

AGRICULTURE DECISIONS

Volume 61

January – June 2002



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.

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AGRICULTURE DECISIONS

Volume 61

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Pages 1 - 329



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

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

UNITED DAIRYMEN OF ARIZONA, et al. v. USDA¹ .

No. 00-16213.

Filed Feb. 12, 2002.

(Cite as: 279 F.3d 1160).

AMAA – “Producer-handler” status – Administrative remedies, exhaustion of – Standing

U.S. Court of Appeals affirmed lower court ruling that as “producers,” Appellants cannot bring a direct suit against the Secretary challenging the “producer-handler” status exemption of another party (a competitor). Court reviewed the “standing to sue criteria” under *Pescosolido v. Block*, 765 F.2d 827 (1985). The Court concluded that since other non-exempt “handlers” would have standing to challenge the “producer-handler” exemption, Appellant could not satisfy criteria that no other handler(s) would have standing to bring an direct action against the Secretary. Appellants must exhaust their administrative remedies to challenge the milk marketing order.

**UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.**

OPINION

BRUNETTI, Circuit Judge.

In this appeal, we consider whether under the Agricultural Marketing Agreement Act of 1937 (“AMAA” or “the Act”), as amended, 7 U.S.C. §§ 601-626 (2001), Appellants United Dairymen of Arizona (“UDA”) and Shamrock Farms, two Arizona milk producers, have standing to bring a direct suit challenging the producer-handler exemption. We conclude that Appellants cannot bring a direct suit challenging the exemption and affirm the district court's decision.

BACKGROUND

Demand for milk fluctuates from day to day and from season to season. Due to the fluctuating demand and to prevent shortages in the milk supply, the industry must carry a constant surplus. In the 1930s, the inherent instability in

¹ Ann M. Veneman is substituted for her predecessor, Dan E. Glickman, as Secretary of the Department of Agriculture. *See* Fed. R.App. P.

milk prices together with competition for the fluid milk market prompted Congress to include milk price regulation in the AMAA. *See Block v. Community Nutrition Inst.*, 467 U.S. 340, 341-42, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). The federal government has regulated the milk market continuously since 1937. Under the AMAA, regional raw milk prices are regulated under the Federal Milk Marketing Order System. *See id.* (“[T]he essential purpose [of this milk market order scheme is] to raise producer prices.”) (quoting S.Rep. No. 1011, 74th Cong., 1st Sess., 3 (1935)). The system regulates the milk market primarily through minimum prices and a pooling mechanism known as the “producer-settlement fund.” To implement this system, the Secretary has divided the country into Milk Marketing Areas, each governed by a separate milk order

7 U.S.C. § 608c. The particular order at issue in this action is Federal Order 131, which governs the Arizona-Las Vegas marketing area. 7 C.F.R. § 1131.2 (2002).

Under Order 131, milk products are divided into three categories for purposes of price regulations and producers are paid through the mechanism of the producer-settlement fund. Each month the Secretary sets a minimum price for milk used to produce each class of milk product. Class I is fluid milk, and commands the highest price. Surplus milk is processed into Class II and III milk products. Class II includes soft dairy products such as yogurt, cottage cheese, and ice cream. Class III contains the least perishable milk products, such as butter, powdered milk, and some hard cheeses. Milk for Class III use receives the lowest price. All businesses that process raw milk into products for the marketplace, or milk “handlers,” are bound by the class prices.

Despite the varying class prices, the pricing regulations guarantee a uniform price to milk producers. This uniformity is accomplished through the computation of blend prices and the pooling mechanisms of producer-settlement funds. Each month, each market administrator computes the total value of all milk purchased by all handlers in the marketing area based on the minimum class prices. The administrator then divides this value by the total quantity of raw milk purchased by the handlers to determine a “blend price.” All milk producers in the marketing area receive this blend price for their raw milk. The uniform pricing for producers must be combined with a pooling system for handlers in order to avoid inequities.

“Producer-handlers” are exempt from the pricing and pooling requirements of the AMAA. Producer-handlers are vertically integrated dairy businesses that process and market milk products from the raw milk produced by their own dairy herds. Producer-handlers may not contribute to or withdraw from a marketing area's producer-settlement fund, and they are not subject to the minimum price requirements. Therefore, producer-handlers that can process and

market most of their milk as Class I products have an advantage over non-exempt producers and handlers. On the production side, they are not limited by the blend price and on the handler side, they do not have to contribute to the settlement fund. On the other hand, producer-handlers bear the burden of managing their surplus and the risks of excess supply.

The producer-handler exemptions vary from area to area and are set out in each Milk Marketing Order. The orders impose a series of requirements on businesses that seek to qualify for the producer-handler exemption. Since 1994, the Secretary has permitted Sara Farms Dairy L.L.C. ("Sara Farms") to claim exempt status as a producer-handler. Sara Farms owns and operates a milk bottling plant located in Yuma, Arizona at which it receives raw milk for processing and distribution within Order 131. In March of 1999, the Appellants filed this action. Appellants argue that the producer-handler exemption is invalid under the AMAA and that the producer-handler exemption violates the equal protection guarantees of the Fifth Amendment. Alternatively, if the producer-handler exemption is valid, Appellants seek declaratory and injunctive relief.

Appellants moved for partial summary judgment. The Secretary moved to dismiss on the grounds (1) that the court lacked subject matter jurisdiction; (2) the initiation of an enforcement proceeding under § 608a is committed to agency discretion and is not subject to judicial review; and (3) the requirements of 28 U.S.C. § 1346(a)(2) were not met. The district court issued an order on May 18, 2000, holding that UDA and Shamrock Farms lacked standing to challenge the promulgation or implementation of the producer-handler exemption. The court, therefore, lacked subject matter jurisdiction and dismissed their claims. Judgment was entered on June 21, 2000.

The district court relied on this court's holding in *Pescosolido v. Block*, 765 F.2d 827 (9th Cir.1985), in reaching its conclusion. The district court read *Pescosolido* as limiting *Stark v. Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944), to "situations in which producers claim that some 'definite personal right' granted by the statute is being infringed by the Secretary acting outside the scope of his delegated authority, with no handler having standing to protest." *Pescosolido*, 765 F.2d at 832. The district court held that the plaintiffs could only invoke the *Stark* exception if they could show: (1) the producer-handler exemption threatens their definite, personal rights; (2) in allowing the producer-handler exemption, the Secretary is acting outside the scope of his delegated authority; and (3) no handler would have standing to protest the producer-handler exemption.

The district court did not address the first two prongs because it held that Appellants could not meet the third. The district court reasoned that the producer-handler exemption affects both producers and handlers. It injures producers by reducing the blend price and it injures handlers by providing a competitive advantage to producer-handlers who do not have to contribute to the settlement fund or pay the mandatory minimum prices. Consequently, the district court concluded that non-exempt handlers would have standing to challenge the exemption in an administrative proceeding. Therefore, Appellants could not show that *no handler* would have standing as required by *Pescosolido*.

DISCUSSION

A. Jurisdiction and Standard of Review

Dismissal by a district court for lack of subject matter jurisdiction is reviewed *de novo*. *Pacific Maritime Ass'n v. Local 63, Int'l Longshoremen's and Warehousemen's Union*, 198 F.3d 1078, 1080 (9th Cir.1999). A district court's interpretation of a statute is also a question of law that is reviewed *de novo*. *Id.*

B. Appellants' Capacity

We first address Appellants' argument that under *Dairylea Coop. Inc. v. Butz*, 504 F.2d 80 (2d Cir.1974), a cooperative that is both a producer and a handler will be treated as either a producer or a handler depending on the "interests [the cooperative] represent[s] in the action then pending." *Id.* at 83. In *Dairylea* the Second Circuit held that Dairylea was acting as a producer because the aspect of the milk order the cooperative was challenging affected the interests of its producers. *Id.* ("The concern of Dairylea in this action is not the money which it paid [as a handler] into the Producer-Settlement Fund . . . but with the money collected on behalf of its producer-members as authorized by 7 U.S.C. § 610(b)(1) (1970) which will increase if the action succeeds.")[]

UDA is a cooperative that acts as a handler as well as a producer. UDA owns and operates a milk processing plant in Tempe, Arizona. In this action UDA is challenging the producer-handler exemption because it reduces the uniform blend price paid to producers and gives producer-handlers a competitive advantage over other handlers. Unlike in *Dairylea*, UDA is not only representing its producers' interests but also its handlers' interests. Therefore, UDA may be deemed a handler in suing in its representative capacity.

Shamrock Farms sells its raw milk to Shamrock Foods. While the two companies are related, the record shows that the two companies are separate businesses. Although the companies appear to be separate, we note that in his

declaration Norman McClelland, the president of Shamrock Farms as well as the chairman of Shamrock Food, states in paragraph three of his declaration:

The exemption of fluid milk sales of a producer-handler from the pooling requirements of the Order reduces the monthly value of the producer-settlement fund, and, therefore, reduces the monthly uniform blend price paid to the Order's producers, including Shamrock. It also gives producer-handlers, such as Sara Farms, a competitive advantage over other handlers, including Shamrock Foods Company.

As a producer Shamrock Farms does not have to exhaust its administrative remedies. Even if we assume *arguendo* that UDA is acting as a producer in bringing this suit, Shamrock Farms and UDA may still be precluded from seeking judicial review under the AMAA.

C. The AMAA and Producers

The AMAA expressly provides procedures under which handlers may challenge the provisions of a milk marketing order through administrative review. 7 U.S.C. § 608c(15)(A). Handlers aggrieved by the actions of the Secretary must first petition the Secretary for relief. The Secretary shall provide a hearing and then rule on the petition. *Id.* Courts have also construed the Act to grant handlers a right to judicial review after they have exhausted the administrative process. *See, e.g., United States v. Ruzicka*, 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946). The AMAA contains no provision, however, under which producers can challenge a marketing order through administrative review.

The Supreme Court in *Stark*, 321 U.S. at 303-04, 64 S.Ct. 559, addressed the rights of producers to seek judicial review of regulatory actions. The producers in *Stark* sought to challenge the Secretary's practice of deducting certain administrative expenses from the settlement fund before calculating the blend price, resulting in a reduced price for producers. *Id.* at 303, 64 S.Ct. 559. The Court held that the producers could obtain judicial review of the Secretary's actions because the AMAA had given producers "definite, personal rights" and the "silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Id.* at 309, 64 S.Ct. 559. The Court concluded that because handlers could not question the use of the fund because they had no

financial interest in the fund or its use, there was no forum in which the Secretary's actions regarding administration of the fund could be challenged. Therefore, judicial review of the producers' complaint was necessary to "ensure achievement of the Act's most fundamental objectives--to wit, the protection of the producers of milk and milk products." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 352, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984).

In *Community Nutrition*, the Court further addressed the issue of standing. The case presented the question of whether consumers of dairy products may obtain judicial review of milk market orders. The Court held that consumers may not obtain judicial review because the AMAA did not intend to cover consumer participation. "The Act contemplates a cooperative venture [only] among the Secretary, handlers, and producers." *Id.* at 346, 104 S.Ct. 2450. Allowing consumer participation would only disrupt the administrative scheme. *Id.* at 347-48, 104 S.Ct. 2450. The Court noted that unlike in *Stark* the "preclusion of consumers will not threaten realization of the fundamental objectives of the statute," i.e., the protection of the producers of milk and milk products. *Id.* at 352, 104 S.Ct. 2450.

D. *Pescosolido v. Block*

Our circuit has read *Stark* and *Community Nutrition* to provide a narrow exception for producers seeking judicial review. In *Pescosolido v. Block*, 765 F.2d 827 (9th Cir.1985), we held that *Stark* "is limited to situations in which producers claim that some 'definite personal right' granted by the statute is being infringed by the Secretary acting outside the scope of his delegated authority, with no handler having standing to protest." *Id.* at 832. In discussing the last phrase involving the standing of handlers, this court reasoned that *Stark* allowed producers to sue only where their interests were not represented by those of handlers, i.e. where handlers would have no interest and would, therefore, not challenge the Secretary's actions. *Id.* This reading is consistent with the Supreme Court's holding in *Community Nutrition*, where the Court considered the interests of the parties involved and found that consumers' interests are similar to those of handlers and that, therefore, actions affecting consumers would also affect handlers who would take steps to challenge those decisions.

We find that the record here supports the district court's holding that the producers are precluded from seeking judicial review because their interests are adequately represented by the handlers. As the district court noted, the exemption injures producers by reducing the blend price and it injures handlers by providing a competitive advantage to producer-handlers. A letter addressed to the Dairy Division Director, Richard McKee, by the law firm representing

UDA, Shamrock Farms, Shamrock Foods, and Agri-Mark, Inc., supports this conclusion. The pertinent part of the letter states:

With the expansion of producer-handler distribution into channels of commerce in direct competition with fully regulated handlers, it is apparent that handlers adversely affected by significant producer-handler competition are no longer willing to accept minimum pricing regulation under a system from which one or more of their major competitors are exempt. Producers who are the intended beneficiaries of the regulatory system are also affected by the exemption. Expansion of the producer-handler share of the market's Class I sales not only reduces producer returns; it poses the long-term threat of a breakdown of the regulatory system.

While legislative history may support exemption from pricing and pooling of producer-handlers who qualify as "small businesses" with a *de minimus* effect on the market, legislative history cannot be invoked to overcome the command of § 8c(5)(C) of the AMAA which requires that the minimum pricing and pooling provisions of the orders be applied to *all* "handlers (including producers who are also handlers)." We have previously brought to the attention of the Dairy Division judicial decisions which confirm the authority of the Secretary to fully regulate handlers with respect to the marketing of milk of their own production. We believe that those decisions, coupled with equal protection principles of the Constitution, compel the Secretary to extend to producer-handlers the same regulatory obligations as are imposed on other handlers with whom they compete.

It is evident that the distributor (or handler) element of the dairy businesses in this case has a significant interest in pursuing Sara Farms and their exempt status. Unlike in *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 560-61, 59 S.Ct. 993, 83 L.Ed. 1446 (1939), and *Stark*, the non-exempt handlers here have standing because of their expressed financial interest that is being affected by the dairy division's application of the producer-handler exemption. *See Stark*, 321 U.S. at 308, 64 S.Ct. 559.

Allowing the plaintiffs in this case to seek judicial review when they are also handlers (such as UDA) or are associated with handlers (such as Shamrock Foods) who have an interest in ensuring that the producer-handler exemption is valid and not unjustly enforced, allows handlers to evade the statutory requirement that they first exhaust their administrative remedies. Such a result would undermine "Congress' intent to establish an equitable and expeditious procedure for testing the validity of orders." *Community Nutrition*, 467 U.S. at 348, 104 S.Ct. 2450 (internal quotation marks omitted). Even though the Second Circuit in *Dairylea* reluctantly concluded that Dairylea was a producer that was

not required to exhaust any administrative remedies, it further observed that “[c]onsidering the complicated nature of the provisions of the Act and the labyrinthian regulations issued thereunder, it would be most appropriate for Dairylea’s complaint to be considered first by the Secretary, who possesses the facilities and the expertise to review and interpret the Act and regulations herein involved.” 504 F.2d at 82. We agree with that assessment of the Act. This case is the perfect example of when a party should first exhaust administrative remedies before judicial review.

Appellants note that other circuits have allowed producers to seek judicial review. See *Minnesota Milk Producers Ass’n v. Madigan*, 956 F.2d 816 (8th Cir.1992); *Farmers Union Milk Mktg. Coop. v. Yeutter*, 930 F.2d 466 (6th Cir.1991) (involving a location adjustment amendment to a milk marketing order that created a fight between two different groups of dairy farmers). These courts have held that an examination of the overall structure of the Act is necessary to determine if judicial review is necessary. See, e.g., *Minnesota Milk Producers*, 956 F.2d at 818. In *Minnesota Milk Producers*, the court held that the producers had standing to seek judicial review because the handlers did not have a reason to challenge the Secretary’s orders, the producers were asserting a definite, personal right, and the producers did not have authority under the Act to vote for repeal of the orders they were challenging because the orders covered production areas in which they were not producers. *Id.*

We do not find these circuit cases persuasive based on the facts of our case. Unlike in *Minnesota Milk Producers*, the non exempt handlers governed by Order 131 have explicitly stated in the letter sent by their counsel to the dairy division that they are affected by the producer-handler exemption and are seeking to challenge the Secretary’s application of the exemption. In addition, the producers had the authority to vote for repeal of the order they are challenging. Before any market order may become effective, it must be approved by at least two-thirds of the affected dairy producers. 7 U.S.C. § 608c(8), 608c(5)(B)(i). The Secretary may impose the order without receiving approval of the handlers of at least 50% of the volume of milk covered by the order, but the Secretary cannot proceed with the producers’ consent. 7 U.S.C. § 608c(9)(B).

The Supreme Court in *Stark* allowed the producers to seek judicial review because if it did not there would be no forum--either administrative or judicial--in which the Secretary’s actions could have been challenged. 321 U.S. at 309, 64 S.Ct. 559. In this case, unlike in *Stark*, the Secretary’s actions can be challenged in the administrative forum by the handlers who have a financial interest in the manner in which the producer-handler exemption is being applied. The record before us supports this conclusion.

CONCLUSION

For the reasons stated above, we find that the AMAA precludes Appellants from seeking judicial review of the producer-handler exemption.

AFFIRMED.

STEW LEONARD'S v. USDA.
Docket No. 01-6111.
April 3, 2002.

(Cite as: 32 Fed. Appx. 606).

AMAA – “Producer-Handler.”

The U.S. Court of Appeals affirmed the lower court's determination upholding that the Secretary's decision was not arbitrary and capricious in determining that Stew Leonard's did not qualify as a "Producer-Handler" under the Milk Marketing Order. It specifically held that [Stew Leonard's] was not a "dairy farmer" and did not provide "as its own enterprise and its own risk [the means to produce milk.]"

**UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.**

Present McLAUGHLIN, PARKER, and POOLER, Circuit Judges.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said district court be and it hereby is AFFIRMED.

Petitioner-appellant Stew Leonard's appeals from the decision of the United States District Court for the District of Connecticut (Thomas P. Smith, *Magistrate Judge*) affirming the determination of the Secretary of Agriculture that Stew Leonard's, a Connecticut milk handler and retailer, did not qualify as a "producer-handler" under the provisions of 7 C.F.R. § 1001.10 (1999) despite its entrance into a lease arrangement with a local milk producer.

After completing review pursuant to 7 U.S.C. § 608c(15)(A), the Secretary determine that Stew Leonard's was a "handler" as defined in 7 C.F.R. § 1001.9, not a "producer-handler" as defined in 7 C.F.R. § 1001.10. Specifically, the Secretary found Stew Leonard's was not a "dairy farmer" and did not provide "as [its] own enterprise and at [its] own risk, the maintenance, care, and management of the dairy herd or other resources and facilities used to produce milk" as required by the language of 7 C.F.R. § 1001.10.

The district court reviewed the Secretary's determinations under the deferential standard outlined in the Supreme Court's *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) decision, finding the Secretary's narrow interpretation of the "producer-handler" definition consistent with both the purposes of the regulations and past interpretations thereof, and her application of the regulation to Stew Leonard's supported by substantial evidence. *See Stew Leonard's v. Glickman*, 199 F.R.D. 48, 55-56, 57-58 (D.Conn.2001). The district court thus concluded that the Secretary's decision was not arbitrary and capricious, but rather "in accordance with the law," within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (E). *Id.* at 60.

This Court notes that the evidence demonstrated no change in the daily operation of Oakridge Farm after the execution of the lease agreement and that Stew Leonard's admitted it did not know how to run a dairy farm. *Id.* at 57-58. As noted by the district court, these facts provide substantial evidentiary support for the Secretary's conclusion that Stew Leonard's was not a "dairy farmer" and did not "[p]rovide[] as [its] own enterprise and at [its] own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk." *See* 7 C.F.R. § 1001.10(a)(1999). Bound by the constraints of deferential review, this Court affirms the district court's decision on the grounds that the Secretary's determination that Stew Leonard's did not fit the narrow definition of "producer-handler" was adequately supported.

This Court affirms the district court's grant of summary judgment on Stew Leonard's due process and equal protection claims for substantially the same reasons stated by the district court. *Stew Leonard's*, 199 F.R.D. at 60-61.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

HERSHEY FOODS CORPORATION v. USDA
No. 01-5169.
Decided June 18, 2002.

(Cite as: 293 F.3d 520).

AMAA – Dismissal, failure to exhaust administrative remedies – Jurisdiction, lack of, under APA.

The U.S. District Court of DC Circuit upheld the dismissal of Hershey's appeal [milk handler] on grounds that Hershey failed to exhaust its administrative remedies. The court rejected lower court ruling which held that the rules promulgated under the NorthEast Compact milk marketing order were not subject to judicial review under the Administrative Procedures Act on the grounds that the regulations had been converted into a statute by the "FAIR Act."

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT.**

RANDOLPH, Circuit Judge:

Hershey Foods Corporation appeals the dismissal of its complaint seeking to vacate a portion of the Department of Agriculture's regulation establishing pricing classifications of milk used in the manufacture of milk chocolate. The district court dismissed the complaint on the ground that legislation converted the regulation into a statute, not subject to judicial review under the Administrative Procedure Act. Although we disagree with the district court in this respect, we hold that dismissal was proper because Hershey failed to exhaust its administrative remedies.

I.

The Agricultural Marketing Agreement Act of 1937 ("AMAA"), empowered the Secretary of Agriculture to regulate the sale of milk by geographic region. *See* 7 U.S.C. § 608c(5). Over the years, the Secretary issued many milk marketing orders, applying to different geographic regions and classifying milk according to the "form in which or the purpose for which it is used." 7 U.S.C. § 608c(5)(A). By 1998, there were thirty-one milk marketing orders in effect. *See Milk in the New England and Other Marketing Areas: Proposed Rule and Opportunity to File Comments, Including Written Exceptions, on Proposed Amendments to Marketing Agreements and Orders*, 63 Fed. Reg. 4802, 4805 (Jan. 30, 1998). In the Federal Agriculture Improvement and Reform Act ("FAIR Act") of 1996, Congress directed the Secretary to reduce the number of these orders to no more than fourteen, and authorized the use of informal rulemaking to expedite the process of milk marketing order consolidation. *See* 7 U.S.C. § 7253. In January 1998, the Department of Agriculture proposed a rule

consolidating the number of marketing orders to eleven, and reconfiguring the milk pricing classification system. *See* 63 Fed. Reg. 4802. As promulgated, the final rule contained four milk classifications. In very general terms, Class I consisted of fluid milk; Class II, fluid milk used to produce food products such as candy; Class III, milk used to produce spreadable cheeses; Class IV, milk used to produce butter and milk products in dried form. *See Milk in the New England and Other Marketing Areas; Order Amending the Orders*, 64 Fed. Reg. 47,898, 47,903 Sept. 1, 1999 (“the final rule”). The final rule’s pricing formulas made Class II skim milk 70 cents more expensive per hundredweight than Class IV milk. *See id.* at 47,907 (to be codified at 7 C.F.R. § 1000.50(e)).

Hershey is the leading maker of milk chocolate in the United States. The company traces its beginnings to the late 19th century when Milton S. Hershey developed a process in which fresh milk was sweetened, mixed with chocolate, and dried as the first step in making milk chocolate. Today, Hershey is the only major manufacturer of milk chocolate still using fresh fluid milk in the proprietary process developed more than a century ago. Hershey’s competitors purchase their milk in dried form from independent milk drying plants. (Milk chocolate must be made with dried milk.)

When Hershey buys fluid milk to make candy, it purchases the milk at Class II prices. Hershey’s competitors in the milk chocolate industry pay Class IV prices because they use dried milk. Alleging the unlawfulness of the price disparity resulting from the final rule, Hershey brought an action in district court seeking injunctive and declaratory relief.

Hershey claimed the final rule violated the Administrative Procedure Act because it was arbitrary, capricious, and contrary to the AMAA. The rule’s effective date was October 1, 1999, but a federal district court in Vermont, on September 28, 1999, enjoined the Secretary from implementing the rule. *See St. Albans Coop. Creamery, Inc. v. Glickman*, 68 F.Supp.2d 380, 392 (D.Vt.1999). (The court called its injunction a “temporary restraining order” but it was in effect a preliminary injunction.) Two weeks later, Representative Blunt introduced a bill in the House of Representatives “to provide for the modification and implementation of the final rule for the consolidation and reform of Federal milk marketing orders.” H.R. 3428, 106th Cong. (Nov. 17, 1999). Among other things, the bill called for the “final rule” to “take effect, and be implemented” with some alterations. H.R. 3428, § 1(b). Twelve days later, H.R. 3428 was “enacted into law,” incorporated by reference as part of the 2000 Appropriations Act. *See* Pub. L. No. 106-113, § 1000(a)(8), 113 Stat. 1501, 1536-37 (1999).

On December 29, 1999, the district court here dismissed Hershey’s suit without prejudice, stating that enactment of H.R. 3428 transformed the regulation into statutory law not subject to APA review. Hershey amended its

complaint to include constitutional challenges to the enactment of H.R. 3428, but alternatively contended that H.R. 3428 simply implemented the rule so that Hershey could still bring suit under the APA to have it set aside. The government moved to dismiss, arguing that the regulation became law through the Appropriations Act. The Department further argued that even if it this were not the case, Hershey could not challenge the rule without first exhausting its administrative remedies under the AMAA. The district court granted the Department's motion, refusing to reconsider its determination that the enactment of H.R. 3428 converted the regulation into a statute. *See Hershey Foods Corp. v. USDA*, 158 F.Supp.2d 37, 37 n.1 (D.D.C.2001).

On appeal, Hershey does not press its constitutional arguments. The company argues instead that the district court erred in determining that “the rule originally challenged by [Hershey] has been enacted into law by the Appropriations Act.” *Id.*

II.

Sections 1 and 2 of H.R. 3428, which the Appropriations Act enacted into law, deal with the rule Hershey challenged. Because of their importance to the case, both sections are quoted in their entirety in the margin.¹

¹ SECTION 1. USE OF OPTION 1A AS PRICE STRUCTURE FOR CLASS I MILK UNDER CONSOLIDATED FEDERAL MILK MARKETING ORDERS.

(a) FINAL RULE DEFINED.-In this section, the term “final rule” means the final rule for the consolidation and reform of Federal milk marketing orders that was published in the Federal Register on September 1, 1999 (64 Fed. Reg. 47897-48021), to comply with section 143 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. § 7253).

(b) IMPLEMENTATION OF FINAL RULE FOR MILK ORDER REFORM.-Subject to subsection (c), the final rule shall take effect, and be implemented by the Secretary of Agriculture, on the first day of the month beginning at least 30 days after the date of the enactment of this Act.

(c) USE OF OPTION 1A FOR PRICING CLASS I MILK.-In lieu of the Class I price differentials specified in the final rule, the Secretary of Agriculture shall price fluid or Class I milk under the Federal milk marketing orders using the Class I price differentials identified as Option 1A “Location-Specific Differentials Analysis” in the proposed rule published in the Federal Register on January 30, 1998 (63 Fed. Reg. 4802, 4809), except that the Secretary shall include the corrections and modifications to such Class I differentials made by the Secretary through April 2, 1999.

(d) EFFECT OF PRIOR ANNOUNCEMENT OF MINIMUM PRICES.-If the Secretary of Agriculture announces minimum prices for milk under the Federal milk marketing orders pursuant to section 1000.50 of title 7, Code of Federal Regulations, before the effective date specified in subsection (b), the minimum prices so announced before that date shall be the only applicable minimum prices under Federal milk marketing orders for the month or months for which prices have been announced.

(e) IMPLEMENTATION OF REQUIREMENT.-The implementation of the final rule, as modified by subsection (c), shall not be subject to any of the following:

(continued...)

(...continued)

(1) The notice and hearing requirements of section 8c(3) of the Agricultural Adjustment Act (7 U.S.C. § 608c(3)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, or the notice and comment provisions of section 553 of title 5, United States Code.

(2) A referendum conducted by the Secretary of Agriculture pursuant to subsections (17) or (19) of section 8c of the Agriculture Adjustment Act (7 U.S.C. § 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937.

(3) The Statement of Policy of the Secretary of Agriculture effective July 24, 1971 (36 Fed. Reg. 13804), relating to notices of proposed rulemaking and public participation in rulemaking.

(4) Chapter 35 of title 44, United States Code (commonly known as the Paperwork Reduction Act).

(5) Any decision, restraining order, or injunction issued by a United States court before the date of the enactment of this Act.

SEC. 2. FURTHER RULEMAKING TO DEVELOP PRICING METHODS FOR CLASS III AND CLASS IV MILK UNDER MARKETING ORDERS.

(a) **CONGRESSIONAL FINDING.**-The Class III and Class IV milk pricing formulas included in the final decision for the consolidation and reform of Federal milk marketing orders, as published in the Federal Register on April 2, 1999 (64 Fed. Reg. 16025), do not adequately reflect public comment on the original proposed rule published in the Federal Register on January 30, 1998 (63 Fed. Reg. 4802), and are sufficiently different from the proposed rule and any comments submitted with regard to the proposed rule that further emergency rulemaking is merited.

(b) **RULEMAKING REQUIRED.**-The Secretary of Agriculture shall conduct rulemaking, on the record after an opportunity for an agency hearing, to reconsider the Class III and Class IV milk pricing formulas included in the final rule for the consolidation and reform of Federal milk marketing orders that was published in the Federal Register on September 1, 1999 (64 Fed. Reg. 47897-48021).

(c) **TIME PERIOD FOR RULEMAKING.**-On December 1, 2000, the Secretary of Agriculture shall publish in the Federal Register a final decision on the Class III and Class IV milk pricing formulas. The resulting formulas shall take effect, and be implemented by the Secretary, on January 1, 2001.

(d) **EFFECT OF COURT ORDER.**-The actions authorized by subsections (b) and (c) are intended to ensure the timely publication and implementation of new pricing formulas for Class III and Class IV milk. In the event the Secretary of Agriculture is enjoined or otherwise restrained by a court order from implementing a final decision within the time period specified in subsection (c), the length of time for which that injunction or other restraining order is effective shall be added to the time limitations specified in subsection (c) thereby extending those time limitations by a period of time equal to the period of time for which the injunction or other restraining order is effective.

(e) **FAILURE TO TIMELY COMPLETE RULEMAKING.**-If the Secretary of Agriculture fails to implement new Class III and Class IV milk pricing formulas within the time period required under subsection (c) (plus any additional period provided under subsection (d)), the Secretary may not assess or collect assessments from milk producers or handlers under section 8c of the Agriculture Adjustment Act (7 U.S.C. § 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, for marketing order administration and services provided under such section after the end of that period until the pricing formulas are implemented. The Secretary may not reduce the level of services provided under that section on account of the prohibition against assessments, but shall rather cover the cost of marketing order administration and services through funds available for the Agricultural Marketing Service of the Department.

(f) **IMPLEMENTATION OF REQUIREMENT.**-The Implementation of the final decision on new Class III and Class IV milk pricing formulas shall not be subject to congressional review under chapter 8 of title 5, United States Code.

There is much to be said in favor of Hershey's contention that the Appropriations Act did not convert the rule into a statute. H.R. 3428 nowhere states that the rule is enacted into statutory law. It refers instead in section 1(e) to "implementation of the final rule" and, in the same subsection, states that the "final rule" "shall not be subject to" the "notice and comment provisions" of the APA. None of this makes any sense unless what is being implemented is a rule. To state the obvious, statutes are not promulgated by agencies and they are not subject to the requirements of the APA. Section 1(e) also overrides the injunction issued in the *St. Albans Creamery* case. The court's order had enjoined the *agency* from putting its rule into effect. If H.R. 3428 meant to enact the rule as a statute this provision would have been unnecessary. The Vermont district court issued its preliminary injunction on the basis that plaintiffs' claims--that the Secretary had violated several statutory procedural requirements--would likely be successful. *See St. Albans Coop. Creamery*, 68 F.Supp.2d at 388-90. That reasoning, and the injunction itself, could not have prevented a statute from going into effect, if the rule were intended to be such. Furthermore, the final rule had allowed the Secretary to "suspend or terminate any or all provisions" upon a finding that any provision contravened the AMAA. 64 Fed. Reg. 47,902 (to be codified at 7 C.F.R. § 1000.26(b)). Nothing in H.R. 3428 altered this aspect, as a result of which the Secretary retained the authority to modify or delete provisions in the rule. While it is not unheard of for Congress to allow an agency to modify the substantive portions of a statute, *see Touby v. United States*, 500 U.S. 160, 162-63, 111 S.Ct. 1752, 1754-55, 114 L.Ed.2d 219 (1991), it is far from ordinary and we would expect Congress to be more explicit than it was here if that were its intent. *Cf.* 21 U.S.C. § 811(a)-(c) (authorizing Attorney General to add or remove substances from the Controlled Substance Act schedule only after various steps including consultation with Secretary of Health and Human Services and notice- and-hearing provisions).

As against these considerations, the government points out that Congress, not the Secretary, decided upon the specific content of the Class I pricing differentials. This raises an obvious question: if Congress has dictated the classification scheme, how could it be arbitrary or capricious for an agency to implement Congress's choice? The government also thinks the legislature's override of the Vermont court's injunction against the Secretary would make little sense if Hershey, or anyone else, could just return to court to get a restraining order as soon as the President signed the Appropriations Act into law. (This has special force with respect to the Class I price differentials. It is hard to see why Congress would have intended the provision to be subject to judicial

review under the APA immediately after enactment.) The government relies on Congress's specific action in altering one part of the rule to mean that Congress intended to enact the rest of it.

There is also the matter of section 2 of the bill, which directed the Secretary to undertake formal rulemaking on the subject of Class III and IV pricing formulas. This provision effectively removed parts of the original rule and remanded to the agency for further consideration. (Although the pricing formulas were left in a state of flux, Hershey's challenge is ripe because the provision setting the Class II price at "the advanced Class IV skim milk price ... plus 70 cents" remained intact. 64 Fed. Reg. 47,907. The Class IV milk price might change, but the difference between it and the Class II price would remain fixed at 70 cents per hundredweight.) The parties disagree on what we should infer from the bill's explicit call for further rulemaking on certain provisions of the original rule.

As the government's argument shows, the problem here is somewhat more complicated than if Congress had simply directed an agency to implement an entire regulation. H.R. 3428 did more. Congress required the Secretary to adopt a specific formula for Class I price differentials, *see* § 1(c), and to conduct rulemaking on Class III and IV prices, *see* § 2. The subject of this litigation, however, is the Class II price. On that subject, Congress did nothing but direct the rule to be implemented despite the Vermont district court's injunction. By leaving the Class II pricing provision untouched, we believe--for the reasons already given--that Congress meant to treat at least this portion of the rule, not as a statute, but as agency action, still subject to challenge under the APA. To decide otherwise would be to go beyond the words of H.R. 3428 and attribute to Congress by inference what it never made explicit.

The legislative history of H.R. 3428, to the extent there is any, supports this conclusion. Congress enacted this bill without any committee consideration and almost no floor debate. *See* 145 CONG. REC. H12,732 (daily ed. Nov. 18, 1999) (remarks of Rep. Obey) ("We have H.R. 3428, which brings several dairy authorization measures to this floor, including the Northeast Compact. That compact was slipped into the law in the first place several years ago without ever having been voted on by either body. It was slipped in by the Senate, and now we are again slipping it in without it ever having been considered by either body."). To understand the concern with the Class I pricing differentials, some history is needed. Since 1961 the price a farmer receives for milk depends in part on how far that farmer (or perhaps more accurately, the farmer's cow) lives from Eau Claire, Wisconsin. *See, e.g.*, 7 C.F.R. §§ 1001.51, 1001.52, 1001.53 (1999); 145 CONG. REC. E2528 (daily ed. Nov. 22, 1999) (remarks of Rep. Baldwin); *see also* David Hess, *Art of Milk Pricing: It is Rocket Science*, THE RECORD (N. N.J.), Nov. 26, 1999, at B54, available at 1999 WL 7119902. Under these

price “differentials,” dairy farmers in the eastern United States collected more per gallon produced than those in the midwest. The Secretary's final rule, promulgated in September 1999, replaced this differential formula. Section 1(c) of H.R. 3428 reinstated the “Class 1A option,” which did not dramatically change the old differentials. *See* 63 Fed. Reg. 4809-10; 145 Cong. Rec. H12,734 (daily ed. Nov. 18, 1999) (remarks of Rep. Peterson). Although senators from Wisconsin and Minnesota threatened a filibuster to prevent the passage of the Appropriations Act because it included H.R. 3428, in the end it passed. *See, e.g.,* Meg Jones, *Anti-Reform Move Upsets State Dairy Farmers*, MILWAUKEE JOURNAL-SENTINEL, Nov. 26, 1999, available at 1999 WL 21553546. (Another provision of H.R. 3428 extended the life of the Northeast Dairy Compact, a USDA-approved arrangement favoring New England dairy farmers. *See* H.R. 3428, § 4.) The issues underlying the Class I pricing changes indicate that Congress sought only to legislate the terms of the Class I price *differentials*, not the entire milk marketing system. The Class II price remains the product of agency action and is subject to judicial review as such.

