corp.*: (1) failure to require a specific *corrupt* intent to induce; (2) equation of secrecy with the payee's principal's or employer's lack of full awareness of the payment or offer; and (3) omission of a *quid pro quo* requirement. This new test, JSG insists, is the per se test redux, and will "turn countless normal business transactions in to [*sic*] bribes." Final Brief of Petitioner at 33-34.

The Judicial Officer's test is consistent with *Goodman* and *Tipco*. Although couched as a presumption,[4] the post-remand articulation of the test is a more formalized version of the *Goodman*/*Tipco* intent-to-induce and secrecy standard. When the presumption language is cast aside, the test's basic structure parallels that of many criminal statutes. There are four elements, each of which is a necessary predicate for liability. Failure to satisfy any one element defeats liability. The only significant divergence from *Goodman* and *Tipco* is the addition of a *de minimis* threshold as an apparent defense to payments or offers to pay that otherwise satisfy the intent and secrecy elements. This *de minimis* element is the converse of that

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[4]The presumption language appears not to perform any burden-allocating function ordinarily associated with presumptions. *See, e.g.,* FED. R. EVID. 301 ("In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.").

which we rejected in *JSG Trading Corp.,* wherein a payment above the *de minimis* threshold was a sufficient rather than a necessary condition for liability. The addition of this liability-defeating element is innocuous and, in any event, JSG does not challenge it.

Neither *Goodman, Tipco,* nor our opinion in *JSG Trading Corp.* requires a specific corrupt intent, a lower secrecy standard, or a *quid pro quo* for commercial bribery. In both *Goodman* and *Tipco,* a generalized intent by the payer to induce purchase of its product satisfied the intent element. In *Goodman,* for example, the Judicial Officer referred to a treatise definition of commercial bribery that contains no hint of specific corrupt intent: "the 'offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors'." *Goodman,* 49 Agric. Dec. at 1184 (quoting 2 RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 49 (3d ed. 1968)). An "expectation" is far from the specific corrupt intent JSG would require. In another place, the Judicial Officer wrote that a "PACA licensee is obligated to refrain from offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of the employer." *Goodman,* 49 Agric. Dec. at 1186. *See also Tipco,* 50 Agric. Dec. at 883. In *Tipco,* the Judicial Officer concluded that "the evidence of record is certain that licensee Tipco made surreptitious payments to its customer's employee to induce the employee to buy, or continue to buy, its produce. . . ." *Tipco,* 50 Agric. Dec. at 889. *Goodman* and *Tipco* say nothing of specific corrupt intent, let alone enough to make the Judicial Officer's formulation of the intent element in this case arbitrary and capricious.[5]

The secrecy element in *Goodman* and *Tipco* contemplates a sufficiently high level of awareness by the payee's employer or principal to justify the Judicial Officer's insistence on "full awareness." The opinions contain language equating a produce seller's breach of duty to a seller's failure to inform, which connotes an obligation to impart actual knowledge of the payments to the payee's employer or principal. *See Goodman,* 49 Agric. Dec. at 1175, 1179, 1182, & 1186; *Tipco*, 50 Agric. Dec. at 883. The opinions also contain language equating secrecy with the payer's expectation that the recipient not fully disclose the payment, which connotes an obligation that somebody–either the payer or payee–ensure the recipient's principal or employer has full awareness of the transaction. *See, e.g., Goodman,* 49 Agric. Dec. at 1184. Yet other language suggests that knowledge alone is not enough, that without an affirmative grant of consent by the payee's principal or

[5]The occasional references to corrupting agents or employees in *Goodman* and *Tipco* describe the effect of commercial bribery, not the required intent.

employer the secrecy element would be satisfied. *See Goodman,* 49 Agric. Dec. at 1186 ("payments by [Goodman] to Messrs. Crandall and Hernandes, without permission of Magruder and Fresh Value, is a violation of section 2(4) of the PACA"); *Tipco,* 50 Agric. Dec. at 883 (suggesting that a produce seller may "only make payments with the customer's permission"). Both cases give produce vendors ample notice that payments intended to induce the buyer's agents or employees to purchase produce are commercial bribes unless the payee's principal or employer is fully aware of the transaction.[6]

Similarly, *Goodman* and *Tipco* do not require a *quid pro quo* arrangement between the payer and the payee. Although a *quid pro quo* arrangement was present in each case–a 25x per box kickback–neither case turned on that fact.[7] Perhaps recognizing this, JSG instead points to our earlier opinion in *JSG Trading Corp*. for a *quid pro quo* requirement. In that opinion, we criticized the per se test's lack of an intent and secrecy element as eliding the line between bribes and legitimate transactions and elliptically suggested a *quid pro quo* element as one way to restore that line. *See JSG Trading Corp.,* 176 F.3d at 545. We did not suggest it was the exclusive means. Indeed, the Judicial Officer fully restored that line by resurrecting the intent and secrecy elements. The federal cases requiring a *quid pro quo* that JSG cites do not persuade us otherwise, for they interpret federal criminal bribery statutes containing entirely different language than PACA.[8] *See, e.g., United States v. Sun-Diamond Growers of California,* 526 U.S. 398, 404-05, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999) (interpreting language in 18 U.S.C. § 201 as requiring a *quid pro quo* for bribery because there must be "a specific intent to give or receive something of value *in exchange* for an official act"); see also 2 RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES

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[6]In both *Goodman* and *Tipco,* the victim companies had an explicit policy forbidding employees to accept gifts from vendors, which the recipients of the payments in each case clearly breached. *See Goodman,* 49 Agric. Dec. at 1174-75; *Tipco,* 50 Agric. Dec. at 878. Neither case turned on the existence of such a policy.

[7]Notably, the Judicial Officer found, and we agree, that JSG's per-box payment scheme constituted a *quid pro quo*. *See* 58 Agric. Dec. at 1090. As in *Goodman* and *Tipco,* our decision does not turn on this fact.

[8]Given the substantial ambiguity in § 499b(4), it is the Department's function, not ours, to define offenses under that provision. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *JSG Trading Corp.*, 176 F.3d at 545 ("Given the broad language of [PACA] § 2(4), the agency is not necessarily bound by traditional statutory definitions of commercial bribery."). Our review is limited to ensuring that the Department's construction of PACA is reasonable and that the Department either follows its prior constructions of the statute or articulates a reasoned justification for departing.

§ 12.02 (1985) ("There need be no close relationship between the value of the consideration and the resulting advantage to the offeror."). JSG's related contention that its payments had no effect on the victim companies' purchases or prices merely restates the *quid pro quo* argument. To the extent the argument differs, nothing in PACA, *Goodman,* or *Tipco* bases illegality on changes in the victim company's purchasing or pricing behavior.

JSG fears that the commercial bribery test will sweep up legitimate business transactions and ordinary social hospitality. JSG forgets that the intent and secrecy elements are necessary, not sufficient, conditions for commercial bribery, so both must be satisfied. Social hospitality–for example, taking a friend who happens to be a purchasing agent to dinner–would be protected if the host lacked the intent to induce purchase of its products (or, if it had such intent, informed the agent's principal). Similarly, sales incentives offered to a purchasing agent are perfectly legal under the Judicial Officer's test if the agent's principal is informed of the transaction.

The secrecy element in particular also distinguishes the transactions at issue from a category of promotional activities recognized as legitimate by PACA. The paragraph of PACA from which the Department drew the prohibition on commercial bribery states that "this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter." 7 U.S.C. § 499b(4). The statute defines "collateral fees and expenses" as "any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity." 7 U.S.C. § 499a(b)(13). JSG's payments to Anthony and Gloria Gentile and Albert Lomoriello do not fall within this category. Promotional allowances, rebates, and the like are typically given with the buyer's knowledge rather than secretly directed to the buyer's agents or employees. JSG's payments also lack the requisite good faith, which Department regulations define as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." 7 C.F.R. § 46.2(hh). No reasonable conception of honesty or fair dealing includes secret payments designed to corrupt a produce buyer's agents or employees.

C. Status of the Payees

The essence of the commercial bribery offense, as defined by *Goodman* and *Tipco,* is the corruption or attempted corruption by the produce seller of its buyer's agent or employee. So framed, it does not cover payments made to an employer or a principal. Nor could it, as payments made to the produce buyer itself, as opposed to its agents or employees, do not possess the requisite secrecy. If Mr. Gentile and

Mr. Lomoriello were principals in L&P and American Banana, then JSG did not commit commercial bribery.

We agree with the Judicial Officer that they were not principals. They were purchasing agents. *See* 58 Agric. Dec. at 1051 (characterizing Mr. Gentile and Mr. Lomoriello as purchasing agents). Mr. Gentile's and Mr. Lomoriello's joint account arrangements[9] with L&P and American Banana do not alter the basic fact that these companies hired them to buy and sell tomatoes on the companies' behalf. Although each man shared profits and losses on his tomato transactions, there is no evidence that either became a full partner in his respective firm. Mr. Gentile, for instance, shared 15 percent of the profits and losses on his tomato sales for L&P. Nothing indicates he shared in profits and losses on any firm activity other than that which he was specifically engaged to perform, whereas full partners in a business typically share profits and losses in all the firm's activities. *See, e.g.,* UNIF. P'SHIP ACT § 202(a) (1997) (defining partnership as "the association of two or more persons to carry on as co-owners a business for profit"). Likewise, Mr. Lomoriello shared 40 percent of the profits and losses on his produce transactions for American Banana, but nothing indicates he shared in American Banana's overall profits and losses or otherwise became a co-owner. Far from indicating co-ownership, the limited profit- and loss-sharing arrangements were a performance-based compensation mechanism fully consistent with Mr. Gentile's and Mr. Lomoriello's status as agents or employees. *See* 58 Agric. Dec. at 1093-94; *see also* UNIF. P'SHIP ACT § 202(c)(2) & (3) (1997) (Stating that "the sharing of gross returns does not by itself establish a partnership," and that "a person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment . . . for services as an independent contractor or of wages or other compensation to an employee.").

JSG nonetheless contends that Mr. Gentile and Mr. Lomoriello were independent brokers and argues, without citation, that "payments to independent brokers are permissible under the PACA." *See* Final Brief of Petitioner at 46- 48. JSG apparently believes that independent brokers are principals because they are subject to PACA. The statute itself belies this claim. Brokers by definition

[9]The Department's regulations define a joint account transaction as "a produce transaction in commerce in which two or more persons participate under a limited joint venture arrangement whereby they agree to share in a prescribed manner the costs, profits, or losses resulting from such transaction." 7 C.F.R. § 46.2(s).

negotiate "for or on behalf of the vendor or the purchaser."[10] 7 U.S.C. § 499a(b)(7). Agents, not principals, act on another's behalf. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tentative Draft No. 1, 2000) ("Agency is the fiduciary relationship that arises when one person (the 'principal') manifests consent to another person (the 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent consents so to act."). Nor does the requirement in 7 U.S.C. § 499c(a) that brokers obtain licenses make them principals. A broker's status as a principal, an agent, or an employee depends on its relationship to other parties in a transaction, not its possession of a license.

D. License Revocation

Section 8(a) of PACA permits license revocation for "flagrant or repeated" violations of § 2 (7 U.S.C. § 499b). *See* 7 U.S.C. § 499h(a).[11] The Judicial Officer found JSG's bribes "willful, flagrant, and repeated violations of section 2(4) of the PACA" (7 U.S.C. § 499b(4)) and revoked its license. *See* 58 Agric. Dec. at 1094. We will not lightly disturb the Department's choice of remedy under a statute committed to its enforcement, especially given the Department's superior knowledge of the industry PACA regulates. *See Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 185, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (Upholding Department of Agriculture suspension order under the Packers and Stockyards Act and reasoning that "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy[,] 'the relation of remedy to policy is peculiarly a matter for administrative competence'."); *County*

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[10]PACA defines a "broker" as "any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively, except that no person shall be deemed to be a 'broker' if such person is an independent agent negotiating sales for and on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of $230,000 in any calendar year." 7 U.S.C. § 499a(b)(7).

[11]Subsection 499h(a) states in its entirety: "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. § 499h(a). JSG appears to be a dealer. *See* 7 U.S.C. § 499a(b)(6) (defining "dealer" as an entity "engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . .").

Produce, Inc. v. United States Dep't of Agric., 103 F.3d 263, 267 (2d Cir. 1997) (courts "must defer to the agency's judgment as to the appropriate sanctions for PACA violations" because the Department of Agriculture "is particularly familiar with the problems inherent in the produce industry, and it has experience conforming the behavior of produce companies to the requirements of PACA").

Nothing in the record persuades us that JSG's payments to the Gentiles and Albert Lomoriello were anything but flagrant and repeated. The bribes in this case were as flagrant as those in *Goodman* and *Tipco*. The Department revoked the defendants' licenses in both cases, providing ample notice that commercial bribes may result in revocation. The only difference from those cases is that JSG apparently did not surcharge its customers to pay for the bribes. That distinction does not diminish the wilfulness of JSG's conduct or the corruption it worked on its buyers' purchasing agents. The Department acted well within its discretion in revoking JSG's license.

We also reject JSG's claim that the Department's denial of its motion to reopen the record was arbitrary and capricious. Some of the supplemental points JSG wished to present were not relevant to a finding of commercial bribery under *Goodman* and *Tipco*. JSG had ample opportunity before the record closed to present the others.

Petition denied.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

C.H. ROBINSON COMPANY v. KAY GEE PRODUCE COMPANY.
PACA Docket No. R-00-0067.
Decision and Order filed February 15, 2001.

PACA - Breach of contract - Untimely filing, of counter-claim - Market value, determination of.

Complainant contended Respondent owed money for produce received. Respondent's breach of contract claim was held to be timely filed. However, the Judicial Officer (JO) held that he lacked jurisdiction to hear Respondent's counter-claim for overpayment and proceeded to rule on the evidence based upon verified pleadings and the report of the investigation by the [Secretary]. The JO determined (based upon the value of the produce shipped to Respondent using the average market price at the destination method less the reduction in market value of the goods due to defects/spoilage) that the Respondent had overpaid for the produce, but could not recover for his overpayment.

Ben G. Campbell, Minneapolis, MN, for Complainant.
Respondent, Pro se.
George S. Whitten, Presiding Officer.
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 $3,357.60 in connection with a transaction in interstate commerce involving watermelons.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

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 the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and Respondent filed an answering statement.
Complainant did not file a statement in reply. Complainant filed a brief.

Findings of Fact

1. Complainant, C. H. Robinson Company, is a corporation whose address is 8100 Mitchell Road, Suite 200, Eden Prairie, Minnesota.

2. Respondent, Kay Gee Produce Company, is a corporation whose address is 4900 Crayton, Cleveland, Ohio. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about June 25, 1998, Complainant sold to Respondent, and shipped from loading point in Wauchula, Florida, to Respondent in Cleveland, Ohio, one truck load containing 2,106 watermelons, or a total 45,100 pounds. The melons were originally billed at $.12 per pound, but Complainant reduced the price on the day of shipment to $.105 per pound.

4. The melons arrived at destination on June 27, 1998, and were accepted by Respondent. On June 28, 1998, at 8:00 a.m. the melons were federally inspected following unloading from the truck. The results of that inspection were as follows, in relevant part:

LOT: A
TEMPERATURES: 68 to 71°F
PRODUCT: Watermelons
BRAND/MARKINGS: "No brand" Bulk
ORIGINS: FL
LOT ID.:
NUMBER OF CONTAINERS: 2016 melons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	02 %	00 %		Quality (Scars)	
	15 %	08 %		Brused (5 - 25%0 (sic)	
	12 %	12 %		Over Ripe (10 - 15%)	
	02 %	02 %		Decay	
	31 %	22 %		Checksum	

GRADE: Fails to grade US No. 1 only account condition

5. Respondent promptly faxed a copy of the inspection certificate to Complainant. Respondent paid Complainant $2,054.00 on December 23, 1998, and also paid Complainant $1,924.50 as an undisputed amount on August 30, 1999.

6. An informal complaint was filed on February 22, 1999, which was within nine months after the cause of action alleged herein accrued.

Conclusions

The first matter that should be discussed is Respondent's apparent attempt at filing a counterclaim. The formal answer (filed September 29, 1999) is very unusual. It starts off with a xerox copy of the complaint, and the complaint's one exhibit. Underneath this, on Respondent's letterhead, is a caption, and the words: "Respondent above named respectfully answers the allegations." Underneath this is another letterhead page that states "ITEM 4." Presumably this refers to paragraph 4 in the complaint. Underneath this is another letterhead page with a brief two paragraph explanation in which Respondent alleges that the one load that is the subject of the complaint was a part of a 20 load contract. The written contract is attached. The answer then proceeds with numerous letterhead pages, each followed by documentation. Respondent finally gets to ITEM 11 which reads as follows:

> Respondent hereby request[s] a judgment in its favor of $19,724.50. This includes lost profit of undelivered watermelon loads totaling $17,500 (14 x 2500 x .50¢) and the undisputed amount of $1,924.50 [See attached Kay Gee 6] and also include recovery of our filing fee of $300.00.

Although Respondent never stated that it wished to file a counterclaim, it is evident from the substance of Respondent's answer that this is what Respondent had in mind. However there are two problems with Respondent's attempt to file such a claim. First, although Respondent requests recovery of a $300.00 "filing fee," there is no record that either the $60.00 filing fee, or the $300.00 handling fee were ever filed. Second, the contract under which Respondent makes its claim specifies shipment of the 20 loads of watermelons between June 22, and July 1, 1998. A breach of that contract by failure to ship would, of necessity, have taken place on or prior to July 1, 1998. However, Respondent's attempt to file the claim was in connection with the answer filed on September 29, 1999, or far more than nine months after the cause of action accrued.[1] We conclude that we do not have

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[1] *See Bar-Well Foods Limited v. Valley Packing Services International*, 39 Agric. Dec. 1200 (1980); *B & K Produce Co. v. Shipper's Service Co.*, 33 Agric. Dec. 701 (1974); *Sanders and Drake v. Gardner Bros.*, 31 Agric. Dec. 128 (1972); *Edward G. Hirn v. Sol Fetterman Produce Co.*, 25 Agric. Dec. 258, *petition for reconsideration dismissed* 420 (1966); *I. Meltzer & Son v. J. Lerner & Son,* 21 Agric. Dec. 685 (1962); *Cardoso Bros. v. Unanue & Sons,* 20 Agric. Dec. 1188 (1961); *R. Dixon &* (continued...)

jurisdiction over the counterclaim which Respondent attempted to file.

Complainant alleges that Respondent failed to give timely notice of any breach of contract. Both parties submitted evidence on this point, and we find Respondent's evidence more convincing. Accordingly, we find that timely notice of a breach was given. The federal inspection clearly shows a breach of contract on the part of Complainant as to the June 25, shipment of watermelons. Respondent is entitled to damages flowing from the breach. According to the Uniform Commercial Code, section 2-714(2):

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The best method of ascertaining the value the goods would have had if they had been as warranted is to use the average price shown by market reports for the destination market on the first day on which resales could have been made following arrival. No reports are issued for Cleveland, Ohio, but reports for Detroit, Michigan, for June 29, 1998, show that various red meat varieties of 16 to 24 pound watermelons from Florida were selling for $.18 per pound. The value of the 45,100 pound load, if it had been as warranted, was therefore $8,118.00. The value of the melons accepted is best shown by an accounting of a prompt and proper resale of the melons. Respondent did not offer an accounting in evidence; and we will, therefore, use the percentage of condition defects to determine Respondent's damages.[2] Condition defects totaled 29 percent. Applying this percentage to the value of the melons if they had been as warranted gives us $2,354.22 as Respondent's damages.

Respondent alleged that the original purchase price of $.12 per pound was lowered to $.105 per pound, and submitted a manifest faxed by Complainant to Respondent on June 25, 1998, that showed the new price. Complainant nowhere

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[1](...continued)
Co., Inc. v. Joseph Spagnola, 17 Agric. Dec. 1057 (1958); *Frank Kenworthy Co. v. D. L. Piazza Co.*, 16 Agric. Dec. 844 (1957); and *Ricks Fertilizer Co. v. M. Dunn & Co.*, 5 Agric. Dec. 194 (1946).

[2]*See Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (1994); *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, 52 Agric. Dec. 684 (1993);, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

directly rebutted this document, or attempted to explain it. We conclude that the adjusted purchase price of the melons was, therefore, $4,735.50. Respondent's damages deducted from this amount leaves $2,381.28 as Respondent's basic liability on this load. Respondent originally paid Complainant $2,054.00, and subsequently paid Complainant $1,924.50. Respondent has, therefore, considerably overpaid Complainant what was due. Since, however, Respondent did not pay the $300.00 handling fee when it attempted to file a counterclaim, we are unable to award Respondent the excess of what it has paid over what was due. The complaint should be dismissed.

Order

The complaint is dismissed.

QUAIL VALLEY MARKETING, INC. v. JOHN A. COTTLE, d/b/a VALLEY FRESH PRODUCE.
PACA Docket No. R-98-0020.
Decision and Order filed December 4, 2000.

Shipping terms - F.o.b. - Appeal re-inspection, request untimely.

Warranty of Suitable Shipping Condition is applicable to city equidistant to agreed upon destination regardless of express agreement of parties that table grapes would not go to the city. Contrary decision will not be followed. Where the parties agree to a destination city as an explicit term of the contract, shipper may offset any damages established for a breach of the agreement against damages established for violation of the warranty, or the parties may agree to liquidated damages for prohibited destination in contact agreement. Notice of east coast inspection provided to California shipper on the date of inspection will be untimely if provided after more than half the shipment is resold as shipper is deprived of opportunity for appeal reinspection.

Thomas R. Oliveri, Newport Beach, CA., for Complainant.
Louis W. Diess, III, Washington, D.C., for Respondent.
Eric Paul, Presiding Officer.
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 $45,112.25 as payment of the balance due on four f.o.b. truck lot shipments of table grapes sold

to Respondent in interstate commerce, plus the recovery of the $300.00 PACA handling fee.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer and counterclaim admitting that Respondent had agreed to f.o.b. purchases totaling $68,568.50 as alleged and had remitted the sum of $23,456.25 to Complainant, but denying that table grapes shipped to Respondent's customer complied with the contract terms and that there was an unpaid balance due in the amount of $45,112.25, and asking for the award of an unspecified amount of damages because of Complainant's failure to ship the kind, quality, grade and size of grapes called for in the contract. Complainant filed a reply denying the allegations of Respondent's counterclaim and affirmatively asserting that Respondent, at shipping point, had personally inspected the grapes as to condition and quality and approved of their shipment to Respondent's customer in Philadelphia, Pennsylvania.

As the amount in controversy exceeded $30,000.00 and Respondent had requested an oral hearing, an oral hearing was held by audio-visual telecommunications on October 14, 1998, with the parties and their representatives located in Fresno, California, and the presiding officer and the court reporter located in Washington, D.C. Complainant was represented by Thomas R. Oliveri, Western Growers Association, Newport Beach, California. Respondent was represented by Stephen P. McCarron, McCarron & Associates, Washington, D.C. Eric Paul, Office of the General Counsel, was the presiding officer. Complainant presented oral testimony from one witness, Robert Rocha. Respondent presented oral testimony from three witnesses, Derek Seto, William Slattery, and Michael Espinosa. By oral stipulation of the parties, the deposition of Pat Prisco was admitted as Deposition Exhibit 1 (DX 1) along with attached exhibits 1 through 46 (DX 1(1) through DX 1(46)); the deposition of Robert Rocha was admitted as Deposition Exhibit 2 (DX 2) along with attached exhibits 1 through 19 (DX 2(1) through DX 2(19)); report of investigation exhibits 1 through 6 (ROI 1 through ROI 6) were admitted; formal complaint exhibits 1 through 21 (FCX 1 through FCX 21) were admitted; Complainant's exhibit's 1 through 5 (CX 1 through CX 5) (as submitted to the Hearing Clerk on October 6, 1998) were admitted; and Respondent's exhibit's 1 and 2 (RX 1 and RX 2) (as submitted to the Hearing Clerk on October 8, 1998) were also admitted. This procedure ensured that all available relevant evidence was admitted, although in many instances the same document was admitted under multiple designations. References to the transcript are by page number (Tr.__). The parties filed briefs. Complainant filed a timely claim in the amount of $3,239.02 for fees and expenses incurred in connection with the oral

hearing and the deposition of Robert Rocha. Respondent filed a timely claim in the amount of $7,557.94 for fees and expenses incurred in connection with the hearing and the deposition of Pat Prisco.

Findings of Fact

1. Complainant, Quail Valley Marketing, Inc., is a corporation whose post office address is P.O. Box 1206, Ridley, CA 93654.

2. Respondent is an individual, John Cottle, doing business as Valley Fresh Produce, whose post office address is 255 West Fallbrook Avenue, Suite 103-A, Fresno, CA 93711-6151.

3. The parties are, and at the time of the transactions involved herein were, licensed under the Act.

4. On or about October 30, 1998, Complainant sold Respondent by oral contract 420 boxes of Red Globe table grapes, Top Knot label, plain pack, styro container, 23 pound, at a $14.00 unit price ($5,880.00) for interstate shipment to Respondent at Philadelphia, Pennsylvania. There was a $1.50 a box pre-cooling and palletizing charge ($630.00), a $10.00 air bag charge, and a $23.50 charge for a temperature recorder. Respondent was given a $0.25 per box discount as a local California buyer ($105.00) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of $6,438.50 (ROI 1D; Tr. 12-14). Complainant's order and invoice number was 963615 for this f.o.b. no grade shipment of table grapes.

5. This was the first of four f.o.b. shipments of table grapes that Respondent purchased from Complainant for delivery to C.H. Robinson Corp. in Philadelphia, Pennsylvania, without advising Complainant of the identity of its Philadelphia customer.

6. This first shipment departed from Sakata Farms in Biola, California, at 5:00 p.m. on October 30, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by Sandstone Transport to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 5, 1996. L & P Fruit had the 420 boxes of unloaded Top Knot brand Red Globe grapes inspected at 8:00 a.m. on November 6, 1996. USDA Inspection Certificate K-248851-8, which identifies Alanco Corp., Bronx, NY, as the shipper, shows that these 420 lugs had temperatures between 37 and 38 degrees and failed to grade U.S. No. 1 table on account of the following condition defects:

Average Defects	Serious Damage	
03%	00%	Quality

05%	00%	Shattering
07%	00%	Sunken areas around Capstem (5 to 10%)
03%	03%	Crushed and Split Berries
05%	05%	Wet and Sticky Berries
02%	02%	Decay
25%	10%	Checksum

The inspector noted that the decay was mostly early, some moderate stages. [DX 1(4)]

7. L & P Fruit sold these grapes to customers at the Hunts Point Terminal on November 7 and November 8, 1996, for an average unit price of $17.51, and after granting credits of $288.00 received sales proceeds of $6,311.00 (DX 1(7)). These 420 lugs had been sold to L & P Fruit by Alanco Corp. as part of a 1761 lug shipment with a total freight expense of $3,150.00. L & P Fruit ended up paying Alanco Corp. $4,233.50 for these 420 lugs of Red Globe grapes (DX 1, pg. 8).

8. On or about October 30, 1998, Complainant sold Respondent by oral contract 692 boxes of Red Globe table grapes, Top Knot label, plain pack, styro container, 23 pound, at a $16.00 unit price ($11,072.00), and 358 boxes of Red Globe table grapes, Covey label, plain pack, styro container, 23 pound, at a $14.00 unit price ($5,012.00), for interstate shipment to Respondent at Philadelphia, Pennsylvania. There was a $1.50 a box pre-cooling and palletizing charge ($1,575.00) and a $23.50 charge for a temperature recorder. Respondent was given a $0.25 per box discount as a local California buyer ($262.50) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of $17,420 (ROI 1H; Tr. 16-17). Complainant's order and invoice number was 963619 for this f.o.b. no grade shipment of table grapes.

9. This second shipment departed from Sakata Farms in Biola, California, at 2:15 p.m. on October 31, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by W.R. Stevens Trucking to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 5, 1996. L & P Fruit had these 1,050 lugs of Red Globe grapes inspected in two lots at 9:55 a.m. on November 6, 1996. USDA Inspection Certificate K-371691-7 shows that the two lots had temperatures between 34 and 37 degrees and failed to grade U.S. No 1 table on account of the following condition defects:

Lot A [692 lugs "Top Knot" Red Globe table grapes]

Average	Serious	

Defects	Damage	
03%	00%	Quality (scars)
05%	00%	Shattering
07%	00%	Shriveling around Capstem (5 to 11%)
16%	16%	Flabby Berries (17 to 21%)
03%	03%	Crushed and Split Berries
05%	05%	Wet and Sticky Berries
03%	03%	Decay (2 to 5%)
42%	27%	Checksum

Lot B [358 lugs "Covey" Red Globe table grapes]

Average Defects	Serious Damage	
03%	00%	Quality (scars)
05%	00%	Shattering
09%	09%	Flabby Berries (7 to 11%)
03%	03%	Crushed and Split Berries
05%	05%	Wet and Sticky Berries
02%	02%	Decay (1 to 4%)
27%	19%	Checksum

The inspector noted that the decay in each of these lots was in mostly early, some moderate stages (DX 1(32).

10. L & P Fruit Corp. sold 980 of these 1,050 lugs of Red Globe grapes to customers at the Hunts Point Terminal on November 7, 1996, at prices that initially averaged $15.03 (for 692 lugs) and $15.00 (for 288 lugs). The $10,404.00 and $4,320.00 that L & P Fruit billed for these respective lots was reduced by credit adjustments giving L & P Fruit proceeds of $9,354.00 ($13.51 a lug) and $3,718 ($12.90 a lug). Alanco Corp. subsequently billed L & P Fruit Corp. $11,149.50 for this shipment [$11.50 delivered for 692 lugs and $11.00 delivered for 288 lugs plus $23.50 Ryan] by a November 11, 1996 invoice that was paid on December 30, 1996. The L & P Fruit Corp. sales records, and this billing and payment, fail to account for 70 of the 358 lugs of the "Covey" label Red Globe grapes that the parties have acknowledged were delivered on November 5, 1996, and inspected on November 6, 1996 (DX 1(28-36)).

11. On or about October 30, 1996, Complainant sold Respondent by oral contract 1820 lugs of Calmeria table grapes, Covey label, plain pack, styro container, 21 pound, at a $11.00 unit price ($20,020.00) for interstate shipment to Respondent at Philadelphia, Pennsylvania. There was a $1.50 a box pre-cooling

and palletizing charge ($2,730.00), and a $23.50 charge for a temperature recorder. Respondent was given a $0.25 per box discount as a local California buyer ($455.00) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of $22,318.50 (ROI-1L); Tr. 17-18). Complainant's order and invoice number was 963651 for this f.o.b. no grade shipment of table grapes.