III.

Our decision that the portion of the rule Hershey challenges remains a rule despite H.R. 3428 does not fully resolve the issues in this appeal. The AMAA contains an exhaustion requirement. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 346, 104 S.Ct. 2450, 2454, 81 L.Ed.2d 270 (1984). It provides that “[a]ny handler subject to an order may file a written petition with the Secretary of Agriculture” challenging the order or requesting an exemption, that the Secretary “shall thereupon [provide] an opportunity for a hearing upon such petition,” and that “[a]fter such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.” 7 U.S.C. § 608c(15)(A). “And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture.” *United States v. Ruzicka*, 329 U.S. 287, 294, 67 S.Ct. 207, 210, 91 L.Ed. 290 (1946); *see also Am. Dairy of Evansville v. Bergland*, 627 F.2d 1252, 1259 (D.C.Cir.1980).

Hershey states that it is a “handler” of milk; we shall assume this to be the case. (If Hershey were a consumer of milk rather than a handler, it would not have statutory standing to sue. *See Block*, 467 U.S. at 346-48, 104 S.Ct. at 2454-55.) Hershey also admits that it did not exhaust its remedies under the AMAA. But it contends that the AMAA is inapplicable because the Secretary promulgated the rule pursuant to the FAIR Act, which does not mention administrative remedies. The underlying assumption is that the FAIR Act

supercedes the AMAA. But that assumption is incorrect. Hershey itself claims that the final rule violates the terms of the AMAA. To be sure, the FAIR Act allows informal rulemaking, rather than the formal rulemaking the AMAA demanded. But the purpose is to facilitate the Secretary's efforts to "amend" the milk marketing orders the AMAA requires. *See* 7 U.S.C. § 7253(a)(1). The FAIR Act thus streamlined the procedures for *implementing* AMAA orders without disturbing, for example, the AMAA's requirement that the Secretary classify milk according to the purpose for or form in which it is used. The AMAA's exhaustion requirement remained unchanged and the final rule Hershey challenges itself states that "administrative proceedings must be exhausted before parties may file suit in court." *See* 64 Fed. Reg. 47,898. A handler of milk thus must petition the Secretary before seeking judicial review of a milk marketing order promulgated under the FAIR Act. Hershey did not undertake this required step, and therefore the dismissal of its complaint was the proper result.

Affirmed.

ANIMAL WELFARE ACT

COURT DECISIONS

FRED HODGINS, JANICE HODGINS & HODGINS KENNELS, INC.
Petitioners-appellants, v. USDA, Respondent-Appellee.
No. 01-3508.
Filed April 17, 2002.

(Cite as: 33 Fed. Appx. 784, WL 649102(6th Cir.)).

AWA – Penalties, generally – “de minimus” infractions – Penalties, basis for.

The U.S. Court of Appeals affirmed the Secretary’s determination to impose a penalty of \$325 and a cease and desist order. The courts determined that there a factual basis for the imposition of penalties for 15 violations which the court termed as “de minimus.” The court allowed that the Secretary’s determination to impose a cease and desist order “may have been a bit overzealous” considering that the violations were relatively distant in time and “long since corrected.”

**UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.**

Before MARTIN, Chief Circuit Judge; MOORE and CLAY, Circuit Judges.

PER CURIAM.

Defendants Fred Hodgins, Janice Hodgins and Hodgins Kennels, Inc. appeal the Secretary of the United States Department of Agriculture's (1) determination, on remand from this court, that they committed fifteen violations of the Animal Welfare Act, 7 U.S.C. § 2131-2159, and the regulations promulgated thereunder, 9 C.F.R. §§ 1.1-3.142, and (2) the Secretary's accompanying assessment of a \$325 penalty and issuance of a cease and desist order. Although we have some concerns regarding the necessity of a cease and desist order, we AFFIRM the Secretary's decision.

I.

Fred and Jane Hodgins are the owners and operators of Hodgins Kennels, a licensed business that sells small animals--primarily dogs and cats--to research facilities. The Animal and Plant Health Inspection Service, an arm of the Department of Agriculture, cited the Hodgins and Hodgins Kennels (collectively, "Hodgins Kennels") for a variety of Animal Welfare Act violations during eight inspections from November 16, 1993 through November 22, 1994. Following these citations, the Department instituted disciplinary proceedings against Hodgins Kennels.

On May 31, 1996, an administrative law judge ruled that Hodgins Kennels committed sixty-one violations of the Animal Welfare Act, and issued a cease and desist order and imposed a \$16,000 fine. On appeal, a Department judicial officer, the Secretary's designate for adjudicatory purposes, found that Hodgins Kennels committed fifty-eight violations and assessed a \$13,500 fine. The Secretary also suspended their dealer license for fourteen days and issued a cease and desist order.

Because the record did not contain substantial evidence for the majority of the Secretary's findings, particularly with respect to the willfulness of the alleged violations, we vacated the Secretary's opinion and remanded the case for further proceedings. *Hodgins v. United States Department of Agriculture*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 11, 2000). We subsequently awarded Hodgins Kennels \$155,384.99 in attorneys fees and costs pursuant to the Equal Access to Justice Act.

On remand, the Secretary invited the parties to submit supplemental briefs regarding the issue of an appropriate sanction. The Department submitted a Recommendation for Sanctions requesting assessment of a \$2,500 fine and issuance of a cease and desist order, but declined to submit supplemental briefing.

The Secretary concluded that there was sufficient evidence for fifteen, relatively minor, violations of the Animal Welfare Act. Emphasizing the minor nature of these violations, the Secretary imposed only a \$325 fine. The Secretary also issued a cease and desist order.

II.

Hodgins Kennels' appeal challenges the Secretary's decision to impose a \$325 fine and issue a cease and desist order. In assessing an administrative decision regarding a particular penalty or set of penalties, our review is ordinarily limited to assessing whether the penalty is either "unwarranted in law . . . or without justification in fact." *Butz v. Glover Livestock Comm. Co.*, 411 U.S. 182, 187-88, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973). Given that the Animal Welfare Act authorizes the Secretary to impose a fine and issue a cease and

desist order for any violation of the Animal Welfare Act or any regulation promulgated thereunder¹ our review in this case narrows to whether the relevant penalties are “without justification in fact.”

A. The Violations

In our prior opinion, we addressed the Secretary's finding that Hodgins Kennels committed fifty-eight violations and the Secretary's decision to impose a \$13,500 fine, issue a cease and desist order, and suspend Hodgins Kennels' license. While we found that the record did not support the majority of violations or a license revocation, we noted that a small fine might be appropriate for a series of relatively minor violations. While we assume familiarity with our prior opinion, we discuss relevant portions of our prior decision below.

1. Recordkeeping

In our prior opinion we summarized the facts underlying the recordkeeping violations as follows:

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

Hodgins, 2000 WL 1785733, at *17.

We acknowledged that “a minimal fine might be supportable” for these violations. *Id.* On remand, the Secretary ruled that Hodgins Kennels committed

¹Section 2149(b) provides in pertinent part:

Any dealer ... subject to section 2141 of this title that violates any provision of this chapter or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation.

7 U.S.C. § 2149(b) (1999).

five violations of the relevant recordkeeping provisions, 7 U.S.C. § 2140 and 9 C.F.R. § 2.75.

2. Structural Requirements

We recounted the Department's factual findings regarding structural violations, detailing:

The November 16, 1993, inspection reportedly found some broken cement blocks, a door with a poorly-patched hole, gaps underneath two doors, and cracking concrete. The January 18, 1994 inspection allegedly disclosed that some wall panels were loose or missing, and that ceiling panels in the cat building needed repair. It also alleged that a door was falling apart. The March 1, 1994 inspection disclosed that the “main barn ceiling had missing panels” and that the roof was leaking in another building (citation omitted) The April 5, 1994, report stated that a barn ceiling was poorly repaired, “leaving exposed insulation and holes” The Hodgins were also cited several times [on September 13, 1994, and November 22, 1994] for bent or broken pen-wires, which (as Dr. Vaupel testified) is the natural and unavoidable result of keeping often-rowdy animals in cages.

Id. at 17-*18.

As with the record keeping infractions, we ruled that the record did not support a license revocation, but accepted that “a minimal fine might be supportable.” *Id.* at *18. On remand, the Secretary concluded that the record supported a finding of six violations of 9 C.F.R. § 3.1(a), the operative structural regulation.

3. Food Storage

In our prior opinion, we also discussed the two food storage violations presently at issue. We noted that during inspections on March 1 and September 13, 1993 the Department found (1) paint stored with the animal's feed and (2) the animal's feed stored in the same room as gasoline. We ruled that these violations were not willful and thus could not support a license revocation, but did not question the evidence regarding the actual violation. *Id.* The Secretary, on remand, concluded that the record supported a finding that Hodgins Kennels committed two violations of 9 C.F.R. § 3.1(e).

4. Space Requirements

With respect to the space requirement violation, we noted the Department's finding that Hodgins Kennels housed too many dogs in a pen together on January 18, 1994; nine dogs were in a pen that the inspectors said should have had only eight dogs. *Id.* at *23. Although we acknowledged that “a small fine might be supportable,” the Secretary, citing the *de minimis* nature of the violation and the confusing methodology governing space calculation, did not impose a fine for this offense, an otherwise finable violation of 9 C.F.R. § 3.6(a)(2)(xi).

5. Primary Conveyance

Lastly, we detailed that Department inspectors found a McDonald's napkin and a can of WD-40 oil in the back of the van, and a McDonald's wrapper in between the two passenger seats during a November 22, 1994 inspection. *Id.* at *27. Like the space requirement violation, the Secretary also characterized the violation of 9 C.F.R. § 3.15 as *de minimis* and granted Hodgins Kennels' request that no fine be imposed.

B. The \$325 Fine

In light of the factual record, we cannot conclude that the Secretary's imposition of a \$325 fine was “without justification in fact.” The factual record provides sufficient evidence that Hodgins Kennels committed the fifteen violations at issue. While we agree with Hodgins Kennels' characterization that these are minor violations, the Secretary nevertheless has the statutory authority to remedy these violations. In fulfilling its statutory obligation to safeguard the “humane care and treatment” of animals for “use in research facilities,” 7 U.S.C. § 2131, the Act authorizes the Secretary to remedy *any* violation, not only willful or particularly egregious violations. While these violations plainly could not support a license revocation, they adequately support the minimal \$325 fine imposed by the Secretary.

C. The Cease and Desist Order

As a practical matter, the Secretary's decision to impose a cease and desist order may have been a bit overzealous. The violations underlying this appeal are not only minor, but they occurred approximately eight years ago and have long since been corrected. Hodgins Kennels has apparently learned from these prior violations because in the past four years, it has achieved perfect

compliance with the Animal Welfare Act rules and regulations. Thus, the Secretary probably did not need the additional firepower of a cease and desist order and the accompanying option to impose a fine for any future violation of the Act and for violation of the cease and desist order to ensure Hodgins Kennels' compliance. Accordingly, we share Hodgins Kennels' concern that a standing cease and desist order, coupled with the prospect of a double penalty for any violation of the Act, however trivial, might lead to an unduly severe and disproportionate punishment. Nevertheless, given the factual record and the language of section 2149(b), we cannot conclude that the Secretary's decision to issue a cease and desist order was either "unwarranted in law" or "without justification in fact." And while we are concerned about the potential limitless reach of the cease and desist order, we are ultimately confident that the Secretary, in addressing any future violation by Hodgins Kennels, will give due consideration to Hodgins Kennels' recent compliance and the relatively distant nature of the violations at issue in this case.

III.

Hodgins Kennels also argues that the Secretary impermissibly assumed the role of Department advocate on remand. According to Hodgins Kennels, the Department's decision to submit only a Recommendation for Sanction and its failure to submit supplemental briefing forced the Secretary into performing the Department's advocacy function. In light of the extensive record in this case, including the Department's prior briefing, the Department's extensive factual findings and our prior opinion, we cannot conclude that the Department's decision to submit only a Recommendation for Sanctions transformed the Secretary from neutral arbiter to Department advocate. Therefore, we reject Hodgins Kennels' argument that the Secretary improperly assumed the role of advocate on remand.

IV.

For the foregoing reasons, we AFFIRM the Secretary's order of a \$325 fine and issuance of a cease and desist order.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

**In re: STEVEN BOURK, CARMELLA BOURK, AND DONYA BOURK.
AWA Docket No. 01-0004.
Decision and Order as to Steven Bourk and Carmella Bourk.
Filed January 4, 2002.**

AWA – Failure to file answer – Default – Dealer – License – Appointed counsel – Public officials – Presumption of regularity – Sanction policy – Civil penalty – License disqualification – Cease and desist order.

The Judicial Officer (JO) reversed the Default Decision issued by Chief Administrative Law Judge James W. Hunt. The JO 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 JO concluded Respondents operated as dealers as defined in the Animal Welfare Act (7 U.S.C. § 2132(f)) and the Regulations (9 C.F.R. § 1.1) without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1. The JO ordered Respondents to cease and desist from violating the Animal Welfare Act and the Regulations; assessed Respondents, jointly and severally, a \$5,000 civil penalty; and disqualified Respondents from obtaining an Animal Welfare Act license for 30 days. The JO held the Chief ALJ erroneously concluded Donya Bourk violated the Animal Welfare Act and the Regulations because Complainant had previously withdrawn the Complaint as to Donya Bourk and, at the time the Chief ALJ issued the Default Decision, Donya Bourk was not a party to the proceeding. The JO rejected Respondent Carmella Bourk's contention that the Chief ALJ had not read her objections to the Complainant's motion for a default decision and proposed default decision, stating, in the absence of evidence to the contrary, public officers are presumed to have properly discharged their duties. The JO further stated that, under the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ had the duty to read and consider Respondent Carmella Bourk's timely-filed objections and the record contained no indication that the Chief ALJ failed to properly perform his duty. The JO rejected Respondent Steven Bourk's request that he be provided with counsel stating that a respondent who is unable to obtain counsel has no right under the Constitution, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary administrative proceedings conducted under the Animal Welfare Act.

Brian T. Hill, for Complainant.

Respondents Steven Bourk and Carmella Bourk, 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

William R. DeHaven, 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 October 17, 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 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: (1) from July 28, 1992, through December 11, 1998, Respondent Steven Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and “subsection” 2.1 of the Regulations (9 C.F.R. § 2.1); (2) Respondent Steven Bourk sold, in commerce, approximately 98 dogs for resale, for use as pets or for exhibition; (3) from January 23, 1995, through September 2, 1998, Respondent Carmella Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and “subsection” 2.1 of the Regulations (9 C.F.R. § 2.1); (4) Respondent Carmella Bourk sold, in commerce, approximately 31 dogs for resale, for use as pets or for exhibition; (5) from September 6, 1997, through March 5, 1999, Respondent Donya Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and “subsection” 2.1 of the Regulations (9 C.F.R. § 2.1); and (6) Respondent Donya Bourk sold, in commerce, approximately 72 dogs for resale, for use as pets or for exhibition (Compl. ¶¶ II-IV).¹

The Hearing Clerk served Respondents Steven Bourk, Carmella Bourk, and Donya Bourk with the Complaint, the Rules of Practice, and a service letter.² Respondents Steven Bourk, Carmella Bourk, and Donya Bourk 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 November 22, 2000, the Hearing Clerk sent a letter to Respondents Steven Bourk, Carmella Bourk, and Donya

¹ Complainant erroneously refers to section 2.1 of the Regulations (9 C.F.R. § 2.1) as “subsection” 2.1 of the Regulations (9 C.F.R. § 2.1) (Compl. ¶¶ II-IV). I find Complainant’s incorrect references to “subsection” 2.1 of the Regulations (9 C.F.R. § 2.1), do not affect the adequacy of the Complaint.

² United States Postal Service Domestic Return Receipts for Article Number P 368 327 621, Article Number P 368 327 622, and Article Number P 368 327 623.

Bourk informing them that their answer to the Complaint had not been received within the time required in the Rules of Practice.³

On March 15, 2001, Complainant filed "Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk" giving notice of Complainant's withdrawal of the Complaint as to Respondent Donya Bourk. On March 20, 2001, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued an "Order Withdrawing Complaint as to Donya Bourk."

On March 15, 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 Upon Admission of Facts By Reason of Default" [hereinafter Proposed Default Decision]. On April 6, 2001, Respondent Carmella Bourk filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Respondent Steven Bourk 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 June 15, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a "Decision and Order Upon Admission of Facts By Reason of Default" [hereinafter Initial Decision and Order]: (1) concluding that from July 28, 1992, through December 11, 1998, Respondent Steven Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act ("7 U.S.C. § 134") and "subsection" 2.1 of the Regulations (9 C.F.R. § 2.1); (2) finding that Respondent Steven Bourk sold, in commerce, approximately 98 dogs for resale, for use as pets or for exhibition; (3) concluding that from January 23, 1995, through September 2, 1998, Respondent Carmella Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act ("7 U.S.C. § 134") and "subsection" 2.1 of the Regulations (9 C.F.R. § 2.1); (4) finding that Respondent Carmella Bourk sold, in commerce, approximately 31 dogs for resale, for use as pets or for exhibition; (5) concluding that from September 6, 1997, through March 5, 1999, Respondent Donya Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act ("7 U.S.C. § 134") and "subsection" 2.1 of the

³Letter dated November 22, 2000, from Joyce A. Dawson, Hearing Clerk, to Respondents Steven Bourk, Carmella Bourk, and Donya Bourk.

Regulations (9 C.F.R. § 2.1); (6) finding that Respondent Donya Bourk sold, in commerce, approximately 72 dogs for resale, for use as pets or for exhibition; (7) directing Respondents Steven Bourk, Carmella Bourk, and Donya Bourk to cease and desist from violating the Animal Welfare Act and the Regulations and “the standards issued thereunder;” (8) assessing Respondents Steven Bourk, Carmella Bourk, and Donya Bourk, jointly and severally, a \$7,500 civil penalty; and (9) disqualifying Respondents Steven Bourk, Carmella Bourk, and Donya Bourk from obtaining an Animal Welfare Act license for 30 days (Initial Decision and Order at 2-4).⁴

On July 6, 2001, Respondent Carmella Bourk appealed to the Judicial Officer. On August 8, 2001, Complainant filed a “Motion in Opposition of Respondent’s Motion to Appeal” [hereinafter Response to Carmella Bourk’s Appeal Petition]. On August 22, 2001, Respondent Carmella Bourk filed a response to Complainant’s Response to Carmella Bourk’s Appeal Petition.⁵ On September 10, 2001, Respondent Steven Bourk appealed to the Judicial Officer. Complainant failed to file a timely response to Respondent Steven Bourk’s appeal petition, and on December 26, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the Chief ALJ’s Initial Decision and Order. Therefore, while I use much of the Chief ALJ’s Initial Decision and Order in this Decision and Order as to Steven Bourk and Carmella Bourk, I do not adopt the Chief ALJ’s Initial Decision and Order as the final Decision and Order as to Steven Bourk and Carmella Bourk.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

⁴The Chief ALJ erroneously indicates that section 4 of the Animal Welfare Act is codified in the United States Code at “7 U.S.C. § 134” (Initial Decision and Order at 2-3). Section 4 of the Animal Welfare Act is codified in the United States Code at 7 U.S.C. § 2134. I find the Chief ALJ’s incorrect references to “7 U.S.C. § 134” harmless error. The Chief ALJ erroneously refers to section 2.1 of the Regulations (9 C.F.R. § 2.1) as “subsection” 2.1 of the Regulations (9 C.F.R. § 2.1) (Initial Decision and Order at 2-3). I find the Chief ALJ’s erroneous references to “subsection” 2.1 of the Regulations (9 C.F.R. § 2.1) harmless error. The Chief ALJ’s reference to “the standards issued thereunder” (Initial Decision and Order at 3) is a reference to the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards].

⁵The Rules of Practice do not provide for a response to a response to an appeal petition. Further, Respondent Carmella Bourk did not request the opportunity to file a response to Complainant’s Response to Carmella Bourk’s Appeal Petition. Therefore, I do not address or consider Respondent Carmella Bourk’s response to Complainant’s Response to Carmella Bourk’s Appeal Petition.

.....
**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

(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(f), 2134, 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.

....

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).⁶

STATEMENT OF THE CASE

Introduction

Respondents Steven Bourk and Carmella Bourk 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 in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as Findings of Fact. This Decision and Order as to Steven Bourk and Carmella Bourk is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Steven Bourk is an individual whose mailing address is 1904 Verendrye Drive, Ft. Pierre, South Dakota 57532.
2. Respondent Carmella Bourk is an individual whose mailing address is 1904 Verendrye Drive, Ft. Pierre, South Dakota 57532.
3. From July 28, 1992, through December 11, 1998, Respondent Steven Bourk operated as a dealer as defined in the Animal Welfare Act and the

⁶During the period material to this proceeding, section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (1998)) was amended by removing the term "APHIS, REAC Sector Supervisor" both times it appears and adding in its place the term "AC Regional Director" (63 Fed. Reg. 62,925-27 (Nov. 10, 1998)). This November 10, 1998, amendment of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (1998)) has no bearing on the disposition of this proceeding.

Regulations without being licensed. Respondent Steven Bourk sold, in commerce, approximately 98 dogs for resale, for use as pets or for exhibition.

4. From January 23, 1995, through September 2, 1998, Respondent Carmella Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed. Respondent Carmella Bourk sold, in commerce, approximately 31 dogs for resale, for use as pets or for exhibition.

Conclusions of Law

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

2. From July 28, 1992, through December 11, 1998, Respondent Steven Bourk willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1).

3. From January 23, 1995, through September 2, 1998, Respondent Carmella Bourk willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1).

Respondents Steven Bourk's and Carmella Bourk's Appeal Petitions

Respondents Steven Bourk and Carmella Bourk raise six issues in Respondent Carmella Bourk's letter filed July 6, 2001 [hereinafter Carmella Bourk's Appeal Petition], and Respondent Steven Bourk's letter filed September 10, 2001 [hereinafter Steven Bourk's Appeal Petition]. First, Respondent Carmella Bourk asks: "Why does my daughter's name still appear on these forms when she received a letter stating that the charges against her have been dropped?" (Carmella Bourk's Appeal Pet. at first unnumbered page.)

Respondent Carmella Bourk does not identify the person who she asserts is her daughter, does not identify the "forms" on which her daughter's name appears, and does not identify the "letter stating that the charges against her [daughter] have been dropped[.]" However, based on the limited record before me, I infer the person who Respondent Carmella Bourk asserts is her daughter is Respondent Donya Bourk; I infer the "letter stating that the charges against [Respondent Donya Bourk] have been dropped" referenced by Respondent Carmella Bourk is either Complainant's Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk or the Chief ALJ's Order Withdrawing Complaint as to Donya Bourk; and I infer Respondent Carmella Bourk asserts the Chief ALJ erroneously concluded that Respondent Donya Bourk willfully violated the Animal Welfare Act and the Regulations and imposed sanctions against Respondent Donya Bourk.

On March 15, 2001, Complainant filed a Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk giving notice of Complainant's

withdrawal of the Complaint as to Respondent Donya Bourk. On March 20, 2001, the Chief ALJ filed an Order Withdrawing Complaint as to Donya Bourk stating:

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.

Notwithstanding Complainant's March 15, 2001, Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk and the Chief ALJ's March 20, 2001, Order Withdrawing Complaint as to Donya Bourk, the Chief ALJ issued an Initial Decision and Order on June 15, 2001, in which he: (1) found that from September 6, 1997, through March 5, 1999, Respondent Donya Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license; (2) found that Respondent Donya Bourk sold, in commerce, approximately 72 dogs for resale, for use as pets or for exhibition; (3) concluded that Respondent Donya Bourk willfully violated section 4 of the Animal Welfare Act ("7 U.S.C. § 134") and "subsection" 2.1 of the Regulations (9 C.F.R. § 2.1);⁷ (4) ordered Respondent Donya Bourk to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; (5) assessed Respondent Donya Bourk a \$7,500 civil penalty; and (6) disqualified Respondent Donya Bourk from obtaining an Animal Welfare Act license for 30 days (Initial Decision and Order at 3-4).

In light of Complainant's March 15, 2001, Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk and the Chief ALJ's March 20, 2001, Order Withdrawing Complaint as to Donya Bourk, I am perplexed by the Chief ALJ's June 15, 2001, Initial Decision and Order in which the Chief ALJ concluded that Respondent Donya Bourk violated the Animal Welfare Act and the Regulations and imposed sanctions against Respondent Donya Bourk. Moreover, I am perplexed by Complainant's failure to appeal the Chief ALJ's Initial Decision and Order as it relates to Respondent Donya Bourk.

⁷The Chief ALJ erroneously indicates that section 4 of the Animal Welfare Act is codified in the United States Code at "7 U.S.C. § 134" (Initial Decision and Order at 2-3). Section 4 of the Animal Welfare Act is codified in the United States Code at 7 U.S.C. § 2134. I find the Chief ALJ's incorrect references to "7 U.S.C. § 134" harmless error. The Chief ALJ erroneously refers to section 2.1 of the Regulations (9 C.F.R. § 2.1) as "subsection" 2.1 of the Regulations (9 C.F.R. § 2.1) (Initial Decision and Order at 2-3). I find the Chief ALJ's erroneous references to "subsection" 2.1 of the Regulations (9 C.F.R. § 2.1) harmless error.

The Chief ALJ does not explain, and I can find nothing in the record which explains, how Respondent Donya Bourk became a party to this proceeding after the Complaint against her had been withdrawn. Based on the limited record before me, I find that no later than March 20, 2001, Respondent Donya Bourk ceased being a party to this proceeding, and I conclude that the Chief ALJ's June 15, 2001, Initial Decision and Order as it relates to Respondent Donya Bourk, is error. Therefore, in this Decision and Order as to Steven Bourk and Carmella Bourk, I make no findings or conclusions as to Respondent Donya Bourk and I impose no sanction against Respondent Donya Bourk.

Second, Respondent Carmella Bourk states Respondent Steven Bourk no longer resides at 1904 Verendrye Drive, Ft. Pierre, South Dakota 57532, but, instead, resides at 324 Spruce Avenue, Pierre, South Dakota 57501. Respondent Carmella Bourk states that she finds meeting with Respondent Steven Bourk "painful" and requests that all mail for Respondent Steven Bourk be sent directly to him. (Carmella Bourk's Appeal Pet. at first unnumbered page.)

Respondent Steven Bourk 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 in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Therefore, Respondent Steven Bourk is deemed to have admitted that his mailing address is 1904 Verendrye Drive, Ft. Pierre, South Dakota 57532, as alleged in paragraph I(A) of the Complaint, and I find in this Decision and Order as to Steven Bourk and Carmella Bourk that Respondent Steven Bourk's mailing address is 1904 Verendrye Drive, Ft. Pierre, South Dakota 57532.

Third, Respondent Carmella Bourk asks whether the Chief ALJ reviewed her "last letter . . . about this case" and "what [the Chief ALJ's] ruling was" (Carmella Bourk's Appeal Pet. at first unnumbered page).

I infer Respondent Carmella Bourk's reference to her "last letter . . . about this case" is a reference to Respondent Carmella Bourk's filing that immediately preceded Carmella Bourk's Appeal Petition: viz., Respondent Carmella Bourk's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, which she filed on April 6, 2001. In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.⁸ Under the Rules of Practice, an administrative

⁸ See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995), (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982)

(continued...)

(...continued)

(per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001) (stating the presumption of regularity supports official acts of public officers; in the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties and the doctrine allows courts to presume that what appears regular is regular, the burden shifting to the attacker to show to the contrary); *United States v. Studevent*, 116 F.3d 1559, 1563 (D.C. Cir. 1997) (stating in the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their official duties); *United States v. Allen*, 106 F.3d 695, 700 (6th Cir.) (stating where there is no evidence indicating that tampering with exhibits occurred, courts presume public officers have discharged their duties properly), *cert. denied*, 520 U.S. 1281 (1997); *Felzcerck v. INS*, 75 F.3d 112, 116 (2d Cir. 1996) (stating records made by public officials in the ordinary course of their duties have a strong indicia of reliability, since public officials are presumed to perform their duties properly and generally lack motive to falsify information); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity which attaches to official acts can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780, 790-92 (2001) (Decision and Order on Remand) (stating, in the absence of clear evidence to the contrary, an administrative law judge is presumed to have considered the evidence in a proceeding prior to the issuance of a decision the proceeding); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. 406, 435-36, (2001) (stating, in the absence of clear evidence to the contrary, an administrative law judge is presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision in the proceeding), *appeal docketed*, No. 01C0890 (E.D. Wis. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating that, in the absence of evidence

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law judge must read and consider a respondent's timely-filed objections to a complainant's motion for a default decision and proposed default decision in order to determine the proper disposition of the complainant's motion for a default decision and proposed default decision.⁹ The record contains no indication that the Chief ALJ failed to read and consider Respondent Carmella Bourk's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Therefore, I presume the Chief ALJ properly discharged his duty to read and consider Respondent Carmella Bourk's

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to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part & transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating that a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001), *appeal docketed*, No. 01-3257 (8th Cir. Sept. 17, 2001); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating that, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating that instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

⁹ 7 C.F.R. § 1.139.

objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

Moreover, I find no basis for Respondent Carmella Bourk's apparent confusion regarding the Chief ALJ's ruling on Complainant's Motion for Default Decision. Section 1.139 of the Rules of Practice provides for the disposition of a complainant's motion for a default decision, as follows:

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. § 1.139.

After Respondent Carmella Bourk filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, the Chief ALJ issued the Initial Decision and Order without further procedure or hearing. While the Chief ALJ did not adopt Complainant's Proposed Default Decision in its entirety, the Chief ALJ's issuance of the Initial Decision and Order establishes that he found Respondent Carmella Bourk's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision lacked merit.

Fourth, Respondent Carmella Bourk states Respondent Steven Bourk emotionally and mentally abused her and controlled her. Moreover, Respondent Carmella Bourk states Respondent Steven Bourk forced her to sell dogs, dogs were sold under her name against her wish, and she "had no say over what was done with the dogs." Respondent Carmella Bourk requests "that these charges be dropped against [her]." (Carmella Bourk's Appeal Pet. at first and second unnumbered pages.)

I infer Respondent Carmella Bourk's statements regarding her relationship with Respondent Steven Bourk and her lack of control over the sale of dogs constitute Respondent Carmella Bourk's general denial of the material allegations in the Complaint that relate to her sale of dogs and operation as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license. Respondent Steven Bourk denies all the allegations in the Complaint "against [himself] and [his] family" (Steven Bourk's Appeal Pet.).

Respondents Steven Bourk's and Carmella Bourk's denials come too late to be considered. Respondents Steven Bourk and Carmella Bourk are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because they failed to answer the Complaint within 20 days after the Hearing Clerk served them with the Complaint.

The Hearing Clerk served Respondents Steven Bourk and Carmella Bourk with the Complaint, the Rules of Practice, and the Hearing Clerk's October 18, 2000, service letter no later than October 31, 2000.¹⁰ Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a

¹⁰United States Postal Service Domestic Return Receipts for Article Number P 368 327 621 and Article Number P 368 327 622.

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 Respondents Steven Bourk and Carmella Bourk 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 2-3.

Similarly, the Hearing Clerk informed Respondents Steven Bourk and Carmella Bourk in the October 18, 2001, 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:

October 18, 2000

Mr. Steven Bourk
Ms. Carmella Bourk
Ms. Donya Bourk
1904 Verendrye Drive
Ft. Pierre, South Dakota 57532

Dear Sir/Madam:

Subject: In re: Steven Bourk, Carmella Bourk, Donya Bourk
Respondents
AWA Docket No. 01-0004

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 [sic].

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 [sic] on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On November 22, 2000, the Hearing Clerk sent a letter to Respondents Steven Bourk and Carmella Bourk informing them that their answer to the Complaint had not been received within the time required in the Rules of Practice.¹¹ Neither Respondent Steven Bourk nor Respondent Carmella Bourk responded to the Hearing Clerk's November 22, 2000, letter.

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,¹² generally there is no basis for

¹¹See note 3.

¹²See *Dale Goodale*, 60 Agric. Dec. 670 (2001) (Rem and Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *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

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setting aside a default decision that is based upon a respondent's failure to file a timely answer.¹³

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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).

¹³ See generally *In re Beth Lutz*, 60 Agric. Dec. 53 (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 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 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

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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)). Neither Respondent Steven Bourk nor Respondent Carmella Bourk filed a timely answer. Respondent Steven Bourk's first and only filing in this proceeding was September 10, 2001,

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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 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 the answer 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 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).

10 months and 9 days after the Hearing Clerk served Respondent Steven Bourk with the Complaint. Respondent Carmella Bourk's first filing in this proceeding was April 6, 2001, 5 months and 5 days after the Hearing Clerk served Respondent Carmella Bourk with the Complaint. Respondent Steven Bourk'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)). Respondent Carmella Bourk'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)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the Chief ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive Respondent Steven Bourk of his rights or Respondent Carmella Bourk of her rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁴

Fifth, Respondent Steven Bourk states that the civil penalty assessed by the Chief ALJ is "astronomical" (Steven Bourk's Appeal Pet.).

The Chief ALJ assessed Respondents Steven Bourk, Carmella Bourk, and Donya Bourk, jointly and severally, a \$7,500 civil penalty for their violations of the Animal Welfare Act and the Regulations (Initial Decision and Order at 3).¹⁵ 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, the Regulations, and the Standards.¹⁶

¹⁴ 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).

¹⁵ My reasons for concluding the Chief ALJ's assessment of a civil penalty against Respondent Donya Bourk is error are discussed in this Decision and Order as to Steven Bourk and Carmella Bourk, *supra*.

¹⁶ The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)) provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, by increasing the maximum civil

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Each violation and each day during which a violation continues is a separate offense. Therefore, based on the approximately 98 dogs which Respondent Steven Bourk sold in commerce for resale for use as pets or for exhibition and the approximately 2,323 days during which Respondent Steven Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations in violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1), the Chief ALJ could have assessed Respondent Steven Bourk a maximum civil penalty of approximately \$6,052,500. Moreover, based on the approximately 31 dogs which Respondent Carmella Bourk sold in commerce for resale for use as pets or for exhibition and the approximately 1,315 days during which Respondent Carmella Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations in violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1), the Chief ALJ could have assessed Respondent Carmella Bourk a maximum civil penalty of approximately \$3,365,000.

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, the Regulations, and the 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.

Based on the number of dogs Respondents Steven Bourk and Carmella Bourk sold in commerce during the period from July 28, 1992, through December 11, 1998, I find Respondents Steven Bourk and Carmella Bourk operated a medium-sized business. I find that the failure to obtain an Animal Welfare Act license before operating as a dealer is a serious violation because

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monetary penalty for each civil monetary penalty by the "cost-of-living adjustment." Effective September 2, 1997, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act, the Regulations, and the Standards by increasing the maximum civil penalty from \$2,500 to \$2,750 (62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(2)(v)). However, based on the limited record before me, I cannot determine the number of Respondent Steven Bourk's violations of the Animal Welfare Act and the Regulations or the number of Respondent Carmella Bourk's violations of the Animal Welfare Act and the Regulations that occurred after September 1, 1997. Therefore, for the purposes of this Decision and Order as to Steven Bourk and Carmella Bourk, I use \$2,500 as the maximum civil penalty that can be assessed against Respondents Steven Bourk and Carmella Bourk for each violation of the Animal Welfare Act and the Regulations.

enforcement of the Animal Welfare Act, the Regulations, and the Standards depends upon the identification of persons operating as dealers as defined by the Animal Welfare Act and the Regulations. During a period of more than 6 years and 4 months, Respondent Steven Bourk operated as a dealer as defined by the Animal Welfare Act and the Regulations without obtaining the required Animal Welfare Act license. During a period of more than 3 years and 7 months, Respondent Carmella Bourk operated as a dealer as defined by the Animal Welfare Act and the Regulations without obtaining the required Animal Welfare Act license. Respondents Steven Bourk's and Carmella Bourk's failure to obtain the required Animal Welfare Act license thwarted the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act. Respondents Steven Bourk's and Carmella Bourk's conduct reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations. Thus, I conclude Respondents Steven Bourk and Carmella Bourk lacked good faith. Finally, an ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)). In light of the number of Respondents Steven Bourk's and Carmella Bourk's violations, the maximum civil penalty that could have been assessed against Respondents Steven Bourk and Carmella Bourk, the seriousness and history of Respondents Steven Bourk's and Carmella Bourk's violations, and the lack of good faith exhibited by Respondents Steven Bourk and Carmella Bourk, I disagree with Respondent Steven Bourk's characterization of the amount of the civil penalty assessed by the Chief ALJ.

However, I find the Chief ALJ's assessment of a \$7,500 civil penalty against Respondents Steven Bourk and Carmella Bourk puzzling. 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 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.

Complainant, one of the officials charged with administering the Animal Welfare Act, requests that Respondents Steven Bourk and Carmella Bourk be ordered to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; that Respondents Steven Bourk and Carmella Bourk be jointly and severally assessed a \$5,000 civil penalty; and that Respondents Steven Bourk and Carmella Bourk be disqualified from obtaining an Animal Welfare Act license for 2 years (Complainant's Proposed Default Decision at fourth unnumbered page).

The Chief ALJ ordered Respondents Steven Bourk and Carmella Bourk to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards as recommended by Complainant. However, without explanation, the Chief ALJ assessed Respondents Steven Bourk and Carmella Bourk, jointly and severally, a \$7,500 civil penalty rather than the \$5,000 civil penalty recommended by Complainant, and disqualified Respondents Steven Bourk and Carmella Bourk from obtaining an Animal Welfare Act license for 30 days rather than 2 years as recommended by Complainant. 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.¹⁷ Thus, the Chief ALJ may choose not to adopt the sanction recommended by an administrative official and may impose any sanction warranted in law and justified by the facts. My puzzlement over the Chief ALJ's sanction derives not from the differences between the

¹⁷*In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001); *In re Karl Mitchell*, 60 Agric. Dec. 91, 105 (2001), *appeal docketed*, No. 01-71486 (9th Cir. Sept. 10, 2001); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n. 8 (2001), *appeal docketed*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *appeal docketed*, No. 01-3508 (6th Cir. May 12, 2001); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, No. 00-60844 (5th Cir. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001); *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).

sanction recommended by Complainant and the sanction imposed by the Chief ALJ, but rather from the Chief ALJ's lack of explanation for the differences.

Complainant did not appeal the Chief ALJ's failure to adopt the sanction recommended by Complainant. In light of the sanction recommended by Complainant in Complainant's Proposed Default Decision, the sanction imposed by the Chief ALJ in the Initial Decision and Order, and Complainant's failure to appeal the sanction imposed by the Chief ALJ, I impose a sanction which gives Respondents Steven Bourk and Carmella Bourk the benefit of the lower civil penalty recommended by Complainant and the shorter period of disqualification from obtaining an Animal Welfare Act license imposed by the Chief ALJ. I also do not order Respondents Steven Bourk and Carmella Bourk to cease and desist from violating the Standards because I do not find that either Respondent Steven Bourk or Respondent Carmella Bourk violated the Standards.

Sixth, Respondent Steven Bourk requests "legal counsel so this matter can be resolved in a timely manner" (Steven Bourk's Appeal Pet.).

The Administrative Procedure Act provides that a party in an agency proceeding may appear by or with counsel, as follows:

§ 555. Ancillary matters

....

(b) . . . A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

5 U.S.C. § 555(b).

However, a respondent who desires assistance of counsel in an agency proceeding bears the responsibility of obtaining counsel. Moreover, a respondent who is unable to obtain counsel has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary administrative proceedings, such as those conducted under the Animal Welfare Act.¹⁸

¹⁸See generally *Elliott v. SEC*, 36 F.3d 86, 88 (11th Cir. 1994) (per curiam) (rejecting petitioner's assertion of prejudice due to his lack of representation in an administrative proceeding before the Securities and Exchange Commission and stating there is no statutory or constitutional right to counsel in disciplinary administrative proceedings before the Securities and Exchange Commission); *Henry v. INS*, 8 F.3d 426, 440 (7th Cir. 1993) (stating it is well-settled that deportation hearings are in the nature of civil proceedings and aliens, therefore, have no constitutional right to counsel under the Sixth Amendment); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990) (stating a deportation proceeding is civil in nature; thus no Sixth Amendment right to counsel exists); *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) (stating because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment); *Sartain v. SEC*,

(continued...)

Therefore, I reject Respondent Steven Bourk's request to have counsel provided to him; however, I note that Respondent Steven Bourk is free to obtain counsel to assist him in this proceeding.

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

ORDER

1. Respondents Steven Bourk and Carmella Bourk, 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, in particular, shall cease and desist from operating as dealers as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license.

(...continued)

601 F.2d 1366, 1375 (9th Cir. 1979) (per curiam) (stating 5 U.S.C. § 555(b) and due process assure petitioner the right to obtain independent counsel and have counsel represent him in a civil administrative proceeding before the Securities and Exchange Commission, but the Securities and Exchange Commission is not obliged to provide petitioner with counsel); *Feeney v. SEC*, 564 F.2d 260, 262 (8th Cir. 1977) (rejecting petitioners' argument that the Securities and Exchange Commission erred in not providing appointed counsel for them and stating, assuming petitioners are indigent, the Constitution, the statutes, and prior case law do not require appointment of counsel at public expense in administrative proceedings of the type brought by the Securities and Exchange Commission), *cert. denied*, 435 U.S. 969 (1978); *Nees v. SEC*, 414 F.2d 211, 221 (9th Cir. 1969) (stating petitioner has a right under 5 U.S.C. § 555(b) to employ counsel to represent him in an administrative proceeding, but the government is not obligated to provide him with counsel); *Boruski v. SEC*, 340 F.2d 991, 992 (2d Cir.) (stating in administrative proceedings for revocation of registration of a broker-dealer, expulsion from membership in the National Association of Securities Dealers, Inc., and denial of registration as an investment advisor, there is no requirement that counsel be appointed because the administrative proceedings are not criminal), *cert. denied*, 381 U.S. 943 (1965); *Alvarez v. Bowen*, 704 F. Supp. 49, 52 (S.D.N.Y. 1989) (stating the Secretary of Health and Human Services is not obligated to furnish a claimant with an attorney to represent the claimant in a social security disability proceeding); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 911 (1998) (stating a respondent who is unable to afford an attorney has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary proceedings, such as those conducted under the Swine Health Protection Act); *In re Steven M. Samek*, 57 Agric. Dec. 185, 188 (1998) (Ruling Denying Motion to Appoint Public Defender as to Steven M. Samek) (stating a respondent who is unable to afford an attorney has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary proceedings, such as those conducted under the Animal Welfare Act); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439, 442 (1984) (stating a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, is not a criminal proceeding and the respondent, even if he cannot afford counsel, has no constitutional right to have counsel provided by the government), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984).

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

2. Respondents Steven Bourk and Carmella Bourk are jointly and severally assessed a \$5,000 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:

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

Respondents Steven Bourk's and Carmella Bourk's payment of the \$5,000 civil penalty shall be sent to, and received by, Brian T. Hill within 60 days after service of this Order on Respondents Steven Bourk and Carmella Bourk. Respondents Steven Bourk and Carmella Bourk shall state on the certified check or money order that payment is in reference to AWA Docket No. 01-0004.

3. Respondents Steven Bourk and Carmella Bourk are disqualified from obtaining an Animal Welfare Act license for 30 days and continuing thereafter until they demonstrate to the Animal and Plant Health Inspection Service that they are in full compliance with the Animal Welfare Act, the Regulations, the Standards, and this Order, including the payment of the civil penalty assessed against them in paragraph 2 of this Order.

The disqualification provisions of this Order shall become effective on the day after service of this Order on Respondents Steven Bourk and Carmella Bourk.

4. Respondents Steven Bourk and Carmella Bourk 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 Steven Bourk and Carmella Bourk 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 4, 2002.

In re: 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.

AWA Docket No. 01-0017.

Decision and Order as to The International Siberian Tiger Foundation, an Ohio corporation; Diana Cziraky, an individual; The Siberian Tiger Foundation, an unincorporated association; and Tiger Lady, a/k/a Tiger Lady LLC, an unincorporated association.

Filed February 15, 2002.

AWA – Exhibition – Handling – Preponderance of the evidence – Public, general viewing – Exhibitors, general public, not included as – Willful – Preemption – Cease and desist order – License revocation.

The Judicial Officer (JO) reversed the Initial Decision issued by Chief Administrative Law Judge James W. Hunt. The JO concluded that Respondents failed to handle lions and tigers during public exhibition so there was minimal risk of harm to the animals and the public and failed to have sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, in willful violation of 9 C.F.R. § 2.131(b)(1). The JO also concluded that Respondent Diana Cziraky exhibited animals during a period when her Animal Welfare Act license was suspended, in willful violation of 9 C.F.R. § 2.10(c). The JO stated Complainant proved Respondent Diana Cziraky's violation of 9 C.F.R. § 2.10(c) and Respondents' violations of 9 C.F.R. § 2.131(b)(1) by a preponderance of the evidence, which is the standard of proof applicable in administrative proceedings under the Animal Welfare Act. The JO rejected Respondents' contention that 9 C.F.R. § 2.131(b)(1) does not provide Respondents with adequate notice of the conduct which is required of Respondents. The JO rejected Complainant's contention that Respondents' trainees were members of "the public" or "the general viewing public" as those terms are used in 9 C.F.R. § 2.131(b)(1), but agreed with Complainant's contention that exhibitors exhibiting animals are not members of "the public" or members of "the general viewing public" as those terms are used in 9 C.F.R. § 2.131(b)(1). The JO also held that assumption of the risk of harm by members of the public is not relevant to whether Respondents violated 9 C.F.R. § 2.131(b)(1). The JO rejected Respondents' contentions that 9 C.F.R. § 2.131(b)(1) exceeds the authority granted to the Secretary of Agriculture under the Animal Welfare Act and that 9 C.F.R. § 2.131(b)(1) interferes with state and local regulations designed to control animals to protect human beings. The JO also stated the Animal Welfare Act does not explicitly or implicitly preempt state or local regulation of animal or public welfare. The JO ordered Respondents to cease and desist violations of the Animal Welfare Act and the regulations issued under the Animal Welfare Act and revoked Respondent Diana Cziraky's Animal Welfare Act license.

Colleen A. Carroll, for Complainant.

Richard D. Rogovin, Columbus, Ohio, for Respondents.

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

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

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a “Complaint” on December 8, 2000. Complainant instituted this 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]; the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards];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].

Complainant alleges that: (1) on or about March 2000, April 29, 2000, May 14, 2000, June 2000, July 14, 2000, September 2000, October 21, 2000, October 28, 2000, October 29, 2000, and December 2, 2000, the International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady, a/k/a Tiger Lady LLC [hereinafter Respondents], failed to handle lions and tigers during public exhibition so there was minimal risk of harm to the public and failed to have sufficient distance or barriers between the animals and the public so as to ensure the safety of the public, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)); (2) on or about March 2000, April 29, 2000, May 14, 2000, June 2000, July 14, 2000, September 2000, October 21, 2000, October 28, 2000, October 29, 2000, and December 2, 2000, Respondents failed to have a responsible, knowledgeable, and readily identifiable employee or attendant present at all times of public contact with Respondents’ animals, in willful violation of section 2.131(c)(2) of the Regulations (9 C.F.R. § 2.131(c)(2)); (3) on or about March 2000, April 29, 2000, May 14, 2000, June 2000, July 14, 2000, September 2000, October 21, 2000, October 28, 2000, October 29, 2000, and December 2, 2000, Respondents publicly exhibited lions and tigers outside the direct control and supervision of a knowledgeable and experienced animal handler, in willful violation of section 2.131(c)(3) of the Regulations (9 C.F.R. § 2.131(c)(3)); and (4) on at least three occasions between November 25, 2000, and December 2, 2000, while her Animal Welfare Act license (Animal Welfare Act license number 31-C-0123)

¹Although Complainant instituted this proceeding under the Standards, Complainant does not allege that the International Siberian Tiger Foundation, Diana Cziraky, David Cziraky, The Siberian Tiger Foundation, or Tiger Lady, a/k/a Tiger Lady LLC, violated the Standards (Compl.).

was suspended, Respondent Diana Cziraky exhibited lions and tigers, in willful violation of section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)) (Compl. ¶¶ 6-9).² On January 2, 2001, Respondents filed an “Answer” denying the material allegations of the Complaint.

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided over a hearing in Columbus, Ohio, on February 7, 2001, through February 9, 2001, and on March 13, 2001, through March 15, 2001. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Richard D. Rogovin, Bricker & Eckler, LLP, Columbus, Ohio, represented Respondents.

On June 29, 2001, Respondents filed “Respondents’ Post-Hearing Brief.” On July 2, 2001, Complainant filed “Complainant’s Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof” [hereinafter Complainant’s Post-Hearing Brief]. On August 7, 2001, Complainant filed “Complainant’s Reply Brief.”

On August 23, 2001, the Chief ALJ issued a “Decision and Order” [hereinafter Initial Decision and Order]: (1) finding that from on or about February 28, 2000, through October 29, 2000, Respondents failed to handle lions and tigers during public exhibition so there was minimal risk of harm to the public and failed to have sufficient distance or barriers or distance and barriers between the animals and the public so as to assure the safety of the public; (2) concluding that from on or about February 28, 2000, through October 29, 2000, Respondents violated the Animal Welfare Act and section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)); and (3) revoking Respondent Diana Cziraky’s Animal Welfare Act license (Animal Welfare Act license number 31-C-0123) (Initial Decision and Order at 23-24).

On September 19, 2001, Respondents appealed to the Judicial Officer. On October 12, 2001, Complainant filed “Complainant’s Petition for Appeal of Decision and Order.” On October 18, 2001, Complainant filed “Complainant’s Response to Respondents’ Petition for Appeal of Decision and Order.” On November 2, 2001, Respondents filed “Respondents’ Response to Complainant’s Petition for Appeal of Decision and Order.” On November 8, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

²Complainant also alleges that David Cziraky violated section 2.131(b)(1), (c)(2), and (c)(3) of the Regulations (9 C.F.R. § 2.131(b)(1), (c)(2)-(3)) (Compl. ¶¶ 6-8). David Cziraky entered into a consent decision on June 29, 2001, and he is no longer a party to this proceeding. *In re The International Siberian Tiger Foundation*, 60 Agric. Dec. 291 (2001) (Consent Decision as to David Cziraky).

Based upon a careful consideration of the record, I agree with the Chief ALJ's conclusion that Respondents violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)). However, I also conclude that Respondent Diana Cziraky violated section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)). Further, I disagree with portions of the Chief ALJ's discussion. Therefore, while I retain much of the Chief ALJ's Initial Decision and Order, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order.

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

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

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

§ 2131. Congressional statement of policy

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

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

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

§ 2132. Definitions

When used in this chapter—

....

(h) The term “exhibitor” means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not[.]

....

§ 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.

....

§ 2143. Standards and certification process for humane handling, care, treatment, and transportation of animals

(a) Promulgation of standards, rules, regulations, and orders; requirements; research facilities; State authority

(1) The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.

....

(8) Paragraph (1) shall not prohibit any State (or a political subdivision of such State) from promulgating standards in addition to those standards promulgated by the Secretary under paragraph (1).

....

§ 2145. Consultation and cooperation with Federal, State, and local governmental bodies by Secretary of Agriculture

....

(b) The Secretary is authorized to cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local, or municipal legislation or ordinance on the same subject.

....

§ 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 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), 2134, 2143(a)(1), (a)(8), 2145(b), 2149(a)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

....

PART VI—PARTICULAR PROCEEDINGS

....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE.—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION

ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

- (1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq.*], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq.*], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 *et seq.*], or the Social Security Act [42 U.S.C. 301 *et seq.*], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and
- (2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

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SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note (Supp. V 1999).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*

....

(2) *Animal and Plant Health Inspection Service.*

....

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of \$2,750[.]

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

....

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not.

....

PART 2—REGULATIONS

SUBPART A—LICENSING

....

§ 2.10 Licensees whose licenses have been suspended or revoked.

....

(c) Any person whose license has been suspended or revoked shall not buy, sell, transport, exhibit, or deliver for transportation, any animal during the period of suspension or revocation.

....

SUBPART I—MISCELLANEOUS

. . . .

§ 2.131 Handling of animals.

. . . .

(b)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

. . . .

(c)(1) Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being.

(2) A responsible, knowledgeable, and readily identifiable employee or attendant must be present at all times during periods of public contact.

(3) During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.

9 C.F.R. §§ 1.1; 2.10(c), .131(b)(1), (c)(1)-(3).

STATEMENT OF THE CASE

Respondent Diana Cziraky is licensed by the Animal and Plant Health Inspection Service to operate as an exhibitor under the Animal Welfare Act. Respondent Diana Cziraky holds Animal Welfare Act license number 31-C-0123. (Compl. ¶ 4; Answer; CX 3, CX 4.) Respondent Diana Cziraky is the founder and director of Respondent The Siberian Tiger Foundation and the president of Respondent Tiger Lady LLC (CX 43). The Siberian Tiger Foundation, also referred to as The International Siberian Tiger Foundation, is an Ohio corporation. The Siberian Tiger Foundation's place of business is 22143 Deal Road, Gambier, Ohio 43022, where it exhibits lions and Siberian tigers to the public. (CX 71). The Siberian Tiger Foundation's promotional material describes Siberian tigers as animals that are threatened with extinction in the wild. The material states that, to preserve Siberian tigers, The Siberian Tiger Foundation exhibits them to the public as an educational endeavor to make the public aware of this threat. (CX 37).

The Siberian Tiger Foundation, operated by its founder, Respondent Diana Cziraky, offers interested members of the public the opportunity to have what it calls "close encounters" with its lions and tigers and the opportunity to enter into a training program to become animal trainers. The Siberian Tiger Foundation has five Siberian tigers and three lions ranging in age from 9 months to 6 years.

The mature tigers weigh from 650 to 800 pounds. (Tr. 183; CX 42). Respondent Diana Cziraky has raised the animals since they were cubs and said they are “trained, but not tame” (Tr. 929-30, 934). She testified that she has not had formal animal training but has learned about lions and tigers by reading books, talking to other animal handlers, and attending programs sponsored by the American Zoological Association and through over 10 years of actual experience with the animals (Tr. 991-92).

A person becomes a trainee by paying \$2,500 and entering into an agreement with The Siberian Tiger Foundation. The agreement provides that the trainee will receive “hands-on training” in such matters as feeding, training, and raising lions and tigers. The agreement further provides:

Trainee understands and verifies by signing below that there are inherent risks associated with exotic cats (specifically Lions and Tigers) and that any and all injuries or illnesses resulting from the contact of, or association with these animals is unintentional by [The Siberian Tiger Foundation]. Trainee assumes full responsibility for any accidents, injuries or related incidents that may occur to themselves, the cats, or others while training with the exotic cats.

CX 6.

Trainees are also personally told to expect “some minor cuts and bruises.” As part of the “hands-on” phase of their training, trainees work with handlers who accompany persons entering the animal compound to have close encounters with the cats. After 500 hours of training, the trainee receives a certificate and, generally, after 1,000 hours of training, Respondents consider the trainee fully trained in animal behavior and control. The Siberian Tiger Foundation has not kept records of the number of persons it has certified. (Tr. 126-27, 720-21, 986-90, 1001).

Members of the public desiring a close encounter pay \$35 and sign a liability waiver. Close encounters provide persons with the opportunity to have physical contact with Respondents’ cats. The liability waiver provides:

I understand that entering into the compound with Lions and Tigers is VERY DANGEROUS and that I can be injured in many different ways by the lions or tigers themselves or just by falling down. I may also suffer damage to my clothing, camera equipment, or any other personal items that I bring in with me. Although many others have entered the

compound without harm, it does not mean that I may not be injured. I hold The Siberian Tiger Foundation and its agents blameless and I accept ALL responsibility for anything that may happen to me.

CX 32.

During the time material to this proceeding, Respondents permitted parents to sign liability waivers on behalf of their children, thereby allowing children to have close encounters with Respondents' animals (Tr. 36, 113, 227, 232-34).

Before members of the public are allowed in the compound, they are given a lecture on proper behavior during the close encounter, such as following the directions of handlers, not turning their backs to the animals, keeping their heads higher than the cat's head, not making sudden movements, not pulling away if "mouthed" by a lion or tiger, and backing away slowly after the close encounter. Respondent Diana Cziraky testified that each day before close encounters begin, she visits with each animal and that she evaluates adults and children to determine whether they are good candidates for close encounters. She said she can tell whether a lion or tiger is in the mood to be viewed by the public. If not, she keeps the animal out of the compound where the close encounters will take place. She also limits close encounters to 3 hours a day. (Tr. 21-23, 227-29, 252-56, 388, 592, 608, 622-24, 719).

During the time material to this proceeding, Respondents allowed groups of up to 20 people at a time in the compound, an outdoor area surrounded by a high wire fence. During close encounters, Respondents chained most of the animals to the fence near wooden wire spools which, from photographs, appear to be 3 to 4 feet high. The animals were apparently allowed to recline on the ground or on the spools during the close encounters. (Tr. 24, 121, 135; CX 13).

As people enter the compound, they walk through a disinfectant to prevent diseases from being tracked into the compound. Those persons in the group desiring a close encounter are generally taken, one at a time by the handlers, to a chained lion or tiger and allowed to approach and touch or pet the animal. Generally, to maintain control over the animal, one handler stands near the animal's head. This handler is to keep his or her "eye on what is going on." Often, another handler is stationed on the animal's other side and stands on the chain during the encounter. Respondent Diana Cziraky testified that with these controls one handler can distract the animal and slow it down if it makes a sudden movement to give the other handler enough time to move the person having a close encounter with the animal the few feet to a safe area beyond the length of the animal's chain. After a close encounter, the person having the close encounter is to back away from the animal. A handler's other means of control is a vinegar spray bottle. The vinegar stings the cat's eyes but does not

cause permanent injury. (Tr. 121, 130-32, 135-37, 300-02, 592-94, 716-17, 794, 817, 936-38, 941, 987).

Respondent Diana Cziraky testified that the animals are declawed and that three of the tigers have been defanged. She said that tigers have short attention spans and that she can control the animals with just voice commands or a rap on the nose. Over 12,000 persons have visited The Siberian Tiger Foundation to have close encounters. (Tr. 931, 993, 1016-17).

Respondent Diana Cziraky said the Regulations are vague and that when she contacted the Animal and Plant Health Inspection Service for interpretation of the Regulations, she received different answers. She stated: "I think it's probably up to the inspector at the time to decide whether it should be this way or that way because it's not very defined." (Tr. 1032).

The Siberian Tiger Foundation has been inspected since 1997 by Animal and Plant Health Inspection Service employees. A number of witnesses testified that Respondents' facility was clean and that Respondents' animals appeared healthy, well-fed, and clean. Prior to the violations alleged in the Complaint, Respondents had not been cited for any violation of the Animal Welfare Act, the Regulations, or the Standards. (Tr. 40-43, 101-02, 249-51, 305-08, 517-18, 575, 639-41, 660-61, 665-66, 683; CX 106).

On February 28, 2000, Terry Aston was in an encounter group of four people. A lion put its paw around her foot and when she tried to pull away the lion "nipped" her on the back of the leg but without breaking the skin. Terry Aston said she was aware that lions and tigers are dangerous animals and that the encounter constituted a risk, but she also stated the animals are "such a wonderful thing to see, that you don't have any regard for anything. You just want to get in there and touch them." The nip did not deter her. She later returned to The Siberian Tiger Foundation and entered its program to become a trainer. (Tr. 356-58, 361, 388-90).

In April 2000, Gayle Channell took her 12-year-old daughter to The Siberian Tiger Foundation to have an encounter. A tiger bit the girl on the foot but quickly let go when a handler hit the tiger on the nose. (Tr. 623-25; CX 104).

On April 29, 2000, Gayle DeLeon took her daughter, Lauren DeLeon, to The Siberian Tiger Foundation where a tiger bit the girl's shoe and bit even harder when sprayed with vinegar before releasing the shoe. Lauren suffered two puncture wounds on her foot which were treated at The Siberian Tiger Foundation and later at a hospital. (Tr. 233-38; CX 75). Gayle DeLeon also said she saw a 5-year-old boy in the compound petting a tiger. When the tiger stood up, the tiger frightened the boy who "took off running towards the lioness. The [boy's] Grandmother stopped the boy, turning him in another direction

running towards another tiger. She grabbed him again and stopped him. He was screaming all this time. All the animals were up and watching him.” (CX 75 at 2-3).

Brittany Sly, a 10-year-old, liked tigers. On July 14, 2000, her father, Robert Sly, took her to The Siberian Tiger Foundation. Though he knew tigers were dangerous, he thought “it would be a special treat for her to be able to touch one.” (Tr. 21). Brittany was in an encounter group of four which was accompanied by three attendants. Robert Sly testified that, when he saw Brittany bend down to pet the tiger’s paw, the cat “stood up and came down with his mouth on my daughter’s head, on Brittany’s head . . . and drove her to the ground and started moving her around -- with him [sic] mouth on her head -- kind of like shaking her.” (Tr. 28). The attendants got wrapped in the tiger’s chain but managed to make the tiger release the girl by hitting the tiger on the nose. After calming down and receiving treatment for the bites, Brittany was taken back into the compound by her father to pet another tiger because, he said, of her “love for tigers.” (Tr. 20-21, 28-33, 44).

On October 21, 2000, Robert Newman took his 10-year-old son, Ethan, to The Siberian Tiger Foundation. It was Ethan’s fourth visit. Robert Newman said Ethan was interested in tigers and “learned to read by reading Calvin and Hobbs cartoons. So, you can see how much he is interested in tigers.” Robert Newman said he was aware that tigers are predators but believed that an encounter with tigers at The Siberian Tiger Foundation was “a low level of risk.” (Tr. 202, 217, 224, 227-29).

When Ethan encountered the tiger, she moved “relatively quickly” and grabbed his leg with her mouth. Ethan stood still as directed, but then the “tiger bit down and [Ethan] said that it hurt and then she bit down harder and he started to scream that it really hurt and at that point, he really started to scream quite loudly and was obviously in serious pain.” The tiger let go when the handler hit her on the nose. The wound required 50 stitches. (Tr. 205-06, 208-09, 211).

Jessica Lee, 19, was present at the time Ethan was bitten. She observed the incident. As it was taking place, Jessica Lee said she “backed up apparently into the range of a male lion -- just on his chain. So, he just knocked me over and pounced on me and had me flat on the ground and was trying to bite my back. And did manage to -- not really sink his teeth in, but I had a bite.” The lion released her after being sprayed with vinegar. (Tr. 594).

On October 28, 2000, a person named Jason Adelsberger was reported to have been bitten at The Siberian Tiger Foundation (Tr. 91, 552; CX 39, CX 40).

On October 29, 2000, Tonya Ware, who was enrolled in the animal trainer program, was working with another handler while a man was having a close encounter with a tiger. When the tiger made a quick move, Tonya Ware told the man to step back. As she turned her head to see if the man had backed up, the

tiger bit her foot. Tonya Ware remained quiet and did not try to pull away, but the tiger continued to bite her foot despite being sprayed with vinegar and being hit on the nose. The tiger finally released her, but not before Tonya Ware had eight wounds in her foot. Tonya Ware was treated by a doctor, but did not require hospitalization or stitches for the wounds. Tonya Ware said she knew that even trained tigers were dangerous and that she was at risk working with the animals when she entered the trainer program but did so because of her fascination and compassion for the animals. (Tr. 138-41, 150, 153, 162-64; CX 5, CX 6, CX 51).

In the meantime, on September 12, 2000, Carl LaLonde, a senior Animal and Plant Health Inspection Service investigator, instituted an investigation of The Siberian Tiger Foundation, and on November 24, 2000, served a notice of a 10-day suspension of Respondent Diana Cziraky's Animal Welfare Act license (Tr. 518, 524-25; CX 64, CX 67). The explanation accompanying the notice states:

I. The current method of exhibition at this facility, allowing the public direct contact with adult dangerous animals such as lions and tigers has resulted in bites and other injuries to individual members of the public. Therefore, this method is not compliant with Title 9 Code of Federal Regulations, Subchapter A, Animal welfare:

Section 2.131(b)(1) which indicates that animals should be exhibited so that there is minimal risk of harm to the public and the animals being exhibited. We have received information that several bites have occurred during the past 8 months.

Section 2.131(b)(1) which indicates that there should be sufficient distance and/or barriers between the animals and the general viewing public to assure the safety of the animals and the public. Many people are in the cage at one time.

Section 2.131(c)(3) which indicates that during public exhibition, animals should be under direct control of experienced handlers. The handlers are apparently unable to prevent these adverse interactions from occurring.

II. The following conditions of exhibition are in compliance with Section 2.131.

Dangerous animals in direct contact with the public for such activities as photographic sessions or “petting” must be:

Less than six months of age, and
Less than seventy-five pounds in weight and
Collared, and
On a leash not longer than 18 inches in length

Members of the public not engaging in direct contact with the animals at the time must be kept away from the exhibit animals by a barrier.

The handlers, as well as the license holder, should meet the requirements for knowledge and experience for direct public contact venues as explained in the “Dear Applicant” letter. A copy of the letter should be left with the license holder.

III. Any methods or conditions for direct contact exhibition other than those listed in II above should be approved by Animal Care prior to exhibition.

CX 53.

Ellen Magid, a veterinary medical officer and an Animal and Plant Health Inspection Service supervisory animal care specialist, testified that she had authorized Mr. LaLonde’s investigation and that the explanation accompanying the suspension notice (CX 53) was based on a settlement involving another exhibitor. She said the explanation was not intended to be a requirement but only “something to give Ms. Cziraky to help her understand the problems that we were facing and to give her some guidance on how to correct them.” (Tr. 660-62, 667, 683-84).

Dr. Peter Kirsten, a United States Department of Agriculture veterinary medical officer, and Richard Porter, a United States Department of Agriculture investigator, went undercover to Respondents’ facility on December 2, 2000, during the period when Respondent Diana Cziraky’s Animal Welfare Act license was suspended. Dr. Kirsten and Richard Porter testified that they attended a close encounter with Respondents’ animals on December 2, 2000. (Tr. 164-67, 627-30). Dr. Kirsten took photographs and Richard Porter took a video of Respondents’ exhibition of animals that show no distance or barriers between members of the general viewing public and Respondents’ animals and both Dr. Kirsten and Richard Porter each testified without contradiction that

there was no distance or barriers between members of the general viewing public and Respondents' animals (Tr. 169, 177-81, 183-84, 190-94, 305, 630-32; CX 1, CX 54-CX 62).

Respondent Diana Cziraky admits that she received the notice of suspension of her Animal Welfare Act license and exhibited animals during the period of suspension, but she states that she exhibited animals during the period of suspension only after being advised by counsel that the notice of suspension was not enforceable, as follows:

[BY MR. ROGOVIN:]

Q. I would like to take you back to your suspension by the USDA.

[BY MS. CZIRAKY:]

A. Okay.

Q. Did you in fact exhibit while under suspension from the USDA?

A. Yes, we did.

Q. Why did you do that?

A. Well, we didn't at first. It happened on a Friday and I had to wait until I talked to an attorney and the one I talked to is in Akron. His name is Tony -- I have trouble saying his name -- T-S-A-R-O-U or something like that. But the reason I wanted to speak to Tony is that he specializes in laws that pertain to animals and I wasn't sure what to do or what was going on, so come Monday, we were turning people away. And once people start traveling, we can't stop. And people come from hours and hours away. So, we were handing out extra gift certificates to use at a later date to compensate for their inconvenience.

I did finally reach Tony on the phone and I talked to him --

Q. What day did you reach him?

A. It would have been on Monday.

Q. The first Monday of your suspension?

A. Yes.

Q. Okay.

A. So, I talked to Tony and I had him on the speaker phone and he said read the letter to me, so I did and he specifically asked me is this paper signed by a judge. I said, no, it is not. Then he asked for it to be faxed over to his office.

Q. Okay.

A. Then I handed it to Jennifer and –

Q. Jennifer Adams?

A. Yes, because she was in the room, so she -- we have two lines, so she faxed it off to his office. He told us to go ahead and continue exhibiting because it was not signed by a judge and it was okay for us to keep running our business.

Q. If he had told you that it was an enforceable order even though it was not signed by a judge, would you have exhibited?

....

THE WITNESS: If he had told us that we should listen to the letter, we would have listened to the letter.

BY MR. ROGOVIN:

Q. And you would have not exhibited?

A. Of course not.

Tr. 945-47.

When Respondent Diana Cziraky failed to comply with the November 2000 suspension order, the Animal and Plant Health Inspection Service issued another suspension order on December 5, 2000, suspending Respondent Diana Cziraky's Animal Welfare Act license for 11 days (Tr. 667, 945-49; CX 33).

At the hearing, Complainant presented a series of witnesses for the purposes of showing the dangerous nature of lions and tigers and showing Respondents

exhibited lions and tigers without providing the safeguards to the animals and the public required by the Regulations.

Dr. Kirsten has had experience inspecting Animal Welfare Act licensees exhibiting exotic animals. He said that other licensed exhibitors providing close encounters evaluate both the animals and the people for safety and said he was familiar with incidents where animals have had to be “traumatized” after attacks on their handlers, citing one instance where four bears were shot and another where a tiger was sprayed with pepper. Dr. Kirsten testified that tigers are “ambushers” and “opportunistic predators” which would view a small person, a person with an infirmity, or an elderly person as an “opportunity” and that they attack by biting their prey. He visited The Siberian Tiger Foundation on December 2, 2000, and expressed the opinion that encounter groups of 10 or 12 persons are too large to supervise, that there did not appear to be any criteria for selecting persons for encounters, that the safe area was not clearly marked, that the chains allowed the animals too much movement, and that a man standing on a tiger’s chain could not have controlled a 400- or 500-pound tiger if the tiger decided to move. (Tr. 166-71, 173-74, 176-78, 181-84, 344).

Dan Hunt, assistant director of the Living Collection for the Columbus (Ohio) Zoo, has had over 20 years’ experience handling “large cats,” which includes lions and tigers. The Columbus Zoo, which has an Animal Welfare Act license, uses pepper spray to control the animals. He said, because of their genetic makeup, tigers are programmed predators which have killed thousands of persons in India and that even hand-raising an animal does not “unwire that predisposition.” Dan Hunt said their behavior is unpredictable, their disposition can change in a “split second,” and direct contact with the animals is “inherently dangerous.” A tiger, he said, uses a sweeping motion with its paw to knock small game off balance and when a tiger similarly curves its paw around a human, the tiger thinks it “owns that human being.” Dan Hunt said, under some circumstances, the Columbus Zoo will allow persons to pet tiger cubs up to the age of 6 months but even that can constitute a risk. Columbus Zoo board members and their guests, including children, have also been allowed to have encounters with animals. Dan Hunt said that he has been attacked by a tiger at the Columbus Zoo and that a woman was injured by a tiger. (Tr. 426, 437-39, 457-58, 462, 472, 483-84, 501, 506-08, 514-15, 917-19).