12. This third shipment departed Complainant's warehouse at 8:20 p.m. on November 1, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by Jo Dar Dist. to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 5, 1996. L & P Fruit had the 1820 lugs of unloaded Covey brand Calmeria grapes inspected at 6:45 a.m. on November 6, 1996. USDA Inspection Certificate K-248174-5, which identifies Alanco Corp., Bronx, NY, as the shipper, shows that these 1820 lugs had temperatures between 37 and 38 degrees and failed to grade U.S. No 1 table on account of the following condition defects:

Average Defects	Serious Damage	
07%	00%	Quality (scars)(6 to 10%)
04%	00%	Shattering
17%	00%	External Brown Discoloration (5 to 23%)
06%	00%	Sunken Discolored areas (4 to 10%)
02%	02%	Crushed and Split Berries
04%	04%	Wet and Sticky Berries
01%	01%	Decay
41%	07%	Checksum [DX 1(15)]

13. L & P Fruit Corp. sold this third shipment of grapes for Alanco's account between November 6, 1996 and November 12, 1996 at prices that initially averaged $9.19 for 1811 lugs and $5.60 for 9 lugs. The $16,702.40 billed was reduced by credit adjustments to gross proceeds of $12,603.40, and was further reduced to net proceeds of $10,113.89 by the deduction of $70.00 cartage, $74.00 inspection, $1,890.51 commission (15%), and $455.00 handling (25¢). Alanco Corp. subsequently billed L & P Fruit Corp. $10,579.50 for this shipment (at $5.80 delivered plus $23.50 Ryan) by a November 27, 1996 invoice that was paid on December 13, 1996 (DX 1(16-27)).

14. On or about October 30, 1996, Complainant sold Respondent by oral contract another 1820 lugs of Calmeria table grapes, Covey label, plain pack, styro container, 21 pound, at a $11.00 unit price ($20,020.00) for interstate shipment to

Respondent at Philadelphia, Pennsylvania. There was a $1.50 a box pre-cooling and palletizing charge ($2,730.00), a $73.00 charge for a federal-state shipping point inspection, and a $23.50 charge for a temperature recorder. Respondent was given a $0.25 per box discount as a local California buyer ($455.00) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of $22,391.50 (ROI 1Q); (Tr. 18-19). Complainant's order and invoice number was 963652 for this f.o.b. no grade shipment of table grapes.

15. This fourth shipment departed Complainant's warehouse at 3:30 p.m. on November 6, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by Sun Aire Trucking to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 11, 1996 (DX 1(38)). L & P Fruit had the 1820 lugs of unloaded Covey brand Calmeria grapes inspected at 7:10 a.m. on November 12, 1996. USDA Inspection Certificate K-248815-3, which identifies Alanco Corp., Bronx, NY, as the shipper, shows that the 1820 lugs of Covey label Calmeria grapes had temperatures between 35 and 37 degrees and failed to grade U.S. No. 1 table on account of the following condition defects:

Average Defects	Serious Damage	
05%	00%	Quality Defects (scars)(4 to 8%)
44%	00%	Brown Discoloration (17 to 62%)
05%	00%	Shattered Berries
02%	02%	Decay
56%	02%	Checksum

The inspector noted that the decay was in early stages and that the stems were mostly green and pliable some brown and brittle (DX 1 (40)).

16. L & P Fruit Corp. sold these grapes for Alanco's account on November 12 and 13, 1996 at prices that totaled $12,643.50 after adjustments. This $12,643.50 in gross proceeds was reduced to net proceeds of $10,010.97 on the accounting prepared by L & P Fruit Corp. by the deduction of $203.00 cartage, $78.00 inspection, $1,896.53 commission (15%), and $455.00 handling (25¢). Alanco subsequently billed L & P Fruit Corp. $10,579.50 for this shipment (at $5.80 delivered plus $23.50 Ryan) by a November 27, 1996 invoice that was paid on December 13, 1996 (DX 1(41-46)).

17. Approximately one or two days prior to the shipment of each of these four loads one of Respondent's salesmen, Mr. Derek Seto, visited Complainant's place of business and determined that Complainant possessed suitable table grapes

for shipment to Philadelphia, Pennsylvania (Tr. 53-56). On November 1, 1996, Complainant obtained federal-state inspections of two 1890 lug lots of Calmeria grapes from which the third and fourth shipments were to be drawn on November 1, 1996, and November 6, 1996, respectively. The inspection reports show that the grapes inspected graded US #1 table when inspected. (FCX 6; 9).

18. Temperature tapes that were produced by Pat Prisco of L & P Fruit for the first and third shipments show transit temperatures in the low to mid-30 degree range (DX 1(3;14)). The third temperature tape produced by Mr. Prisco shows transit temperatures in the upper 20 degree range for the second shipment (DX 1(31).[1] There is no temperature tape in the record for the fourth shipment, and the deposition testimony of this witness merely goes to the temperature ranges of the grapes on arrival at L & P Fruit (DX 1, pg. 6-7).

19. On November 6, 1996, Complainant's salesman, Robert Rocha, was advised by warehouse staff that the trucker picking up the fourth shipment had checked in that the load was going to New York. Mr. Rocha telephoned Respondent and obtained express assurance from one of Respondent's salesmen, Mr. Derek Seto, that the shipment was going to Philadelphia, Pennsylvania as had been agreed (Tr. 21). Before Mr. Seto confirmed to Mr. Rocha that the destination was Philadelphia and not New York, he spoke to Respondent's office manager, Mr. William Slattery, who talked over the telephone to the C.H. Robinson salesman who had ordered the grapes for delivery in Philadelphia and obtained his oral assurance that the destination was Philadelphia and not New York (Tr. 68).

20. Mr. Slattery subsequently learned, from faxed USDA inspection reports received on that same day, that the first three shipments had been delivered to L & P Fruit at the Hunts Point Terminal Market, Bronx, NY. Mr. Slattery decided to make inquiries with C.H. Robinson and the PACA Branch before contacting Complainant (Tr. 69-71).

21. On the afternoon of November 12, 1996, a date that Mr. Rocha remembered because it was his birthday, he was informed by Mr. William Slattery in a telephone conversation that the grapes in these shipments had all gone to New York City and not to Philadelphia, Pennsylvania (Tr. 22-24).

22. On November 14, 1996, Mr. Rocha received a letter from Bill Slattery by fax, the body of which reads as follows:

> To reiterate our phone conversation of November 12, Valley Fresh

[1] Abnormal transportation is not apparent from this reading because the freezing point for grapes is about 28 degrees and the relevant inspection certificate contains no specific notation as to freeze damage as is required when such damage is present.

> Produce placed orders with Quail Valley for 1470 Red Globes and 3640 Calmerias on October 30 and November 1, with destinations listed as Philadelphia, PA. On November 6, Robert called Valley Fresh to double check the destination of order #963652, because the truck was checking in for Bronx, NY. At the same time, Kurt with C.H. Robinson (Philadelphia) was on another phone line and I asked him whether or not the grapes were going to New York, which he denied.
>
> We want to make it clear with Quail Valley that Valley Fresh's position in this matter is that the responsibility of the grapes lies with C.H. Robinson, because they diverted the grapes from the original destination. With Quail Valley's approval Valley Fresh will hold our position with C.H. Robinson and keep Quail Valley appraised of the situation as events proceed. We are also aware that after my conversations with PACA that they agree with my position at this time, but he did also make me aware of the possibility of recourse by the inspections due to the destinations being equidistant and the same day arrival from shipping point, but he did not see this being brought up in this case.

(DX 2(10)).

23. On November 16, 1996, Mr. Rocha received by fax a copy of a letter that Mr. Slattery had sent to Mr. Greg Goven at C.H. Robinson's headquarters Eden Prairie, MN, on November 15, 1996, that went over the same information that had been covered in Mr. Slattery's prior letter to Mr. Rocha, and explained that he had discovered that L & P Fruit had purchased the grapes from Alanco Corp., who purchased them from C.H. Robinson-NYC, who bought the grapes from Kurt at C.H. Robinson's Paulsboro, NJ, branch office. Mr. Slattery went on to state "Now, after conversations with the Paulsboro office I am being told that my failure to investigate the true destination of the grapes will result in all deductions on these files to be the responsibility of Valley Fresh Produce." (DX 2(11)).

24. On December 3, 1996, Complainant received from Respondent by fax copies of Respondent's trouble file reports pertaining to the first and second shipments, the 1,470 lugs of Red Globe table grapes, as well as the USDA inspection reports pertaining to the third and fourth shipments, the 3,640 lugs of Calmeria table grapes (CX 4). On the following day, Complainant returned copies of these trouble reports and inspections to Respondent with notes from Robert Rocha stating "These Inspections were not received in a timely manner. Quail Valley is unable to grant any adjustments." (CX 5).

25. Pursuant to these trouble reports, Respondent sought Complainant's agreement to accept remittance of the following amount's that Respondent was to

receive from C.H. Robinson:

$8.25 x 692 “Top Knot” Red Globes
$7.75 x 358 “Covey” Red Globes
less $95.25 for federal inspection [$8,388.25]

and

$8.25 x 420 Red Globes
less $74.00 for federal inspection [$3,391.00]

26. Complainant has received Respondent’s check no. 02886, dated December 17, 1996, in the amount of $25,456.25 as the undisputed amount involved in this reparation proceeding (ROI 2a; Complaint; Answer).

27. The formal complaint was received by the Department on March 28, 1997, which is within 9 months after the cause of action herein accrued.

Conclusions

Respondent has purchased and received from Complainant in interstate commerce four f.o.b. shipments of table grapes, a perishable agricultural commodity. The Regulations[2] in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined[3] in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and condition, will assure delivery without deterioration at the contract destination agreed upon the between the parties."[4] The warranty of

[2] 7 C.F.C. § 46.43(i) [Note: 7 C.F.R. § 46.43(i) - Editor]

[3] 7 C.F.R. § 46.43(j)

[4] The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43 (j)) which require delivery to contract destination “without abnormal deterioration”,
(continued...)

suitable shipping condition is made applicable only when transportation service and conditions are normal. It is well established that where that where the question of abnormality of transportation service is raised, either by a party or on the face of the record, a buyer who has accepted a commodity has the burden of proving that transportation service and condition were normal.[5]

Complainant contends that the warranty of suitable shipping condition is not applicable to any of the four transactions in dispute because of unauthorized changes in the agreed contract destination for these shipments from Philadelphia, Pennsylvania, to New York City that were made by Respondent's customer, C.H. Robinson. In addition, Complainant has asserted that the warranty of suitable shipping condition is not applicable because Respondent's representative, Derek Seto, inspected and approved each load of grapes prior to its shipment from Complainant's place of business. Finally, Complainant contends that even if the warranty of suitable shipping condition was applicable to these transactions, that the failure of Respondent to give Complainant timely notice of the condition defects determined by USDA inspection reports bars any reliance upon these inspection reports to establish that the shipments failed to make good delivery. Complainant has not attempted in this proceeding to establish that the transportation service and

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[4](...continued)
or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, Sales § 245 (rev. ed. 1948). As an illustration of how the rule operates, under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. For all commodities other than lettuce (for which see 7 C.F.R. § 46.44) what is "normal" or abnormal deterioration is judicially determined. *See Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

[5]Admiral Packing Company v. Sam Viviano & Sons, 40 Agric. Dec. 1993 (1981): Dave Walsh v. Rozak's, 39 Agric. Dec. 281 (1980).

conditions were abnormal with respect to any of the four shipments of table grapes in controversy, or that the warranty of suitable shipping condition is not applicable because of abnormal transportation.

It is necessary to determine whether the warranty of suitable shipping condition should be applied to these transactions because we have four USDA inspection certificates that show excessive condition defects in a 22% to 56% range that were revealed by timely inspections. With respect to table grapes, we have held that condition defects at destination averaging 17% will establish a breach of the warranty of suitable shipping condition. *Robert A. Shipley, d/b/a Shipley Sales Service v. Peacock Sales,* 46 Agric. Dec. 702 (1967). *See also Lester Distributing Co. v. Levatino Produce Corp.*, 43 Agric. Dec. 1606 (1984).

We will first examine Complainant's contention that Respondent inspected and approved the grapes prior to shipment. Respondent's office in Fresno, California, is located within 25 miles of Complainant's place of business at Reedley, California (Tr. 45). Complainant was engaged in the marketing of fresh fruit as a grower's agent, and had table grapes and other perishable agricultural commodities obtained from various growers on hand at its warehouse facility during the months of October and November. One of the regular duties of a former employee of Respondent, Mr. Derek Seto, was to visit Complainant's place of business and to determine whether Complainant had produce available that would be suitable for shipment to Respondent's customers. Mr. Rocha testified that, prior to these four shipments, Derek Seto inspected the table grapes that were located at Complainant's warehouse, and determined that the table grapes were suitable for shipment to Philadelphia, Pennsylvania (Tr. 13, 17-18). However, Mr. Rocha acknowledged that he was not present when Derek Seto looked at the grapes (Tr. 38-39). Mr. Seto presented the following credible testimony with respect to his inspections of the grapes in these shipments:

Q. The four truck lot shipments of grapes covered by this reparation proceeding, were you the individual on behalf of Respondent's firm, that being Quail -- excuse me --Valley Fresh Produce that inspected the grapes?

A. Yes, I was.

Q. There seems to be some type of confusion on the dates that you might have gone out to look at the grapes.

Did you look at the grapes on the date of shipment?

A. No, I didn't.

Q. Did you look at the grapes maybe the day before they were shipped?

A. Yes. Actually, I'd say on some occasions it was on probably one or two days before they shipped.

Q. I'm assuming you did not look at every lug of grapes?

A. You're right, I didn't.

Q. Did you look at a representative sample of the grapes that were to be shipped?

A. Yes, I did.

Q. In your opinion, were these grapes suitable for shipping to the east coast?

A. Certainly. Definitely east coast quality.

Q. From your experience--

A. When I say "east coast quality," there are different types of products that you want to keep on the west coast, different types of products that you want to keep, you know, in the southwest area to the midwest, and then there are east coast type of boxes which are a little bit under export standards that is in cases.

Q. Would you -- in your opinion, are these the types of grapes that the markets in Hunts Point, New York, like to order?

A. I wouldn't -- my personal opinion, just dealing with the New York market, I wouldn't send anything to New York because myself, I don't have a relationship with a customer in that area buying, and I've just heard some horrible stories about sending product there.

Q. Were you aware of where these four truck lot shipments of grapes were to be shipped to, what city they were to be shipped to?

A. Yes. Pennsylvania.

Q. To Philadelphia, Pennsylvania.

Did you happen to know the name of the buyer in Philadelphia, Pennsylvania, who was purchasing these grapes?

A. We were dealing with C.H. Robinson.

(TR. 53-54).

There is documentary evidence that Complainant, in connection with the two purchase orders placed for Respondent by Derek Seto, instructed its warehouse personnel not to load the two shipments of Calmeria grapes until they were inspected by Respondent's representative. Complainant's shipping orders nos. 963651 and 963652 for the third and fourth shipments contain the following special instruction: "Do not load until Valley Fresh inspects." (Tr. 38-39; DX 2).