Baron Julius von Uhl, an exhibitor licensed under the Animal Welfare Act, has worked in circuses and shows as a trainer of lions, tigers, and leopards since 1954. He said that tigers are too dangerous to allow people to interact with them. He has seen a trainer killed and knows others who “got chewed up” and even bought the cats that killed their trainer as publicity for his show. Julius von

Uhl said that a cat putting its paw around a person's leg is demonstrating its dominance and places the person at the "mercy of the animal." Julius von Uhl said a person standing on a lion's chain cannot control the animal and the chain could wrap around and break the person's leg if the animal moved. He uses a whip and stick to control the animals with which he interacts but said a trainer has to be dominant and have the respect of the animals. He said it takes 3 years to become a trainer. (Tr. 392, 400-10, 413-15).

Alicia Hall, a zoologist called by Respondents as a witness, has studied animal behavior. She said tigers and lions are dangerous but curious animals with short attention spans. While they are predators, she said, socialized tigers do not regard humans as prey. As for the risks involved with the encounters at The Siberian Tiger Foundation, Ms. Hall testified, as follows:

[BY MR. ROGOVIN:]

Q. Based on your experience and observations at the Siberian Tiger Foundation, how would you evaluate the risks of people having close encounters with these tigers?

....

[BY MS. HALL:]

THE WITNESS: Inherently, any time any human is around a larger order primate -- or larger order animal, there is a risk. By nature these animals are predators, therefore, they are equipped with equipment to do damage to prey. So, there is an inherent risk.

The question is specifically are risks addressed? It's a really hard question to answer. I think it's all a matter of degrees. Like I said, I was a dog groomer. There is not a dog groomer in existence that hasn't been bit every single day they go to work. You go to work, you get bit. That's just the rule.

....

THE WITNESS: There is a risk involved and it's just inherent. It's not that the risk is any greater because these animals [lions and tigers] are vicious or violent. It's just they have bigger equipment. So, an accidental touch or an accident [sic] move of the head can inflict a larger wound than an accidental movement of a dog's head, but I don't think in a controlled environment like [The Siberian Tiger Foundation's environment], that the risk of intentional damage or intentional infliction of harm is any greater at all. I don't think there is a significant risk.

Tr. 265-66.

Other witnesses were presented to testify that, because of their interest in or love of tigers and lions, they were willing to assume the risk of being injured just to have the opportunity for an encounter with these animals.

Beth Wismar, for example, a faculty member of the College of Medicine, Ohio State University, with a doctorate in anatomy, has been a volunteer teacher at the Columbus Zoo for 14 years. She testified that when she visited The Siberian Tiger Foundation she was aware of the danger when she petted the animals. (Tr. 801, 805, 810-11, 813).

Marie Collart, a registered nurse, said that she visited The Siberian Tiger Foundation because of her "life-long interest in the big cats." She said she was aware of the danger and risk of injury. Her comment on her willingness to have encounters with lions and tigers was that "life has risks." (Tr. 752, 780).

Jane Zickau, a vice president of administrative services, Central Ohio Breathing Association, said she visited The Siberian Tiger Foundation because "I am [a] cat lover and an animal lover" and she knew there was a risk and she accepted the risk. Asked if she would return to The Siberian Tiger Foundation despite the incidents that occurred there, she responded: "As soon as this is over, I will go back. Absolutely." (Tr. 784, 799-800).

Anne Taylor, a municipal court judge and a member of the board of the Columbus Zoo, testified that she is an animal lover and photographer. She said that she has had encounters with grizzly bears and with tigers in China, as well as at The Siberian Tiger Foundation, and that "I think there ought to be a place in the world for people to have this personal, unique encounter with animals, particularly the big cats, which I think are probably the most beautiful animal." She added that leopards have been allowed to attend board meetings at the Columbus Zoo, that a python was allowed to wrap itself around her neck, and that, as part of the Columbus Zoo's program to allow board members and contributors to the Columbus Zoo to have "behind the scenes" tours and encounters, Judge Taylor's niece and nephew, 6 and 15 years of age, were allowed by the Columbus Zoo to have an encounter with a Siberian tiger weighing between 300 and 400 pounds. (Tr. 900-01, 903-05, 917-19).

Since Complainant filed the Complaint, Respondents have improved their safety practices. These improvements include shortening the control chains on the animals, using more handlers during close encounters, making encounter groups smaller, not allowing children under the age of 16 to have close encounters, and acquiring a tranquilizer gun. (Tr. 938, 1035).

DISCUSSION

Complainant contends Respondents repeatedly violated the handling provisions of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) in a manner that placed the public and the exhibited animals at risk of harm.

Respondents argue, *inter alia*, that there was no violation of the Animal Welfare Act as it relates to the public. Respondents contend that section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) purporting to deal with public safety exceeds the scope of the Animal Welfare Act because the fundamental purpose of the Animal Welfare Act is to insure the humane treatment of animals and that “there is nothing in the Act which even suggests the purpose of protecting the public against animals.” (Respondents’ Post-Hearing Brief at 9). Respondents argue “Congress did not authorize the Secretary to become the general guardian of public safety where animals are concerned. It is not the function of [an administrative proceeding] to rectify each and every perceived threat or actual injury to the public simply because a holder of a license under the Act becomes the subject of publicity and Complainant suffers some embarrassment. There are local courts, laws and remedies for this.” (Respondents’ Post-Hearing Brief at 12-13). As Respondents contend, the historic police power of a state or municipality to regulate animals has not been supplanted by the Animal Welfare Act. *DeHart v. Town of Austin*, 39 F.3d 718 (7th Cir. 1994).

Complainant counters with the argument that Congress intended that animals be exhibited in a manner that is safe for both animals and the public because the Animal Welfare Act refers to the public concern for animals and that, before there can be an exhibition, animals must be exposed to the public. Complainant further argues the lack of adequate safeguards when animals are exhibited can lead to injuries to the public which, in turn, can result in the animals being subjected to unnecessary discomfort or harm through such means as being hit with a stick, sprayed with a CO₂ fire extinguisher, or even being killed. (Complainant’s Post-Hearing Brief at 2-5). Respondents argue that this discomfort, which Respondents contend is momentary, is a necessary disciplinary means of controlling the animal (Respondents’ Post-Hearing Brief at 2).

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure that they are provided humane care and treatment (7 U.S.C. § 2131). The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling of animals by exhibitors (7 U.S.C. §§ 2143(a), 2151). The Regulations deal almost exclusively with the care and treatment of animals. However, section 2.131(b)(1) of the Regulations (9 C.F.R. §

2.131(b)(1)) also provides that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public.

Animals that attack or harm members of the public are at risk of being harmed. The record establishes that effective methods of extricating people from the grip of an animal can cause the animal harm and can cause the animal's death (Tr. 406-07, 409-10, 458-59, 671-72). Even after an animal attacks a person, the animal is at risk of being harmed for revenge or for public safety reasons (Tr. 520-21, 671). Respondents often sprayed their animals with vinegar or struck their animals when the animals bit members of the public. Occasionally, Respondents sprayed their animals with CO₂ fire extinguishers to stop an attack. (Tr. 27, 937-38, 992-93). Respondent Diana Cziraky testified that her first tiger that attacked a small girl was confiscated by the health department and decapitated to test it for rabies (Tr. 926-27, 949). Thus, section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), which requires that, during public exhibition, animals be handled so there is minimal risk of harm to the public, with sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the public, is directly related to the humane care and treatment of animals and within the authority granted to the Secretary of Agriculture under the Animal Welfare Act.

Complainant contends the incidents where members of the public were injured were the direct result of Respondents' failures to handle their animals as required by section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)). Specifically, Complainant alleges Respondents' following practices led to the incidents where persons were injured and were therefore violations: (a) allowing small children to have direct contact with adult lions and tigers without having adequate barriers or controls; (b) allowing persons to be placed in the position of appearing as prey to the animals; (c) allowing animals to be exhibited to the public without having adequately trained and experienced personnel to control the animals; (d) using chains to tether the animals that were inadequate to prevent the animals from injuring people; (e) using ineffective measures, such as hitting the animals or spraying the animals with vinegar to control the animals; (f) allowing encounter groups that were too large to supervise; and (g) failing to provide a safe distance between the animals and the public (Complainant's Post-Hearing Brief at 12-31).

Respondents argue the Secretary of Agriculture has not issued standards covering the practices used by Respondents in handling and exhibiting animals. Respondents state the Animal and Plant Health Inspection Service was aware of Respondents' practices through its inspections of Respondents' facility and had

therefore, in effect, approved them. Respondents contend, therefore, that, in the absence of standards, the practices that they followed must be considered adequate. (Respondents' Post-Hearing Brief at 1-7).

"In order to satisfy constitutional due process requirements, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit." *Freeman United Coal Mining Co. v. Federal Mine Safety and Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997); "Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). Section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) specifically requires Respondents to handle animals during public exhibition so there is minimal risk of harm to the animals and the public with sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the animals and the public.

The evidence presented by Complainant overwhelmingly establishes that lions and tigers are instinctive and dangerous predators. They can be trained but not tamed. Even when trained, these powerful animals can inflict serious injuries on people as demonstrated not only by the incidents at Respondents' facility, but also by the incidents referred to at the Columbus Zoo, the incidents involving handlers referred to by Dr. Kirsten, and the incidents involving injuries to trainers referred to by Baron Julius von Uhl.

Respondents' lions and tigers are simply too large, too strong, too quick, and too unpredictable for a person (or persons) to restrain the animal or for a member of the public in contact with one of the lions or tigers to have the time to move to safety. Respondents' animals had a history of injuring members of the public and a history of being hit and sprayed with vinegar in order to stop their attacks on members of the public. Nonetheless, Respondents failed to have any distance or barriers between their animals and the general viewing public. I conclude section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) provides Respondents with adequate notice of the manner in which Respondents' animals are required to be handled during public exhibition. Given the size, quickness, strength, and unpredictability of Respondents' animals, Respondents should have known that some distance or barrier between Respondents' animals and the general viewing public is necessary so as to assure the safety of Respondents' animals and the public.

The incidents that occurred at Respondents' facility during the period February 28, 2000, through December 2, 2000, show that Respondents were not in compliance with the handling requirements of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)). Therefore, by failing to handle animals

during public exhibitions so there was minimal risk of harm to the animals and the public and by failing to maintain sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, Respondents willfully violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)).

Section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)) prohibits any person whose Animal Welfare Act license has been suspended from exhibiting any animal during the period of suspension. Respondents do not argue that section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)) fails to provide them with adequate notice of the conduct which is prohibited. I conclude that section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)) provides exhibitors with adequate notice of the conduct which is prohibited.

Complainant proved by a preponderance of the evidence that on December 2, 2000, Respondent Diana Cziraky exhibited animals during a period when her Animal Welfare Act license was suspended, in willful violation of section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)).³ Specifically, the record

³The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 643-44 n.8 (2000) (Order Denying Respondent's Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 149, 151 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1107-08 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1052 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1015 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), printed in 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), printed in 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), printed in 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological*

(continued...)

establishes that pursuant to section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)), the Administrator, Animal and Plant Health Inspection Service, temporarily suspended Respondent Diana Cziraky's Animal Welfare Act license for a 10-day period beginning on November 24, 2000 (CX 64, CX 67). On December 2, 2000, during the period of suspension, Respondent Diana Cziraky exhibited animals (Tr. 166-67, 169, 177-81, 183-84, 190-94, 305, 629-32; CX 1, CX 49, CX 54-CX 62). Respondent Diana Cziraky admits that she received the notice of suspension of her Animal Welfare Act license and exhibited animals during the period of suspension, but she states that she exhibited animals during the period of suspension only after being advised by counsel that the notice of suspension was not enforceable (Tr. 945-47).

Respondent Diana Cziraky's reliance on erroneous advice is not a defense to her violation of section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)). Moreover, Respondent Diana Cziraky's reliance on erroneous advice does not negate the willfulness of Respondent Diana Cziraky's violation of section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)). An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent or reliance on erroneous advice, or done with careless disregard of statutory requirements.⁴ The United States Court of

(...continued)

Consortium of Maryland, Inc., 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

⁴*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 621 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re James E. Stephens*, 58 Agric. Dec. 149, 201 n.7 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1144 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (2000); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1061 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1034 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 286 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1998) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1454 n.4 (1997), *aff'd*, 173 F.3d 422 (3d Cir. 1998) (Table), *printed in* 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be

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Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word “willfulness,” as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep’t of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Appeal in this proceeding does not lie either to the United States Court of Appeals for the Fourth Circuit or to the United States Court of Appeals for the Tenth Circuit. However, even under this more stringent definition, Respondent Diana Cziraky’s violation of section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)) would still be found willful.

Section 2.131(c)(2) of the Regulations (9 C.F.R. § 2.131(c)(2)) requires that a responsible, knowledgeable, and readily identifiable employee or attendant must be present during periods of public contact with animals, and section 2.131(c)(3) of the Regulations (9 C.F.R. § 2.131(c)(3)) requires that, during public exhibition, dangerous animals must be under the direct control and supervision of a knowledgeable and experienced animal handler. Complainant failed to prove by a preponderance of the evidence that Respondents violated section 2.131(c)(2) and (c)(3) of the Regulations (9 C.F.R. § 2.131(c)(2), (c)(3)).⁵

COMPLAINANT’S APPEAL PETITION

(...continued)

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, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also* *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 187 n.5 (1973) (“‘Wilfully’ could refer to either intentional conduct or conduct that was merely careless or negligent.”); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) (“In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’”)

⁵See note 3.

Complainant raises 12 issues in Complainant's Petition for Appeal of Decision and Order [hereinafter Complainant's Appeal Petition]. First, Complainant asserts the record does not support the Chief ALJ's statement that a person becomes a trainer by paying \$2,500 and entering into an agreement with The Siberian Tiger Foundation (Complainant's Appeal Pet. at 5). The Chief ALJ states "[a] person becomes a trainer by paying \$2,500 and entering into an agreement with the Foundation" (Initial Decision and Order at 2). I agree with Complainant that the record does not support the Chief ALJ's statement. Instead, the record establishes that a person who pays \$2,500 and enters into an agreement with The Siberian Tiger Foundation is referred to as a "trainee" and the purpose of the agreement is to train the trainee "in the area of exotic cats and the ownership thereof" (CX 6). Further, the record establishes that a trainee must receive a minimum of 500 hours of training before losing the status of a trainee (Tr. 988-89). Therefore, I do not adopt the Chief ALJ's statement that a person becomes a trainer by paying \$2,500 and entering into an agreement with The Siberian Tiger Foundation. Instead, I find that a person becomes a trainee by paying \$2,500 and entering into an agreement with The Siberian Tiger Foundation.

Second, Complainant contends the record does not support the Chief ALJ's statement that after 1,000 hours a trainee is considered fully trained in animal behavior and control. Complainant asserts the Chief ALJ's statement appears to accept Respondents' view of what "fully trained" means (Complainant's Appeal Pet. at 5). The Chief ALJ states:

As part of the "hands on" phase of their training, trainees work with handlers who accompany persons entering the animal compound to have a "close encounter" with the cats. After five hundred hours of training[,] the trainee receives a certificate and after a thousand hours the trainee is considered fully trained in animal behavior and control.

Initial Decision and Order at 3.

The Chief ALJ does not state that he found Respondents' trainees fully trained in animal behavior and control after 1,000 hours of training as Complainant contends. Instead, the Chief ALJ uses the passive voice of the verb "to consider" and does not indicate who considers Respondents' trainees fully trained in animal behavior and control after 1,000 hours of training. Based on the record, which establishes that Respondents generally consider their trainees fully trained after 1,000 hours of training (Tr. 720-21, 988-89) and my reading of the Initial Decision and Order, I infer the Chief ALJ found that Respondents consider their trainees fully trained in animal behavior and control

after 1,000 hours of training. I restate the Chief ALJ's Initial Decision and Order by eliminating the passive voice of the verb "to consider" and stating that generally Respondents consider a trainee fully trained in animal behavior and control after 1,000 hours of training.

Third, Complainant contends the Chief ALJ's description of Respondents' close-encounter method of exhibition is error. The Chief ALJ states, as follows:

Large groups are broken down into smaller groups and each group is accompanied by two to four handlers. The group is then stationed in a "safe area" which is beyond the length of the chains attached to each cat. Those persons in the group desiring a "close encounter" are taken one at a time by the handlers to the chained lion or tiger and allowed to approach and touch or pet the animals from behind. Meanwhile, to maintain control over the animal, one handler, a "spotter," stands near the animal's head with his/her hand either poised above the head or holding the animal's collar. The spotter is to keep his/her "eye on what is going on." The other handler is stationed on the animal's other side and stands on the chain to keep the chain taut during the encounter.

Initial Decision and Order at 4.

The record does not support the Chief ALJ's statement that each group of people was accompanied by two to four handlers. Respondent Diana Cziraky admitted that on some occasions Respondents allowed members of the public to have direct contact with lions and tigers with only one handler present (Tr. 990).

The record does not support the Chief ALJ's statement that groups were stationed in "safe areas" which is beyond the length of the control chain attached to each cat. On October 21, 2000, Jessica Lee was a member of the public observing another member of the public, Ethan Newman, pet a tiger named Imara. When Imara began biting Ethan Newman, Jessica Lee stepped back, whereupon Joseph, a male lion, knocked Jessica Lee over, pounced on her, bit her, and released her only after his eyes were sprayed with vinegar (Tr. 594). An incident such as the October 21, 2000, incident involving the injury to Jessica Lee establishes that Respondents did not always place groups in safe areas. Further, on February 28, 2000, Respondents allowed Nikita, a male tiger, to walk around freely during a close encounter (CX 84-CX 90, CX 94-CX 96). Terry Aston, one of Respondents' trainees, testified that Nikita was allowed to walk around freely on several occasions, as follows:

[BY MS. CARROLL:]

Q. And how long did you [train]?

[BY MS. ASTON:]

A. March to June was my last. I had moved, so I didn't go back there. In my training time that I was there, supposedly, my volunteering time as I call it, Nikita walked around freely quite a bit. I mean, we could have a crowd in there of 20 people and if Nikita decided to come of his den, he did and you just herd the people up and we would stand in front of him and Nikita would walk around.

One day in May, they had put up the swimming pool. They have a swimming pool for the animals, but we had to put a big caging around it because Imara, the youngest one, she has a tendency to want to play in there and then use it as a bathroom.

And two of the ladies that were there that day were so scared when Nikita walked out, they went in that enclosure closed the gate and locked themselves in there.

Q. With Imara?

A. No, Imara wasn't in there. Nobody was in there at that time because it's very intimidating to some people to have a cat that large just walking free.

Tr. 373-74.

I find that during the close encounters in which Respondents allowed Nikita to roam freely, no area could be considered a "safe area" which is beyond the length of the control chain attached to each cat.

The record does not support the Chief ALJ's statement that close encounters were limited to touching or petting the animals from behind. The evidence reveals that members of the public were often face-to-face with Respondents' animals (CX 1, CX 59-CX 61, CX 80-CX 88).

The record does not support the Chief ALJ's statement that during close encounters the control chain attached to each animal was kept taut by a handler. On a number of occasions, Respondents failed to keep taut the control chain attached to the animal with which a member of the public was having a close

encounter or there was no control chain attached to the animal (CX 13, CX 93-CX 97).

Therefore, I do not adopt the Chief ALJ's description of Respondents' close-encounter method of exhibition, and I substantially modify the Chief ALJ's description of Respondents' close-encounter method of exhibition.

Fourth, Complainant asserts the Chief ALJ erroneously indicates Respondents had an accessible CO₂ fire extinguisher and an available tranquilizer gun on the dates alleged in the Complaint (Complainant's Appeal Pet. at 8). The Chief ALJ states: "A CO₂ fire extinguisher is also accessible. It provides control of the animal by temporarily depriving it of oxygen. A tranquilizer gun is available if necessary" (Initial Decision and Order at 5).

I agree with Complainant's contention that the record establishes that Respondents did not acquire a tranquilizer gun until February or March of 2001 (Tr. 938), well after the violations alleged in the Complaint. Further, the record does not establish that a CO₂ fire extinguisher was accessible during the entire period covered in the Complaint (Tr. 1035). Therefore, I do not adopt the Chief ALJ's statement that "[a] CO₂ fire extinguisher is . . . accessible" and "[a] tranquilizer gun is available if necessary" (Initial Decision and Order at 5). Instead, I find Respondents made CO₂ fire extinguishers more accessible to handlers and acquired a tranquilizer gun after Complainant filed the Complaint.

Fifth, Complainant asserts the Chief ALJ erroneously stated that Respondent Diana Cziraky keeps a daily record of each animal's behavior and discusses each animal's behavior with the trainers (Complainant's Appeal Pet. at 8-9). The Chief ALJ states Respondent Diana Cziraky "keeps a daily record of each animal's behavior and discusses their behavior with the trainers" (Initial Decision and Order at 5).

The record does not support the Chief ALJ's statement that Respondent Diana Cziraky keeps a daily record of each animal's behavior and discusses each animal's behavior with the trainers. Complainant introduced part of a notebook in which one of Respondents' students recorded the behavior of one of Respondents' tigers. The notebook contains three consecutive entries: one for October 21, 2000; another for October 29, 2000; and the last for October 30, 2000. Further, Respondent Diana Cziraky testified that the students keep the notebooks and bring to her attention any issues of major concern. (CX 46; Tr. 993-94). Therefore, I do not adopt the Chief ALJ's statement that Respondent Diana Cziraky keeps a daily record of each animal's behavior and discusses each animal's behavior with the trainers.

Sixth, Complainant contends the Chief ALJ erroneously suggests that Complainant's legal theory is that Respondents were in compliance with section

2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) until people were bitten by Respondents' animals (Complainant's Appeal Pet. at 9-10).

The Chief ALJ states Complainant's "rationale for alleging a violation in this proceeding is that . . . the Foundation was in compliance with section 2.131(b)(1) until people were bitten" (Initial Decision and Order at 19). However, the Chief ALJ also indicates Complainant's position is that Respondents' failures to handle their animals so there was minimal risk of harm to the animals and the public with sufficient distance or barriers or distance and barriers between the animals and the general viewing public, so as to assure the safety of the animals and the public, constituted violations of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) (Initial Decision and Order at 9, 15, 17).

Complainant's filings reveal that Complainant's rationale for alleging Respondents violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) is that during public exhibition, Respondents failed to handle their animals so there was minimal risk of harm to the animals and the public, with sufficient distance or barriers or distance and barriers between the animals and the general viewing public, so as to assure the safety of the animals and the public. The record clearly establishes that Complainant views the bites and other injuries sustained by people who had close encounters with Respondents' animals as the consequence of Respondents' violations of the Regulations. I find nothing in Complainant's filings indicating that Complainant takes the position that Respondents' animals' bites constitute violations of the Regulations, and I do not adopt the Chief ALJ's statement that Complainant's rationale for alleging a violation in this proceeding is that Respondents were in compliance with section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) until people were bitten.

Seventh, Complainant contends the Chief ALJ erroneously assumed that Respondents' "premium customers" who paid \$2,500 for exposure to Respondents' animals were trainers and not members of the public. Complainant contends the record establishes that these "premium customers" were members of the "public" and "the general viewing public" as those terms are used in section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)). (Complainant's Appeal Pet. at 10-13).

I agree with Complainant that the record does not establish that persons who paid \$2,500 for exposure to Respondents' animals were trainers. Instead, the record establishes that persons who paid \$2,500 and entered into training agreements with The Siberian Tiger Foundation were Respondents' "trainees" (CX 6). However, I do not agree with Complainant's contention that Respondents' trainees were members of "the public" or members of "the general viewing public." The Regulations do not define the term "the public" or the

term “the general viewing public” as used in section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), and Complainant did not prove by a preponderance of the evidence that Respondents’ trainees were members of “the public” or members of “the general viewing public” as those terms are used in section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)).⁶

Eighth, Complainant contends the Chief ALJ’s suggestion that, under the Regulations, all dealers, exhibitors, intermediate handlers, and carriers and their bonafide employees are members of “the public” and “the general viewing public” under section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), is error (Complainant’s Appeal Pet. at 13-14).

The Chief ALJ states section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) prohibits any exhibition where there is human interaction with dangerous animals and, although it could be argued that persons who actually conduct the exhibitions of dangerous animals are not members of the viewing public, section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) does not provide for any exceptions (Initial Decision and Order at 19, 22 n.5).

I disagree with the Chief ALJ’s conclusion that section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) prohibits any exhibition where there is human interaction with dangerous animals and the Chief ALJ’s conclusion that persons who exhibit animals fall within the meaning of the term “the public” and the term “the general viewing public” in section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)).

Section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) clearly does not prohibit the exhibition of dangerous animals. To the contrary, section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) specifically states “during public exhibition” an exhibitor of animals must adhere to certain conditions.

The Regulations do not define the term “the public” or the term “the general viewing public.” However, generally, the term “the public” does not mean all people, as the Chief ALJ suggests. Instead, the term “the public” is often used to distinguish a large group of people from a smaller group of people. For instance, if one were to say “the plumber treats the public fairly,” this statement generally would not be interpreted to indicate how the plumber treats his or her employees, apprentices, or himself or herself. Similarly, the term “the general viewing public” is not always used to mean “all people who view an event or object.” The term “the general viewing public” is often used in a way that excludes those who are presenting the event or object to an audience. For

⁶See note 3.

instance, a projectionist in a movie theater and other movie theater employees who happen to see a movie or part of a movie which is being shown to movie theater patrons often would not be considered members of “the general viewing public.” Thus, I find, as commonly used and in order to carry out the purpose of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), the terms “the public” and “the general viewing public,” as used in section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), do not include exhibitors.⁷

Ninth, Complainant contends the Chief ALJ erroneously focuses on whether Respondents’ customers voluntarily assumed the risk of injury in interacting with Respondents’ lions and tigers. Complainant argues that assumption of the risk of close encounters with Respondents’ animals is not relevant to the issue of whether Respondents violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) (Complainant’s Appeal Pet. at 14).

I agree with Complainant that Respondents’ customers’ assumption of the risk of close encounters with Respondents’ animals is not relevant to the issue of whether Respondents violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)). Section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) requires that, during public exhibition, animals must be handled so there is minimal risk of harm to the animals and the public. Even if a member of the public acknowledges that there is greater than minimal risk of harm associated with a close encounter with Respondents’ animals and accepts a greater than minimal risk, Respondents are still required by section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) to handle their animals during public exhibition so there is minimal risk of harm to the animals and the public. Further, section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) requires that Respondents provide sufficient distance or barriers or distance and barriers between their animals and the general viewing public so as to assure the safety of the animals and the public. The requirements in section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) are neither negated nor affected in any way by a customer’s acknowledgment and acceptance of the risk of harm associated with a close encounter with Respondents’ animals or by a customer’s waiver of liability. Despite the Chief ALJ’s focus on assumption of the risk, I note the

⁷*Cf. United States v. Bruno’s Inc.*, 54 F. Supp. 2d 1252, 1257 (M.D. Ala. 1999) (stating, in the context of federal and Alabama medicaid regulations, the term “general public” refers to customers paying the prevailing retail price and does not include those covered by third-party payers such as Blue Cross-Blue Shield); *Lish v. Harper’s Magazine Foundation*, 807 F. Supp. 1090, 1101-02 (S.D.N.Y. 1992) (holding the term “the public” in the Copyright Act does not include a fiction writer’s prospective students to whom he had sent a copyrighted letter which stressed the confidentiality of class and restricted disclosure of the letter’s contents); *Investment Registry v. Chicago & M. Electric R.*, 206 F. 188, 192 (N.D. Ill. 1913) (stating the general rule is that the public is free to bid for property offered at a judicial sale; however, the term “general public,” as used in this connection, does not include persons who, by virtue of lien, ownership, or otherwise have an existing interest in the property to be sold).

Chief ALJ did not conclude that assumption of the risk by members of the public having close encounters with Respondents' animals constitutes a defense to Respondents' violations of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)). I retain some of the Chief ALJ's discussion concerning Respondents' customers' assumption of the risk; however, I do not conclude that Respondents' customers' assumption of the risk constitutes a defense to Respondents' violations of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)).

Tenth, Complainant contends the Chief ALJ erroneously found that section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) effectively bars all direct contact between any person and any dangerous animal (Complainant's Appeal Pet. at 15-16).

The Chief ALJ states "[i]nterpreted literally, [section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1))] effectively prohibits not only any 'close encounter' exhibition but also any other type of exhibition where there is human interaction with dangerous animals" (Initial Decision and Order at 19). The plain language of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) clearly does not prohibit human interaction with dangerous animals during exhibition. As previously discussed, I find, as commonly used and in order to carry out the purpose of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), the terms "the public" and "the general viewing public," as used in section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), do not include exhibitors. Therefore, section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) places no restriction on the interaction between an animal being exhibited and the exhibitor. Consequently, I reject the Chief ALJ's conclusion that section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) effectively prohibits human interaction with dangerous animals.

Eleventh, Complainant contends the Chief ALJ erroneously failed to find that Respondents violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) on December 2, 2000 (Complainant's Appeal Pet. at 16-17).

The Chief ALJ found that from on or about February 28, 2000, through October 29, 2000, Respondents failed to handle lions and tigers during public exhibition so there was minimal risk of harm to the public and failed to have sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the public, in violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) (Initial Decision and Order at 23-24). Complainant alleges Respondents willfully violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) on or about March 2000, April 29, 2000, May 14, 2000, June 2000, July 14, 2000, September 2000,

October 21, 2000, October 28, 2000, October 29, 2000, and December 2, 2000 (Compl. ¶ 6).

The record supports the conclusion that on December 2, 2000, Respondents failed to handle lions and tigers during public exhibition so there was minimal risk of harm to the animals and to the public and failed to have sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)). Dr. Peter Kirsten and Richard Porter testified that they attended a close encounter with Respondents' animals on December 2, 2000 (Tr. 166-67, 629-30). Dr. Kirsten took photographs and Richard Porter took a video of Respondents' exhibition of animals that show no distance or barriers between members of the general viewing public and Respondents' animals, and Dr. Kirsten and Richard Porter each testified without contradiction that there was no distance or barriers between members of the general viewing public and Respondents' animals (Tr. 169, 177-81, 183-84, 190-94, 305, 630-32; CX 1, CX 54-CX 62). Therefore, I conclude that on December 2, 2000, Respondents failed to handle lions and tigers during public exhibition so there was minimal risk of harm to the animals and the public and failed to have sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)).

Twelfth, Complainant contends the Chief ALJ erroneously failed to find that Respondent Diana Cziraky violated section 2.1 of the Regulations (9 C.F.R. § 2.1) by engaging in regulated activities without an Animal Welfare Act license (Complainant's Appeal Pet. at 17-18).

Complainant did not allege that Respondent Diana Cziraky violated section 2.1 of the Regulations (9 C.F.R. § 2.1) (Compl.). Therefore, I do not find the Chief ALJ erred by failing to conclude that Respondent Diana Cziraky violated section 2.1 of the Regulations (9 C.F.R. § 2.1).

However, Complainant did allege that on at least three occasions between November 25, 2000, and December 2, 2000, while Respondent Diana Cziraky's Animal Welfare Act license was suspended, Respondent Diana Cziraky exhibited lions and tigers, in willful violation of section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)). The record supports the conclusion that Respondent Diana Cziraky exhibited lions and tigers during the period her Animal Welfare Act license was suspended, in willful violation of section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)).

Specifically, the record establishes that pursuant to section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)), the Administrator, Animal and Plant Health Inspection Service, temporarily suspended Respondent Diana Cziraky's

Animal Welfare Act license for a 10-day period beginning on November 24, 2000 (CX 64, CX 67). On December 2, 2000, during the period her Animal Welfare Act license was suspended, Respondent Diana Cziraky exhibited animals (Tr. 166-67, 169, 177-81, 183-84, 190-94, 305, 629-32; CX 1, CX 49, CX 54-CX 62). Respondent Diana Cziraky admits that she received the notice of suspension of her Animal Welfare Act license and exhibited animals during the period of suspension, but she states that she exhibited animals during the period of suspension only after being advised by counsel that the notice of suspension was not enforceable (Tr. 945-47).

Respondent Diana Cziraky's reliance on erroneous advice is not a defense to her violation of section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)). Moreover, Respondent Diana Cziraky's reliance on erroneous advice does not negate the willfulness of Respondent Diana Cziraky's violation of section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)). An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of reliance on erroneous advice.⁸

RESPONDENTS' APPEAL PETITION

Respondents raise four issues in Respondents' Appeal to Judicial Officer [hereinafter Respondents' Appeal Petition]. First, Respondents contend the Chief ALJ erroneously applied section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) to protect public safety. Respondents contend the application of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) to public safety exceeds the authority granted to the Secretary of Agriculture by Congress and interferes with the historic police power of the states and local governments to regulate the control of animals to protect human beings. Respondents state that nothing in the Animal Welfare Act suggests that Congress intended its protection to extend to human beings or that Congress intended to preempt local regulations designed to protect the public. (Respondents' Appeal Pet. at 1).

I disagree with Respondents' contention that the provisions of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) which relate to the risk of harm to the public and the safety of the public exceed the authority granted to the Secretary of Agriculture in the Animal Welfare Act. One of the purposes of the Animal Welfare Act is to insure that animals intended for exhibition are provided humane care and treatment (7 U.S.C. § 2131). The Secretary of

⁸See note 4.

Agriculture is specifically authorized to promulgate regulations to govern the humane handling of animals by exhibitors (7 U.S.C. §§ 2143(a)(1), 2151).

Animals that attack or harm members of the public are at risk of being harmed. The record establishes that effective methods of extricating people from the grip of an animal can cause the animal harm and can cause the animal's death (Tr. 406-07, 409-10, 458-59, 671-72). Even after an animal attacks a person, the animal is at risk of being harmed for revenge or for public safety reasons (Tr. 520-21, 671). Respondents often sprayed their animals with vinegar or struck their animals when the animals bit members of the public. Occasionally, Respondents sprayed their animals with CO₂ fire extinguishers to stop an attack. (Tr. 27, 937-38, 992-93). Respondent Diana Cziraky testified that her first tiger that attacked a small girl was confiscated by the health department and decapitated to test the tiger for rabies (Tr. 926-27, 949). Thus, section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), which requires that, during public exhibition, animals be handled so there is minimal risk of harm to the public, with sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the public, is directly related to the humane care and treatment of animals and within the authority granted to the Secretary of Agriculture under the Animal Welfare Act.

With respect to Respondents' contention that section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) interferes with state or local regulations designed to control animals to protect human beings, Respondents cite no state or local law or regulation with which section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) interferes. Moreover, Respondents cite no state or local law or regulation that is preempted by section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)).

The Animal Welfare Act does not expressly or impliedly preempt state or local law.⁹ Instead, the Animal Welfare Act specifically provides that states and

⁹*DeHart v. Town of Austin*, 39 F.3d 718, 722 (7th Cir. 1994) (stating it is clear that the Animal Welfare Act does not evince an intent to preempt state or local regulation of animal or public welfare; the Animal Welfare Act expressly contemplates state and local regulation of animals); *Kerr v. Kimmell*, 740 F. Supp. 1525, 1529-30 (D. Kan. 1990) (stating in determining whether a particular state regulation is preempted by the Animal Welfare Act, the critical inquiry is one of congressional intent; finding the Animal Welfare Act does not evince a congressional intent to preempt state regulation of animal welfare); *Winkler v. Colorado Dep't of Health*, 564 P.2d 107, 111 (Colo. 1977) (rejecting the plaintiffs' contention that the Animal Welfare Act preempts Colorado regulation of the importation of pets for resale from states with less stringent licensing laws for commercial pet dealers than Colorado); *Hendricks County Board of Zoning Appeals v. Barlow*, 656 N.E.2d 481, 484-85 (Ind. Ct. App. 1995) (stating congress demonstrated no express or implied intent in the Animal Welfare Act to preempt state or local government regulation of wild or exotic animals); *Medlock v. Board of Trustees of the University of Massachusetts*, 580 N.E.2d 387, 389 n.3 (Mass. App. Ct.) (rejecting the defendants'

(continued...)

political subdivisions of states are not prohibited from promulgating standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors and authorizes the Secretary of Agriculture to cooperate with states and political subdivisions of states in carrying out the purposes of the Animal Welfare Act and any state, local, or municipal legislation or ordinance on the same subject.¹⁰

Therefore, I reject Respondents' contention that section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)) interferes with state and local regulation designed to control animals to protect human beings.