We conclude that Complainant has failed to establish by a preponderance of the evidence that Respondent's employee inspected the specific lugs of grapes that were going to be shipped in these four shipments. It is not clear whether Mr. Seto's inspections were conducted only at Complainant's facility or included visits to specific grower locations such as Sakata Farms. It appears that Mr. Seto looked at a representative sample of an unspecified volume of table grapes that were on

hand one or two days prior to the actual loading of these shipments. We have nothing in the record as to the size of Complainant's table grape inventory at the time that Mr. Seto performed his inspections, and we can not determine what part of the grapes shipped to fill Respondent's orders were actually inspected by Mr. Seto. The two federal-state inspections of Calmeria grapes that Complainant obtained on November 1, 1996, were conducted after the two shipping orders were taken that contained the special instructions "Do not load until Fresh Valley inspects." It appears that the inspection that were performed by Mr. Seto were for the purpose of checking the quality and condition of the general run of Complainant's table grapes and were not inspections made for the purpose of determining the quality and condition of a specific quantity. We have held that such an inspection does not establish the existence of a sale after inspection. *See Kirby & Little Packing Co. v. United Fruit & Produce Company*, 16 Agric. Dec. 1066, 1069 (1957). Even if we were able to find that Mr. Seto had inspected a representative sample of the grapes purchased by Respondent, it does not appear that the parties agreed to "Purchase after Inspection" terms in their contract negotiations[6], and their use of the contract term "f.o.b." on the shipping orders and invoices relating to these shipments was inconsistent with these being purchase after inspection transactions which do not carry a warranty of suitable shipping condition. In a number reparation cases where the significance of the use of these trade terms under the Department's Regulations was not fully addressed, it was held that if a buyer, directly or through its agent, inspects specific produce prior to its purchase, the warranty of suitable shipping condition does not apply, as the buyer is deemed to have made a purchase after inspection at shipping point. *Ritepak Produce v. Green Grove Markets,* 29 Agric. Dec. 165 (1970); *Goldstein Fruit & Produce v. East Coast Distributors,* 18 Agric. Dec. 493 (1957); *L.T. Malone v. Al Kaiser & Bros.*, 18 Agric. Dec. 1221 (1959); *PACA Docket No. 5123,* 9 Agric. Dec. 146 (1950). More recently, in *Delano Farms Company v. Suma Fruit International*, 57 Agric. Dec. 749, 754 (1998)*; Primary Export International v. Blue Anchor, Inc.,* 56 Agric. Dec. 969, 977-78 (1997), we held that under the Regulations the waiver of the suitable shipping condition warranty requires the use of the trade term "purchase after inspection," and that the use of the trade term "f.o.b." under the Regulations expressly entails the suitable shipping warranty. We also rejected the

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[6]Section 46.43(ff) of the Regulations provides:

"Purchase after inspection" means a purchase of produce after inspection or opportunity for inspection by the buyer or his agent. Under this term the buyer has no right of rejection and waives all warranties as to quality or condition except warranties expressly made by the seller." (7 C.F.R. § 46.43(ff))

exclusion of the suitable shipping warranty as an implied warranty, by a prior examination of the goods under section 2-316(3)(b) of the Uniform Commercial Code, since under the Department's Regulations in f.o.b. sales the suitable shipping condition warranty is an extension of the warranty of merchantability and more equivalent to an express warranty. *Id.* at 979-80. We find that Respondent did not waive the warranty of suitable shipping condition.

We now turn to Complainant's contention that the warranty of suitable shipping condition is not applicable to any of the four transactions in dispute because of unauthorized changes in the agreed contract destination for these shipments from Philadelphia, Pennsylvania, to New York City that were made by Respondent's customer, C.H. Robinson. There is no question that Respondent consistently represented in good faith that the contract destination for these shipments was Philadelphia, Pennsylvania. It is also true that Philadelphia, Pennsylvania, and New York City are essentially equidistant from California shipping points and share the same five day transit time. If these two destinations had been regarded by the parties in this proceeding as equally good destinations in which to market California table grapes during October and November, 1996, we would follow, without further analysis, the precedent of a number of cases where contract destination diversions that did not materially alter transit time and distance were held inadequate to waive the warranty of suitable shipping condition. *Merrill Farms v. Tom Lange Company, Inc.,* 44 Agric. Dec. 1253 (1985); *Kirby & Little Valley Packing Co. v. United Fruit & Produce Company, supra*. See, also *Magic Valley Potato Shippers, Inc. v. C.B. Marchant & Co., Inc., et al.,* 42 Agric. Dec. 1602 (1983) where we said (dicta) " the diversion of the car to a different destination than that specified in the contract would not necessarily leave respondent totally without benefit of the warranty since the condition of the commodity at that different point may be relevant in determining whether the commodity would have been abnormally deteriorated at the destination specified." We find in the present case, that the parties shared an implicit understanding throughout their course of dealing that none of these four shipments was going to New York City, and that in the case of the fourth shipment, Respondent provided an express representation to this effect that induced Complainant to release the shipment to Respondent's trucker.

We know from the testimony of Robert Rocha that Complainant would not have agreed to sell the grapes to a buyer located on the Hunts Point Market because of a reasonable fear that they would not bring an adequate return at this destination. Mr. Rocha explained Complainant's understanding with respect to sending grapes to the New York market in the following testimony:

Q. Was that an important factor to you, were contract destination would be?
A. Yes.

Q. Why was it important to you that the grapes were going to be going to Philadelphia?

A. Well, at the time it was a very tight grape market, table grape market. It was a demand exceed situation and we wanted to make sure that our grapes were going to the right market, and we thought the grapes were fine to go to Philadelphia, and knowing that it was going to go there, and we kind of were picking what markets we would go to and who we were going to sell them to.

Q. Would you consider going to a market let's say of Hunts Point, New York, or the Bronx with these grapes?

A. Absolutely not.

Q. Could you -- excuse.

Are you done with your answer? I don't want to stop you if want to continue.

Why would you not want to go to the Hunts Point area?

A. Well, at least from our experience, we've had a lot of trouble with New York City. It's a very tough market. You have -- you just always run into problems, either the inspections' adjustments, pay whatever it is into that market.

And like Philadelphia, we've had good experience with; dealt with, you know, people there and everything has gone fine with that market. And so, especially with the demand exceed situation we had with the grapes, we were definitely going to pick a better market to go to, and New York City definitely that year was not in any way we were going to go that market with grapes that we know we can go to a different market with better success.

(Tr. 14-15).

When specifically questioned with respect to the fourth shipment, Mr. Rocha testified:

A. Given the choice, given the choice, and if they were told -- if it was asked to me in the beginning to go to New York City, I would not have shipped these grapes to New York City.

Q. Because you expected there would be problems?

A. We've had bad experiences. New York City, especially that year, we did not ship any grapes to New York City because they went into demand exceeds market. You go into your other markets, and we didn't have to sell to New York City.

(Tr. 41-42).

We find that there was a clear perception, shared by both Complainant's witness Robert Rocha and Respondent's witness Derek Seto, that a shipper would be better off selling table grapes at other locations than New York City.

We find that the diversions of these shipments from Philadelphia to New York City by Respondent's customer, which are acceptances of the shipments by Respondent, constitute breaches of the oral contract between the parties to this reparation proceeding.

The effect that a breach of an express agreement between parties that a shipment would not go to New York City would have on the applicability of the warranty of suitable shipping condition was recently considered in *The Chuck Olsen Co. v. Produce Distributors Inc., and Produce Etc. Marketing*, 57 Agric. Dec. 1689 (1998), a case in which a truckload of California table grapes was diverted from a Paterson, New Jersey, contract destination and also sold by L & P Fruit at the Hunts Point market. In that case we determined that:

> The clearly manifested intent of the parties must be upheld where it is not illegal, and does not conflict with public policy. We find the warranty of suitable shipping condition to be inapplicable to this transaction.

Id. at 1694.

The reasoning we followed in *Chuck Olsen* was that the suitable shipping condition warranty provision of the Regulations expressly uses the term "contract destination" and that the extension to other equidistant locations was an expansive interpretation that should not followed when it is found that the parties specifically excluded the actual destination where the shipment was delivered. On further consideration, the warranty of suitable shipping condition is a warranty that the shipper has supplied product in good condition and, absent abnormal transportation, the shipper warrants that the product will arrive in good condition. So long as the destination of the product is virtually equidistant from the point of shipment as the agreed upon destination, there is no reason that the warranty that goods would arrive in good condition should not continue to apply. Accordingly, it is not appropriate to reject the applicability of the suitable shipping condition warranty in this proceeding. We conclude that this warranty remains applicable, but that Complainant has the right to claim damages resulting from breach of the agreement not to ship to New York City. Complainant has failed to establish that it incurred

any specific amount of damages because of Respondent's breach.[7]

Having concluded that the warranty of suitable shipping condition remains applicable in this matter, we must now determine whether Respondent is precluded from using the results of the first three USDA inspections to determine whether the warranty was breached because Respondent has failed to provide Complainant with timely notice of the inspection results. There is a direct conflict in the testimony that was provided by Robert Rocha and Bill Slattery as to when Complainant received notice of the inspection results. We find the testimony of Mr. Rocha, that he was not advised by Mr. Slattery that the first three shipments had gone to New York City until November 12, 1996, to be more credible on this matter. Mr. Slattery testified that he talked to Mr. Rocha regarding both the diversions to New York, and the condition of the grapes upon delivery, on November 7, 1996, one day after he had received faxed copies of the three inspections that were done on the morning of November 6, 1996., and after he had spoken to the salesman at C.H. Robinson and the PACA Branch. He failed to confirm that he had provided such oral notification with a follow up letter, a common business practice that he followed after his telephone conversation with Mr. Rocha on November 12, 1996. He did not fax copies of the inspection reports to Complainant upon receipt. Although he also testified that he started to fax them, and received a telephone call from Mr. Rocha inquiring as to the reason for the interrupted fax transmission, we do not believe that such a telephone conversation would have occurred without a follow up written transmission of information. The telephone records that have been produced are not persuasive since Complainant has established that there were numerous unrelated transactions between the parties that occurred shortly after the transactions that are the subject of this proceeding. We find that Complainant has established that it received only an unrelated fax respecting Navel orange prices from Respondent at about the time and date that Mr. Slattery testified that his broken off transmittal of the first three inspection reports to Complainant had occurred (CX 2).

A shipper is entitled to receive timely notice of an inspection that does indicate abnormal deterioration and breach of warranty before a buyer can rely upon such

[7] As a practical matter, establishing a dollar amount for such damages may prove to be difficult. Parties wishing to expressly exclude a specific location, to or exclude all locations other than a specified contract destination, while retaining the warranty of suitable shipping condition for an agreed contract destination, could so provide in writing on the transaction records adding that in case of a breach the agreed f.o.b. contract amount shall constitute liquidated damages.

inspection report.[8] Even assuming that the oral notification of shipment diversion provided by Bill Slattery to Robert Rocha on November 12, 1996, contained an adequate disclosure of the condition defects set forth on the USDA inspection certificates, a conclusion that is strongly disputed by Mr. Rocha, it would clearly be untimely as to the three inspections conducted on the morning of November 6, 1996. The 420 lugs of Red Globe grapes included in the first shipment were resold to customers by L & P Fruit on November 7 and November 8, 1996. Some 980 lugs of the 1050 lugs of Red Globe grapes included in the second shipment were resold to customers by L & P Fruit on November 7. All 1820 lugs of Calmeria grapes included in the third shipment were resold to customers by L & P Fruit by the close of business on November 12, 1996. Notice received on November 12, 1996, was far too late to provide Complainant with any possibility of getting a reinspection. Considering the fact that Complainant had a federal-state inspection report that showed that this shipment of Calmeria grapes graded US No. 1 Table on November 1, 1996, the date they were shipped, it is highly likely that Complainant would have sought a reinspection if Respondent had provided Complainant with a copy of USDA Inspection Certificate K-248174-5 on November 6 or November 7, 1996.

The question of timely notice is less clear with respect to the fourth shipment which was inspected in New York at 7:10 a.m. EST on November 12, 1996. Bill Slattery's telephone call on the afternoon of November 12, 1996, which took place on Pacific time, was probably made too late to permit a reinspection before November 13, 1996, and L & P Fruit reported reselling 1240 lugs of the 1820 lugs of Calmeria grapes included in this shipment on November 12, 1996, and the balance on November 13, 1996 (DX 2(41)). The record does not establish the time of day when Respondent received the faxed inspection certificate from this fourth inspection. It would have gone first to Alanco Corp, as the named shipper, and probably gone from Alanco to one or more C.H. Robinson offices before being sent to Respondent's office. A copy of Inspection Certificate K-248815-3 was not faxed to Complainant upon its arrival at Respondent's office, and nobody present telephoned Complainant. Instead, a telephone call was made to Respondent's office manager, Bill Slattery, who was out of town on business. At some unspecified time during the afternoon of November 12, 1996, Bill Slattery telephoned Robert Rocha at Complainant's place of business. A copy of the actual inspection certificate itself was not faxed to Complainant until December 3, 1996. Even assuming that Bill Slattery orally provided Robert Rocha will full details of the results of this

[8] Failure to provide timely notice of breach will bar the buyer from any remedy under § 2-607(3)(a) of the Uniform Commercial Code; *see Diazteca Co. v. The Players Sales, Inc.*, 53 Agric. Dec. 909 (1994) (right to pursue appeal process established for USDA inspections).

inspection at 12:01 p.m. Pacific time, which is the earliest possible "afternoon" time, it would have been at least 3:01 p.m. EST time before they started talking. Notice provided after more than half of the inspected commodity is resold and not available for an appeal reinspection is untimely. We conclude that Respondent failed to provide Complainant with timely notice of the results of this fourth inspection, and is barred from using this inspection to prove breach of the warranty of suitable shipping condition.

Since Respondent accepted the four loads of grapes, and has not proven any breach of contract on the part of Complainant, Respondent became liable to Complainant for the full purchase price of the four loads, or $68,568.50. Respondent has paid Complainant $23,456.25 as the undisputed amount involved in this reparation proceeding. Respondent's failure to pay Complainant the $45,112.25 balance of the purchase price is a violation of section 2 of the Act for which reparation should be awarded to Complainant.

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 (including any handling fee paid by the injured person or persons under section 6(a)(2)) sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Steel & Iron 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 Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., 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).

In accordance with the applicable provisions of the Rules of Practice the parties each filed claims for fees and expenses.[9] Complainant as prevailing party is entitled to "reasonable fees and expenses incurred in connection with [the] hearing." We have followed the standard court practice of multiplying the prevailing market rate by the number of hours expended unless the hours claimed are deemed excessive.[10] In this case Complainant's representative has claimed a total of $3,239.02 in fees and expenses. The fees for representation break down to: (1) 9 hours at $165.00

[9] 7 C.F.R. § 47.19(d). The filing time was extended at the close of the hearing to permit the simultaneous submission of applications for fees and expenses with the filing of briefs.

[10] *Newbern Groves, Inc. v. C.H. Robinson Co., et al.*, 53 Agric. Dec. 1766, 1858 (1994); *Potato Sales, Inc. v. Perfection Produce*, 38 Agric. Dec. 273 (1979).

per hour for preparing for the oral hearing; (2) 3 hours at $165.00 per hour for appearance the oral hearing; and (3) 4 hours at $165.00 per hour for appearance at the deposition of Robert Rocha. The costs break down to: (1) $278.00 for airfare; (2) $84.75 in lodging expenses in Fresno, CA (1 night); (3) $75.00 for meals (2 days); (4) $45.27 for rental car; and (5) $116.00 for the hearing transcript. We may not award the $116.00 sought in costs for the hearing transcript. This is a post-hearing expense that is not recoverable. The balance of the fees and expenses claimed are found to be reasonable, resulting in an allowable award of $3,123.02.

Order

Within thirty days from the date of this Order, Respondent shall pay to Complainant, as reparation, $45,112.25 with interest thereon at the rate of 10 percent per annum from December 1, 1996, until paid. Respondent shall pay Complainant $300.00 as additional reparation for the handling fee paid by Complainant.

Within thirty days from the date of this Order, Respondent shall pay to Complainant, as reparation for fees and expenses, $3,123.02 with interest thereon at the rate of 10 percent per annum from the date of this Order, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

QUAIL VALLEY MARKETING, INC. v. JOHN A. COTTLE, d/b/a VALLEY FRESH PRODUCE.
PACA Docket No. R-98-0020.
Order Denying Petition for Reconsideration filed February 22, 2001.

Thomas R. Oliveri, Newport Beach, CA., for Complainant.
Louis W. Diess, III, Washington, D.C., for Respondent.
Eric Paul, Presiding Officer.
Order Denying Petition for Reconsideration issued by William G. Jenson, Judicial Officer.