Second, Respondents contend the Chief ALJ misconstrued section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) as prohibiting the touching of an exhibited animal, effectively eliminating all petting zoos and other close-encounter exhibitions of animals which might bite or injure members of the public (Respondents' Appeal Pet. at 1-2).

The Chief ALJ states "[i]nterpreted literally, [section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1))] effectively prohibits not only any 'close encounter' exhibition but also any other type of exhibition where there is human interaction with dangerous animals" (Initial Decision and Order at 19). I agree with Respondents' contention that section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) does not prohibit the touching of an exhibited animal or effectively eliminate all close-encounter exhibitions of animals. Therefore, I do not adopt the Chief ALJ's conclusion that section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) effectively prohibits close-encounter exhibitions.

Third, Respondents contend the Chief ALJ's Initial Decision and Order directly conflicts with the evidence that Animal and Plant Health Inspection Service inspectors repeatedly found Respondents' close-encounter method of exhibition in compliance with the Animal Welfare Act. Respondents contend that having approved Respondents' close-encounter method of exhibition, Complainant cannot now, under due process principles, constitutionally apply the Regulations to end Respondents' close-encounter method of exhibition. (Respondents' Appeal Pet. at 2).

Respondents do not cite any evidence that Animal and Plant Health Inspection Service inspectors repeatedly found Respondents' close-encounter

(...continued)

argument that state animal welfare regulations are preempted by the Animal Welfare Act), *review denied*, 586 N.E.2d 10 (Mass. 1991) (Table).

¹⁰7 U.S.C. §§ 2143(a)(1), (a)(8), 2145(b).

method of exhibition in compliance with the Animal Welfare Act or that Complainant approved Respondents' close-encounter method of exhibition. The record does not reveal that Animal and Plant Health Inspection Service inspectors viewed any of Respondents' public exhibitions of animals prior to October 4, 2000. Moreover, the record reveals that Animal and Plant Health Inspection Service inspectors viewed only two public exhibitions of Respondents' animals, one of which took place on October 4, 2000, the other on December 2, 2000. Complainant alleges that Respondents violated sections 2.10(c) and 2.131(b)(1), (c)(2), and (c)(3) of the Regulations (9 C.F.R. §§ 2.10(c), .131(b)(1), (c)(2)-(3)) on December 2, 2000 (Compl. ¶¶ 6-9). Dr. Markin, the Animal and Plant Health Inspection Service inspector who inspected Respondents' facility on October 4, 2000, did not cite Respondents for a violation of the Animal Welfare Act or the Regulations, and Complainant does not allege that Respondents violated the Animal Welfare Act or the Regulations on October 4, 2000 (Tr. 665-67, 675-79; CX 106; Compl.). However, a failure to cite Respondents during a routine facility inspection does not constitute "approval" of Respondents' methods of exhibition on other occasions, as Respondents contend.

Moreover, due process does not prevent Complainant from instituting this proceeding merely because an Animal and Plant Health Inspection Service inspector observed Respondents' public exhibition of animals on October 4, 2000, and did not cite Respondents for a violation of the Animal Welfare Act or the Regulations based on observations during the October 4, 2000, inspection.

Fourth, Respondents contend the Chief ALJ's sanction of license revocation was excessive in light of the facts of this case. Respondents state no violations of the Animal Welfare Act that relate to the care and treatment of Respondents' animals were found and the evidence shows that Respondents voluntarily reduced the risk of close encounters. (Respondents' Appeal Pet. at 2).

Respondents' contention that the revocation of Respondent Diana Cziraky's Animal Welfare Act license is excessive because Respondents did not violate any provisions of the Animal Welfare Act that relate to the care and treatment of their animals, is without merit. The evidence does establish that Respondents' facility was clean and Respondents' animals appeared healthy, well-fed, and clean (Tr. 40-43, 101-02, 249-51, 305-08, 639-41, 660-61, 665-66, 683). However, Complainant proved by a preponderance of the evidence that Respondents violated regulations governing the handling of animals, section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), on seven occasions.¹¹ Handling clearly relates to care and treatment and the record reveals that because of the bites that resulted from Respondents' close-encounter method of

¹¹See note 3.

exhibition, Respondents hit their animals, sprayed vinegar on their animals, and occasionally sprayed their animals with a CO₂ fire extinguisher.

The record reveals that Respondents have taken steps in an attempt to reduce the risk of harm to the animals and the public associated with close encounters with Respondents' animals. Specifically, Respondent Diana Cziraky testified that Respondents have increased the minimum age for children to participate in a close encounter from 7 to 16, Respondents no longer allow persons with physical impairments to participate in a close encounter, Respondents no longer allow more than six people in the cage with their animals at any one time, Respondents now require that three handlers accompany each group of six in the cage, Respondents have shortened the control chains on their cats, and Respondents have acquired a tranquilizer gun (Tr. 938-42, 1035). Complainant contends Respondents' changes to their close-encounter method of exhibition do not reduce the risk of harm to the animals and the public (Complainant's Response to Respondents' Pet. for Appeal of Decision at 28-30). However, Dr. Peter Kirsten, a United States Department of Agriculture veterinary medical officer, testified that he was concerned about Respondents' allowing small and physically compromised persons and large groups of people into Respondents' animal enclosure (Tr. 170); Richard Porter, a United States Department of Agriculture investigator, found that the chains limiting Respondents' animals' range of motion were too long (Tr. 645); and Dr. Ellen Magid, a supervisory animal care specialist for the United States Department of Agriculture, suggested a length of the control chains on dangerous animals that would be "more acceptable" than the length of the control chains Respondents were using (Tr. 667; CX 53). I infer that these United States Department of Agriculture officials mentioned these aspects of Respondents' close-encounter method of exhibition because they viewed them as deficiencies in the context of risk of harm to the animals and the public. Therefore, I reject Complainant's contention that Respondents' changes to their close-encounter method of exhibition do not reduce the risk of harm to Respondents' animals and the public. Moreover, I find Respondents' changes in their close-encounter method of exhibition to be a mitigating factor. However, I do not find Respondents' improvements sufficiently mitigating to warrant reducing the sanction imposed by the Chief ALJ.

The record reveals that Respondents willfully violated section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)) on one occasion and willfully violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) on seven occasions. Respondents' violations of the Regulations are serious. Respondents' violations of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) resulted in

harm to members of the public and more than a minimal risk of harm to Respondents' animals. Respondents' violation of section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)) thwarts the Secretary of Agriculture's ability to obtain compliance with the Animal Welfare Act and the Regulations. I conclude that a cease and desist order and the revocation of Respondent Diana Cziraky's Animal Welfare Act license are appropriate and necessary to ensure Respondents' compliance with the Regulations in the future, to deter others from violating the Regulations, and to thereby fulfill the remedial purposes of the Animal Welfare Act. In addition to the cease and desist order and the revocation of Respondent Diana Cziraky's Animal Welfare Act license, which I impose, Respondents could be assessed a maximum civil penalty of \$2,750 for each of Respondents' eight violations of the Regulations.¹² However, I conclude that a cease and desist order and the revocation of Respondent Diana Cziraky's Animal Welfare Act license are sufficient to achieve the purposes of the Animal Welfare Act.

FINDINGS OF FACT

1. The International Siberian Tiger Foundation is an Ohio corporation. The International Siberian Tiger Foundation is also known as The Siberian Tiger Foundation. At all times material to this proceeding, The Siberian Tiger Foundation operated as an exhibitor as that term is defined in the Animal Welfare Act and the Regulations.

2. Tiger Lady, also known as Tiger Lady LLC, is an unincorporated association. At all times material to this proceeding, Tiger Lady LLC operated as an exhibitor as that term is defined in the Animal Welfare Act and the Regulations.

3. Respondent Diana Cziraky is an individual. At all times material to this proceeding, Respondent Diana Cziraky operated as an exhibitor as that term is defined in the Animal Welfare Act and the Regulations under Animal Welfare Act license number 31-C-0123. Respondent Diana Cziraky is the founder of, and doing business as, The International Siberian Tiger Foundation, The Siberian Tiger Foundation, and Tiger Lady, also known as Tiger Lady LLC.

4. Respondents' business address is 22143 Deal Road, Gambier, Ohio 43022.

5. On or about February 28, 2000, April 29, 2000, July 14, 2000, October 21, 2000, October 28, 2000, October 29, 2000 and December 2, 2000, Respondents failed to handle lions and tigers during public exhibition so there was minimal risk of harm to the animals and the public and failed to have

¹² 7 U.S.C. § 2149(b); 28 U.S.C. § 2461 note; 7 C.F.R. § 3.91(b)(2)(v).

sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the animals and the public.

6. Effective November 24, 2000, the Administrator, Animal and Plant Health Inspection Service, acting pursuant to section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)), suspended Respondent Diana Cziraky's Animal Welfare Act license for a period of 10 days.

7. On December 2, 2000, Respondent Diana Cziraky exhibited animals during the period when her Animal Welfare Act license was suspended.

CONCLUSIONS OF LAW

1. On or about February 28, 2000, April 29, 2000, July 14, 2000, October 21, 2000, October 28, 2000, October 29, 2000, and December 2, 2000, Respondents willfully violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)).

2. On December 2, 2000, Respondent Diana Cziraky willfully violated section 2.10(c) of the Regulations (9 C.F.R. § 2.10(c)).

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 in particular shall cease and desist from:

a. Handling their animals during public exhibition in a manner that results in more than minimal risk of harm to the animals and the public;

b. Handling their animals during public exhibition without sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the animals and the public; and

c. Exhibiting any animal during a period when Respondent Diana Cziraky's Animal Welfare Act license is suspended or revoked.

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

2. Respondent Diana Cziraky's Animal Welfare Act license (Animal Welfare Act license number 31-C-0123) is revoked, effective 60 days 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 February 15, 2002.

ANIMAL QUARANTINE AND RELATED LAWS

DEPARTMENTAL DECISION

In re: SALVADOR SANCHEZ-GOMEZ.

A.Q. Docket No. 01-0010.

Decision and Order.

Filed May 28, 2002.

AQ – Default – Birds – Pet birds – Importation – Certificate – Port of entry – Sanction policy – Civil penalty.

The Judicial Officer (JO) affirmed the Default Decision issued by Administrative Law Judge Dorothea A. Baker (ALJ): (1) concluding that Respondent imported a pet canary into the United States in violation of 9 C.F.R. §§ 101(a), .104(a), and .105(b); and (2) assessing Respondent a \$1,000 civil penalty. The JO rejected Respondent's assertion that he did not import a pet canary, but rather imported a cheap pet parakeet. The JO stated that the complaint alleged Respondent imported a pet canary and Respondent is deemed by his failure to file a timely answer to the complaint to have admitted the allegations in the complaint (7 C.F.R. § 1.136(c)). Moreover the JO stated that 9 C.F.R. §§ 93.101(a), .104(a), and .105(b) apply equally to pet canaries and pet parakeets; thus, the disposition of the proceeding would not be altered even if the JO found that respondent imported a pet parakeet. The JO also rejected Respondent's contention that his confusion regarding the instructions he received concerning the return of his pet bird to Mexico was a meritorious basis for Respondent's failure to file a timely answer to the complaint and timely objections to Complainant's motion for adoption of a proposed decision and order and Complainant's proposed decision and order. Finally, the JO rejected Respondent's offer to pay a civil penalty equal to the price of the pet parakeet Respondent asserted he imported into the United States. The JO stated that a \$1,000 civil penalty was warranted in law, justified by the facts, and consistent with the United States Department of Agriculture's sanction policy.

Darlene Bolinger, for Complainant.

Respondent, Pro se.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

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

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on August 6, 2001. Complainant instituted this proceeding under sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120) [hereinafter the Act of May 29, 1884]; regulations issued under the Act of May 29, 1884 (9 C.F.R. §§ 93.100-.107); 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] (Compl. at 1).

Complainant alleges that: (1) on or about September 25, 2000, Salvador Sanchez-Gomez [hereinafter Respondent] brought a pet canary into the United States in violation of 9 C.F.R. § 93.101(a) in that the pet bird was not brought into the United States in accordance with the regulations in 9 C.F.R. pt. 93, as required; (2) on or about September 25, 2000, Respondent imported a pet canary into the United States from Mexico in violation of 9 C.F.R. § 93.104(a) in that the pet bird was not accompanied by a certificate, as required; and (3) on or about September 25, 2000, Respondent imported a pet canary into the United States from Mexico in violation of 9 C.F.R. § 93.105(b) in that the pet bird was not offered for entry at one of the ports of entry designated in 9 C.F.R. § 93.102(a), as required (Compl. ¶¶ II-IV).¹

On August 21, 2001, the Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated August 6, 2001.² 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 October 10, 2001, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the time required in the Rules of Practice.³

On November 26, 2001, the Hearing Clerk again served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated August 6, 2001.⁴ 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. §

¹Sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120), do not provide the Secretary of Agriculture with authority to regulate the importation of birds into the United States, and the authority citation for 9 C.F.R. pt. 93 does not include a reference to section 4 or 5 of the Act of May 29, 1884 (21 U.S.C. § 120). Therefore, I find Complainant's institution of this proceeding under sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120), is error. However, Respondent does not contend he was misled by the reference in the Complaint to sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120). Moreover, the Secretary of Agriculture has authority under other statutes to regulate the importation of birds into the United States. (*See, e.g.*, section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111) [hereinafter the Act of February 2, 1903]). Therefore, I find Complainant's erroneous reference in the Complaint to sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120), harmless error.

²*See* Memorandum to File dated August 22, 2001, from Regina A. Paris.

³*See* letter dated October 10, 2001, from Joyce A. Dawson, Hearing Clerk, to Salvador Sanchez-Gomez.

⁴*See* Domestic Return Receipt for Article Number 7099 3400 0014 4581 5419.

1.136(a)). On January 15, 2002, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the time required in the Rules of Practice.⁵

On January 16, 2002, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a “Motion for Adoption of Proposed Default Decision and Order” and a “Proposed Default Decision and Order.” On February 4, 2002, the Hearing Clerk served Respondent with Complainant’s Motion for Adoption of Proposed Default Decision and Order, Complainant’s Proposed Default Decision and Order, and the Hearing Clerk’s service letter dated January 17, 2002.⁶ Respondent failed to file objections to Complainant’s Motion for Adoption of Proposed Default Decision and Order and Complainant’s Proposed Default Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). On March 19, 2002, the Hearing Clerk sent a letter to Respondent informing him that he failed to file timely objections to Complainant’s Motion for Adoption of Proposed Default Decision and Order and Complainant’s Proposed Default Decision and Order and that the file was being referred to an administrative law judge for consideration and decision.⁷

On March 22, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a “Default Decision and Order” [hereinafter Initial Decision and Order]: (1) finding that on or about September 25, 2000, Respondent imported a pet canary into the United States from Mexico in violation of 9 C.F.R. §§ 93.101(a), .104(a), and .105(b) because the pet bird was not brought into the United States in accordance with 9 C.F.R. pt. 93, as required, the pet bird was not accompanied by the required certificate, and the pet bird was not offered for entry at a designated port of entry; (2) concluding that Respondent violated section 2 of the Act of February 2, 1903 (21 U.S.C. § 111), and the regulations

⁵See letter dated January 15, 2002, from Joyce A. Dawson, Hearing Clerk, to Salvador Sanchez-Gomez.

⁶See Domestic Return Receipt for Article Number 7099 3400 0014 4581 5112.

⁷See letter dated March 19, 2002, from Joyce A. Dawson, Hearing Clerk, to Salvador Sanchez-Gomez.

issued under the Act of February 2, 1903 “(9 C.F.R. § 100 *et seq.*.”;⁸ and (3) assessing Respondent a \$1,000 civil penalty (Initial Decision and Order at 2).

On April 30, 2002, Respondent appealed to the Judicial Officer. On May 17, 2002, Complainant filed “Response to Respondent’s Appeal.” On May 22, 2002, the Hearing Clerk transmitted the record to the Judicial Officer to consider Respondent’s appeal petition and issue a decision.

Based upon a careful consideration of the record, I agree with the ALJ’s Initial Decision and Order, except that I issue an Order that provides for Respondent’s payment of the civil penalty in installments. 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 ALJ’s conclusion of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

21 U.S.C.:

TITLE 21—FOOD AND DRUGS

.....

CHAPTER 4—ANIMALS, MEATS, AND MEAT AND DAIRY PRODUCTS

.....

SUBCHAPTER III—PREVENTION OF INTRODUCTION AND SPREAD OF CONTAGION

§ 111. Regulations to prevent contagious diseases

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the

⁸The ALJ’s reference to 9 C.F.R. § 100 *et seq.* appears to be a typographical error. Based on the record before me, I infer the ALJ concluded that Respondent violated 9 C.F.R. § 93.100 *et seq.* The ALJ’s incorrect citation of the Code of Federal Regulations is harmless error.

District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

§ 120. Regulation of exportation and transportation of infected livestock and live poultry

In order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other livestock and/or live poultry, and to prevent the spread of such diseases, he is authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of livestock and/or live poultry from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, and into and through the District of Columbia and to foreign countries as he may deem necessary, and all such rules and regulations shall have the force of law.

§ 122. Offenses; penalty

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. 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.

21 U.S.C. §§ 111, 120, 122.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

.....

PART VI—PARTICULAR PROCEEDINGS

.....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

.....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990”

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION
ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq.*], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq.*], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 *et seq.*], or the Social Security Act [42 U.S.C. 301 *et seq.*], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

(1) multiple of \$10 in the case of penalties less than or equal to \$100;

(2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;

(3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;

(4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;

(5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and

(6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note.

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*. . . .

. . . .

(2) *Animal and Plant Health Inspection Service.* . . .

. . . .

(xi) Civil penalty for a violation of the Act of February 2, 1903 (commonly known as the Cattle Contagious Disease Act), codified at 21 U.S.C. 122, has a maximum of \$1,100.

7 C.F.R. § 3.91(a), (b)(2)(xi).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

. . . .

**SUBCHAPTER D—EXPORTATION AND IMPORTATION
OF ANIMALS (INCLUDING POULTRY)
AND ANIMAL PRODUCTS**

. . . .

**PART 93—IMPORTATION OF CERTAIN ANIMALS, BIRDS,
AND POULTRY, AND CERTAIN ANIMAL, BIRD, AND
POULTRY PRODUCTS; REQUIREMENTS FOR MEANS OF
CONVEYANCE AND SHIPPING CONTAINERS**

SUBPART A—BIRDS

§ 93.100 Definitions.

Whenever in this subpart the following terms are used, unless the context otherwise requires, they shall be construed, respectively, to mean:

....

Birds. All members of the class aves (including eggs for hatching), other than poultry.

....

Pet birds. Birds, except ratites, which are imported for the personal pleasure of their individual owners and are not intended for resale.

§ 93.101 General prohibitions; exceptions.

(a) No product or bird subject to the provisions of this part shall be brought into the United States except in accordance with the regulations in this part and part 94 of this subchapter; nor shall any such product or bird be handled or moved after physical entry into the United States before final release from quarantine or any [sic] other form of governmental detention except in compliance with such regulations; *Provided*, That the Administrator may upon request in specific cases permit products or birds to be brought into or through the United States under such conditions as he or she may prescribe, when he or she determines in the specific case that such action will not endanger the livestock or poultry of the United States.

§ 93.104 Certificate for pet birds, commercial birds, zoological birds, and research birds.

(a) *General.* All pet birds, except as provided in § 93.101(b) and (c) of this part; all research birds; and all commercial birds and zoological birds, including ratites and hatching eggs of ratites, offered for importation from any part of the world, shall be accompanied by a certificate issued by a full-time salaried veterinary officer of the national government of the exporting region, or issued by a veterinarian authorized or accredited by the national government of the exporting region and endorsed by a full-time salaried veterinary officer of the national government of that region.

§ 93.105 Inspection at the port of entry.

....

(b) All pet birds imported from any part of the world, except pet birds from Canada and pet birds meeting the provisions of § 93.101(c)(2), shall be subjected to inspection at the Customs port of entry by a veterinary inspector of APHIS and such birds shall be permitted entry only at the ports listed in § 93.102(a). Pet birds of Canadian origin and

those birds meeting the provisions of § 93.101(c)(2) shall be subject to veterinary inspection at any of the ports of entry listed in § 93.102 and 93.203.

9 C.F.R. §§ 93.100, .101(a), .104(a), .105(b) (footnote omitted).

**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 in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted and set forth in this Decision and Order 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 mailing address is 334 State Avenue, Somerton, Arizona 85350.
2. On or about September 25, 2000, Respondent brought a pet canary into the United States in violation of 9 C.F.R. § 93.101(a) in that the pet bird was not brought into the United States in accordance with the regulations in 9 C.F.R. pt. 93, as required.
3. On or about September 25, 2000, Respondent imported a pet canary into the United States from Mexico in violation of 9 C.F.R. § 93.104(a) in that the pet bird was not accompanied by a certificate, as required.
4. On or about September 25, 2000, Respondent imported a pet canary into the United States from Mexico in violation of 9 C.F.R. § 93.105(b) in that the pet bird was not offered for entry at one of the ports of entry designated in 9 C.F.R. § 93.102(a), as required.

Conclusion of Law

By reason of the Findings of Fact in this Decision and Order, Respondent violated 21 U.S.C. § 111 and 9 C.F.R. §§ 93.101(a), .104(a), and .105(b).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

On April 30, 2002, Respondent filed a letter dated April 18, 2002, addressed to the United States Department of Agriculture. Respondent's letter states that it is an appeal of "your decision dated August 10, 2001[,] which states I did imported [sic] a canary without legal procedures[.]" The record does not contain a decision dated August 10, 2001. Based on the record before me, I infer Respondent's letter dated April 18, 2002, addressed to the United States Department of Agriculture [hereinafter Appeal Petition], is an appeal of the ALJ's Initial Decision and Order.

Respondent raises three issues in his Appeal Petition. First, Respondent contends the ALJ erroneously found that Respondent imported a pet canary into the United States. Respondent asserts that the pet bird he imported into the United States was a "cheap parakeet." (Respondent's Appeal Pet).

I disagree with Respondent's contention that the ALJ erroneously found that Respondent imported a pet canary into the United States in violation of 9 C.F.R. §§ 93.101(a), .104(a), and .105(b). The Complaint alleges Respondent imported a pet canary into the United States in violation of 9 C.F.R. §§ 93.101(a), .104(a), and .105(b). Respondent failed to file a timely answer to the Complaint. In accordance with section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint, including the allegation that he imported a pet canary into the United States. Moreover, Complainant proposed a finding that Respondent imported a pet canary into the United States in violation of 9 C.F.R. §§ 93.101(a), .104(a), and .105(b) in Complainant's Proposed Default Decision and Order. Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Respondent's denial in his Appeal Petition that he imported a pet canary into the United States comes too late to be considered.

Moreover, even if I were to find Respondent imported a cheap pet parakeet into the United States, as Respondent asserts, that finding would not alter the disposition of this proceeding. The regulations Respondent is alleged to have

violated (9 C.F.R. §§ 93.101(a), .104(a), .105(b)) apply equally to cheap pet parakeets and pet canaries imported into the United States from Mexico.⁹

Second, Respondent appears to offer a reason for his failure to file a timely answer and timely objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order, as follows:

Second.- At the time I was detained the officer asked me to return the pet to Mexico without any fine and before I did another officer kept the pet with him and one of them asked to return the pet and the other did not wanted [sic]. I was very confused about it. [T]hat was the reason I did not answer your previous letter on time.

Respondent's Appeal Pet.

Respondent's confusion regarding purported instructions by unidentified officers concerning the return of his pet bird to Mexico is not a meritorious basis for Respondent's failure to file a timely answer to the Complaint or for Respondent's failure to file timely objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order. Moreover, I cannot find anything in the record before me that would cause Respondent to believe that he would not be deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint if he failed to answer the Complaint within 20 days after the Hearing Clerk served him with the Complaint.

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's August 6, 2001, service letter on August 21, 2001, and on November 26, 2001.¹⁰ 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.

⁹Section 93.101(a) of the regulations (9 C.F.R. § 93.101(a)) applies to *birds*. Sections 93.104(a) and 93.105(b) of the regulations (9 C.F.R. §§ 93.104(a), .105(b)) apply to *pet birds*. The terms *birds* and *pet birds* are defined in 9 C.F.R. § 93.100, and the pet parakeet Respondent asserts he imported from Mexico into the United States falls within the definition of the terms *birds* and *pet birds* in 9 C.F.R. § 93.100.

¹⁰*See* notes 2 and 4.

(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 have twenty (20) days after service of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the applicable rules of practice (7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of the allegation. Failure to file an answer within the prescribed time shall constitute an admission of the allegation in this complaint and a waiver of hearing.

Compl. at 2.

Similarly, the Hearing Clerk informed Respondent in the August 6, 2001, 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:

August 6, 2001

Mr. Salvador Sanchez-Gomez
334 State Avenue
Somerton, Arizona 85350

Dear Mr. Gomez:

Subject: In re: Salvador Sanchez-Gomez, Respondent -
A.Q. Docket No. 01-0010

Enclosed is a copy of a Complaint, which has been filed with this office under the [sic] Section 2 of the Act of February 2, 1903, 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 three copies of your written and signed [sic] 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 [sic] on the last page of the complaint.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

On October 10, 2001, and January 15, 2002, the Hearing Clerk sent letters to Respondent informing him that an answer to the Complaint had not been filed within the time required in the Rules of Practice.¹¹ Respondent did not respond to the Hearing Clerk's October 10, 2001, letter or to the Hearing Clerk's January 15, 2002, letter.

On January 16, 2002, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Motion for Adoption of Proposed

¹¹ See notes 3 and 5.

Default Decision and Order and a Proposed Default Decision and Order. On February 4, 2002, the Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and the Hearing Clerk's service letter dated January 17, 2002.¹² The Hearing Clerk informed Respondent in the January 17, 2002, service letter that he had 20 days within which to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order, as follows:

January 17, 2002

Mr. Salvador Sanchez-Gomez
P.O. Box 277
344 [sic] State Avenue
Somerton, Arizona 85350

Dear Mr. Gomez:

Subject: In re: Salvador Sanchez-Gomez, Respondent
A.Q. Docket No. 01-0010

Enclosed is a copy of Complainant's Motion for Adoption of Proposed Default Decision and Order together with a copy of the Proposed Default Decision and Order, 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 objection to the Motion for Decision.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default

¹²See note 6.

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).

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,¹³ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.¹⁴

¹³See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *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).

¹⁴See, e.g., *In re Daniel E. Murray*, 58 Agric. Dec. 64 (1999) (holding the administrative law judge properly issued a default decision where the respondent filed his answer 9 months 3 days after the Hearing Clerk served him with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating 9 C.F.R. § 78.8(a)(2)(ii), a regulation issued under the Act of February 2, 1903, as alleged in the complaint); *In Conrad Payne*, 57 Agric. Dec. 921 (1998) (holding the administrative law judge properly issued the default decision where the respondent failed to file a timely answer to the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating the Act of February 2, 1903, and 9 C.F.R. § 94.0 *et seq.*, as alleged in the complaint); *In re Eddie Benton*, 50 Agric. Dec. 428 (1991) (adopting the administrative law judge's default decision where the respondent failed to file an answer after the Hearing Clerk served the complaint on the respondent and holding the respondent is deemed, by the failure to file an answer, to have admitted violating 9 C.F.R. § 78.9(c)(2)(ii)(B), a regulation issued under the Act of February 2, 1903, as alleged in the complaint); *In re Daniel Cano*, 50 Agric. Dec. 383 (1991) (adopting 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 did not file a timely answer. Respondent's first and only filing in this proceeding was April 30, 2002, 8 months 9 days after the Hearing Clerk served Respondent with the Complaint on August 21, 2001, and 5 months 4 days after the Hearing Clerk served Respondent with the Complaint on November 26, 2001. 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)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁵

Third, Respondent offers "to pay a reasonable fine according with the pet price" (Respondent's Appeal Pet.). Respondent does not indicate the amount he believes is a "reasonable" civil penalty or the amount of the "pet price." However, based on Respondent's description of the pet bird that he imported into the United States, I infer Respondent asserts that a reasonable civil penalty would be significantly less than the \$1,000 civil penalty assessed by the ALJ.

Section 3 of the Act of February 2, 1903 (21 U.S.C. § 122), provides that the Secretary of Agriculture may assess a civil penalty of not more than \$1,000 for each violation of the Act of February 2, 1903, and the regulations issued under the Act of February 2, 1903. The Federal Civil Penalties Inflation Adjustment

(...continued)

administrative law judge's default decision where the respondent failed to file a timely answer after the Hearing Clerk served the complaint on the respondent and holding the respondent is deemed, by the failure to file a timely answer, to have admitted violating the Act of February 2, 1903, and the regulations promulgated under the Act of February 2, 1903).

¹⁵See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding 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 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).

Act of 1990, as amended (28 U.S.C. § 2461 note), provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. Effective September 2, 1997, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under section 3 of the Act of February 2, 1903 (21 U.S.C. § 122), for each violation of the Act of February 2, 1903, and the regulations issued under Act of February 2, 1903, by increasing the maximum civil penalty from \$1,000 to \$1,100.¹⁶ Respondent committed two violations of the regulations under Act of February 2, 1903.¹⁷ Therefore, the ALJ could have assessed Respondent a maximum civil penalty of \$2,200, and the ALJ's assessment of \$1,000 civil penalty against Respondent is warranted in law.

Moreover, the assessment of a \$1,000 civil penalty against Respondent is in accord with the United States Department of Agriculture's sanction policy. 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 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 administration of the regulatory statute. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

¹⁶7 C.F.R. § 3.91(b)(2)(xi).

¹⁷I conclude Respondent violated three regulations, 9 C.F.R. §§ 93.101(a), .104(a), and .105(b). However, based on the record before me, Respondent's violation of 9 C.F.R. § 93.101(a) appears to be no more than Respondent's failure to comply with 9 C.F.R. §§ 93.104(a) and .105(b). Therefore, I conclude Respondent committed two violations of the regulations under the Act of February 2, 1903.

Complainant, one of the officials charged with administering the Act of February 2, 1903, recommends the assessment of a \$1,000 civil penalty against Respondent, as follows:

Respondent's action undermines the United States Department of Agriculture's efforts to prevent the spread of animal diseases throughout the United States. In order to deter [R]espondent and others similarly situated from committing violations of this nature in the future, [C]omplainant believes that assessment of the requested civil penalty of one thousand dollars (\$1,000.00), is warranted and appropriate.

Complainant's Motion for Adoption of Proposed Default Decision and Order at 2nd unnumbered page.

Thus, I find assessment of a \$1,000 civil penalty against Respondent is justified in fact. I find no basis in this proceeding for assessing a civil penalty against Respondent other than that recommended by Complainant. I reject Respondent's request that I assess a civil penalty against Respondent that is equal to the price of the pet bird Respondent brought into the United States in violation of 9 C.F.R. §§ 93.101(a), .104(a), and .105(b).

Complainant states he has no objection to Respondent's payment of the civil penalty in installments of \$50 per month (Response to Respondent's Appeal at 5). Based on Complainant's lack of objection to Respondent's paying the civil penalty in installments of \$50 per month and my finding that Respondent's payment of the \$1,000 civil penalty in installments of \$50 per month will achieve the remedial purposes of the Act of February 2, 1903, I issue an Order which allows Respondent to pay the \$1,000 civil penalty in installments of \$50 per month.

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

ORDER

Respondent is assessed a \$1,000 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, MN 55403

Respondent shall pay the \$1,000 civil penalty in installments of \$50 each month for 20 consecutive months. Respondent's first payment shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 30 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 the certified checks or money orders that payment is in reference to A.Q. Docket No. 01-0010.

BEEF PROMOTION AND RESEARCH ACT

COURT DECISION

**LIVESTOCK MARKETING ASSOCIATION, et al. v. USDA and
NEBRASKA CATTLEMEN, INC., et al., INTERVENERS &
DEFENDANTS. v. USDA.**

No. Civ. 00-1032.

Filed June 21, 2002.

(Cite as: 207 F.Supp.2d 992).

BPRA – First Amendment – Commercial Speech – Beef checkoffs – Intervener as proper party – Standing.

The U.S. District Court of South Dakota (Court) held that the portion of enforced dues known as “Beef checkoffs” collected by the Cattlemen’s Beef Promotion and Research Board (Board) which were used to promote generic advertisement for beef (commercial speech) was an unconstitutional infringement of the rights of the several plaintiffs. The Court likened the compulsory collection of the Beef checkoffs of \$1.00 (per head of live cattle sold) to be indistinguishable from the collection of \$0.01 (per pound of mushrooms sold) in the case of *United Foods, Inc. v. USDA*. The Court agreed that the use of 85% of the compulsory dues in promoting generic beef as “producer communications” and which is not merely ancillary to an overall statutory scheme requiring anti-trust exemptions is an unconstitutional infringement of free speech. The Court struck down as unconstitutional all portions of the Beef Promotion and Research Act which mandates that sellers pay an assessment because it violates the First amendment of the Constitution. The Court enjoined the Board from prospectively collecting such dues and restrained the use of checkoff funds from certain purposes lauding the policies or actions of the Board. The Court recognized the Plaintiffs’ (as a group) as having standing so long as one of the several Plaintiffs qualified and the Court did not need to consider the standing issue as to the other plaintiffs

**UNITED STATES DISTRICT COURT
D. SOUTH DAKOTA,
NORTHERN DIVISION.**

MEMORANDUM OPINION AND ORDER

KORNMAN, District Judge.

INTRODUCTION

[1.] Plaintiffs instituted this action to challenge certain activities in connection with the Beef Promotion and Research Act (Title XVI, Subtitle A, of the Food Security Act of 1985), Pub.L. 99-198, Title XVI, § 1601, codified at 7 U.S.C. §§ 2901-11 (“the Act”) and certain actions and inaction on the part of the United States Secretary of Agriculture (“Secretary”) and the Cattlemen’s Beef Board (“Board”). The Act authorizes the Secretary to promulgate a Beef Promotion and Research Order (“Order”), 7 U.S.C. § 2903, to establish a Cattlemen’s Beef Promotion and Research Board (“Board”), 7 U.S.C. § 2904, and an Operating Committee, 7 U.S.C. § 2904(4)(A), to carry on a “program of promotion and research designed to strengthen the beef industry’s position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.” 7 U.S.C. § 2901(b). The program is funded by mandatory producer and importer contributions of one dollar per head on each transaction. 7 U.S.C. § 2904(8)(C). These mandatory contributions are referred to collectively as the “beef checkoff.”

[2.] In fiscal year 2001, beef checkoff revenues totaled \$86,099,403.00. Of that, \$47,469,581.00 went to the Board. In states with a Qualified State Beef Council (“QSBC”), such as South Dakota, all checkoff funds collected by livestock markets go to the QSBC. There are 45 QSBC organizations. Each QSBC sends 50 cents to the Board, 25 cents to the National Cattleman's Beef Association (“NCBA”), a private trade group, for use in its non-Beef Board activities. The amount going to the Board included \$60,907.00 collected from producers in states without a QSBC, \$8,778,852.00 from importers, and \$38,629,822.00 from QSBCs. The remaining funds were used by the QSBCs. The NCBA is the federation of QSBC's. The NCBA is a private contractor with the Board and 90% of all Board contracts are awarded to the NCBA. The Board consists of 110 members. The QSBC's nominate ten members to serve on the Beef Operating Committee which approves the budgets of the Board. The Board elects the Operating Committee.

[3.] In 1998, the Livestock Marketing Association (“LMA”) initiated a petition drive to obtain a referendum on the question of the continuation of the beef checkoff program. LMA submitted the petitions to USDA on November 12, 1999. The Secretary did not act to validate the petitions and schedule a referendum vote. Plaintiffs instituted this litigation seeking 1) a declaratory judgment that the 1985 Act and the Secretary's action or inaction pursuant thereto is unconstitutional in violation of plaintiffs' rights to due process and equal protection, 2) an injunction prohibiting the Secretary from collecting assessments pursuant to the 1985 Act, 3) a preliminary injunction ordering defendants to immediately schedule a referendum election as to whether the

checkoff should be retained or, alternatively, ordering defendants to immediately decide whether to schedule such a referendum, and 4) an order requiring the Board to immediately cease its expenditures for so-called “producer communications” and to make restitution to producers for in excess of \$10 million claimed to have been illegally expended on such communications since 1998.

[4.] Plaintiffs' claims that the Board's producer communications activities violate both the Act and the First Amendment by using checkoff funds to disseminate public relations messages, including anti-referendum messages, and their claims that in implementing the petition validation program, the Secretary has failed to comply with the requirements of the Paperwork Reduction Act of 1995, were heard on January 25, 2001. The court issued a preliminary injunction on February 23, 2001. This prevented defendants from any further use of beef checkoff assessments to create or distribute any material for the purpose of influencing governmental action or policy with regard to the beef checkoff or the Board or both. It also prevented defendants from using assessments to block or discourage a referendum, from using assessments to attempt to influence beef producers to keep the Board or the checkoff program or both in existence, and from using assessments to laud the checkoff program by using descriptive words or phrases such as “fair”, “accountable”, “effective”, “it's working”, and the like. *Livestock Marketing Association v. United States Department of Agriculture*, 132 F.Supp.2d 817 (D.S.D.2001).

[5.] The United States Supreme Court issued a decision on June 25, 2001, in *United States Department of Agriculture v. United Foods, Inc.*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001), holding that the mandatory checkoff for mushroom promotions was in violation of the First Amendment and striking down as unconstitutional all portions of the Mushroom Act of 1990 which “authorize such coerced payments for advertising.” *United Foods v. U.S.*, 197 F.3d 221, 225 (6th Cir.1999), aff'd 533 U.S. 405, 121 S.Ct. at 2341, 150 L.Ed.2d 438. Following the issuance of the *United Foods* decision, the plaintiffs were allowed to amend their complaint to add a claim that the beef checkoff program violated plaintiffs' First Amendment rights to freedom of speech and freedom of association. The parties filed cross motions for summary judgment on the new First Amendment claims and those motions were denied. The First Amendment claims were bifurcated and a trial to the court on those issues was held on January 14, 2002.

DECISION

I. Standing.

[6.] Defendants and INTERVENERS contend that plaintiffs LMA and the Western Organization of Resource Councils (“WORC”) lack standing to raise the First Amendment claims at issue here. Standing is comprised of three elements:

First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (internal quotations and citations omitted).

It is sufficient to confer standing that at least one of the plaintiffs qualifies and, if so, the court does not need to consider the standing issue as to the other plaintiffs in that action. *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S.Ct. 3181, 3185, 92 L.Ed.2d 583 (1986), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 n. 9, 97 S.Ct. 555, 562 n. 9, 50 L.Ed.2d 450 (1977).

[7.] Plaintiff Pat Goggins (“Goggins”) is a grower, breeder and livestock marketer from Billings, Montana. Goggins objects to the use of his checkoff dollars to produce messages promoting all cattle rather than American cattle. Goggins is of the opinion that American produced cattle are superior to foreign produced cattle. Goggins objects to being compelled to pay for and promote foreign products. Goggins' auction business collects from producers and pays approximately \$30,000 each year to the Board under the checkoff.

[8.] Plaintiff Johnnie Smith (“Smith”) from Pierre, South Dakota, raises cattle and owns a partnership interest in a livestock market. Smith believes that the generic promotion of beef serves to promote imported beef. In fact, from September 11, 2001, to October 2001, foreign beef imports from Canada increased 26% while imports from Mexico increased 8%. Smith believes that foreign cattle are generally older with meat that is stringy and tough and that the

foreign animals are more likely to have been subjected to pesticides. Smith opposes the use of his checkoff dollars to promote imported beef.

[9.] Herman Schumacher (“Schumacher”) is a cattle producer from Herried, South Dakota. He also owns a livestock auction. He believes that generic advertising increases foreign imports which hurts his business. Foreign grown beef is in direct competition with his business. He objects to the use of his checkoff dollars for generic advertising of beef.

[10.] Plaintiff Jerry Goebel (“Goebel”) is a cattle producer from Lebanon, South Dakota. Goebel objects to the use of checkoff funds for generic advertising which implies that beef is all the same.

[11.] Plaintiff Robert Thullner (“Thullner”) is a cattle producer from Herried, South Dakota. Thullner objects to the generic messages paid for by checkoff dollars, which messages are contrary to his belief that only American beef should be promoted.

[12.] The parties spent considerable trial time trying to establish or attack the organizational standing of LMA and WORC. It was all much ado about nothing since it is clear that at least the foregoing five individual plaintiffs have standing to raise a United Foods First Amendment challenge to the beef checkoff. One plaintiff with standing is sufficient to confer jurisdiction over the claim and afford complete relief. Any claim of lack of standing should be rejected.

II. Compelled Speech.

[13.] The United States Supreme Court has made it clear that “the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.” *Abood v. Detroit Board of Education*, 431 U.S. 209, 233, 97 S.Ct. 1782, 1798, 52 L.Ed.2d 261 (1977). *Abood* made it clear that the First Amendment protects not only the right to associate but also the right to refuse to associate.

[14.] The First Amendment does not necessarily prohibit Congress from compelling beef producers to associate for a common purpose. Indeed, the Supreme Court in *Abood* recognized that requiring public employees to help finance a union as a collective-bargaining agent “is constitutionally justified by the legislative assessment of the important contribution of the union shop to the

system of labor relations established by Congress.” *Abood*, 431 U.S. at 222, 97 S.Ct. at 1793. The Supreme Court has also held that compelled association by virtue of an integrated state bar is “justified by the State's interest in regulating the legal profession and improving the quality of legal services.” *Keller v. State Bar of California*, 496 U.S. 1, 13, 110 S.Ct. 2228, 2236, 110 L.Ed.2d 1 (1990).

[15.] Like the plaintiffs in *Abood* and *Keller*, the plaintiff cattle producers are compelled to associate. They are required by federal law, by virtue of their status as cattle producers who desire to sell cattle, to pay “dues,” if you will, to an entity created by federal statute. Their status is not much different from that of attorneys who are required by statute to pay dues to a state bar association, which bar association is created by statute. The Act authorized the Secretary of Agriculture to promulgate the Beef Promotion and Research Order. The rules and regulations for collecting the checkoff assessments, for establishing the Board which Board decides how to spend the assessments collected, and the powers and duties of that Board are all statutorily mandated.

[16.] However, the use of compelled “dues” for advancing ideological causes objectionable to any member of the group violates the First Amendment. Compelling plaintiffs to make contributions for speech to which they object works an infringement of their constitutional rights. *Abood*, 431 U.S. at 234, 97 S.Ct. at 1799.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Abood, 431 U.S. at 235, 97 S.Ct. at 1799 (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943)).

The First Amendment protects not only the right to engage in or not engage in political speech but also any “expression about philosophical, social, artistic, economic, literary, or ethical matters.” *Abood*, 431 U.S. at 231, 97 S.Ct. at 1797. See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958) (“it is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious or cultural matters”).

[17.] Three terms after the *Abood* decision the Supreme Court declared, in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*,

that the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” 447 U.S. 557, 562, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). The Supreme Court announced a four-part analysis in commercial speech cases which has become known as the Central Hudson test:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351.

[18.] Applying the *Central Hudson* analysis, the United States Court of Appeals for the Third Circuit held:

Although we find that the Beef Promotion Act implicates the first amendment rights of those obligated to participate, we hold that the government has enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the Act in a way that infringes on the contributors' rights no more than is necessary to achieve the stated goal.

United States v. Frame, 885 F.2d 1119, 1137 (3rd Cir.1989).

The Ninth Circuit reviewed the constitutionality of a similar generic advertising program for California tree fruits in *Wileman Brothers & Elliott, Inc. v. Espy*, and, applying *Central Hudson*, reached a contrary conclusion:

In sum, although we agree that the Secretary has a substantial interest in promoting peaches and nectarines, we hold that forced contributions to pay for generic advertising programs contravene the First Amendment rights of the handlers. The generic advertising programs neither “directly advance” the government's interest nor are they narrowly tailored. They therefore fail the second and third prongs of the *Central Hudson* test and violate the First Amendment.

Wileman Brothers & Elliott, Inc. v. Espy, 58 F.3d 1367, 1380 (9th Cir.1995).

The United States Supreme Court granted certiorari in *Wileman* to resolve the conflict between *Frame* and *Wileman*. *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 466-67, 117 S.Ct. 2130, 2137, 138 L.Ed.2d 585 (1997).

[19.] The Supreme Court in *Glickman* rejected the use of the *Central Hudson* test because that case involved a restriction on commercial speech rather than the compelled funding of speech involved in the California tree fruit marketing orders. *Glickman*, 521 U.S. at 474 n. 18, 117 S.Ct. at 2141 n. 18. A recent case, while admittedly dealing with the *Central Hudson* test, contains a statement indicating, if nothing else, the philosophical bent of the United States Supreme Court: “If the First Amendment means anything, it means that regulating speech must be a last--not first--resort. Yet it seems to have been the first strategy the Government thought to try.” *Thompson v. Western States Medical Center*, ___ U.S. ___, 122 S.Ct. 1497, 1507, 152 L.Ed.2d 563 (2002). This court makes the same observation in the context of the present case, namely that if the First Amendment means anything, it means that compelling speech must be the last and not the first strategy considered by the government. *Glickman*, rather than using the *Central Hudson* test, applied Abood's “germaneness” test, which the Supreme Court summarized as whether 1) the generic advertising in question “is unquestionably germane to the purposes” of the Act and 2) the assessments are not used to fund ideological activities. *Glickman*, 521 U.S. at 473, 117 S.Ct. at 2140. The Court held that the compelled contributions at issue were germane:

Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme . . . In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers “do not wish to foster” generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Glickman, 521 U.S. at 476-77, 117 S.Ct. at 2141-42.

The Court further concluded that the assessments were not used to fund ideological activities. *Glickman*, 521 U.S. at 473, 117 S.Ct. at 2140.

[20.] The Supreme Court in *Glickman* instructed that:

[A]bood . . . did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief." . . . Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit. Neither the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message . . . our cases provide affirmative support for the proposition that assessments to fund a lawful program may sometimes be used to pay for speech over the objection of some members of the group.

Glickman, 521 U.S. at 471-73, 117 S.Ct. at 2139-40.

In *Glickman*, the Court emphasized that, in determining whether the compelled assessments raised a First Amendment issue, it was important to consider the statutory context in which the compelled assessments arise:

California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

Glickman, 521 U.S. at 469, 117 S.Ct. at 2138.

It was the broad regulatory scheme, as we shall see, which was dispositive of the outcome in *Glickman*. Thus, the extent of the regulatory scheme in connection with the beef checkoff must be largely dispositive in this case.

[21.] Four terms after *Glickman*, the very same First Amendment claim was raised in *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001). The statute in question in *United Foods* was the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101, *et seq.* The Mushroom Act mandated assessments upon handlers of fresh mushrooms to fund advertising for mushrooms. The assessment was similar to the beef checkoff in that the assessment is paid by producers and importers in an amount not to exceed one cent per pound of mushrooms. 7 U.S.C. § 6104(g). The Supreme Court distinguished *Glickman* because the compelled assessments for California tree fruits arose out of “a different regulatory scheme” which was fundamentally different in that the “mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy” while the advertising involved in the mushroom checkoff, “far from being ancillary, is the principal object of the regulatory scheme.” *United Foods*, 533 U.S. at 411-12, 121 S.Ct. at 2338-39.

The California tree fruits were marketed “pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity.” [*Glickman*, 521 U.S.] at 469, 117 S.Ct. 2130, 138 L.Ed.2d 585. Indeed, the marketing orders “displaced competition” to such an extent that they were “expressly exempted from the antitrust laws.” *Id.*, at 461, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585. 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, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585. 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 . . . 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.

United Foods, 533 U.S. at 412-13, 121 S.Ct. at 2339.

[22.] *United Foods* applied the rules of *Abood* and *Keller*: “objecting members [are] not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association.” *United Foods*, 533 U.S. at 414, 121 S.Ct. at 2340. “We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself.” *United Foods*, 533 U.S. at 415, 121 S.Ct. at 2340. *United Foods* held that the compelled contributions for advertising mushrooms are not part of some broader regulatory scheme. *United Foods*, 533 U.S. at 415, 121 S.Ct. at 2340.

[23.] The Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101, *et seq.*, was identical in many respects to the Beef Promotion and Research Act, 7 U.S.C. § 2901, *et seq.* The Mushroom Act authorized the establishment of [–]

a coordinated program of promotion, research, and consumer and industry information designed to--(1) strengthen the mushroom industry’s position in the marketplace; (2) maintain and expand existing markets and uses for mushrooms; and (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b).

The Beef Act authorizes the establishment of a [–]

coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.

7 U.S.C. § 2901(b).

The Mushroom Act authorized the Secretary to issue a Mushroom Order which mandated the establishment of a Mushroom Council and provided that each first handler of mushrooms, importer of mushrooms or any person marketing that person's own mushrooms must pay an assessment to the Mushroom Council. 7 U.S.C. §§ 6104(b) and 6104(g). The Beef Act authorizes the Secretary to issue a Beef Promotion and Research Order which mandates the establishment of a Cattlemen's Beef Promotion and Research Board and which order shall provide that producers of cattle and importers of cattle, beef, or beef products shall pay an assessment to the Board. 7 U.S.C. §§ 2904(1) and 2904(8). The Mushroom Act authorized the Mushroom Council to use the assessments for "the implementation and carrying out of plans or projects of mushroom promotion, research, consumer information, or industry information". 7 U.S.C. § 6104(e). The Beef Act authorizes the Beef Board to use the assessments to "implement programs of promotion, research, consumer information, and industry information." 7 U.S.C. § 2904(6).

[24.] The beef checkoff is, in all material respects, identical to the mushroom checkoff: producers and importers are required to pay an assessment, which assessments are used by a federally established board or council to fund speech. Each sale of a head of cattle requires a one dollar payment as a checkoff. Thus, the beef checkoff is more intrusive, if you will, than was the case with the mushroom checkoff. The evidence presented to the court in this case was that at least 50% of the assessments collected and paid to the Beef Board are used for advertising. Only 10-12% of assessments collected and paid to the Beef Board are used for research. Clearly, the principal object of the beef checkoff program is the commercial speech itself. Beef producers and sellers are not in any way regulated to the extent that the California tree fruit industry is regulated. Beef producers and sellers make all marketing decisions; beef is not marketed pursuant to some statutory scheme requiring an anti-trust exemption. The assessments are not germane to a larger regulatory purpose. This case is therefore controlled by *United Foods* and not by *Glickman*.

[25.] The producer plaintiffs object to the payment of \$1 per head of cattle for use in generically advertising beef. As set forth above in the discussion on

standing, the plaintiffs believe that the generic advertising campaign increases the demand for cheaper foreign beef, to the detriment of plaintiffs. Plaintiffs also object to having to pay for the advertisement of steak, which is not the product that they sell. The plaintiff producers sell live cattle and the assessment is paid per head of live cattle. Restaurants, meat-packers, wholesale food outlets, and retail groceries sell beef and beef products. The plaintiffs object that they are required to pay for advertising for a product for which they do not receive the profit. These other entities receive the profits when there is an increase in demand for beef products. The objections of plaintiffs could be analogized to a wheat farmer being required to fund advertising for General Mills breakfast cereal.

[26.] The beef checkoff is unconstitutional in violation of the First Amendment because it requires plaintiffs to pay, in part, for speech to which the plaintiffs object. The Constitution requires that expenditures for advertising of beef be financed only from assessments paid by producers who do not object to advancing the generic sale of beef and who are not coerced into doing so against their wills. *Abood*, 431 U.S. at 236-237, 97 S.Ct. at 1800.

II. Government Speech.

[27.] The defendants and intervenors argue that promotional materials paid for by the beef checkoff constitute government speech and are therefore not subject to a First Amendment challenge. The so called “government speech” doctrine is not so much a doctrine as it is an evolving concept that the government may compel the use of coerced financial contributions for public purposes. The Supreme Court explained the doctrine in *Abood* without actually naming it:

Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

Abood, 431 U.S. at 259 n. 13, 97 S.Ct. at 1811 n. 13 (Powell, J., concurring).

[28.] The State of California sought to rely on the government speech doctrine in *Keller v. State Bar of California*, 496 U.S. 1, 10, 110 S.Ct. 2228, 2234, 110 L.Ed.2d 1 (1990). *Keller* held, however, that the State Bar of California was not a typical government agency because it [-]

was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

Keller, 496 U.S. at 13, 110 S.Ct. at 2235.

[29.] *Keller* and other cases imply, in passing, that there is a "government speech" doctrine. It cannot be said, however, that the Supreme Court has given us an extensive discussion or explanation of the doctrine. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-42, 121 S.Ct. 1043, 1048-49, 149 L.Ed.2d 63 (2001), the Supreme Court stated:

We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, see *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), or instances, like *Rust*, in which the government "used private speakers to transmit specific information pertaining to its own program." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). . . . The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."

Board of Regents of Univ. of Wis. System v. Southworth, supra, at 235, 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193.

[30.] One of the latest Supreme Court cases dealing with the First Amendment is *Ashcroft v. The Free Speech Coalition, et al.*, ___ U.S. ___, 122 S.Ct. 1389, 1399, 152 L.Ed.2d 403 (2002): “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.” The “laundry list”, for what significance it may have, does not speak of “government speech.”

[31.] The question here is essentially whether the government is the speaker or whether the government has instead permitted a private entity to promote its own program and agenda. Congress cannot legislatively extend the power to a private group to abridge First Amendment rights. *Abood*, 431 U.S. at 226 n. 23, 97 S.Ct. at 1795 n. 23 (citing *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961)).

[32.] Is the Board, which receives the compelled checkoff assessments, akin to a labor union or state bar association whose members are representative of one segment of the population, thus preventing the Board from using checkoff assessments to fund speech of an ideological nature, or instead, is the Board more akin to a governmental agency, representative of the people, thus allowing the Board to use checkoff funds for speech that is relevant and appropriate to the Board's governmental interests? Defendants and INTERVENERS contend that this issue is squarely answered by the Supreme Court's decision in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995). In *Lebron*, the Supreme Court held that, where “the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.” *Lebron*, 513 U.S. at 400, 115 S.Ct. at 974-75. *Lebron* held that Amtrak was one such corporation.

[33.] The Third Circuit rejected the government's contention that the compelled expressive activities mandated by the Act constitute “government speech” in *United States v. Frame*, 885 F.2d 1119 (3rd Cir.1989).

When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the

government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.

Frame, 885 F.2d at 1132 (internal citations omitted).

The Cattlemen's Board seems to be an entity “representative of one segment of the population with certain common interests.” Members of the Cattlemen's Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private sector. The pool of nominees from which the Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those that “have a history of stability and permanency,” and whose “primary or overriding purpose is to promote the economic welfare of cattle producers.” 7 U.S.C. § 2905(b)(3) & (4). Therefore, we believe that although the Secretary's extensive supervision passes muster under the non-delegation doctrine, it does not transform this self-help program for the beef industry into “government speech.”

Frame 885 F.2d at 1133.

The evidence presented to this court as to the makeup of the Board and the Operating Committee as well as the supervision by the Secretary is consistent with that set forth in *Frame*.

[34.] Defendant and INTERVENERS contend that *Frame* is no longer valid in light of *Lebron*. *Lebron* could hardly be regarded as a “government speech” case. Amtrak was contending that it was not a governmental agency for the purposes of an artist's First Amendment challenge to the denial of his request to display an advertisement on an Amtrak billboard. The question in *Lebron* was not whether the speech was constitutional (because the government can use compelled contributions to pay for speech which is repugnant to some who contributed) but whether Amtrak could constitutionally prevent the artist's speech.

[35.] Of course, in evaluating whether the Beef Act's generic advertising scheme constitutes “government speech”, one must take into account whether the speech comes from general tax revenues or instead from some forced assessments paid for by members of one group. “Since neither Congress nor the

state legislatures can abridge (First Amendment) rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgment by government whether directly or indirectly.” *Abood*, 431 U.S. at 227 n. 23, 97 S.Ct. at 1795 n. 23 (quoting *International Ass'n of Machinists v. Street*, 367 U.S. 740, 777, 81 S.Ct. 1784, 1804, 6 L.Ed.2d 1141 (1961) (concurring opinion)). The speech at issue here is not funded by any governmental general tax revenue. The assessments are collected from only one very narrow segment of society--cattle producers, importers, and others, all of whom sell cattle. That segment of society is not representative of the population in general. The speech funded by that group can be traced directly to that group.

[36.] I reject the contentions of defendants that the beef checkoff is part of a regulatory scheme, akin to what exists with regard to California tree fruit. The regulatory scheme as to beef deals with meat safety, livestock auctions, and, at least allegedly, conduct by packers and stockyards. Cattle producers are not regulated on the farm or ranch or in marketing cattle. Cattle producers take what is offered to them by buyers and do not sell collectively.

[37.] As already discussed, the evidence received by the court in the trial of the First Amendment issue would support the findings by the district court and the Third Circuit in *Frame*, 885 F.2d at 1131-33. It is true that the Board, the entity which decides how to spend the mandated checkoff assessments, is created by statute to further the policy of the United States Congress to promote beef for the purpose of strengthening the beef industry's position in the marketplace. The Board is, however, comprised of private individuals who are not government employees. It is true that the Secretary must approve the appointment of those nominated to the Board. However, based upon the evidence, I conclude that such approval is merely pro forma. In fact, the Act itself only provides that the Secretary “certify” that those elected are in fact qualified. 7 U.S.C. § 2904(4)(A). It is true that all projects are submitted to the Secretary for final approval to spend checkoff funds for the project. It is true that USDA employees attend every meeting of the Board, the Operating Committee, and the Executive Committee. However, Barry Carpenter, Deputy Administrator for the Livestock and Seed Division of the USDA Agricultural Marketing Service, admitted that USDA oversight is more akin to ministerial review of the Board's compliance with the Order.

[38.] Many millions of dollars have been spent these past several years on “producer communications”. All of these so-called “producer communications,”

which were prepared with checkoff funds, stress to the producers that the Beef Board is a “producer-controlled, independent Board.” They stress to the producers that the beef checkoff is an “industry run program,” that “cattlemen run the program,” that the Board is “accountable” to the producers, that the people who make the decisions are producers, that the program is producer run, producer led, producer controlled, and independent. Nowhere in any of the “producer communications” (which communications were apparently approved or at least not vetoed by the Secretary) does it even hint that the Board is accountable to the USDA or that the speech being paid for by the producers is that of the federal government.

[39.] All audits of the Board are done by a private auditing concern, not by the Office of Inspector General.

[40.] The Board's beef advertisements bear the copyright of the NCBA and the Board. They do not bear the distinctive notice from the Government Printing Office.

[41.] The Act provides that the Board, with the approval of the Secretary, may invest assessment funds “only in obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in Obligations fully guaranteed as to principal and interest by the United States.” 7 U.S.C. § 2904(9). These funds are not treated in the same manner as general tax funds. For the one year period ending September 30, 2001, (FY 2001) the Board earned interest income of \$1,820,563.00. As of December 31, 2001, the Board's total investments amounted to \$30,046,237.00.

[42.] The Third Circuit in *Frame* concluded that, despite the Secretary's “extensive” supervision of the checkoff program, “it does not transform this self-help program for the beef industry into 'government speech.'” *Frame*, 885 F.2d at 1133. I agree. The generic advertising program funded by the beef checkoff is not government speech and is therefore not excepted from First Amendment challenge.

[43.] Common sense tells us that the government is not “speaking” in encouraging consumers to eat beef. After all, is the “government message” therefore that consumers should eat no other product or at least reduce the consumption of other products such as pork, chicken, fish, or soy meal? The answer is obvious.

[44.] The Secretary approves Board contracts much like the Indian Gaming Commission does as to Indian casino contracts. Do the advertisements promoting gambling and entertainment then generated by Indian casinos or their management companies (operating under a contract approved by the Commission) then constitute “government speech”? Again, the answer is obvious.

[45.] The beef checkoff was used to pay \$176,502.00 in FY 2000 and \$169,988.00 in FY 2001 for “USDA Oversight.” This is a further indication that what the Board has been doing is not government speech, the reason being that general tax revenues are not even being used to oversee the checkoff program. Administration expenses of the Board in FY 2001 were \$1,745,110.00. Total program expenses for FY 2001 were \$51,409,950.00.

III Relief.

[46.] As in *Abood*, it would be impossible to separate what portion of any individual's checkoff assessment is related to the objectionable generic beef promotion activities and what portion is used for the unobjectionable research and educational activities. There is no authority for this court to allow any objecting producer to simply not pay the assessment. Such relief would, in essence, rewrite the Act so as to make it a voluntary assessment. This court may not and will not rewrite the Act. The only other relief available and authorized is to strike down those portions of the Act which authorize compelled assessments for generic promotional activities.

[47.] The court rejects the contentions of defendants that the court should, if relief is granted, limit the terms of this ruling to the contributions paid and to be paid by plaintiffs. To so limit the holding would only encourage numerous other producers, importers, and other sellers of beef on the hoof to file additional lawsuits in this and other federal jurisdictions.

[48.] With a ruling that the entire Act and the Order violate the First Amendment, the defendants would be prohibited from using previously paid checkoff funds to continue operations, pay staff members, rent and other expenses, and otherwise operate under the terms of the Act and the Order to promote the purchase and consumption of beef and to fund or conduct research, i.e. until the money “runs out.” Contracts for advertising have already been signed. It would be a virtual impossibility to attempt to refund illegally

collected checkoff dollars to the beef producers and sellers. Costs to conduct the refund would be astronomical. Plaintiffs have not sought the refund of checkoffs paid in violation of the First Amendment. They have sought only the refund of checkoffs used in violation of the Act, i.e. to promote the checkoff itself and to oppose the referendum sought by plaintiffs. The court has already enjoined the use of beef checkoffs for such illegal purposes and does so again today by way of a permanent injunction. For all these reasons, the court determines that this ruling should be prospective only and should take effect only as of the start of business on July 15, 2002.

[49.] The court has earlier today discussed with counsel of record what the court intends to do. Defendants and the INTERVENERS have orally and informally stated to the court and the other parties their desire to seek a stay of this injunction and declaratory ruling, this pursuant to Fed.R.App.P. § 8(a)(1). The court has informally advised the parties that the court would not be inclined to grant any such application for a stay. Therefore, it appears that moving for such a stay in the district court would be impracticable. The reasons are: (a) the ruling is prospective only; (b) the defendants will be allowed to continue to expend checkoff derived funds on hand and to be collected between now and July 15, 2002, to the extent that the uncommitted funds total more than \$10,048,677.00; (c) the Board has at all times had a large surplus and such surplus can be used to continue advertising and research as the Board “winds down”; (d) if the defendants were to be allowed to continue to collect checkoffs under an unconstitutional law, cattle producers, many of whom are now under severe stress from drought conditions, unfavorable market conditions, and economic pressures forcing almost unprecedented sales of live cattle, including in many cases entire herds, would be irreparably harmed since it would be extremely impractical, if not impossible, to refund, if the ruling of this court is not overturned by the United States Court of Appeals for the Eighth Circuit or the United States Supreme Court, any such future collections; (e) justice would not be served by a stay; and (f) the entire matter would only be further delayed if defendants were to be required to seek a stay in the district court with likely no chance of success before proceeding to the Court of Appeals.

[50.] The foregoing constitutes the court's findings of fact and conclusions of law.

[51.] The requested alternative relief as to the referendum and the Fifth Amendment claims should be denied on the basis that they are moot.

[52.] Remaining issues in this case include (a) the award of attorney fees, sales tax, and costs, and (b) the refund request as to \$10,048.677.00 alleged to have been illegally expended on so-called "producer communications." A certification pursuant to Fed.R.Civ.P. § 54(b) is appropriate.

[53.] Portions of the preliminary injunction previously issued by the court should be made permanent.

ORDER

[54.] Based upon the foregoing,

[55.] IT IS ORDERED, ADJUDGED AND DECREED as follows:

(1) The plaintiffs' request in the seventh cause of action of their third amended complaint for declaratory and injunctive relief is granted.

(2) The Beef Promotion and Research Act, 7 U.S.C. § 2901, *et seq.*, and the Beef Order promulgated thereunder, which mandate the payment of an assessment by cattle producers, importers, and others who sell beef subject to the terms of the Act (the beef checkoff), are unconstitutional and unenforceable because they violate the plaintiffs' rights under the First Amendment to the United States Constitution.

(3) The defendants and each of them as well as those described in Fed.R.Civ.P. § 65(d) are hereby enjoined and restrained from any further collection of beef checkoffs as of the start of business on July 15, 2002. This does not prohibit anyone from remitting on or after July 15, 2002, checkoffs collected before July 15, 2002.

(4) This ruling is prospective only as of July 15, 2002.

(5) There is no just reason for delay and, pursuant to Fed.R.Civ.P. § 54(b), judgment should be entered as provided herein although the judgment is as to fewer than all the claims or the rights and liabilities of the parties.

(6) Attorney fees, sales tax thereon, and the costs of this action shall be awarded to the plaintiffs.

(7) A stay, even if formally requested, would be denied for the reasons expressed in the opinion.

(8) The defendants and those described in Fed.R.Civ.P. § 65(d) are permanently enjoined and restrained from any further use of checkoff funds, directly or indirectly, for the purpose of lauding the merits of the checkoff program and from creating or distributing any material, whether written, oral, or audio-visual, for the purpose of influencing governmental action or policy with regard to the beef checkoff or the Board or both.

EQUAL ACCESS TO JUSTICE ACT

COURT DECISION

DWIGHT L. LANE; DARVIN R. LANE, APPELLANTS, v. USDA.

No. 01-3257.

Filed: June 21, 2002.

E.A.J.A. – Attorney fees – Agent’s fees – Litigation expenses, calculation of.

Upon a *de-novo* review in a light most favorable to Appellant, the U.S. Court of Appeals determined that the Judicial Officer (JO) correctly determined that: (1) Appellants cannot recover for both attorney fees and agent’s fees under EAJA; (2) the JO’s determination that the adversarial adjudication began with the denial of the Farm Service Agency loans to Appellants is correct; and (3) the JO’s determination was supported by substantial evidence and was not an abuse of discretion.

(Cite as: 294 F.3d 1001)

**UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.**

Before HANSEN, Chief Judge, FAGG and BOWMAN, Circuit Judges.

PER CURIAM.

Brothers Dwight L. Lane and Darvin R. Lane (the Lanes) are before this Court for the third time pursuing attorney's fees from the United States Department of Agriculture (the Agency) under the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504 (2000). This case began when the Farmers Home Administration (now the Farm Service Agency, or FSA) did not review the Lanes' applications for delinquent loan servicing within 90 days, then denied the applications. The Lanes appealed the denial to the National Appeals Division (NAD) and won. The Lanes then sought attorney's fees under the EAJA. In the Lanes' first appeal to this Court, we concluded the appeal to the NAD was an adversary adjudication under the Administrative Procedures Act thus attorney's fees were available under the EAJA. *Lane v. United States Dep't of Agriculture*, 120 F.3d 106, 109-10 (8th Cir.1997). We remanded the case so the NAD hearing officer could consider the merits of the Lanes' fee petitions.

The NAD hearing officer found the Lanes were prevailing parties, the Agency's position in the underlying denial of delinquent loan servicing was not

substantially justified, and no special circumstances existed that would make a fee award unjust. The NAD officer awarded Dwight Lane \$95,933.45 and Darwin Lane \$118,064.26 for attorney's fees, agent's fees, and costs. The FSA petitioned the Judicial Officer of the USDA for review of the NAD officer's fee award. While the FSA's administrative appeal was pending, the Lanes challenged the FSA's authority to bring an administrative appeal to an EAJA award. Because the agency decision was not final, the challenge was dismissed as premature. *Lane v. United States Dep't of Agriculture*, 187 F.3d 793, 795 (8th Cir.1999). The Judicial Officer resolved the administrative appeal by reducing Darwin's award to \$27,353.30 and Dwight's award to \$28,043.30, for a total reduction of \$158,601.17. The Lanes then petitioned the district court for review. The district court¹ granted the Agency's motion for summary judgment, affirming the Judicial Officer's reduced award. The Lanes now appeal. Having reviewed the record *de novo* and considered the facts and all reasonable inferences that can be drawn from them in the light most favorable to the Lanes, we conclude the district court correctly granted summary judgment to the Agency. *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir.2002).

Although the Lanes claim the district court did not apply the proper standard of review, we disagree. Abuse of discretion governs review of fee awards, however, questions of law are reviewed *de novo*. *Jenkins v. Missouri*, 127 F.3d 709, 713 (8th Cir.1997). The record shows the district court properly considered legal issues *de novo* and applied legal conclusions to the factual record made before the administrative agency. 5 U.S.C. § 554(c)(2) (2000). The district court correctly recognized its authority to modify the fee award is limited to situations where the fee award was unsupported by substantial evidence. *Allen v. Nat. Trans. Safety Bd.*, 160 F.3d 431, 432 (8th Cir.1998).

The Lanes object to the Judicial Officer's exclusion of agent's fees from the fee award. Like the Judicial Officer and the district court, we reject the Lanes' claim that the EAJA (so in original - Editor) allows recovery of both attorney's and agent's fees. The plain language of the statute reads " 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study . . . , and reasonable attorney or agent fees." 5 U.S.C. § 504(b)(1)(A) (2000); *Duncan v. Walker*, 533 U.S. 167, 172, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (statutory construction begins with the language of the statute). Contrary to the Lanes' contention, "or", in "attorney or agent fees" is disjunctive, meaning a claimant cannot receive fee awards for both attorney and agent fees. *United States v. Smith*, 35 F.3d 344, 346 (8th Cir.1994). Congress intended agent fees to be awarded where a non-attorney represents a party before an administrative agency. See H.R.Rep. No. 96-1418 (1980) reprinted in 1980

¹ The Honorable Rodney S. Webb, United States District Judge for the District of North Dakota

U.S.C.C.A.N. 4984, 4993. The reduced award is consistent with the intent of Congress to reduce the deterrent effect of the expense of seeking review of unreasonable government action because it compensates the Lanes for their reasonable representation-related expenses. *Id.* Even if the statute is construed to permit awards of both attorney's and agent's fees, we agree with the Judicial Officer that awarding fees to both Lanes' attorneys and agent would be unreasonable. The Judicial Officer found that the Lanes' were represented by two attorneys who specialized in agricultural law, the agent served in a representational capacity, and three representatives were unnecessary. This fee reduction is supported by substantial evidence and is not an abuse of discretion.

The Lanes also claim the Judicial Officer abused his discretion by disallowing fees that accrued before the date the USDA formally denied the delinquent loan servicing applications. The EAJA allows for awards of fees and expenses in connection with an adversarial adjudication proceeding. Section 504(b)(1)(C) defines adversarial adjudication meaning an adjudication under 5 U.S.C. § 554, when the United States is represented by counsel and the controversy is resolved after a hearing on the record. The Lanes contend the adversarial proceeding began when the Agency failed to review their applications for delinquent loan servicing within the 90 day time limit and investigated them for bad faith. The Agency's notification that it was seeking legal advice on whether the Lanes had acted in bad faith, while adversarial, does not transform the Agency's review of the loan servicing application into an adjudicative proceeding. The Judicial Officer's finding that the adversarial adjudication began no earlier than the denial of the Lanes' applications is not an abuse of discretion. *See Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 887-88 (8th Cir.1995) (strictly construing the Government's partial waiver of sovereign immunity).

We thus affirm on the basis of the district court's well-reasoned opinion.