Preliminary Statement

On December 4, 2000, a Decision and Order was issued awarding the Complainant in this reparation proceeding $45,112.25 as reparation for four shipments of table grapes, plus $300.00 for the PACA handling fee, and $3,123.02 for fees and expenses incurred in connection with the oral hearing. Respondent filed a timely Petition for Reconsideration on December 22, 2000, before this

Decision and Order became final. Respondent requests reconsideration of this Decision and Order only as to our determination that Respondent's notice of breach was untimely with respect to the fourth shipment of table grapes, which had an agreed invoice price of $22,391.50 and a net proceeds payment of $10,010.97, leaving $12,380.53 in dispute. Respondent argues that it was not proper to determine that a notice of inspection results given on the same day on which the inspection was conducted was untimely without also requiring Complainant to show that it had requested an appeal inspection. For the reasons stated below, we find that Respondent's argument is without merit, and conclude that Respondent should be required to the pay Complainant the reparation and interest specified in the Decision and Order issued on December 4, 2000.

The fourth shipment, consisting of 1820 lugs of Calmeria table grapes, arrived at the Hunts Point Terminal Market on November 11, 1996. The USDA inspection was performed at 7:10 a.m., on November 12, 1996, on 1800 lugs of these grapes which had been unloaded and were located at the time of the inspection on the premises of L&P Fruit Corp. The account of sales that L&P Fruit Corp. furnished to Alanco Corp. shows that 1160 cartons of the 1820 cartons received, some 63.7 percent of the total shipment, were sold to six customers of L&P Fruit on November 12, 1996 (DX 1 (41)). This accounting further shows that 659 of the remaining 660 lugs were sold to 12 customers of L&P Fruit on the following day, November 13, 1996, and that a single lug was donated to charity. Respondent's Petition for Reconsideration asserts that there is no evidence that the 1000 cases of grapes sold on November 12, 1996, had been removed from the receiver's premises and were unavailable for inspection, and that there were still 800 cases of grapes that were unsold and available for reinspection on November 13, 1996. Respondent argues that without any attempt by the seller to obtain an immediate reinspection, it is impossible to say that a reinspection with evidentiary value could not have been conducted. Respondent requests that we reconsider and determine that in cases where there is notice given on the same day that an inspection is performed that the notice be accepted as timely unless an immediate reinspection is requested and could not be accomplished.

We find that the PACA does not place a general obligation upon shippers to immediately request an appeal inspection. Moreover, and perhaps more to the point, the law does not require actions that would be no more than an exercise in futility. The question that we will ask in cases of this kind is not "Did the shipper call for an appeal inspection?" but rather, "If the shipper had called for an appeal inspection immediately after receiving notice would an appeal inspection have been possible?" Complainant was well aware that produce firms doing business at terminal markets will normally open early and complete their daily business by

about 11 a.m. It would be highly unusual for any produce sold to remain on the premises until the following day. The earliest possible Pacific time at which William Slattery could have informed Robert Rocha of the results of this inspection during their afternoon telephone call on November 12, 1996, 12:01 p.m., Pacific time, would have been 3:01 p.m. Eastern time. Therefore, Complainant had to know that even if it had immediately requested an appeal inspection that at least a full day's sales would have been completed before such an inspection could have been performed, and quite likely a substantial part of a second day's sales. We conclude that even if the Inspection Service had received a request for an appeal inspection, and had returned to the premises of L&P Fruit on the morning of November 13, 1996, that the inspector would have found no more than 660 lugs of grapes, or 36.3 percent of the shipment present. Paragraph 130 of the Appeal Inspection Procedures, which have been published by the Fresh Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, at page 49 of General Market Inspection Instructions, April 1998, provides that requests for Appeals should be denied "(3) When a large number of containers from the original (previous) manifest are not accessible for sampling or have been disposed of." There is no doubt that the sale of 1160 lugs of grapes on November 12, 1996, insured the absence of a sufficiently large number of containers in a 1820 lug shipment to preclude the conducting of an appeal inspection on November 13, 1996.

We conclude that Respondent has failed to present a valid basis for reversing our determination that Respondent's notice of the inspection results to Complainant for the fourth shipment was untimely, and that Respondent was entitled to be awarded, as reparation, the unpaid balance of the contract prices for all four of these shipments of table grapes, with interest, handling fee, and fees and expenses incurred for the hearing.

Order

Respondent's Petition for Reconsideration is denied.

Within thirty days from the date of this Order Denying Petition for Reconsideration, Respondent shall pay to Complainant the amounts of reparation and interest required by the Order issued on December 4, 2000.

Copies of this Order shall be served upon the parties.

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PROCACCI BROS SALES CORPORATION t/a PROCACCI MARKETING v. B T PRODUCE CO., INC.
PACA Docket No. R-01-0064.
Decision and Order filed April 12, 2001.

Evidence – Inference drawn from failure to follow normal practice and regulations.

Where shipper claimed a sale, and receiver claimed the produce was received on consignment, the failure of the shipper to prepare an invoice showing a sale was found to be contrary to normal practice, to contravene the Regulations, and to lend credence to the transaction having been one of consignment.

Jurisdiction – Time limitation on filing of complaint.

Complainant filed more than nine months after accrual of cause of action was timely when it came within special legislation extending time limit for claims alleging false inspections on Hunts Point Terminal Market.

Practice and Procedure – Necessary parties.

Neither the Secretary nor employees of the Secretary who performed fraudulent inspections of produce are necessary parties to reparation complaint against firm alleged to have procured fraudulent inspection.

Practice and Procedure – Conflict of interest.

No conflict of interest existed that would preclude the Secretary from adjudicating reparation complaint involving allegation that damage resulted to Complainant from fraudulent inspections performed by former Department employees.

Inspections, by inspector convicted of receiving bribes.

Where grapes were consigned to a firm whose employee subsequently pleaded guilty to paying bribes to federal inspectors to alter inspections, and where an inspector who pleaded guilty to receiving bribes to alter inspections issued an inspection certificate covering 500 cartons of grapes from the 1,280 carton consignment showing the 500 cartons were ready to be dumped, it was held that since the consignee could only profit from the resale, and not the dumping of the grapes, the inspection certificate was presumed to be valid.

Consignments – Breach of consignment contract.

Where consignee claimed damages from consignor because 500 cartons out of 1,280 cartons of consigned grapes had to be dumped, and there was no evidence that grapes were agreed to be of good quality, but consignee knew that there was a prior rejection of the load, it was held that no breach of the consignment contract had been proven.

Mark C.H. Mandell, Annandale, N.J., for Complainant.
Stephen P. McCarron, Washington, D.C., for Respondent.
George S. Whitten, Presiding Officer.

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 $18,266.65 in connection with a transaction in interstate commerce involving a truck load of grapes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Respondent's answer also included a counterclaim arising out of the same transaction as that in the complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

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 the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, Procacci Bros Sales Corporation is a corporation trading as Procacci Marketing Co., whose address is 3655 South Lawrence Street, Philadelphia, Pennsylvania. At the time of the transaction involved herein Complainant was licensed under the Act.

2. Respondent, B T Produce Co., Inc., is a corporation whose address is 163 - 166 Row A, New York City Terminal Market, Bronx, NY. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about June 13, 1996, Complainant consigned to Respondent one truck load consisting of 1,280 cartons of bagged white perlette grapes. The load of grapes was shipped to Respondent on June 13, 1996, after having been rejected by Complainant's customer.

4. On June 27, 1996, at 5:30 a.m., 500 cartons of the grapes were federally inspected at the place of business of Respondent on the Hunts Point Market, Bronx, N.Y., with the following results in relevant part:

LOT: A

TEMPERATURES: 37 to 38°F
PRODUCT: Table Grapes
BRAND/MARKINGS: "Bloss" Perlette 18 lbs bagged
ORIGINS: CA
LOT ID.: 523-k34
NUMBER OF CONTAINERS: 250 Cartons
INSP. COUNT: N

LOT: B
TEMPERATURES: 36 to 38F
PRODUCT: Table Grapes
BRAND/MARKINGS: "Peter Rabbit" 18lbs Perlette bagged
ORIGINS: CA
LOT ID.: 523-k12
NUMBER OF CONTAINERS:
INSP. COUNT:

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	100%	100%	%	Decay advanced and nested	
	100%	100%	%	Checksum	
B	21%	21%	%	Wet and Sticky berries (17 to 25%)	
	12%	00%	%	Shattered berries. (11 to 14%)	
	50%	50%	%	Decay (42 to 61%) advanced and nested	
	83%	71%	%	Checksum	

GRADE:

REMARKS: Applicant States above lots to be dumped.

. . . .

Inspector's Signature: [MICHAEL TSAMIS]

5. On July 23, 1996, Respondent sent Complainant payment by check in the amount of $8,704.00. Complainant accepted and deposited the check. Respondent's accounting showed a breakdown of sales by lot, with gross proceeds in the total amount $10,931.00. Expenses were shown as $200.00 for dumping, $20.00 terminal charge, $50.00 unloading, $320.00 handling charge, and a 15 percent commission

in the amount of $1,639.65. Net proceeds were shown as $8,701.35.

6. The informal complaint was filed on May 23, 2000, which was within the time permitted under section 6(a)(1) of the Act, as amended.

Conclusions

Complainant asserts that the load of grapes was sold to Respondent on a price after sale basis. Respondent denies this assertion, and claims that the grapes were consigned. It is customary for an invoice to be issued when perishables are sold. In fact, the Regulations require that a dealer "prepare . . . memoranda . . . which shall fully and correctly disclose all transactions involved in his business."[1] This includes "memorandums of sale . . ."[2] The only memorandum prepared by Complainant as to this transaction was an invoice dated July 10, 1996, almost a month after shipment, for $8,704.00. This was merely an acknowledgment and acquiescence in Respondent's resales of the grapes. Complainant's failure to prepare an invoice, as would have been both normal and required if the transaction had been one of purchase and sale, lends credence to Respondent's contention that the transaction was one of consignment. We find that Respondent has proven by a preponderance of the evidence that the load was consigned.

In spite of the above conclusions, the essential basis of Complainant's claim herein does not depend upon the transaction having been one of purchase and sale.[3] Complainant asserts that the worth of the grapes was $26,240.00 and that due to a false inspection it was induced to accept the lesser sum of $8,704.00.[4] Against this claim Respondent offers several defenses. First, Respondent asserts that the complaint is time barred because it was not filed within nine months after the cause of action accrued. This assertion was made prior to the passage of the amendment to section 6(a)(1) of the Act, which provides that:

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[1] 7 C.F.R. §46.14(a).

[2] 7 C.F.R. §46.15

[3] *See Ronnie Carmack v. Delbert E. Selvidge*, 51 Agric. Dec. 892 (1992); *B. G. Sales v. Sin-Son Produce Co., Inc.*, 43 Agric. Dec. 1991 (1984); and *Coastal Produce Co. v. Joe Perrone & Co.*, 8 Agric. Dec. 1050 (1949).

[4] The inspection was performed by Michael Tsamis, a federal fruit and vegetable inspector who pleaded guilty to accepting bribes to alter federal inspections, and the inspection was performed at the request of B. T. Produce, a firm whose employee, William Taubenfeld, pleaded guilty to paying bribes to federal inspectors to alter federal inspections.

> Notwithstanding section 6(a)(1) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f(a)(1)), a person that desires to file a complaint under section 6 of that Act involving the allegation of a false inspection certificate prepared by a grader of the Department of Agriculture at Hunts Point Terminal Market, Bronx, New York, prior to October 27, 1999, may file the complaint not later than January 1, 2001.[5]

Accordingly, Respondent's defense on the basis of untimely filing is without foundation.

Respondent also asserts that since Complainant's "damages arise from Respondent's obtaining 'a false USDA inspection[],'" the Secretary is a necessary party to this action through its agents or employees. Respondent asserts that although such employees performed the allegedly fraudulent inspections which were the causes of Complainant's damages, they are not commission merchants, dealers, or brokers, and were not licensed under the Act, and cannot be joined as parties in this reparation action because the Secretary lacks subject matter jurisdiction over them. Respondent is in error in the overall thrust of these assertions. Neither the Secretary, nor its employees, is a necessary party to this proceeding. Complete justice can be done as regards the claim brought by Complainant against Respondent in this forum. Other forums are open for any allegations Respondent may have against those who perpetrated the alleged fraud, and their presence here, as parties, is not necessary to the resolution of this matter.

Respondent additionally contends that the Secretary of Agriculture "must recuse and/or abstain from ruling or considering the Complaint due to a conflict of interest, and or a direct financial interest in the outcome of this matter." However, Respondent has shown no direct, or indirect, financial interest by this Department in the outcome of this matter. Furthermore, even if the Department did have such a financial interest that would not be a cause for the Secretary to refuse to decide this matter. Federal agencies, including this Department, continually adjudicate tort claims made against themselves, just as the courts of the United States continually adjudicate claims against the United States.

We come now to the merits of Complainant's claim. Complainant consigned the grapes to Respondent after they had been rejected by another customer. Complainant asserts that the rejection was due to untimely delivery, but offered no evidence to bolster this contention. Respondent assumes that the rejection was due to the condition of the grapes. The consignment of the grapes lends some minimal

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[5] Grain Standards and Warehouse Improvement Act of 2000, Pub. L. No. 106-472, § 309, 114 Stat 2058 (November 9, 2000).

credence to this assumption. However, it is not necessary that we decide this issue. The grapes remained the property of Complainant while they were in the hands of Respondent. Respondent's profit was directly dependant upon the realization of as high a price as possible for the grapes. As Respondent's counterclaim makes clear, the dumping of a portion of the grapes lessened the profit which would otherwise have been realized from the sale of the grapes. Complainant has shown no motive for Respondent to have bribed the federal inspector to issue what was essentially a dump certificate in a consignment transaction. We presume, therefore, that the inspection certificate is valid. The complaint should be dismissed.

Respondent's counterclaim is based upon the contention that by shipping grapes which were in poor condition so that 500 out of an original 1,280 cartons had to be dumped, Complainant deprived Respondent of the commission it would have normally made on the cartons that were dumped. However, there is no evidence that the consignment agreement between Complainant and Respondent required the grapes to be of any particular quality or condition. In fact, Respondent points to the fact of the prior rejection of the grapes as implicit evidence that the grapes were in poor condition. We conclude that the poor condition of the grapes was an implicit aspect of the consignment agreement, and that such agreement was not breached by Complainant. The counterclaim should be dismissed.

Order

The complaint is dismissed.
The counterclaim is dismissed.
Copies of this order shall be served upon the parties.

SPENCER FRUIT COMPANY v. NORTHWEST CHOICE, INC.
PACA Docket NO. R-01-0054.
Decision and Order filed May 1, 2001.

Federal inspections – Credibility.

Where two inspections of shipments of cantaloupes on the Hunts Point market were performed by inspectors who pleaded guilty to accepting bribes for the falsification of inspection certificates, but there was no evidence that the firms which received the produce on the Hunt's Point market were involved in the paying of bribes, it was held that Complainant had not submitted sufficient evidence to raise credible doubts as to the integrity of the federal inspections, and the complaint was dismissed.

Complainant, Pro se.
Respondent, Pro se.

George S. Whitten, Presiding Officer.
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 $8,725.50 in connection with transactions in interstate commerce involving six shipments of cantaloupes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

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 the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Respondent filed a brief.

Findings of Fact

1. Complainant, Spencer Fruit Company, is a partnership composed of Spencer Fruit Company Investors, LP, and Far Western Securities Company. Complainant's address is P. O. Box 1246, Reedley, California 93654-1246.

2. Respondent, Northwest Choice Inc., is a corporation whose address is 2513 Lemaister, Wenatchee, Washington 98801.

3. On or about July 16, through August 17, 1996, Complainant sold to Respondent, and shipped to Respondent's customer, Superior Foods, New York, New York, six truck loads of cantaloupes for f.o.b. prices totaling $27,066.00.