INSPECTION AND GRADING ACT**COURT DECISION****AMERICAN RAISIN PACKERS, INC. V. USDA.****CV F 01 5606 AWISMS.****Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment.****Filed March 5, 2002.****AMA – Arbitrary, capricious – Misrepresentation – Willful – Fraud – Deference to agency interpretations – Burden on moving party.**

The U.S. District court for California granted summary judgment in favor of USDA. The Court gave deference to the Judicial Officer's JO interpretation of the agency's regulations that disbarment from receiving USDA inspection services to [Plaintiff] was a reasonable interpretation of the agency's regulations even though under the agreed facts, the [Plaintiff's] actions were not willful, but were merely unintentional and not shown to be fraudulent conduct. The Court distinguished and dismissed the [Plaintiff's] comparison of similar regulations

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

This action is an appeal of a decision by the United States Department of Agriculture (USDA) that resulted in Plaintiff American Raisins Packers, Inc.'s disbarment from inspection services for one year. This court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346(a)(2).

Anthony W. Ishii, Judge

PROCEDURAL HISTORY**A. Background of Administrative Proceedings.¹**

Plaintiff is a processor of California raisins. In August 1998, Plaintiff sold raisins to the USDA pursuant to USDA Invitation Number 21, issued on June 3, 1998, soliciting bids for Thompson Seedless Raisins for domestic feeding programs.

¹ Because no party has provided the court with the Administrative Record, the portions of this section pertaining to the administrative proceedings are taken from the parties' briefs and the final decision of the USDA. Upon learning that the court did not have the Administrative Record, both parties offered to provide the court with it. However, the court has determined that the Administrative Record is not necessary to resolve the issues raised by Plaintiff.

On December 3, 1998, the Agricultural Marketing Service (“AMS”), an agency of the USDA filed a complaint before the Secretary of Agriculture. The complaint was filed pursuant to the Agricultural Marketing Act of 1946, as amended, 7 U.S.C. §§ 1621-1632, and the regulations and standards issued under the Agricultural Marketing Act, 7 C.F.R. Part 52. The complaint alleged that between August 5 and August 11, 1998, Plaintiff violated 7 C.F.R. § 52.54 by misrepresenting Golden Raisins as Thompson Seedless Raisins.

On May 24, 2000, a hearing was held in Fresno, California before an Administrative Law Judge (“ALJ”) of the USDA. On November 21, 2000, the ALJ issued a decision. The ALJ found that Plaintiffs failure to provide 100% Thompson Seedless Raisins to the USDA for sampling constituted a misrepresentation and a violation of 7 C.F.R. § 52.54. Specifically, the ALJ found Plaintiff had misrepresented the product that it had presented for inspection as being 100% Natural Thompson Seedless Raisins because some of the containers had Golden Raisins, which contained sulphur, in them. The ALI barred Plaintiff from receiving inspection services for one year.

Plaintiff appealed the decision to a Judicial Officer (“JO”) for the USDA, to whom the Secretary of the Agriculture has delegated the authority to issue final decisions of the USDA. Plaintiff contended that there should be no debarment because there was no finding of any willfulness in the violation. The AMS also appealed to the JO, arguing that the debarment should have been for four years. On May 1, 2001, the JO issued a decision. The JO adopted the ALJ's decision and order with minor modifications and upheld the one-year debarment.

B. Background of Current Action

On May 18, 2001, Plaintiff filed a complaint for review of an administrative decision under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 702-706. The complaint alleges that the USDA's decision must be set aside pursuant to 5 U.S.C. § 706 because the decision and order is arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of statutory jurisdiction and authority. The complaint also contends that 7 C.F.R. § 52.54 does not permit debarment from inspection services for negligent misrepresentation. The complaint alleges that 7 C.F.R. § 52.54 requires willfulness, which the ALJ and JO found was not present in this case.

On November 13, 2001, Plaintiff filed a motion for summary judgment. Plaintiff contends that 7 C.F.R. § 52.54 allows debarment for only intentional acts of fraud, misrepresentation, or deceptive practices. Because the ALJ and JO both found there was no willfulness or deceptive or fraudulent acts or practices,

Plaintiff believes section 52.54 does not apply. Plaintiff's brief offers three proposed undisputed facts concerning the conclusions of the ALJ and JO that Plaintiff's conduct was not intentional².

On December 17, 2001, Defendant filed an opposition to Plaintiff's motion. Defendant agrees that the JO found Plaintiff's conduct was a misrepresentation and was not willful. Defendant characterizes Plaintiff's actions as a failure to take steps to assure the applicable inspection regulations were followed or a negligent misrepresentation. However, Defendant contends these non-willful actions constitute a violation of section 52.54.

Concerning Plaintiff's proposed statement of undisputed facts, Defendant states that it does not object to the decision of the JO and requests the court review the entire decision.

On December 17, 2001, Defendant filed its own motion for summary judgment. Defendant contends that the JO's decision is supported by substantial evidence. Defendant contends Plaintiff violated section 52.54(a) by misrepresenting that the raisins it was packing were only Thompson Seedless Raisins when Golden Raisins, which contained sulphur, were also mixed in with the Thompson Seedless Raisins. Defendant contends that the inspection regulations and facts support Plaintiff being debarred for one year for violating section 52.54. Defendant also provides proposed undisputed facts which concern the evidence admitted during the administrative process.

On January 11, 2002, Plaintiff filed a reply to Defendant's opposition to Plaintiff's motion for summary judgment along with an opposition to Defendant's motion for summary judgment. Plaintiff argues that its debarment means that Plaintiff will have to shut down its business, and the court should recognize the harshness of this penalty when evaluating whether negligent or unintentional conduct violates section 52.54. Plaintiff again argues that section 52.54 only allows debarment for intentional acts of fraud, misrepresentation, or deceptive practices. Plaintiff's brief does not respond to Defendant's proposed undisputed facts.

On February 6, 2002, Defendant filed a reply to Plaintiff's reply to Defendant's opposition to Plaintiff's motion for summary judgment.³

² Plaintiff's brief also provides Plaintiff's interpretation of the evidence submitted at the administrative hearings. Plaintiff states these additional facts are only provided to give the court background information. In its briefs and at the hearing, Plaintiff stated it is only the facts concerning the actual findings of the ALJ and JO that are relevant because Plaintiff's sole contention is a legal argument on the proper interpretation of section 52.54.

³ While Defendant could have filed a reply to Plaintiff's brief to the extent it was an opposition to Defendant's motion, Defendant was not entitled to file a sur-reply to Plaintiff's reply to Plaintiff's motion.

(continued...)

On February 25, 2002, the court held a hearing. At the hearing, the parties agreed that the issue in this action is whether section 52.54 requires an intent to commit a misrepresentation beyond that found by the ALJ and JO.

LEGAL STANDARDS

Summary judgment shall be granted when the undisputed facts entitle the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment motions are particularly appropriate where, as here, the court's review is of an administrative record. *See Adams v. United States*, 318 F.2d 861, 865 (9th Cir. 1963).

When a motion for summary judgment is before the court, the court is ordinarily guided by the standards articulated in Federal Rule of Civil Procedure 56(c), which provides that summary judgment is appropriate when there exists no genuine issue of material fact and the moving party should prevail as a matter of law. When the court is called upon to review an agency decision, however, the standards for summary judgment are modified by 5 U.S.C. § 706(2), at least with respect to factual disputes. The question is not whether there is a genuine issue of material fact, but rather whether the agency action was arbitrary, capricious, and an abuse of discretion, not in accordance with law, or unsupported by substantial evidence on the record taken as a whole.

Sacramento Regional County Sanitation Dist. v. Thomas, 668 F. Supp. 1427, 1430-31 (E.D. Cal. 1987) (citations omitted), reversed on other grounds by *Sacramento Regional County Sanitation Dist. v. Reilly*, 905 F.2d 1262 (9th Cir. 1990).

When reviewing an agency decision, the court must first decide whether the agency acted within the scope of its authority. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

This requires the court to ascertain the scope or range of the agency's authority and discretion and determine whether the agency's decision was within that range. *Id.* at 415-16. Second, the court must review the agency's decision and "hold unlawful and set aside agency action, findings, and conclusions"

(...continued)

which are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “contrary to constitutional right” or “unsupported by substantial evidence.” 5 U.S.C. §§ 706(2)(A), (B), (E).

In determining whether an agency decision is arbitrary[,] capricious, or an abuse of discretion, the court determines whether the agency “considered the relevant factors and articulated a rational connection between the facts found and the choice made.” *Resources Ltd. v. Robertson*, 35 F.3d 1301, 1304 (9th Cir. 1993); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29,43 (1983). When reviewing an agency's decision, the court must consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Agency action is arbitrary and capricious if the agency relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.*

“Substantial evidence” within the meaning of 5 U.S.C. § 706(2)(E) is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Western Truck Manpower, Inc., v. United States Dep't of Labor*, 12 F.3d 151, 153 (9th Cir. 1993) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). To determine if an agency's decision is supported by substantial evidence, the court must “carefully search the entire record to determine whether it contains such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and whether it demonstrates that the decision was based on a consideration of the relevant factors.” *Hielvk v. Babbitt*, 198 F.3d 1072, 1074 (9th Cir. 1999). (internal cites and quotations omitted).

The court must review an agency's conclusions of law *de novo*, “with deference to the agency's ‘reasonable construction’ of the statute and regulations.” *Potato Sales Co., Inc. v Department of Agriculture*, 92 F.3d 800, 803 (9th Cir. 1996) (citing *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989)). The court must give substantial deference to an agency's interpretation of its own regulations. *Akootchook v. United States*, 271 F.3d 1160, 1167 (9th Cir. 2001); *see also Alhambra Hosp., v. Thompson*, 259 F.3d 1071 (9th Cir. 2001) (stating that in Ninth Circuit court's review of agency's interpretation of its own regulations is “extremely deferential”). The court's task “is not to decide which among several competing interpretations best serves the regulatory purpose.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). The court must defer to the agency's interpretation of its own regulations unless an alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation.

Id.; *In re Transcon Lines*, 89 F.3d. 559, 567 (9th 1996); *Providence Hosp. of Toppenish v. Shalala*, 52 F.3d 213, 216 (9th Cir. 1995). The “agency’s determination must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Thomas Jefferson Univ.*, 512 U.S.. at 512 (internal quotations and citations omitted).

The court must not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. [] at 43. In general, the court must defer to the agency “given that an agency’s interpretation of its regulations is of controlling weight unless it is plainly erroneous or inconsistent with the regulations.” *Anchustegui v. Department of Agriculture*, 257 F.3d. 1124, 1128 (9th Cir. 2001).

UNDISPUTED FACTS

There is no agreed statement of undisputed facts before the court. Neither party adequately responded to the other party’s proposed statement of undisputed facts. Defendant requests the court review the JO’s decision for itself to determine the JO’s factual findings instead of relying on Plaintiff’s proposed statement of undisputed facts. Plaintiff did not respond in any way to Defendant’s proposed statement of undisputed facts.

A. Evidence Admitted During the Administrative Hearings.

The court cannot make any factual findings concerning the evidence admitted during the administrative hearings. While both parties’ briefs discuss the evidence admitted during the administrative hearings, the court does not have the Administrative Record before it. The only documents provided to the court are the ALJ’s opinion and the JO’s opinion. Thus, the court can make no factual findings concerning the evidence, determine whether the evidence is sufficient, or decide whether the JO’s factual findings are arbitrary, capricious, an abuse of discretion, or contrary to law. However, at the hearing, Plaintiff clarified that Plaintiff’s contentions neither depend on the evidence admitted during the administrative process nor dispute the ALJ’s and JO’s factual findings. Plaintiff’s sole argument is that the factual findings made by the ALJ and JO do not allow for disbarment under section 52.54. Thus, it is unnecessary for the court to make factual findings on the evidence admitted during the administrative hearing.

B. Agency Decision

The relevant decision being reviewed by this court is the JO's decision as it represents the final decision of the USDA. The JO found that the AMS's position was that because USDA Invitation Number 21 called only for Thompson Seedless Raisins, Plaintiff engaged in fraud, misrepresentation, and deceptive practices by including sulfur (so in original - Editor) and Golden Raisins with the Thompson Seedless Raisins. *See* JO's Decision at 19. The USDA had contended that a fraudulent practice was shown by: (1) Plaintiff's actions in darkening the Golden Raisins and placing the Golden Raisins where they could be blended with Thompson Seedless Raisins for the purpose of making it difficult for Plaintiff's employees to distinguish the Golden Raisins from the Thompson Seedless Raisins; (2) failing to fully account for the disposition of 30,000 pounds of Golden Raisins; (3) engaging in the practice of mixing poor quality raisins with better quality raisins; (4) deceiving purchasers of raisins for bird feed by darkening Golden Raisins to have them resemble Thompson Seedless Raisins; and (5) failing to provide measures to prevent Golden Raisins from being mixed with Thompson Seedless Raisins. *Id.* at 19-20.

The JO concluded that Plaintiff's failure to provide 100% Thompson Seedless Raisins to the USDA for sampling, as required by USDA Invitation Number 21 constituted a misrepresentation and a violation of 7 C.F.R. § 52.54(a)(1)(ii). *See* JO's Decision at 23. The JO found that USDA Invitation Number 21 called only for Thompson Seedless Raisins. *Id.* at 21. Yet, Golden Raisins were present with the Thompson Seedless Raisins. *Id.* Thus, the JO found that Plaintiff had failed to comply with USDA Invitation Number 21 because the inclusion of any amount of Golden Raisins with Thompson Seedless Raisins, for whatever reasons, is a misrepresentation of the variety of raisins Plaintiff agreed to supply. *Id.* While the JO found only a relatively small number of Golden Raisins were present, the JO concluded that Plaintiff had violated 7 C.F.R. 52.54(a)(1)(ii). *Id.*

The JO made several findings about Plaintiff's intent. The JO concluded that there was a lack of substantial evidence showing that Plaintiff engaged in a deceptive or fraudulent practice or act. *Id.* at 20. The JO found that "the record does not support a finding that Plaintiff] manipulated the inspection process for its own benefit." *Id.* at 36. The JO agreed with the ALJ that the record did not support a finding that Plaintiff's violation was willful. *Id.* at 25 & 37⁴. The JO reviewed the ALJ's finding that "There is a lack of substantial evidence showing

⁴ The JO did state that Plaintiff had caught a break on willfulness because Plaintiff "'barely' escaped being found to have intentionally blended two varieties of raisins when [Plaintiff] was required to provide 100 percent Thompson seedless raisins." JO Decision at 37.

that there was a practice of fraudulent misrepresentation or deception.” ALJ Decision at 9. The JO modified this finding to read: “There is a lack of substantial evidence showing that there was a deceptive or fraudulent practice or act.” JO Decision at 25.

On appeal to the JO, as in this court, Plaintiff had argued that the ALJ erred by ordering debarment because the ALJ did not find willfulness and section 52.54 allows debarment for only intentional acts of misrepresentation, fraud, or deceptive practices. The JO determined that the ALJ had correctly found that Plaintiff had violated 7 C.F.R. § 52.54(a)(1), which allows for debarment for fraud or misrepresentation, *Id.* at 23. The JO concluded this case hinged on “misrepresentation” and not on a “deceptive or fraudulent practice or act” *Id.* at 25. Because 7 C.F.R. § 52.54(a)(1) is written in the disjunctive, allowing debarment for “[a]ny misrepresentation or deceptive or fraudulent practice or act,” the JO concluded Plaintiff could be debarred for a non-willful misrepresentation. *Id.* at 25-26 (quoting 7 C.F.R. § 52.54(a)(1)). The JO concluded that the ALJ properly found a misrepresentation in connection with Plaintiff's submission of samples for inspection. *Id.* at 26. Finally, the JO rejected the USDA's argument on appeal that the evidence showed Plaintiff's actions were willful. *Id.*⁵

DISCUSSION

Title 7 U.S.C. § 1662 defines the duties of the Secretary of Agriculture 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, including assessment and collection of such fees as will be reasonable was as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire[.]

⁵ Other findings by the JO have been omitted because they do not address issues before this court.

Title 7 U.S.C. § 499n(a) authorizes the Secretary to create rules and regulations concerning inspectors and the inspection of perishable agricultural commodities. The AMS has issued regulations governing the inspection and certification of fruits and vegetables, and these rules are found in Chapter I of Title 7. The AMS may debar a company from inspection services for “(a)ny misrepresentation or deceptive or fraudulent practice or act found to be made or committed in connection with . . . the submission of samples for inspection.” 7 C.F.R. § 52.54(a)(1)(ii).

A. Whether the USDA’s Decision is supported by Substantial Evidence.

The first section of Defendant’s motion for summary judgment argues that there was substantial evidence to support the administrative decision and it was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Defendant cites to the administrative record and Defendant’s proposed statement of undisputed facts to support Defendant’s arguments.

In its briefs Plaintiff does not respond to this argument nor does Plaintiff respond to Defendant’s proposed statement of undisputed facts. At the hearing, Plaintiff clarified that it is neither arguing the factual findings made by the USDA were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law nor arguing that there was not substantial evidence. Plaintiff’s contention is that section 52.54 only allows debarment for conduct that is found to be willful or intentional. Thus, Defendants’ request for summary judgment on this issue is granted because Plaintiff does not contend the factual findings were incorrect.

B. 7 C.F.R. § 52.54

Both Plaintiff and Defendant request summary judgment on Plaintiff’s contention that 7 C.F.R. § 52.54(a)(1)(ii), which Plaintiff was found to have violated, requires willful or intentional misrepresentation. Plaintiff’s position is that he cannot be debarred under this provision because the ALJ and JO concluded Plaintiff’s actions were not willful or intentional and debarment requires willful or intentional misrepresentation. Defendant contends that a misrepresentation does not have to be willful or intentional to meet the requirements of 7 C.F.R. § 52.54(a)(1).

Title 7 C.F.R. § 52.54 provides the circumstances under which the USDA can debar a company from receiving inspection services.

[. . .]

(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 official 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) Willful violation of the regulations in this subpart. Willful 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.

The JO found that Plaintiff had violated section 52.54(a)(1)(ii), which allows for debarment for "[A]ny misrepresentation or deceptive or fraudulent practice

or act found to be made or committed in connection . . . [t]he submission of samples for inspection,” As discussed above, the JO agreed with the ALJ that there was a lack of substantial evidence showing that Plaintiff engaged in a deceptive or fraudulent practice or act. JO's Decision at 20 & 25. The JO and AW agreed that Plaintiff's violation and actions were not willful. *Id.* at 25 & 37. The JO concluded that despite the lack of a deceptive or fraudulent practice or act and despite the fact Plaintiff's actions were not willful, Plaintiff still had violated section 52.54(a)(1)(ii) because the conduct constituted a misrepresentation.

In Plaintiff's motion for summary judgment, Plaintiff contends that its conduct cannot result in debarment under section 52.54. Plaintiff argues that section 52.54 requires willfulness before debarment. Plaintiff argues, without citing any authority, that misrepresentation means to deceive or mislead or be dishonest in a representation and requires a state of mind of being deceptive or something intentional, not innocent misrepresentation. Plaintiff argues that it makes no sense to read the statute to allow debarment for innocent or negligence misrepresentation and also allow debarment for a “deceptive or fraudulent practice act” or a “willful violation.”

Defendant argues that the plain reading of section 52.54(a) does not require a misrepresentation to be intentional or willful. Defendant contends willful is only required for a section 52.54(a)(2) violation. Because Plaintiff was found to have violated section 52.54(a)(1), there is no willful requirement. Because the word “misrepresentation” is not modified. Defendant argues the JO correctly found a misrepresentation under section 52.54(a)(1) does not require any intent or willful conduct. In light of the deference that must be given to an agency's reasonable construction of its own regulations, Defendant contends that the JO's interpretation should be enforced.

As discussed above, the court must defer to the agency's interpretation of its own regulations unless an alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation. *Thomas Jefferson Univ*, 512 U.S. at 512; *In re Transcon Lines* 89 F.3d. at 567; *Providence Hospital of Toppenish* 52 F.3d at 216.

1. Plain Language of Section 52.54

There is no indication Plaintiff's reading of section 52.54 is compelled by section 52.54's plain language. Plaintiff was found to have violated section 52.54(a)(1)(ii), which provides for debarment for “[a]ny misrepresentation or deceptive or fraudulent practice or act found to be made or committed in connection with . . . [t]he submission of samples for inspection.” As found by

the JO, the word “or” separates the words “misrepresentation,” “deceptive,” and “fraudulent.” The use of the word “or” implies that the misrepresentation does not have to be deceptive or fraudulent because these words describe different conduct which can violate section 52.54(a)(1). Plaintiff relies on the fact that the title of section 52.54(a)(1) is “Fraud or Misrepresentation.” However, because the word “or” is used between fraud and misrepresentation, the plain reading of this title does not require the misrepresentation to also be committed with fraud. Thus, the plain reading of section 52.54(a)(1) provides that misrepresentation without deceptive or fraudulent conduct violates section 52.54(a)(1).

The word “willful” is nowhere in section 52.54(a)(1). “Willful” is found in section 52.54(a)(2), which allows for debarment for a “[w]illful violation of the regulations in this subpart” and for a “[w]illful violation of the provisions of this part of the Act.” Plaintiff was not found to have violated section 52.54(a)(2). Section 52.54(a) begins “[T]he following acts or practices . . . may be deemed sufficient cause for the debarment. . . .” This sentence clearly implies that 52.54(a)(1), section 52.54(a)(2), and section 52.54(a)(3) are each separate acts that can result in debarment. As such, section 52.54(a)(2)'s willful requirement deals only with section 52.54(a)(2) and the plain reading of section 52.54(a) does not provide for the word willful to be read into section 52.54(a)(1). Thus, the plain reading of section 52.54(a)(1) does not require that the misrepresentation be willful.

In Plaintiff's brief, Plaintiff also argues any misrepresentation must be intentional. The word intentional is found at no place in section 52.54. Thus, the plain reading of section 52.54(a)(1) does not require that the misrepresentation be intentional.

Reviewing the plain reading of section 52.54(a)(1), the term “misrepresentation” stands alone. The plain reading of section 52.54(a)(1) does not require the words “deceptive,” “fraudulent,” or “willful,” from the other provisions of section 52.54(a) nor any other word, such as “intentional,” to be read into section 52.54(a)(1) to modify the word “misrepresentation.” Thus, this court must defer to the agency's interpretation of its own regulations because the plain language of the statute does not compel a different reading. *See Thomas Jefferson Univ.*, 512 U.S. at 512.

2. Intent of USDA When Enacting Section 52.54

Even if the plain language of a regulation does not compel a different reading than the agency's interpretation[,], the court still need not defer to the agency's interpretation of its own regulations if an alternate reading is compelled by other

indicators of the agency's intent at the time the regulation was promulgated. *See Thomas Jefferson Univ.*, 512 U.S. at 512[.]

a.. Public Policy.

Plaintiff argues that policy should not allow the word “misrepresentation” in section 52.54(a)(1) to include even non-willful or innocent misrepresentations. Plaintiff argues that with numerous varieties of raisins processed through the same equipment it is likely a large shipment will often not be one hundred percent one type of raisin. Plaintiff believes that debarment is not appropriate for such a common mistake. Plaintiff also argues that because debarment will most likely close a business, it is a harsh sanction for innocent conduct that is not deceptive, fraudulent, or willful.

While these may be good policy arguments, Plaintiff provides no authority or evidence that these were policy concerns considered by Congress when enacting the relevant Statutes or the USDA when enacting the regulations. This court must defer to the agency's interpretation of its own regulations unless an alternative reading is compelled by the agency's intent at the time of the regulation's promulgation. *See Thomas Jefferson Univ.*, 512 U.S. at 512; *Providence Hosp. of Toppenish*, 52 F.3d. at 216. Without any evidence that Congress or the USDA only meant to debar raisin producers for willful or intentional misrepresentation because innocent misrepresentations are common in the raisin packing industry, Plaintiff's policy arguments fail.

Further, section 52.54(a) states that the listed acts or practices “may be deemed sufficient cause for debarment.” The use of the word “may” provides that the ALJ and JO are not required to debar an entity for any and all misrepresentations. The USDA has discretion to consider all factors when deciding whether to debar. Thus, Plaintiff's prediction - that most raisin packers will be debarred at some time because accidental misrepresentations always occur -- is not accurate.

b. *Potato Sales Co. Inc. v. Department of Agriculture*

In its reply brief, Plaintiff cites *Potato Sales Co. Inc. v. Department of Agriculture*, 92 F.3d 800, 803 (9th Cir. 1996), for the proposition that a license revocation cannot occur if conduct was simply negligent and not deliberate. In this case, Potato Sales held a license under the Perishable Agricultural Commodities Act (PACA). *Id.* at 803. When Potato Sales misrepresented the origin of apples, the USDA instituted proceedings against Potato Sales and two other entities, seeking revocation of their licenses. *Id.* The applicable regulation was Title 7 C.F.R. § 46.45, which described violations as “serious,” “very

serious,” or “flagrant” depending upon the circumstances of the misrepresentation. Where the violation is also willful, the revocation proceeding may be initiated without prior written warning and an opportunity to demonstrate or achieve compliance. 7 C.F.R § 46.45(e)(5). The issue in *Potato Sales* was whether Potato Sales' conduct was flagrant and willful. *Potato Sales*, 92 F.3d at 804. The Ninth Circuit determined that the JO correctly found the conduct intentional, deliberate, and knowing and the JO correctly found the conduct willful⁶. *Id.* at 804-806. The court did note that if Potato Sales' conduct was not intentional or deliberate, it would not have been flagrant. *Id.* at 805.

Plaintiff cites to *Potato Sales* as authority for the proposition that intentional or willful conduct are required before a license revocation or debarment. However, *Potato Sales* concerned a different regulation, not section 52.54. The applicable provision, 7 C.F.R. § 46.45(a) reads:

(a) Violations. Violations are considered to be serious, very serious, or repeated and/or flagrant, depending upon the circumstances of the misrepresentation.

...

(3) Flagrant violations. Include, but are not necessarily limited to, the following examples:

(i) Shipment or sale of a lot . . . after notification by official inspection that the inspected commodity fails to comply with any markings on the container . . .;

(ii) To offer for resale or consignment a lot . . . that has been, officially inspected at destination and found to be misbranded without advising a prospective receiver that the lot is misbranded . . .; or

(iii) To withhold or fail to disclose known material facts with respect to a misrepresentation or misbranding[.]

⁶ The Court found *Potato Sales*'s conduct was willful because the evidence showed it had been done intentionally or at least with a careless disregard of the statutory requirements. *Id.* at 806.

7 C.F.R. § 46.45(a) (emphasis added).⁷

⁷ Title 7 C.F.R. § 46.45(a) reads in full:

(a) Violations. Violations are considered to be serious, very serious, or repeated and/or flagrant, depending upon the circumstances of the misrepresentation.

(1) Serious violations. Include the following:

(i) Any lot of a perishable agricultural commodity shown by official inspection to contain scorable defects, off-size, off-count, exceeding the tolerance(s) in an amount up to and including double the tolerance provided in the applicable grades, standards or inspection procedures;

(ii) Any lot of perishable agricultural commodity officially certified as failing to meet the declared weight;

(iii) Any lot of a perishable agricultural commodity in which the State, country, or region of origin of the produce is misrepresented because the lot is made up of containers with various labels or marking that reflect more than one incorrect State, country or region of origin. Example: A lot with containers individually marked to show the origin as Idaho or Maine or Colorado when the produce was grown in Wisconsin; or

(iv) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(2) Very serious violations. Include the following:

(i) Any lot of a perishable agricultural commodity shown by official inspection to contain scorable defects, off-size, off-count in excess of double the tolerance(s) provided in the applicable grades, standards, or inspection procedures;

(ii) Any lot of a perishable agricultural commodity packed in containers showing a single point of origin, which is other than that in which the produce was grown, such as containers marked "California" when the produce was grown in Arizona;

(iii) Any lot of a perishable agricultural commodity officially certified as having an average net weight more than four percent below the declared weight;

(iv) Multiple sales or shipments of a misrepresented perishable agricultural commodity within a seven day period that can be attributed to one cause; or

(v) Any other physical act verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(3) Flagrant violation . Include, but are not necessarily limited to, the following examples:

(i) Shipment or sale of a lot of a perishable agricultural commodity from shipping point after notification by official inspection that the inspected commodity fails to comply with any marking on the container without first correcting the misbranding,

(ii) To offer for resale or consignment a lot of a perishable agricultural commodity that has been officially inspected at destination and found to be misbranded without advising a prospective receiver that the lot is misbranded and that the misbranding must be corrected before resale. When a resale or consignment is finalized, written notice must be given that the lot is misbranded and must be corrected before resale; or

(continued...)

The difference between section 52.54(a) and section 46.45(a) is that section 52.54(a)(1) only requires a “misrepresentation.” To constitute a flagrant violation under section 46.54(a)(3)(iii), the entity must withhold or fail to disclose known material facts with respect to a misrepresentation or misbranding. A misrepresentation itself does not violate section 46.54(a)(3). It is only misrepresenting a known material fact that requires the suspension of a license. Because *Potato Sales* concerns an entirely different regulation, it is not helpful to Plaintiff. Under the regulation at issue in *Potato Sales*, the plain meaning of flagrant requires the entity to withhold or fail to disclose a known material fact with respect to a misrepresentation. At no place in section 46.45 is the word “misrepresentation” alone used to describe a violation. The word “misrepresentation” is modified by the rest of section 46.45(a)(3)(iii) in a way not found in section 52.54. The plain language of section 46.45 requires an intent to not disclose a misrepresentation. Thus, the fact the Ninth Circuit implied that section 46.45 requires more than an innocent or unintentional conduct in *Potato Sales* is of no help to Plaintiff because section 52.54 and not section 46.45 is at issue.

c. Similar Regulations

Finally, while not discussed by the parties, the other regulations in Title 7 provide some evidence as to the USDA's intent when section 52.54 was promulgated. Specifically, the court has reviewed the meaning given to the word “misrepresentation” in other places in Title 7. The word “misrepresentation” is used over 100 times in Title 7. The word “misrepresentation” is often used alone. *See e.g.* 7 C.F.R. § 46.9; 7 C.F.R. § 401.6; 7 C.F.R. § 762.103; 7 C.F.R. § 1446.707. However, the word “misrepresentation” is also modified in many places. In Title 7 the word “misrepresentation” is modified by the term “knowing,” requiring in some regulations that there be a “knowing misrepresentation.” *See e.g.* 7 C.F.R. 28.32. The word “misrepresentation” is modified in some regulations by the term “willful,” requiring that there be a “willful misrepresentation” or that the entity has “willfully made any misrepresentation.” *See e.g.* 7 C.F.R. § 51.46; 7 C.F.R. § 52.54; 7 C.F.R. § 54.1032; 7 C.F.R. § 57.46; 7 C.F.R. § 54.54; 7

(...continued)

(iii) To withhold or fail to disclose known material facts with respect to a misrepresentation or misbranding.

C.F.R. § 979.80. The word “misrepresentation[”] is modified by the term “deliberate,” requiring in some regulations that there be a “deliberate misrepresentation,” *See, e.g.*, 7 C.F.R. § 225.6. The word “misrepresentation” is also modified with the word “material,” requiring that there be a “material misrepresentation.” *See e.g.* 7 C.F.R. § 723.303; 7 C.F.R. § 1404.7.

The fact that the USDA choose to modify the word “misrepresentation” at other places in Title 7 implies that the USDA did not mean to modify the word “misrepresentation” in section 52.54(a)(1) with the words “willful,” “deliberate,” or “intentional.” When the USDA wishes this type of intent to be read into the word “misrepresentation” in a regulation in Title 7, the USDA adds a modifier providing for this intent. A review of other provisions in Title 7 reveals that the USDA knows how to write a regulation to add a specific intent element to a party's misrepresentation. By choosing not to add a modifier to the word, “misrepresentation” in section 52.54(a)(1), the USDA intended to not require that the misrepresentation be willful, deliberate, or intentional. As such, other provisions in Title 7 indicate that the USDA intended that the word “misrepresentation” in section 52.54(a)(1) would not be modified to require a specific intent to commit a misrepresentation. Thus, an alternative reading of section 52.54(a)(1) is not compelled by indicators of the agency's intent at the time the regulation was promulgated. *See Thomas Jefferson Univ.*, 512 U.S. at 512.

C. Sanction

At the hearing and, in Defendant's improper sur-reply, Defendant argues that the USDA's choice of sanction should not be changed unless unwarranted in law or without justification in fact. There is no implication in the complaint, in any of Plaintiff's briefs, or at the hearing that one issue being raised by Plaintiff is that a different sanction should have been imposed. At the hearing, Plaintiff clarified that Plaintiff's sole contention is that it did not violate section 52.54 because the misrepresentation was not found to be willful or intentional. At the hearing and in Plaintiff's reply brief, Plaintiff did discuss the harshness of a one-year debarment and asserts that the debarment will result in Plaintiff having to close its business. However, Plaintiff has clarified that this argument is being made to show that a willful or intentional misrepresentation must be necessary because debarment is a harsh sanction and such a harsh sanction should be reserved for willful or intentional conduct. However, neither in Plaintiff's briefs nor at the hearing did Plaintiff request that the court provide a lesser punishment or sanction. Plaintiff's position is that it did not violate section 52.54. Thus, the court does not need to rule on whether a different sanction is appropriate because Plaintiff has never made such a request of this court.

CONCLUSION AND ORDER

The sole issue before the court is whether section 52.54(a)(1)(ii) requires a misrepresentation to be willful or intentional. Each of the arguments that Plaintiff makes for finding the JO's interpretation of section 52.54(a)(1) incorrect and an intentional or willful misrepresentation is required fail for the reasons discussed above. The burden of proof in this action is on Plaintiff. Plaintiff has provided no persuasive argument that the JO's interpretation of section 52.54(a)(1) is incorrect and Plaintiff's interpretation is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation. Thus, summary judgment in favor of Defendant is appropriate, and summary judgment in favor of Plaintiff must be denied.

For the reasons stated in the above Memorandum Opinion, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment is DENIED;
2. Defendant's motion for summary judgment is GRANTED;
3. The Clerk of the Court is DIRECTED to enter judgment for Defendant; and
4. The Clerk of the Court is DIRECTED to close this action.

NONPROCUREMENT DEBARMENT AND SUSPENSION**DEPARTMENTAL DECISION**

**In re: ADVANTAGE TIMBER CO., INC., RICKY R. JOHNSON,
YOLANDA JOHNSON, AND JAMES C. JOHNSON.**

DNS-FS Docket No. 01-0003.

Decision and Order.

Filed March 15, 2002.

Suspension and debarment, term of, commensurate with seriousness – Breach of Contract.

The Administrative Law Judge (ALJ) affirmed suspension and debarment, but shortened the term, finding that Respondent Advantage Timber had failed to pay damages for breach of timber contract, but there were mitigating circumstances. The ALJ found that Respondent R. Johnson had “power to control” Advantage Timber whereas Respondents Y. & J. Johnson did not.

Lori Jones, for Complainant.

Respondents, Pro se.

Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

In this Decision and Order, I determine that the U. S. Forest Service Debarring and Suspending Official (U. S. Forest Service) had the authority to suspend and debar Respondents Advantage Timber Co., Inc. (Advantage Timber), and Ricky R. Johnson (Ricky Johnson). I conclude further that the maximum period of suspension and debarment commensurate with the seriousness of their acts or omissions is one year. Neither Respondent Yolanda Johnson nor Respondent James C. Johnson was shown, within the meaning of the term “affiliate,” to have the power to control Advantage Timber or Ricky Johnson. Consequently, I determine that the U. S. Forest Service did not have the authority to suspend or debar either Yolanda Johnson or James C. Johnson.

Applicable Regulations

The Government wide Debarment and Suspension (Nonprocurement) regulations are found in Title 7 Part 3017 of the Code of Federal Regulations. Two sections of particular importance to this Decision and Order, 7 C.F.R. §§ 3017.300 and 3017.305, are included here in their entirety:

Subpart C--Debarment

§ 3017.300 General.