4. Following arrival at destination each of the loads of cantaloupes was federally inspected on the application of L & P Fruit Co., Inc., at their store in Bronx, New York. On the basis of excessive damage disclosed by these inspections the parties negotiated adjustments to the contracts. Pursuant to these adjustments Respondent paid Complainant a total of $18,340.50 for the six loads of cantaloupes.

5. The formal complaint was filed on April 4, 2000, which was within the time permitted under section 6(a)(1) of the Act, as amended.

Conclusions

Complainant seeks to recover $8,725.50 which is the total amount of the adjustments granted on six loads of cantaloupes sold to Respondent. Complainant states that "this balance is due to federal inspections done by fraudulent federal inspectors." While this laconic statement leaves much to inference, especially as it regards the liability of Respondent who was not based on the Hunt's Point market, we can dispose of the claim without engaging in imaginative expansion of Complainant's pleading. Only two of the six inspections were clearly performed by an inspector who pled guilty to accepting bribes, the copies supplied of one of the inspections has the name of the inspector clipped off, and the remaining three inspections were signed by an inspector who was not implicated in the bribery. More importantly, there is no proof that either Superior Foods, the apparent purchaser of the cantaloupes from Respondent, or L & P Fruit Co., Inc., the firm that called for all the inspections,[1] was involved in the bribery of federal inspectors through their officers or employees. Complainant has not submitted sufficient evidence to raise credible doubts as to the integrity of the federal inspections relevant to this proceeding. The complaint should be dismissed.

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

PACIFIC TOMATO GROWERS, LTD. v. B. T. PRODUCE CO., INC.
PACA Docket No. R-01-0095.
Decision and Order filed May 23, 2001.

Contracts – Privity.

Where a reparation action was brought against a produce receiver involved in bribery of federal inspectors on the Hunts Point Market instead of against the firm that purchased the produce from Complainant, and negotiated an adjustment with Complainant, it was held that there was no privity of contract between Complainant and Respondent, and no jurisdiction under the Act.

Mike D. Bess, Orlando, FL., for Complainant.
Mark C.H. Mandell, Annandale, NJ., for Respondent.
George S. Whitten, Presiding Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

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[1] The relationship of L & P Fruit Co., Inc. to Superior Foods, or to Respondent, is nowhere disclosed in the record.

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 $10,690.00 in connection with transactions in interstate commerce involving five lots of tomatoes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

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 the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, Pacific Tomato Growers, LTD, is a corporation whose address is P. O. Box 866, Palmetto, Florida.

2. Respondent, B. T. Tomato Co., Inc., is a corporation whose address is New York City Terminal Market, Row A, Units 163-168, Bronx, New York. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about October 10, 1997, through April 28, 1998, Complainant sold and shipped to Southeast Tomato Distributors, Palmetto, Florida, five truck lots of tomatoes with f.o.b. prices totaling $50,517.50. Southeast Tomato Distributors sold the loads to Respondent, and diverted them to Respondent on the Hunts Point Market.

4. As a result of inspections performed by federal inspectors who subsequently pleaded guilty to accepting bribes to falsify inspections, Complainant agreed to contract modifications which called for it to accept less than the original contract price for the five lots of tomatoes. William Taubenfield, an employee of Respondent, pleaded guilty to bribery of a federal inspector.

5. The informal complaint was filed on May 23, 2000, which was within the time permitted under section 6(a)(1) of the Act, as amended.

Conclusions

Complainant brings this action to recover adjustments granted to Southeast Tomato Distributors on five lots of tomatoes sold to that firm, and diverted and sold by that firm to its customer, Respondent herein. The tomatoes were not sold by Complainant to Respondent, and there is absolutely no privity of contract between the parties to this litigation. Although Complainant advanced no reason why it should be allowed to recover against a party with which it had no contractual relationship, we will explore one basis upon which recovery might be thought to rest apart from that relationship. Section 5 of the Act provides:

> If any commission merchant, dealer, or broker violates any provision of section 499b of this title he shall be liable to the person or persons injured thereby for the full amount of damages (including any handling fee paid by the injured person or persons under section 499f(a)(2) of this title) sustained in consequence of such violation.

At first blush, it would seem that since the alleged bribery activity of Respondent injured Complainant, Complainant should be able to seek damages directly from Respondent even though Complainant had no contractual connection with Respondent. However, this overlooks important and pivotal considerations. First, there can be no violation of section 2 unless the unlawfulness delineated in section 2 is in connection with interstate or foreign commerce *transactions*.[1] The question is, therefore, were Complainant and Respondent involved in the type of *transaction* with each other that is contemplated by section 2 of the Act? All of the section 2 violations involve transactions with commission merchants, dealers, or brokers.[2] A commission merchant is "any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another."[3] A dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities . . . any perishable agricultural commodity in interstate or foreign commerce . . . ."[4] And, a broker is "any person engaged in the business of negotiating sales and purchases

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[1] Section 2 begins with the words: "It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:"

[2] Each of the seven subsections of section 2 begins with a continuation of the language quoted in footnote 2 in which the delineated unlawful activities are limited to commission merchants, dealers, and/or brokers.

[3] Section 1(5) of the Act. 7 U.S.C. 499a(5).

[4] Section 1(6) of the Act. 7 U.S.C. 499a(6).

of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively . . . ."[5] It is obvious that the type of transactions intended are commercial consignment, brokerage, or purchase and sale transactions.[6] In these type transactions there is always an underlying contract.[7] Thus, the unlawfulness delineated in section 2 is intended to be in connection with contractual transactions. A transaction under the Act contemplates an action, or intended action, whereby produce is transferred from one party to another. The parties involved in the transfer, or intended transfer, are involved in the transaction, and the unlawfulness contemplated by the relevant portions of section 2 is relative to the other party with whom the transaction is conducted. This is clear from the broad language of section 2 which forms the basis of most reparation liability:

> . . . 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; . . . (emphasis supplied)[8]

There must have been a failure to perform a duty arising out of an *undertaking* in connection with a covered transaction. A tort can be, and often is, committed without any allied "undertaking." In contrast, an "undertaking" always implies contract. Contractual obligation requires privity.[9] We conclude that the Secretary has no jurisdiction under the Act to adjudicate the complaint against Respondent, and that Respondent was incorrectly joined as a party to this proceeding. The complaint should be dismissed.

Order

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[5] Section 1(7) of the Act. 7 U.S.C. 499a(7).

[6] "The term 'interstate or foreign commerce' means *commerce* . . ." (emphasis supplied). Section 1(3) of the Act. 7 U.S.C. 499a(3).

[7] A perishable transaction is required by the Act to be considered in interstate or foreign commerce if it is "part of the current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, *after purchase*, in another, ..." (emphasis supplied). Section 1(8) of the Act. 7 U.S.C. 499a(8).

[8] Section 2(4) of the Act. 7 U.S.C. 499b(4).

[9] *See Magic Valley Produce, Inc. v. National Produce Distributors, Inc., and/or Eastern Idaho Packing Corp.*, 24 Agric. Dec. 1117 (1965).

The complaint is dismissed.

Copies of this order shall be served upon the parties.

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PACIFIC TOMATO GROWERS, LTD. v. AMERICAN BANANA CO., INC.
PACA Docket No. R-00-176.
Decision and Order filed June 14, 2001.

Accord and Satisfaction – Return of payment.

Under UCC § 3-311 the return within 90 days of an amount paid in full satisfaction of a claim disputed in good faith precludes the discharge of the claim unless the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Federal inspections – Credibility.

Where an inspection of a shipment of tomatoes on the Hunts Point Market was performed by an inspector who pleaded guilty to accepting bribes for the falsification of inspection certificates, and an employee of the purchasing firm was indited for bribery of federal inspectors, but acquitted, it was held that Complainant had failed to prove by a preponderance of the evidence that the employee participated in the bribery, and it was presumed, in the absence of the motive of a bribe, that the inspector would have inspected the tomatoes in the normal fashion.

F.o.b., Suitable Shipping Condition – Normality of transportation.

Where tomatoes were packed in the field and not pre-cooled, it was found that the failure of the refrigeration equipment to bring the temperature down to the temperature specified on the bill of lading did not constitute abnormal transportation. A transit period of three and one-half to four days was held to be abnormal where the usual transit period was one and one-half to two days. However, under the judicial exception to the abnormal transportation rule, the seller was found to have breached the contract.

Mike D. Bess, Orlando, FL., for Complainant.
Respondent, Pro se.
George S. Whitten, Presiding Officer.
Decision and Order issued by Wiliam G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $9,864.00 in connection with a transaction in interstate commerce involving tomatoes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which defaulted in the filing of an answer. Within the time allowed Respondent filed a petition to reopen after default together with a proposed answer denying liability to Complainant. The motion and proposed answer were served on Complainant, which objected to the granting of the motion. On March 8, 2000, Respondent's motion was granted, and the proceeding was reopened.

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 the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, Pacific Tomato Growers, LTD, is a corporation whose address is P. O. Box 866, Palmetto, Florida.

2. Respondent, American Banana Co., Inc., is a corporation whose address is 250 Coster Street, Bronx, New York. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about November 12, 1998, Complainant sold to Respondent, and shipped from loading point in Palmetto, Florida to Respondent in Bronx, New York, one truck load containing 1,440 25 pound cartons of Field Pink vine ripe extra large tomatoes at $11.00 per box, plus a $.85 handling charge, or $17,064.00, f.o.b.

4. The contract was negotiated through a broker, Brad Bolton.

5. Following arrival of the tomatoes at the place of business of Respondent the load of tomatoes was federally inspected on November 16, 1998, at 9:40 a.m., while still on the truck. The certificate of inspection stated in relevant part as follows:

LOT: A
TEMPERATURES: 68 to 72°F
PRODUCT: Tomatoes
BRAND/MARKINGS: "USA" N.W. 25 lb., 5x6
ORIGINS: FL
LOT ID.: See Remarks
NUMBER OF CONTAINERS: 1440 Cartons
INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	08%	08%	08%	Soft (0 to 16%)	Average approximately 80% light red and red color.
	06%	00%	00%	Sunken Discolored Areas (0 to 12%)	
	12%	12%	12%	Decay (2 to 31%)	Decay - mostly early to moderate, many advanced stages
	26%	20%	20%	Checksum	

In the process of being unloaded by applicant at time of inspection
REMARKS: USDA Federal State Inspected Fl. Many 760363 - C 005, Some 611113 C005, Some None, Few partly illegible, few illegible

6. On November 25, 1998, Respondent issued a check to Complainant in the amount of $7,200.00. On the face of the check the following was hand printed: “As per Brad Bolton payment in full for 1440 tomatoes recv'd 11/16/98"

7. On February 3, 1999, Complainant purchased an official bank check in the amount of $7,200.00, and sent it to Respondent as a refund of the November 25, 1998 check. However, the check was returned to Complainant by Respondent.

8. The informal complaint was filed on March 1, 1999, which was within nine months after the cause of action herein accrued.

Conclusions

Respondent alleged that a copy of the inspection was promptly faxed to Complainant. Complainant did not deny receiving this notice. Respondent also asserted that, since there was a dispute between the parties, Complainant's cashing of the November 25, 1998 check marked “payment in full” accomplished an accord and satisfaction. Complainant, however, has shown that on February 3, 1999, it purchased a bank check made out to Respondent in the same amount as the full payment check, and sent it to Respondent. Although Respondent promptly returned the check, Complainant points to section 3-311(c)(2) of the Uniform Commercial Code as negating an accord because of the return of the check. Section 3-311 provides, in relevant part, as follows:

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

. . . .

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Respondent has shown compliance with all the elements of paragraph (a). Except that paragraph (b) is subject to paragraph (c), Respondent has shown compliance with paragraph (b). However, Complainant has shown compliance with paragraph (c)(2) except that paragraph (c) is subject to paragraph (d). Respondent, in its earliest communication with the Department during the informal stages of this proceeding stated that the tomatoes were "ordered through Brod Bolton, the broker on the transaction, and Tony Hale, Pacific's salesman." Tony Hale, in the opening statement, affirmed that the contract was negotiated through the broker, Brod Bolton, and stated that:

American Banana obtained a USDA inspection (ROI ex. 3A) and submitted

> a $7,200 check marked "payment in full per Brod Bolton", while I was away on vacation. (ROI ex. 3D). The check was inadvertently deposited in my absence. When I returned from vacation I saw what had happened and did not accept their return.

Respondent's secretary, George Contos, stated in Respondent's answering statement that:

> Contrary to Mr. Hale's statement, I spoke to him in a conference call with the broker to discuss the condition of the tomatoes and the results of the inspection. He acknowledged the problems and asked AB to handle the load for Pacific's account and to do the best under the circumstances. He was fully aware of the $7,200 settlement that was sent to him only 10 days after AB received the tomatoes.

In the statement in reply Mr. Hale responded:

> Mr. Contos stated in paragraph 2 that I spoke with him in a conference call about these tomatoes. As I stated in my opening statement, I did not speak with Mr. Contos after the tomatoes were purchased. He obviously negotiated with his broker, as the check is marked "paid in full per Brod Bolton."

It is clear that Respondent has not shown that the conditions set forth in paragraph (d) were met. Accordingly, the return of the check within three months under paragraph (c)(2) was effective to negate the attempted accord. We find that there has been no accord and satisfaction of Complainant's claim against Respondent.

Complainant asserts that Respondent has not shown a breach of contract because the inspection upon which Respondent relies to show a breach was performed by a federal inspector who pleaded guilty to accepting bribes to downgrade produce, and that American Banana was indicted for paying bribes to USDA inspectors. While is it certainly true that the inspector who performed the inspection involved herein pleaded guilty to accepting bribes to downgrade produce, it is not true that American Banana was ever indicted. An employee of American Banana was indicted, and pleaded not guilty to the charge. This employee was subsequently tried and acquitted. Complainant, however, argues that the acquittal was in a criminal trial where the standard is proof beyond a reasonable doubt, and the evidence adduced at the trial nevertheless met the standard of proof by a preponderance of the evidence that obtains in civil trials, and in reparation proceedings. Complainant attached a few pages of the criminal trial transcript to its brief in an attempt to buttress this argument. Neither the brief, nor the attachments,

are in evidence in this proceeding. According to the examiner's report (see 7 C.F.R. § 47.19(c)), the Presiding Officer read the entire transcript of the criminal trial, and was not convinced that it demonstrated bribery on the part of the American Banana employee even using the preponderance of the evidence standard. We must, therefore, conclude that Complainant has failed to show by a preponderance of the evidence herein that American Banana's employee participated in the bribery of the inspector. It is presumed that, absent the motive of a bribe, the inspector would have inspected produce in the normal fashion. We find that the results of the federal inspection must be considered.

The contract of sale included f.o.b. terms. The Regulations,[1] in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,[2] in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

The suitable shipping condition provisions of the Regulations[3] which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery,"[4] are based upon case law predating the adoption of the Regulations.[5] Under the rule, it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain

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[1] 7 C.F.R. § 46.43(i).

[2] 7 C.F.R. § 46.43(j).

[3] 7 C.F.R. § 46.43(j).

[4] 7 C.F.R. § 46.44.

[5] See Williston, *Sales* § 245 (rev. ed. 1948).

forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery.[6] This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination.[7] If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.[8]

The warranty of suitable shipping condition is made applicable only when transportation services and conditions are normal. It is well established that where the question of abnormality of transportation service is raised, either by a party or on the face of the record, a buyer who has accepted a commodity has the burden of

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[6] *See Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

[7] As an illustration, the United States Standards for Grades of Lettuce (7 C.F.R. § 51.2510 *et seq.*) allow lettuce to grade U.S. No. 1 with 1 percent decay at shipping point or 3 percent decay at destination. The good delivery standards, however, allow an additional "2 percent decay . . . in excess of the destination tolerances provided . . . in the U.S. Standards for Grades of Lettuce." Thus lettuce sold as U.S. No. 1, f.o.b., could have 4 percent decay at destination and therefore fail to grade U.S. No. 1, but nevertheless make good delivery since the amount of decay would not exceed the total of 5 percent allowed by the good delivery standards. Of course, in the case of other commodities for which specific good delivery standards have not been promulgated, the concept of good delivery allows a similar expansion of any destination grade tolerances under the judicial determination of good delivery. See cases cited at note 6, *supra*.

[8] *See Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

proving that transportation service and conditions were normal.[9]

Complainant asserts that the 68 to 72 degree temperatures disclosed by the arrival inspection are much higher than the 55 degrees which it instructed the carrier to maintain on the bill of lading. This is correct. However, it is not indicative of abnormal transportation. The refrigeration equipment used on the trucks that transport produce is typically able only to maintain the temperature of the commodity. The subject tomatoes were packed in the field, and were not precooled. If the tomatoes were loaded on the truck at 70 degrees, which is not unlikely considering the region from which they were shipped, the refrigeration equipment would not likely have lowered the temperature of the tomatoes even if the air produced by the equipment was at 55 degrees.

According to Respondent the load was received on November 16, 1998, and the inspection was taken on the same morning. Shipment was on November 12, from Palmetto, Florida. Palmetto is near Sarasota, approximately half way down the peninsula, and on the western shore. It is approximately 1,200 miles from the New York destination, and is thus a one and one-half to two day trip by truck. An arrival on the fourth morning after shipment is approximately double the transit time which we would consider normal. Accordingly, we find that transportation service was abnormal.

This finding, however, does not automatically mean that the warranty of suitable shipping condition is voided. A judicial exception to the requirement that transportation be normal in order for the warranty to apply has been long recognized. This exception allows a buyer to prove a breach of the seller's warranty of suitable shipping condition, in spite of the presence of abnormal transportation, if the nature of the damage found at destination is such as could not have been caused or aggravated by the faulty transportation service. The exception was explained in *Anonymous*, 12 Agric. Dec. 694 (1953) as follows:

> It is a well established rule that evidence of abnormal deterioration of the commodity upon its arrival at destination is evidence of breach of the warranty of suitable shipping condition only in cases in which the transportation was normal . . . .

The reason for the rule is obvious. Whether the commodity, at time of billing, was in good enough condition to travel to destination without abnormal deterioration can be determined only from the condition in which it did arrive at

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[9] *Admiral Packing Company v. Sam Viviano & Sons*, 40 Agric. Dec. 1993 (1981); *Dave Walsh v. Rozak's*, 39 Agric. Dec. 281 (1980).

destination, and where the carrier provides such faulty service as may have damaged the commodity in transit, it becomes impossible to attribute the abnormal deterioration found at destination to the condition at time of billing. The rule does not necessarily assume that abnormal transportation service caused the damage. It merely acknowledges such possibility, and even though the possibility of unsuitable condition at time of billing remains, it bars a recovery for want of proof that the damage resulted therefrom.

Since this is the rational of the rule, it has been held, as an exception to the rule, that a buyer may prove breach of the seller's warranty of suitable shipping condition in spite of proof of abnormal transportation service if the nature of the damage found at destination is such as could not have been caused by, or aggravated by, the faulty transportation service. The exception has also been applied where, even though the faulty transportation service would have most certainly aggravated the damage found at destination, the damage is nevertheless deemed to be so excessive that the commodity would clearly have been abnormally deteriorated even if transit service had been normal.[10]

The inspection disclosed the presence of 8 percent soft with a range up to 16 percent, 6 percent sunken discolored areas with a range up to 12 percent, and 12 percent decay with a range up to 31 percent. The total condition defects were 26 percent, with 20 percent being soft and/or decayed. We would allow a maximum of 6 to 7 percent soft and/or decayed tomatoes under the suitable shipping condition warranty for a 2 day transit period. The subject tomatoes exceeded this by approximately three times. We are confident that these tomatoes would not have met the 6 to 7 percent soft and/or decay limit even if they had arrived two days earlier. Accordingly, we find that Complainant breached the contract of sale.

Under UCC section 2-714(2), the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the produce accepted and the value it would have had if it had been as warranted, unless special circumstances show proximate damages of a different amount. Respondent had the burden of proving its damages. The best method of ascertaining the value the produce would have had if it had been as warranted is to use the average price for the commodity at time and place of arrival, as shown by Market News Service Reports.[11] Respondent did not submit any reports into evidence, however, we commonly consult market reports in an effort to ascertain damages. Applicable market reports for New York, New York, on November 16, and 17, do not show any sales for extra large vine ripe tomatoes from Florida. As an alternative to use

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[10] *See Sanbon Packing Co. v. Spada Distributing Co., Inc.*, 28 Agric. Dec. 230 (1969).

[11] *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990).

of market reports we can use the delivered price of the commodity, i.e. the f.o.b. price plus freight.[12] Nowhere in the record do the parties disclose the freight rate that was applicable to this shipment of tomatoes. However the Market News Branch publishes freight rates for selected shipping areas. The freight rate for trucks carrying tomatoes from central Florida to New York was $1,500 to $1,760 on November 17, 1998, which is the only available date near the November 12, 1998, shipping date for the subject tomatoes.[13] Since the shipping point for the summary is not the exact point from which the subject load was shipped, and since any uncertainty should disadvantage the party which had the burden of proof, but failed to submit evidence, we will use the lower of these rates, or $1,500. The per carton freight rate for the 1,440 cartons contained on the subject shipment was, therefore, $1.04. We conclude that the value of the tomatoes if they had been as warranted was the $11.85 per carton f.o.b. cost, plus freight at $1.04 per carton, or $12.89.

The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale.[14] However, Respondent did not submit an accounting of the resale of the tomatoes. Absent an accounting, the value of the goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection.[15] Applying the 26 percent condition defects to the delivered cost of this load, or $12.89, gives us $3.35 as Respondent's damages. Respondent's damages for the entire load were $4,824.00.

Since Respondent accepted the load it became liable for the original contract price of $17,084.00, less its damages of $4,824.00, or $12,260.00. Respondent has already paid Complainant $7,200.00 of this amount, which leaves $5,060.00 still owing from Respondent to Complainant. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured

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[12] *Rogelio C. Sardina v. Caamano Bros., Inc.*, 42 Agric. Dec. 1275 at 1278-79 (1983).

[13] See Fruit and Vegetable Truck Rate Summary for 1998, p. 9, published by the Market News Branch of the Fruit & Vegetable Division of the Agricultural Marketing Service of this Department.

[14] *R. F. Taplett Fruit & Cold Storage Co. v. Chinnok Marketing Co. et al.*, 39 Agric. Dec. 1537 (1980).

[15] *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, PACA Docket No. R-92-83, decided January 21, 1993, 52 Agric. Dec. 684 (1993); *V. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[16] 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.[17] 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, $5,060.00, with interest thereon at the rate of 10% per annum from December 1, 1998, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[16] *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).

[17] *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).

MISCELLANEOUS ORDERS

In re: PRODUCE DISTRIBUTORS, INC., AND IRENE T. RUSSO, d/b/a JAY BROKERS.
PACA Docket No. D-97-0013.
Order Lifting Stay as to Irene T. Russo, d/b/a Jay Brokers, filed February 28, 2001.

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). Respondent filed a petition for reconsideration of the January 25, 1999, Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, which I denied. *In re Produce Distributors*, 58 Agric. Dec. 535 (1999) (Order Denying Pet. for Recons. 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, 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 (2d Cir. 1999). Respondent filed a petition for 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). Respondent filed a petition for rehearing for writ of certiorari which the Supreme Court of the United States denied on January 16, 2001. *Russo v. Department of Agric.*, 121 S. Ct. 871 (2001).

On January 23, 2001, 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] requesting that I issue an order

lifting the May 17, 2000, Stay Order.[1] Complainant further requests that any order lifting the May 17, 2000, Stay Order,[2] become effective 15 days from the date of issuance.

On February 23, 2001, Respondent filed a response to Complainant's Motion to Lift Stay. On February 26, 2001, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for consideration and a ruling on Complainant's Motion to Lift Stay.

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 concluded. Therefore, Complainant's Motion to Lift Stay is granted. However, Complainant has provided no basis for modifying the January 25, 1999, Order to make it effective 15 days from the date of issuance of this Order Lifting Stay as to Irene Russo, d/b/a Jay Brokers. Therefore, I decline to modify the effective date of the January 25, 1999, Order.

The Stay Order issued on May 17, 1999, *In re Produce Distributors, Inc.*, 58 Agric. Dec. 542 (1999) (Stay Order as to Irene T. Russo, d/b/a Jay Brokers), is lifted. The Order issued in *In re Produce Distributors, Inc.* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506 (1999), is effective, as follows:

Order

Jay Brokers' PACA license is revoked, effective 61 days after service of this Order on Irene T. Russo, d/b/a Jay Brokers.

In re: PMD PRODUCE BROKERAGE CORP.
PACA Docket No. D-99-0004.
Order Denying Petition to Reopen Hearing and Remand Order filed April 6, 2001.

Petition to reopen – Opportunity to file – Remand order – Oral decision – Bench decision.

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[1]The record does not reveal that a May 17, 2000, Stay Order was issued in this proceeding. I infer Complainant's reference to a Stay Order issued May 17, 2000, is a typographical error and Complainant intends to refer to the Stay Order issued May 17, 1999. *In re Produce Distributors, Inc.*, 58 Agric. Dec. 542 (1999) (Stay Order as to Irene T. Russo, d/b/a Jay Brokers).

[2]See note 1.

The Judicial Officer denied the Respondent's petition to reopen the hearing stating the Respondent did not state the nature and purpose of the evidence to be adduced or set forth a good reason for the Respondent's failure to adduce evidence at the November 17, 1999, hearing. The Judicial Officer found that Administrative Law Judge Edwin S. Bernstein did not afford the Respondent a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with 7 C.F.R. § 1.142(b). Therefore, the Judicial Officer remanded the proceeding to the Chief Administrative Law Judge to assign the case to an administrative law judge and ordered that the administrative law judge provide the Respondent a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief, as provided in 7 C.F.R. § 1.142(b), and issue a decision.

Jane McCavitt, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Procedural History

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding on November 16, 1998. Complainant instituted the 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. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) during the period February 1993 through September 1996, PMD Produce Brokerage Corp. [hereinafter Respondent] failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). Respondent filed an Answer on January 6, 1999, denying the material allegations of the Complaint (Answer ¶¶ 3-4).

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] scheduled a hearing for November 17, 1999 (Notice of Hearing filed September 7, 1999). On November 12, 1999, Complainant filed a Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order, requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section

1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)). Respondent received a copy of Complainant's Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order on November 15, 1999 (Tr. 6).

On November 17, 1999, the ALJ presided over a hearing in New York, New York. Deborah Ben-David, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.[1] Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. During the November 17, 1999, hearing, Respondent requested that the ALJ refrain from issuing a decision orally at the close of the hearing to provide Respondent additional time within which to submit proposed findings of fact, conclusions, order, and a brief in support of proposed findings of fact, conclusions, and order (Tr. 94).

The ALJ denied Respondent's request and issued a decision orally at the close of the November 17, 1999, hearing. The ALJ: (1) found, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) found a compliance review conducted between October 20, 1999, and November 1, 1999, revealed Respondent continued to owe approximately $769,000 for purchases of perishable agricultural commodities from produce sellers listed in the Complaint; (3) concluded Respondent's failures to make full payment promptly of the agreed purchase prices for 600 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances of Respondent's violations (Tr. 95-101). On November 30, 1999, the ALJ filed a document entitled "Bench Decision," which is a written excerpt of the decision orally announced at the close of the hearing.

On January 7, 2000, Respondent filed a petition to reopen the hearing and appealed to the Judicial Officer. On February 14, 2000, Complainant filed Complainant's Response to Respondent's Appeal. On February 15, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and a decision. On February 18, 2000, I denied Respondent's Appeal Petition on the ground that it was late-filed. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order

[1]On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance).

Denying Late Appeal).

On March 15, 2000, Respondent filed Respondent's Petition for Reconsideration. On March 29, 2000, Complainant filed Complainant's Response to Respondent's Motion for Reconsideration. On March 30, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). On March 31, 2000, I denied Respondent's Petition for Reconsideration. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (Order Denying Pet. for Recons.).

Respondent sought judicial review of the Order Denying Late Appeal. The United States Court of Appeals for the District of Columbia Circuit reversed the Order Denying Late Appeal. *PMD Produce Brokerage Corp. v. United States Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000).

On February 2, 2001, I held a telephone conference with counsel for Complainant and counsel for Respondent. Counsel informed me that neither Complainant nor Respondent would seek further judicial review of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). I informed counsel that I was troubled by the ALJ's denial of Respondent's request for an opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). Complainant and Respondent requested the opportunity to brief the issue of Respondent's opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). I granted Complainant's and Respondent's requests for the opportunity to brief the issue. On March 2, 2001, Complainant filed Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures. On April 4, 2001, Respondent filed Respondent's Brief in Support of Judicial Officer Remanding to the Administrative Law Judge for Further Procedure.

On April 5, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's January 7, 2000, petition to reopen the hearing and a ruling on the issue regarding remand to an administrative law judge.

Petition to Reopen Hearing

Respondent requests reopening of the hearing for two reasons. First, Respondent contends "errors of fact and law that occurred at the hearing that denied Respondent due process of law" require reopening the hearing. Second, Respondent contends the appearance that Complainant scripted the ALJ's decision

orally announced at the close of the hearing requires reopening the hearing (Respondent's Appeal Pet. at 2, 4).

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a 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 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).

I deny Respondent's petition to reopen the hearing because Respondent has not stated the nature and purpose of the evidence to be adduced. Moreover, Respondent has not set forth a good reason for Respondent's failure at the November 17, 1999, hearing to adduce evidence that Respondent now wants to adduce.

Opportunity to Submit Proposed Findings of Fact, Conclusions, Order, and Brief

On November 12, 1999, Complainant filed a Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order, requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)). Respondent received a copy of Complainant's Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order on November 15, 1999. During the November 17, 1999, hearing, Respondent requested that the ALJ refrain from issuing a decision orally at the close of the hearing to provide Respondent with additional time within which to submit for the ALJ's consideration proposed findings of fact, conclusions, order, and a brief in support of proposed findings of fact, conclusions, and order. The ALJ denied Respondent's request and issued a

decision orally at the close of the November 17, 1999, hearing. (Tr. 6, 94-101.)

Section 1.142(b) of the Rules of Practice provides that prior to the Judge's decision, each party shall be afforded a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief, as follows:

> **§ 1.142 Post-hearing procedure.**
>
> . . . .
>
> (b) *Proposed findings of fact, conclusions, orders, and briefs*. 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. A copy of each such document filed by a party shall be served upon each of the other parties.

7 C.F.R. § 1.142(b).

Respondent contends Complainant was permitted to file proposed findings of fact, conclusions, order, and a brief, but the ALJ denied Respondent a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief, as provided in 7 C.F.R. § 1.142(b). Further, Respondent contends the use of the word "shall" in section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) indicates that the provisions of section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) are mandatory. (Respondent's Brief in Support of Judicial Officer Remanding to the Administrative Law Judge for Further Procedure at 2-3.)

Complainant states "[t]he PACA allows that if a complaint is issued the respondent is afforded the opportunity for a hearing. 7 U.S.C. § 499f(c)(2)." Complainant contends that "[t]here is no statutory requirement for the filings of findings of facts, conclusions of law, and briefs by a respondent, rather, the Department's Rules of Practice allow for that opportunity when it is deemed appropriate." (Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures at 10.)

I disagree with Complainant's contention that the Rules of Practice allow for the filings of findings of fact, conclusions of law, and briefs when it is deemed appropriate. The Rules of Practice do not provide that parties have an opportunity to file proposed findings of fact, conclusions of law, order, and a brief only "when it is deemed appropriate." Instead, section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) states that, prior to the administrative law 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. The word *shall* is ordinarily the language of command and leaves no room for

administrative law judge discretion.[2] Thus, under the Rules of Practice an administrative law judge must afford each party a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief. Moreover, there is no provision in the Rules of Practice which makes section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) inapplicable when a decision is issued orally in accordance with section 1.142(c) of the Rules of Practice (7 C.F.R. § 1.142(c)).

Complainant also contends an interpretation of the Rules of Practice that requires that each party be given a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief would defeat the purpose of issuing an oral decision in accordance with section 1.142(c) of the Rules of Practice (7 C.F.R. § 1.142(c)) (Complainant's Objection to Remanding Case to

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[2] *See generally Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating the word "shall" normally creates an obligation impervious to judicial discretion); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (stating the word "shall" is ordinarily the language of command); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (stating the word "shall" is ordinarily the language of command); *Ex parte Jordan*, 94 U.S. 248, 251 (1876) (indicating the word "shall" means "must"); *Barbieri v. RAJ Acquisition Corp.*, 199 F.3d 616, 619 (2d Cir. 1999) (stating the term "shall" generally is mandatory and leaves no room for the exercise of discretion by the trial court); *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999) (stating the word "shall" is used to express a command or exhortation and is used in laws, regulations, or directives to express what is mandatory); *Salahuddin v. Mead*, 174 F.3d 271, 274 (2d Cir. 1999) (stating that "shall" is an imperative); *United States v. Insurance Co. of North America*, 83 F.3d 1507, 1510 n.5 (D.C. Cir. 1996) (stating the cases are legion affirming the mandatory character of "shall"); *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (stating the word "shall" generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive); *Lefkowitz v. Arcadia Trading Co.*, 996 F.2d 600, 603 (2d Cir. 1993) (stating the word "shall" ordinarily connotes language of command); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (stating "shall" is a term of legal significance, in that it is mandatory or imperative, not merely precatory); *Randolph-Sheppard Vendors v. Weinberger*, 795 F.2d 90, 102 n.19 (D.C. Cir. 1986) (stating "shall" is normally the language of command in a statute); *American Federation of Government Employees v. FLRA*, 739 F.2d 87, 89 (2d Cir. 1984) (stating "shall" is ordinarily the language of command and indicates a mandatory intent unless a convincing argument to the contrary is made); *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977) (stating the word "shall" is the language of command in a statute); *Boyden v. Commissioner of Patents*, 441 F.2d 1041, 1043 n.3 (D.C. Cir.) (stating "shall" is the language of command), *cert. denied*, 404 U.S. 842 (1971); *Jameson v. Jameson*, 176 F.2d 58, 60 (D.C. Cir. 1949) (stating the word "shall" is mandatory); *In re David Harris*, 50 Agric. Dec. 683, 703 (1991) (stating the word "shall" is ordinarily the language of command); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1460 (1987) (stating the word "shall" is ordinarily the language of command), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1899 (1985) (stating the word "shall" is ordinarily the language of command); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1366 (1980) (stating the word "shall" is the language of command), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1043 (1979) (stating the word "shall" is ordinarily the language of command).

Administrative Law Judge for Further Procedures at 11). However, compliance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) does not preclude the issuance of an oral decision. Section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)) provides that an oral decision may be issued within a reasonable time after the close of the hearing. Thus, parties can be afforded a reasonable opportunity to submit proposed findings of fact, conclusions, orders, and briefs after the close of a hearing, and an administrative law judge may still issue an oral decision.[3]

I find the ALJ did not afford Respondent a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). Therefore, I remand this proceeding to Chief Administrative Law Judge James W. Hunt for assignment of this proceeding to an administrative law judge in accordance with 5 U.S.C. § 3105.[4] The administrative law judge to whom this proceeding is assigned must provide Respondent with a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). After providing Respondent with a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief, the

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[3]Complainant cites 7 U.S.C. § 499f(c)(2) as the statutory provision requiring hearings in disciplinary administrative proceedings under the PACA. Complainant contends "[t]here is no statutory requirement for filings of findings of fact, conclusions of law, and briefs" in disciplinary administrative proceedings under the PACA (Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures at 10). I agree with Complainant that 7 U.S.C. § 499f(c)(2) does not require that litigants be provided a reasonable opportunity to file proposed findings of fact, conclusions, orders, and briefs. I deduce from Complainant's argument that Complainant takes the position that the Administrative Procedure Act is not applicable to disciplinary administrative proceedings under the PACA, and consequently the requirement in the Administrative Procedure Act that parties be given a reasonable opportunity to submit proposed findings of fact, conclusions, and reasons for the proposed findings of fact and conclusions (5 U.S.C. § 557(c)) is not applicable to disciplinary administrative proceedings under the PACA. I do not address this issue in this Order Denying Petition to Reopen Hearing and Remand Order. However, if Complainant is correct, the Rules of Practice may be amended to make section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) inapplicable to disciplinary administrative proceedings under the PACA.

[4]If Administrative Law Judge Edwin S. Bernstein, the administrative law judge who issued the decision orally at the close of the November 17, 1999, hearing, was available, I would have remanded this proceeding to him. However, Administrative Law Judge Edwin S. Bernstein retired on August 26, 2000, and he is no longer available to conduct this proceeding on remand.

administrative law judge to whom this proceeding is assigned should then issue a decision (or adopt the ALJ's November 17, 1999, decision), which either party may then appeal to the Judicial Officer in accordance with 7 C.F.R. § 1.145(a).

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In re: UNIVERSAL PRODUCE & ITALIAN PRODUCTS, LLC and JEFFREY LOMORIELLO.
PACA Docket No. APP-00-0002.
Dismissal of Responsibly Connected Cases filed June 7, 2001.

Ruben D. Rudolph, for Complainant.
John M. Himmelberg, Washington, D.C., for Respondent.
Dismissal issued by Jill S. Clifton, Administrative Law Judge.

A Consent Decision and Order regarding Universal Produce & Italian Products, LLC and Albert S. Lomoriello, Jr., PACA Docket No. D-00-0007, was filed on June 5, 2001.

Consequently, on behalf of Jeffrey Lomoriello, PACA-APP 00-0002 (PACA RC 20-0005) and Jason Lomoriello, PACA-APP 00-0003 (PACA RC 20-0004), John M. Himmelberg, Esq., withdrew the appeals in the above cases, by letter dated June 6, 2001.

Accordingly, pursuant to the facsimile copy of Mr. Himmelberg's June 6, 2001 letter, the cases are hereby dismissed.

Copies hereof shall be served upon the parties.

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In re: UNIVERSAL PRODUCE & ITALIAN PRODUCTS, LLC and JASON LOMORIELLO.
PACA Docket No. APP-00-0003.
Dismissal of Responsibly Connected Cases filed June 7, 2001.

Ruben D. Rudolph, for Complainant.
John M. Himmelberg, Washington, D.C., for Respondent.
Dismissal issued by Jill S. Clifton, Administrative Law Judge.

A Consent Decision and Order regarding Universal Produce & Italian Products, LLC and Albert S. Lomoriello, Jr., PACA Docket No. D-00-0007, was filed on June 5, 2001.

Consequently, on behalf of Jeffrey Lomoriello, PACA-APP 00-0002 (PACA RC 20-0005) and Jason Lomoriello, PACA-APP 00-0003 (PACA RC 20-0004), John M. Himmelberg, Esq., withdrew the appeals in the above cases, by letter dated

June 6, 2001.

Accordingly, pursuant to the facsimile copy of Mr. Himmelberg's June 6, 2001 letter, the cases are hereby dismissed.

Copies hereof shall be served upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: STATE PRODUCE BROKERS, INC.
PACA Docket No. D-00-0016.
Decision and Order filed October 18, 2000.

PACA - Default - Full payment, failure to make, when due - Bankruptcy creditors.

Mary Hobbie, for Complainant
R. Jason Read, Newport Beach, CA, for Respondent
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 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 May 1999, through July 1999, Respondent State Produce Brokers, Inc., (hereinafter "Respondent") failed to make full payment promptly to 3 sellers of the agreed purchase prices, or balances thereof, in the total amount of $328,794.22 for 68 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. The Complaint also noted that on July 14, 1999, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Central District of California pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*). This petition was converted to a Chapter 7 Petition for Bankruptcy on October 15, 1999, pursuant to Bankruptcy Code (7 U.S.C. § 700 *et seq.*) and designated Case No. LA-99-36391-EC. 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 3 sellers listed in Paragraph III of the Complaint $462,347.31. The Complaint alleged debt to those same 3 sellers of $328,794.22. 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 a 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).

Finding of Fact

1. Respondent is a corporation whose business address was P.O. Box 2399, Bell Gardens, California 90201.

2. Pursuant to the licensing provisions of the PACA, license number 671960 was issued to Respondent on May 3, 1967. This license terminated on May 3, 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. Respondent, during the period May 1999 through July 1999, on or about the dates and in the transactions set forth in paragraph III of the Complaint, purchased, received and accepted 68 lots of perishable agricultural commodities with agreed purchase prices in the total of $328,794.22 from 3 sellers in interstate commerce.

5. On July 14, 1999, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq*.) in the United States Bankruptcy Court for the Central District of California. This petition was converted to a Chapter 7 Petition for Bankruptcy on October 15, 1999, pursuant to Bankruptcy Code (7 U.S.C. § 700 *et seq*.) and designated Case No. LA-99-36391-EC.

6. Respondent admitted in bankruptcy pleadings that it owed an amount that totals $462,347.31, an amount greater than that which the Complaint alleged, to the same 3 sellers that are alleged to be unpaid for the 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**
Blakal Packing, Inc. Quincy, WA	$ 31,362.50	$ 36,854.90
L & M Produce Inc. Merirll, OR	$ 3,272.50	$ 3,272.50

Jones Produce, Inc. Quincy, WA	$427,712.31	$288,666.82
	Total Amount: $462,347.31	Total Amount $328,794.22

Conclusions

Respondent has admitted in the petition and schedules that were filed in its bankruptcy proceeding that it still owed 3 sellers at least $462,347.31 for 68 lots of perishable agricultural commodities on July 14, 1999. However, a follow-up investigation conducted on August 28, 2000, through August 29,2000, by Lisa Velez, a Marketing Specialist with the PACA Branch, showed that 1 seller was paid in full and partial payments were made to the other 2 sellers under the PACA trust, leaving a balance of $26,288.55 (see following table).

SELLER'S NAME & ORIGIN	**BANK-RUPTCY PLEADING**	**COMPLAINT**	**AMT PAID UNDER TRUST**	**UNPAID BALANCE**
Blakal Packing, Inc. Quincy, WA	$ 31,362.50	$ 36,854.90	$ 11,162.63	$ 25,692.27
L & M Produce Inc. Merirll, OR	$ 3,272.50	$ 3,272.50	$ 2,681.22	$ 591.28
Jones Produce, Inc. Quincy, WA	$427,712.31	$288,666.82	$288,666.82	$ 0
	Total[1] Amount: $62,3472.31	Total Amount $328,794.22	Total Amount $302,510.67	Total Amount $ 26,288.55

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

[1]Total amount should agree with prior table at $462,347.31 - Editor

Respondent committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b) and the facts and circumstances set forth above shall be published.

This order shall take effect on the 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 effective July 11, 2001.-Editor].

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In re: PRODUCE MANAGEMENT SERVICE.
PACA Docket No. D-00-0011.
Decision and Order filed October 20, 2000.

PACA - Default - Full payment, failure to make, when due - Flagrant violation.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (PACA), instituted by a complaint filed on March 20, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleged that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period February 1998 through March 1999, by failing to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $312,900.90 for 1,080 lots of perishable agricultural commodities which it purchased, received and accepted in interstate and foreign commerce. The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA and order Respondent's license revoked.

A copy of the complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of Complainant for the issuance of a Decision Without Hearing by Reason of Default,

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. Produce Management Service (hereinafter, "Respondent"), is a corporation organized and existing under the laws of the State of California. Its business mailing address is 1630 Florance Street, Los Angeles, California 90023.

2. At all times material herein, Respondent was licensed under the PACA. License number 960003 was issued to Respondent on October 2, 1995. This license has been renewed annually and is next subject to renewal on October 2, 2000.

3. As more fully set forth in paragraph III of the complaint, Respondent, during the period February 1998 through March 1999, failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $312,900.90 for 1,080 lots of perishable agricultural commodities which it purchased, received and accepted in interstate and foreign commerce.

Conclusions

Respondent's actions, as set forth in Finding of Fact 3 above, constitute willful, flagrant and repeated violations of section 2(4) of the PACA, for which the Order below is issued.

Order

Respondent's PACA license is hereby revoked.

This Order 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 Without Hearing by Reason of Default will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became effective April 10, 2001.-Editor]

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In re: H.P. ISLAND-WIDE, INC.
PACA Docket No. D-01-0012.
Decision and Order filed May 1, 2001.

PACA - Default - Full payment, failure to make, when due.

Christopher P. Young-Morales, for Complainant.
Donald M. Lefari, New York, NY, for Respondent.
Decision and Order issued by Jill S. Clifton, 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 and Notice to Show Cause filed on March 2, 2001, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Complaint and Notice to Show Cause alleges that during the period August 1999 through August 2000, Respondent violated Section 2(4) of the PACA (7 U.S.C. §499b(4)), by failing to make full payment promptly to 9 sellers of the agreed purchase prices, or balances thereof, in the total amount of $347,444.65 for 166 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce. The Complaint and Notice further asks that Respondent be required to show cause why it should not be denied a license.

A copy of the Complaint and Notice to Show Cause was served upon Respondent on March 5, 2001. Pursuant to Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent had 10 days from that date to respond and file an answer with the Hearing Clerk. No answer was filed. The time for filing an answer having run, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. H. P. Island-Wide, Inc. is a corporation organized and existing under the laws of the State of New York. Its business and mailing address is 1681 Richmond Terrace, Staten Island, New York 10310.

2. Respondent became incorporated on March 18, 1999. Mario L. Tiberi is its president and 100 percent stockholder.

3. Respondent has never been licensed under the PACA.

4. As more fully set forth in paragraph 3 of the Complaint, during the period

August 1999 through August 2000, Respondent violated Section 2(4) of the PACA (7 U.S.C. §499b(4)), by failing to make full payment promptly to 9 sellers of the agreed purchase prices, or balances thereof, in the total amount of $347,444.65 for 166 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce

5. Respondent filed an application for a PACA license with the PACA Branch of the Agricultural Marketing Service on February 2, 2001.

Conclusions

Respondent's failure to make full payment promptly with respect to the 166 transactions set forth in Finding of Fact No. 4, above, constitutes willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b). The facts and circumstances set forth above shall be published and Respondent shall be denied a license pursuant to Section 4(d) of the PACA (7 U.S.C. § 499d).

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became effective July 2, 2001.-Editor]

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CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

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Multi Fruit USA, Inc. PACA Docket No. D-00-0018. 3/8/2001.

A. Sam & Sons Produce, Inc., Dayoub Marketing, Inc., and Michael P. Schindler. PACA Docket No. D-01-0014. 5/2/2001.

Glacier Distribution Company, Inc. PACA Docket No. D-00-0026. 5/3/2001.

Universal Produce & Italian Products, LLC and Albert S. Lomoriello, Jr. PACA Docket No. D-00-0007. 6/5/2001.

Captain Jack's Tomatoes, Inc. and The Fresh Group, Ltd., d/b/a Maglio and Company. PACA Docket No. D-00-0008. 6/15/2001.

American Produce Company. PACA Docket No. D-01-0017. 6/19/2001.

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