The debarring official may debar a person for any of the causes in § 3017.305, using procedures established in §§ 3017.310 through § 3017.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

3017.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 3017.300 through § 3017.314 for:

- (a) Conviction of or civil judgment for:
 - (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
 - (2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
 - (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or
 - (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.
- (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:
 - (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
 - (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
 - (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.
- (c) Any of the following causes:
 - (1) A nonprocurement debarment by any Federal agency taken before March 1, 1989, the effective date of these regulations or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 3017.215 or § 3017.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 3017.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of Subpart F of this part, relating to providing a drug-free workplace, as set forth in § 3017.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[54 FR 4731, Jan. 30, 1989, as amended at 54 FR 4952, Jan. 31, 1989].

Procedural History

The U. S. Forest Service suspended Advantage Timber effective June 26, 2001, and then debarred Advantage Timber for three years, until June 26, 2004. Further, the U. S. Forest Service applied the same sanctions to three individuals that it found to be affiliated with Advantage Timber: Ricky Johnson, Yolanda Johnson, and James C. Johnson.

The U. S. Forest Service decision can be vacated only if I determine that it is (1) Not in accordance with law; (2) Not based on the applicable standard of evidence; or (3) Arbitrary and capricious and an abuse of discretion. *See*, § 3017.515 Appeal of debarment or suspension decisions.

Following a thorough review of the Administrative Record, I find that the preponderance of the evidence supports the U. S. Forest Service decision, except in two regards:

- (1) the seriousness of the acts or omissions of Advantage Timber and Ricky Johnson supports debarment for a period not to exceed one year; and
- (2) neither Yolanda Johnson nor James C. Johnson was shown to have the power to control Advantage Timber or Ricky Johnson within the meaning of the term "affiliate."

Consequently, I affirm the suspension and subsequent debarment of Advantage Timber but shorten the period of debarment so that it will end no later than June 26, 2002; I affirm the suspension and subsequent debarment of Ricky Johnson but shorten the period of debarment so that it will end no later than June 26, 2002; I vacate the suspension and debarment of Yolanda Johnson; and I vacate the suspension and debarment of James C. Johnson.

Discussion

On July 15, 1998, the U. S. Forest Service awarded to Advantage Timber, the Compartment 254G Timber Sale Contract (the 254G Contract), Contract No. 08-06-02-028478. Under the 254G Contract, Advantage Timber bought the right, for \$134,451.64 [\$133,297.64 contract stumpage value, plus \$1,154.00 erosion control cost], to harvest timber within a specified area comprised of approximately 170 acres, on the Kisatchie National Forest, Calcasieu Ranger District, within Vernon Parish, Louisiana. Advantage Timber was required under the 254G Contract "to pay for, cut, and remove all Included Timber within areas shown as the Sale Area Map." Tab 12. [Tab numbers identify the position of the evidence within the Administrative Record.]

By letter dated May 5, 2000, Advantage Timber President Ricky Johnson wrote to the U. S. Forest Service Contracting Officer, Thomas Marq Webb, Jr. (Contracting Officer), to request that the 254G Contract "be voided, due to the fact of excessive amounts of bullets." Bullets embedded within timber can cause damage and be dangerous when encountered by a saw blade or other equipment. Ricky Johnson reported that Advantage Timber's customers refused to accept timber from the Compartment 254G location, because of their experience with the bullet-ridden timber that Advantage Timber had sold them from the adjoining Compartment 254F. Tab 11.

Thus, the 254G Contract timber held no value for Advantage Timber. Advantage Timber did not cut or remove any of the 254G Contract timber. Advantage Timber had completed the adjoining Compartment 254F Timber Sale Contract but had stockpiled approximately 500 cords of timber because none of its customers would accept it. Tab 11.

The Administrative Record does not show whether there were bullets in the 254G timber, only that Advantage Timber's customers believed there would be bullets in the timber. It is not clear whether the U. S. Forest Service believed there were bullets in the timber. The U. S. Forest Service did not warn of bullets in the timber, but rather of contamination on or below the surface of the lands.

Specifically, the 254G Contract Provision 11.15, at Tab 12, provides:

11.15 - Safety - Contaminated Lands. (3/94) Lands included in this contract were formerly used by the Department of Defense as an impact area of an artillery (bombing, machine gun, mortar, etc.) range, and were contaminated by unexploded and dangerous bombs, shells, rockets, mines, charges, or other explosives on or below the surface thereof.

The United States is unable to certify that these lands are completely decontaminated of dangerous explosives, and is unable to state whether or not the lands are safe for use.

Purchaser assumes full obligation for any and all liabilities for damage to life or property arising from the operations on, and the occupancy or use of the National Forest lands under this contract; and shall save and hold the United States harmless from any and all claims for damages by third parties resulting from such operations, occupancy or use.

By letter dated May 17, 2000, the Contracting Officer responded to Advantage Timber's request that the 254G Contract be voided, refusing to cancel the 254G Contract, indicating that "cancellation by agreement may be permitted only in those instances where it's in the best interest of the government." Tab 10.

Thereafter Advantage Timber breached the 254G Contract, by failing to pay \$46,700.00 by the August 8, 2000 due date. Based on Advantage Timber's failure to pay and failure to remedy that breach of contract within the specified time limits, the U. S. Forest Service terminated the 254G Contract, by notice letter dated October 24, 2000. Tabs 1, 5, 7-9.

Under Contract Provision 26, "Failure to cut," the U. S. Forest Service calculated the damages due from Advantage Timber under the 254G Contract. First, the U. S. Forest Service gave a credit to Advantage Timber for the "reappraised" value of the remaining 254G Contract timber, all of which was still standing and available to be resold. Credit was given for 3 years' timber growth, which had increased the stumpage from 2,303 CCF to 2,580 CCF. Next, the reappraised or resale value of the 2,580 CCF stumpage was calculated. The U. S. Forest Service multiplied the 2,580 CCF stumpage by only \$29.00 per CCF, roughly half the price Advantage Timber had been required to pay, for a reappraised or resale stumpage value of \$74,820. The price per CCF that Advantage Timber was required to pay under the 254G Contract was \$57.88 per CCF, whereas the resale calculation was based on \$29.00 per CCF. The

Administrative Record contains no explanation for the dramatic drop in value. Tabs 2, 12.

To the resale \$74,820.00 stumpage value, the "overbid" of \$16,336.40 was added, for a total of \$91,156.40. This is the credit that Advantage Timber was given for the 254G Contract timber, all of which was still standing. Advantage Timber was also given credit for the money it paid on the contract, a total of \$33,500.00, consisting of the performance guarantee of \$14,000.00 and the downpayment of \$19,500.00. Thus, Advantage Timber received credit for \$124,656.40. Tabs 2, 12.

When Advantage Timber's \$124,656.40 credit was applied to what the U. S. Forest Service expected under the 254G Contract, Advantage Timber still fell short. The U. S. Forest Service calculated it had the right to collect (1) the contract stumpage value; (2) plus interest; (3) plus the costs of resale. Those three components were calculated as follows. The U. S. Forest Service multiplied the 2,303 CCF contract stumpage by the \$57.88 per CCF contract price, for a contract stumpage value of \$133,297.64, owed by Advantage Timber. That figure was then multiplied by 7.25% to arrive at "interest on the uncollected stumpage value" in the amount of \$9,664.08. [Advantage Timber was charged interest on even the \$33,500.00 it had paid.] Re-[]sale costs of \$771.00 were then added, \$574.00 for "Dawson," and \$197.00 for "Wagner." The total, calculated by adding together \$133,297.64 contract stumpage value, plus \$9,664.08 interest, plus \$771.00 costs, is \$143,732.72. The \$143,732.72 total that the U. S. Forest Service calculated it had the right to collect, was \$19,076.32 more than Advantage Timber's \$124,656.40 credit. Thus, the U. S. Forest Service demanded that Advantage Timber pay \$19,076.32 damages. Tabs 2, 6, 12.

On May 9, 2001, the U. S. Forest Service began charging Advantage Timber 6% per year interest on the \$19,076.32. The U. S. Forest Service indicated that it would also add 6% per year penalty charge to the interest charge, plus administrative costs to cover processing and handling of the claim. Tab 2.

As of June 5, 2001, the last calculation in the Administrative Record, Advantage Timber's unpaid obligation totaled \$19,196.70. Tab 1. Advantage Timber failed to pay the \$19,196.70.

Whether, under these circumstances, Advantage Timber and Ricky Johnson proved themselves to be unreliable and not presently responsible to do business with the Federal Government is a matter upon which reasonable minds can differ. Likewise, whether, in the interest of protecting the Federal Government's and the public's interest, suspension and debarment needed to be imposed, is also a matter upon which reasonable minds can differ. Based on Advantage Timber's

breach of contract and its failure to pay the damages for breach (\$19,196.70 as of June 5, 2001), the U. S. Forest Service decided that Advantage Timber was not presently responsible to do business with the Federal Government and suspended Advantage Timber effective June 26, 2001, and then debarred Advantage Timber for three years, until June 26, 2004. Further, the U. S. Forest Service applied the same sanction to three individuals that it found to be affiliated with Advantage Timber: Ricky Johnson, Yolanda Johnson, and James C. Johnson.

Findings of Fact

1. Advantage Timber failed to pay to the U. S. Forest Service the balance of damages for breach of the 254G Contract, which, as of June 5, 2001, amounted to \$19,196.70, with interest, penalties, and costs continuing to accrue.

2. The Administrative Record does not establish by a preponderance of the evidence that the integrity of the U. S. Forest Service's timber sale program was threatened by the actions of Advantage Timber and Ricky Johnson.

3. Thus, the Administrative Record does not establish by a preponderance of the evidence that Advantage Timber's breach of the 254G Contract constitutes a "(v)iolation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as: (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions" as would be required under 7 C.F.R. § 3017.305(b)(2).

4. Ricky Johnson, President of Advantage Timber, made the 254G Contract decisions for Advantage Timber and controlled Advantage Timber's actions with respect to the 254G Contract.

5. The seriousness of Advantage Timber's and Ricky Johnson's failure to pay is lessened and is mitigated by several circumstances concerning the 254G Contract, including:

- (a) their having been unaware when they entered into the 254G contract that "excessive amounts of bullets" would be found embedded in the timber from that area;
- (b) their having taken nothing under the 254G Contract and nothing tangible from the U. S. Forest Service, because they cut no timber, removed no timber, and did not impact the physical environment;
- (c) their safety issues, including their need to avoid exposing their customers' equipment and personnel to the potential dangers of bullets embedded within the timber;
- (d) their having no customers who would accept the 254G timber;

- (e) their inability to cancel the contract, due to the U. S. Forest Service's position that "cancellation by agreement may be permitted only in those instances where it's in the best interest of the government;"
- (f) the damages calculation triggered by the dramatic drop in appraised value from the price they were required to pay, \$57.88 per CCF, to the reappraised or resale price of only \$29.00 per CCF, roughly **half** the price; and
- (g) their \$33,500.00 payment to the U. S. Forest Service [the performance guarantee of \$14,000.00 plus the downpayment of \$19,500.00], for which they derived no benefit.

6. Yolanda Johnson merely certified, as Secretary of Advantage Timber, that Ricky Johnson was President of Advantage Timber and that the corporation's entering into the 254G Contract was authorized. [She was not initially regarded by the U. S. Forest Service as an "affiliate," as only Ricky Johnson was deemed responsible by the officials closest to the contracting. Tabs 4, 6.] Neither her having made a certification, nor her position as an initial director and officer [Secretary-Treasurer] in 1997, nor any other evidence, established that she controlled Advantage Timber's or Ricky Johnson's actions with respect to the 254G Contract.

7. James C. Johnson was an initial director and officer [Vice President] in 1997. [He was not initially regarded by the U. S. Forest Service as an "affiliate," as only Ricky Johnson was deemed responsible by the officials closest to the contracting. Tabs 4, 6.] Neither his positions within the corporation nor any other evidence, established that he controlled Advantage Timber's or Ricky Johnson's actions with respect to the 254G Contract.

Conclusions of Law

1. Suspension and debarment could not be imposed under 7 C.F.R. § 3017.305(b)(2).
2. Suspension and debarment could be imposed under 7 C.F.R. § 3017.305(c)(3), because the Administrative Record does establish by a preponderance of the evidence that Advantage Timber failed to pay to the U. S. Forest Service a single substantial debt, in the amount of \$19,196.70.
3. The U. S. Forest Service acted within its discretion to suspend and debar Advantage Timber, under 7 C.F.R. § 3017.305(c)(3).

4. Ricky Johnson was an "affiliate" of Advantage Timber within the meaning of 7 C.F.R. § 3017.105, and debarment may include such an affiliate. 7 C.F.R. § 3017.325(a)(2).

5. The U. S. Forest Service acted within its discretion to suspend and debar Ricky Johnson as an affiliate, under 7 C.F.R. § 3017.325(a)(2).

6. Suspension and debarment for a period no longer than one year is commensurate with the seriousness of Advantage Timber's and Ricky Johnson's failure to pay and adequately protects the Federal Government's interest in conducting business only with responsible persons. 7 C.F.R. §§ 3017.115, 3017.320.

7. Yolanda Johnson could not be suspended or debarred as an affiliate, because the Administrative Record does not establish by a preponderance of the evidence that she controlled Advantage Timber's or Ricky Johnson's actions with respect to the 254G Contract. 7 C.F.R. § 3017.105.

8. James C. Johnson could not be suspended or debarred as an affiliate, because the Administrative Record does not establish by a preponderance of the evidence that he controlled Advantage Timber's or Ricky Johnson's actions with respect to the 254G Contract. 7 C.F.R. § 3017.105.

Order

1. The suspension and debarment of Advantage Timber are affirmed, for a period ending no later than June 26, 2002.

2. The suspension and debarment of Ricky Johnson are affirmed, for a period ending no later than June 26, 2002.

3. The suspension and debarment of Yolanda Johnson are hereby vacated.

4. The suspension and debarment of James C. Johnson are hereby vacated.

5. This decision is final and is not appealable within the United States Department of Agriculture. 7 C.F.R. § 3017.515.

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

[This Decision and Order became final March 15, 2002.-Editor]

HORSE PROTECTION ACT
DEPARTMENTAL DECISIONS

In re: ROBERT B. McCLOY, JR.
HPA Docket No. 99-0020.
Decision and Order.
Filed March 22, 2002.

HPA – Allowing entry – Guarantor – Baird test – Burton test – Lewis test – Crawford test – Credibility determinations – Relevant evidence defined – Self-serving testimony – Affidavit defined – Civil penalty – Disqualification – Sanction policy.

The Judicial Officer (JO) affirmed the decision by Administrative Law Judge Dorothea A. Baker (ALJ) concluding that Respondent allowed the entry of a horse in a horse show while the horse was sore in violation of 15 U.S.C. § 1824(2)(D) and assessing Respondent a \$2,200 civil penalty. In addition, the JO disqualified Respondent for 1 year 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. The JO found that Respondent's residence and place of business are in Oklahoma and concluded that, under 15 U.S.C. § 1825(b)(2), (c), Respondent may obtain judicial review in the United States Court of Appeals for the Tenth Circuit and the United States Court of Appeals for the District of Columbia Circuit. Therefore, the JO rejected Respondent's request that the JO apply the tests adopted in *Lewis v. Secretary of Agric.*, 73 F.3d 312 (11th Cir. 1996); *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994); and *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982), to determine whether Respondent violated 15 U.S.C. § 1824(2)(D). The JO rejected Complainant's contention that the ALJ's credibility determinations were error, stating the JO gives great weight to the ALJ's credibility determinations because of her opportunity to see and hear the witnesses testify. The JO also rejected Complainant's contention that the ALJ erred by receiving and finding credible self-serving testimony. The JO stated that neither the Administrative Procedure Act nor the Rules of Practice prohibits the reception of self-serving testimony and self-serving testimony is not as a matter of law unworthy of belief. The JO rejected Complainant's argument that Respondent's Exhibit C was irrelevant stating that it had a tendency to make the existence of a fact of consequence to the determination of the proceeding more likely than it would be without the exhibit. The JO agreed with Complainant's contention that the ALJ erroneously referred to two written statements as "affidavits." The JO stated that one of the statements was clearly not a writing made on oath or affirmation before a person having authority to administer the oath or affirmation. The JO found that the other written statement lacked a notary seal. Therefore, there was not sufficient proof that the person who administered the oath had authority to administer the oath.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jensen, Judicial Officer.

PROCEDURAL HISTORY

Craig A. Reed, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a “Complaint” on May 4, 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 September 4, 1998, Robert B. McCloy, Jr. [hereinafter Respondent], allowed the entry of a horse known as “Ebony Threat’s Ms. Professor” [hereinafter Missy] for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ 3). On June 1, 1999, Respondent filed “Respondent’s Original Answer” [hereinafter Answer]. Respondent admits he was the owner of Missy during all times material to this proceeding but denies he allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Answer ¶¶ 2-4).

Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] presided at a hearing in Oklahoma City, Oklahoma, on August 22, 2000. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, appeared on behalf of Complainant. Respondent appeared pro se. Allison A. Lafferty assisted Respondent.

On January 3, 2001, Complainant filed “Complainant’s Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof” [hereinafter Complainant’s Post-Hearing Brief]. On April 12, 2001, Respondent filed “Respondent’s Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof.” On July 5, 2001, Complainant filed “Complainant’s Reply Brief.”

On August 10, 2001, the ALJ issued a “Decision and Order” [hereinafter Initial Decision and Order] in which the ALJ concluded Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as alleged in the Complaint, and assessed Respondent a \$2,200 civil penalty (Initial Decision and Order at 13-14).

On November 19, 2001, Complainant appealed to the Judicial Officer. On February 5, 2002, Respondent filed “Respondent’s Petition for Appeal of

Decision and Order and Answer to the Complainant's Petition for Appeal." On February 25, 2002, Complainant filed "Complainant's Response to Respondent's Appeal of Decision and Order." On February 26, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with most of the ALJ's findings of fact, the ALJ's conclusion that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), and the ALJ's assessment of a \$2,200 civil penalty against Respondent. However, I also disqualify Respondent for a period of 1 year from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. Moreover, I disagree with portions of the ALJ's discussion. Therefore, while I retain portions of the ALJ's Initial Decision and Order, I do not adopt the Initial Decision and Order as the final Decision and Order.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." 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.

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

....

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

§ 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.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

.....

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

§ 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, 1823(a), (c), 1824(2), 1825(b)(1)-(2), (c), (d)(5), 1828.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

.....

PART VI—PARTICULAR PROCEEDINGS

.....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

.....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990”

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq.*], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq.*], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 *et seq.*], or the Social Security Act [42 U.S.C. 301 *et seq.*], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

(1) multiple of \$10 in the case of penalties less than or equal to \$100;

(2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;

(3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;

(4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;

(5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and

(6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note (Supp. V 1999).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*

....

(2) *Animal and Plant Health Inspection Service. . . .*

....

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of \$2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

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 in a standard dictionary, such as “Webster’s.”

.....

Designated Qualified Person or *DQP* means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

.....

§ 11.7 Certification and licensing of designated qualified persons (DQP’s).

(a) *Basic qualifications of DQP applicants.* DQP’s holding a valid, current DQP license issued in accordance with this part may be appointed by the management of any horse show, horse exhibition, horse sale, or horse auction, as qualified persons in accordance with section 4(c) of the Act, to inspect horses to detect or diagnose soring and to otherwise inspect horses, or any records pertaining to any horse for the purpose of enforcing the Act. Individuals who may be licensed as DQP’s under this part shall be:

(1) Doctors of Veterinary Medicine who are accredited in any State by the United States Department of Agriculture under part 161 of chapter I, title 9 of the Code of Federal Regulations, and who are:

(i) Members of the American Association of Equine Practitioners, or
(ii) Large animal practitioners with substantial equine experience, or
(iii) Knowledgeable in the area of equine lameness as related to soring and soring practices (such as Doctors of Veterinary Medicine with a small animal practice who own, train, judge, or show horses, or Doctors of Veterinary Medicine who teach equine related subjects in an accredited college or school of veterinary medicine). Accredited Doctors of Veterinary Medicine who meet these criteria may be licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department under this part without undergoing the formal training requirements set forth in this section.

(2) Farriers, horse trainers, and other knowledgeable horsemen whose past experience and training would qualify them for positions as horse industry organization or association stewards or judges (or their equivalent) and who have been formally trained and licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department in accordance with this section.

(b) *Certification requirements for DQP programs.* The Department will not license DQP's on an individual basis. Licensing of DQP's will be accomplished only through DQP programs certified by the Department and initiated and maintained by horse industry organizations or associations. Any horse industry organization or association desiring Department certification to train and license DQP's under the Act shall submit to the Administrator a formal request in writing for certification of its DQP program and a detailed outline of such program for Department approval. Such outline shall include the organizational structure of such organization or association and the names of the officers or persons charged with the management of the organization or association. The outline shall also contain at least the following:

(1) The criteria to be used in selecting DQP candidates and the minimum qualifications and knowledge regarding horses each candidate must have in order to be admitted to the program.

(2) A copy of the formal training program, classroom and practical, required to be completed by each DQP candidate before being licensed by such horse industry organization or association, including the minimum number of hours, classroom and practical, and the subject matter of the training program. Such training program must meet the

following minimum standards in order to be certified by the Department under the Act.

(i) Two hours of classroom instruction on the anatomy and physiology of the limbs of a horse. The instructor teaching the course must be specified, and a resume of said instructor's background, experience, and qualifications to teach such course shall be provided to the Administrator.

(ii) Two hours of classroom instruction on the Horse Protection Act and regulations and their interpretation. Instructors for this course must be furnished or recommended by the Department. Requests for instructors to be furnished or recommended must be made to the Administrator in writing at least 30 days prior to such course.

(iii) Four hours of classroom instruction on the history of soring, the physical examination procedures necessary to detect soring, the detection and diagnosis of soring, and related subjects. The instructor teaching the course must be specified and a summary of said instructor's background, experience, and qualifications to teach such course must be provided to the Administrator.

(iv) Four hours of practical instruction in clinics and seminars utilizing live horses with actual application of the knowledge gained in the classroom subjects covered in paragraphs (b)(2)(i), (ii), and (iii) of this section. Methods and procedures required to perform a thorough and uniform examination of a horse shall be included. The names of the instructors and a resume of their background, academic and practical experience, and qualifications to present such instruction shall be provided to the Administrator. Notification of the actual date, time, duration, subject matter, and geographic location of such clinics or seminars must be sent to the Administrator at least 10 days prior to each such clinic or seminar.

(v) One hour of classroom instruction regarding the DQP standards of conduct promulgated by the licensing organization or association pursuant to paragraph (d)(7) of this section.

(vi) One hour of classroom instruction on recordkeeping and reporting requirements and procedures.

(3) A sample of a written examination which must be passed by DQP candidates for successful completion of the program along with sample answers and the scoring thereof, and proposed passing and failing standards.

(4) The criteria to be used to determine the qualifications and performance abilities of DQP candidates selected for the training program and the criteria used to indicate successful completion of the training program, in addition to the written examination required in paragraph (b)(3) of this section.

(5) The criteria and schedule for a continuing education program and the criteria and methods of monitoring and appraising performance for continued licensing of DQP's by such organization or association. A continuing education program for DQP's shall consist of not less than 4 hours of instruction per year.

(6) Procedures for monitoring horses in the unloading, preparation, warmup, and barn areas, or other such areas. Such monitoring may include any horse that is stabled, loaded on a trailer, being prepared for show, exhibition, sale, or auction, or exercised, or that is otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction.

(7) The methods to be used to insure uniform interpretation and enforcement of the Horse Protection Act and regulations by DQP's and uniform procedures for inspecting horses for compliance with the Act and regulations;

(8) Standards of conduct for DQP's promulgated by the organization or association in accordance with paragraph (d)(7) of this section; and

(9) A formal request for Department certification of the DQP program.

The horse industry organizations or associations that have formally requested Department certification of their DQP training, enforcement, and maintenance program will receive a formal notice of certification from the Department, or the reasons, in writing, why certification of such program cannot be approved. A current list of certified DQP programs and licensed DQP's will be published in the FEDERAL REGISTER at least once each year, and as may be further required for the purpose of deleting programs and names of DQP's that are no longer certified or licensed, and of adding the names of programs and DQP's that have been certified or licensed subsequent to the publication of the previous list.

(c) *Licensing of DQP's.* Each horse industry organization or association receiving Department certification for the training and licensing of DQP's under the Act shall:

(1) Issue each DQP licensed by such horse industry organization or association a numbered identification card bearing the name and personal signature of the DQP, a picture of the DQP, and the name and address,

including the street address or post office box and zip code, of the licensing organization or association;

(2) Submit a list to the Administrator of names and addresses including street address or post office box and zip code, of all DQP's that have successfully completed the certified DQP program and have been licensed under the Act and regulations by such horse industry organization or association;

(3) Notify the Department of any additions or deletions of names of licensed DQP's from the licensed DQP list submitted to the Department or of any change in the address of any licensed DQP or any warnings and license revocations issued to any DQP licensed by such horse industry organization or association within 10 days of such change;

(4) Not license any person as a DQP if such person has been convicted of any violation of the Act or regulations occurring after July 13, 1976, or paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976, for a period of at least 2 years following the first such violation, and for a period of at least 5 years following the second such violation and any subsequent violation;

(5) Not license any person as a DQP until such person has attended and worked two recognized or affiliated horse shows, horse exhibitions, horse sales, or horse auctions as an apprentice DQP and has demonstrated the ability, qualifications, knowledge and integrity required to satisfactorily execute the duties and responsibilities of a DQP;

(6) Not license any person as a DQP if such person has been disqualified by the Secretary from making detection, diagnosis, or inspection for the purpose of enforcing the Act, or if such person's DQP license is canceled by another horse industry organization or association.

(d) *Requirements to be met by DQP's and Licensing Organizations or Associations.* (1) Any licensed DQP appointed by the management of any horse show, horse exhibition, horse sale or auction to inspect horses for the purpose of detecting and determining or diagnosing horses which are sore and to otherwise inspect horses for the purpose of enforcing the Act and regulations, shall keep and maintain the following information and records concerning any horse which said DQP recommends be disqualified or excused for any reason at such horse show, horse exhibition, horse sale or auction, from being shown, exhibited, sold or auctioned, in a uniform format required by the horse industry organization or association that has licensed said DQP:

- (i) The name and address, including street address or post office box and zip code, of the show and the show manager.
- (ii) The name and address, including street address or post office box and zip code, of the horse owner.
- (iii) The name and address, including street address or post office box and zip code, of the horse trainer.
- (iv) The name and address, including street address or post office box and zip code, of the horse exhibitor.
- (v) The exhibitors number and class number, or the sale or auction tag number of said horse.
- (vi) The date and time of the inspection.
- (vii) A detailed description of all of the DQP's findings and the nature of the alleged violation, or other reason for disqualifying or excusing the horse, including said DQP's statement regarding the evidence or facts upon which the decision to disqualify or excuse said horse was based.
- (viii) The name, age, sex, color, and markings of the horse; and
- (ix) The name or names of the show manager or other management representative notified by the DQP that such horse should be excused or disqualified and whether or not such manager or management representative excused or disqualified such horse.

Copies of the above records shall be submitted by the involved DQP to the horse industry organization or association that has licensed said DQP within 72 hours after the horse show, horse exhibition, horse sale, or horse auction is over.

(2) The DQP shall inform the custodian of each horse allegedly found in violation of the Act or its regulations, or disqualified or excused for any other reason, of such action and the specific reasons for such action.

(3) Each horse industry organization or association having a Department certified DQP program shall submit a report to the Department containing the following information, from records required in paragraph (d)(1) of this section and other available sources, to the Department on a monthly basis:

(i) The identity of all horse shows, horse exhibitions, horse sales, or horse auctions that have retained the services of DQP's licensed by said organization or association during the month covered by the report. Information concerning the identity of such horse shows, horse exhibitions, horse sales, or horse auctions shall include:

(A) The name and location of the show, exhibition, sale, or auction.

- (B) The name and address of the manager.
- (C) The date or dates of the show, exhibition, sale, or auction.
- (ii) The identity of all horses at each horse show, horse exhibition, horse sale, or horse auction that the licensed DQP recommended be disqualified or excused for any reason. The information concerning the identity of such horses shall include:
 - (A) The registered name of each horse.
 - (B) The name and address of the owner, trainer, exhibitor, or other person having custody of or responsibility for the care of each such horse disqualified or excused.
- (4) Each horse industry organization or association having a Department certified DQP program shall provide, by certified mail if personal service is not possible, to the trainer and owner of each horse allegedly found in violation of the Act or its regulations or otherwise disqualified or excused for any reason, the following information;
 - (i) The name and date of the show, exhibition, sale, or auction.
 - (ii) The name of the horse and the reason why said horse was excused, disqualified, or alleged to be in violation of the Act or its regulations.
- (5) Each horse industry organization or association having a Department certified DQP program shall provide each of its licensed DQP's with a current list of all persons that have been disqualified by order of the Secretary from showing or exhibiting any horse, or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Department will make such list available, on a current basis, to organizations and associations maintaining a certified DQP program.
- (6) Each horse industry organization or association having a Department certified DQP program shall develop and provide a continuing education program for licensed DQP's which provides not less than 4 hours of instruction per year to each licensed DQP.
- (7) Each horse industry organization or association having a Department certified DQP program shall promulgate standards of conduct for its DQP's, and shall provide administrative procedures within the organization or association for initiating, maintaining, and enforcing such standards. The procedures shall include the causes for and methods to be utilized for canceling the license of any DQP who fails to properly and adequately carry out his duties. Minimum standards of conduct for DQP's shall include the following;

(i) A DQP shall not exhibit any horse at any horse show or horse exhibition, or sell, auction, or purchase any horse sold at a horse sale or horse auction at which he or she has been appointed to inspect horses;

(ii) A DQP shall not inspect horses at any horse show, horse exhibition, horse sale or horse auction in which a horse or horses owned by a member of the DQP's immediate family or the DQP's employer are competing or are being offered for sale;

(iii) A DQP shall follow the uniform inspection procedures of his certified organization or association when inspecting horses; and

(iv) The DQP shall immediately inform management of each case regarding any horse which, in his opinion, is in violation of the Act or regulations.

(e) *Prohibition of appointment of certain persons to perform duties under the Act.* The management of any horse show, horse exhibition, horse sale, or horse auction shall not appoint any person to detect and diagnose horses which are sore or to otherwise inspect horses for the purpose of enforcing the Act, if that person:

(1) Does not hold a valid, current DQP license issued by a horse industry organization or association having a DQP program certified by the Department.

(2) Has had his DQP license canceled by the licensing organization or association.

(3) Is disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act, after notice and opportunity for a hearing, when the Secretary finds that such person is unfit to perform such diagnosis, detection, or inspection because he has failed to perform his duties in accordance with the Act or regulations, or because he has been convicted of a violation of any provision of the Act or regulations occurring after July 13, 1976, or has paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976.

(f) *Cancellation of DQP license.* (1) Each horse industry organization or association having a DQP program certified by the Department shall issue a written warning to any DQP whom it has licensed who violates the rules, regulations, by-laws, or standards of conduct promulgated by such horse industry organization or association pursuant to this section, who fails to follow the procedures set forth in § 11.21 of this part, or who otherwise carries out his duties and responsibilities in a less than satisfactory manner, and shall cancel the license of any DQP after a second violation. Upon cancellation of his DQP license, the DQP may, within 30 days thereafter, request a hearing

before a review committee of not less than three persons appointed by the licensing horse industry organization or association. If the review committee sustains the cancellation of the license, the DQP may appeal the decision of such committee to the Administrator within 30 days from the date of such decision, and the Administrator shall make a final determination in the matter. If the Administrator finds, after providing the DQP whose license has been canceled with a notice and an opportunity for a hearing, that there is sufficient cause for the committee's determination regarding license cancellation, he shall issue a decision sustaining such determination. If he does not find that there was sufficient cause to cancel the license, the licensing organization or association shall reinstate the license.

(2) Each horse industry organization or association having a Department certified DQP program shall cancel the license of any DQP licensed under its program who has been convicted of any violation of the Act or regulations or of any DQP who has paid a fine or civil penalty in settlement of any alleged violation of the Act or regulations if such alleged violation occurred after July 13, 1976.

(g) *Revocation of DQP program certification of horse industry organizations or associations.* Any horse industry organization or association having a Department certified DQP program that has not received Department approval of the inspection procedures provided for in paragraph (b)(6) of this section, or that otherwise fails to comply with the requirements contained in this section, may have such certification of its DQP program revoked, unless, upon written notification from the Department of such failure to comply with the requirements in this section, such organization or association takes immediate action to rectify such failure and takes appropriate steps to prevent a recurrence of such noncompliance within the time period specified in the Department notification, or otherwise adequately explains such failure to comply to the satisfaction of the Department. Any horse industry organization or association whose DQP program certification has been revoked may appeal such revocation to the Administrator in writing within 30 days after the date of such revocation and, if requested, shall be afforded an opportunity for a hearing. All DQP licenses issued by a horse industry organization or association whose DQP program certification has been revoked shall expire 30 days after the date of such revocation, or 15 days after the date the revocation becomes final after appeal, unless they are

transferred to a horse industry organization or association having a program currently certified by the Department.

9 C.F.R. §§ 11.1, .7 (1998) (footnotes omitted).

FINDINGS OF FACT

1. Respondent is an individual who resides and has his place of business in Norman, Oklahoma. Respondent has been a full-time physician practicing for 32 years and is director of medical services at the Norman Regional Hospital, in Norman, Oklahoma, where he was in charge of the Emergency Department for 29 years. Respondent was elected by his peers to serve as chief-of-staff at Norman Regional Hospital in 1992. In addition, Respondent has served his community for many years, including a seat on the board of directors for the United Way for 6 years. (Answer ¶ 1; RX D, RX E, RX F).

2. Respondent purchased Missy in December 1995 and placed her in training at the David Landrum Stables where she remained for approximately 1 year. Her trainer at the David Landrum Stables, Link Webb, left the David Landrum Stables and took Missy with him. Because Mr. Webb was having trouble getting Missy to canter, he suggested that Respondent move Missy to Young's Stables to be trained by Ronal Young, which Respondent did in August 1997. At the time of the violation alleged in the Complaint, Missy lived at Young's Stables in Lewisberg, Tennessee, and thus resided hundreds of miles from Respondent's residence and place of business. Ronal Young was Missy's trainer from August 1997 to approximately February 1999. (CX 2, CX 4 at 1; Tr. 151-52, 174-76, 187).

3. During the period that Respondent owned Missy, the trainers hired by Respondent showed Missy in horse shows approximately 25 times and, until the violation alleged in the Complaint, Missy had not been found to be sore (CX 4 at 1; Tr. 151, 161-62).

4. Respondent made clear to each trainer that he only purchased horses that walked "naturally," in other words they did not need to be sored (Tr. 150-52, 170-71).

5. On September 4, 1998, Respondent owned Missy (CX 4 at 1; Tr. 182, 185). On September 4, 1998, Missy's trainer, Ronal Young, entered Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Missy at the show (CX 1 at 3, CX 4; Tr. 19-20, 189).

6. On September 4, 1998, Mark Thomas and Ira Gladney, Designated Qualified Persons,¹ inspected Missy just prior to her scheduled participation in the 60th Annual Tennessee Walking Horse National Celebration and disqualified her from being shown or exhibited based upon her general appearance, locomotion, and reaction to palpation (CX 3b at 1, CX 3c; RX A; Tr. 51-52, 67, 69).

7. On September 4, 1998, Dr. John Michael Guerdon and Dr. Ruth E. Bakker, veterinary medical officers employed by the United States Department of Agriculture, examined Missy when she was entered in the 60th Annual Tennessee Walking Horse National Celebration and found her to be “sore” as that term is defined in the Horse Protection Act² (CX 3a, CX 3b, CX 3c, CX 4 at 2; Tr. 46-56, 85, 130-39). Respondent concedes Missy was sore when Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy at the show (CX 4; Tr. 152-53, 155, 161-62).

8. When Respondent first attended the 60th Annual Tennessee Walking Horse National Celebration, Respondent did not know Missy was at the 60th Annual Tennessee Walking Horse National Celebration. Respondent first became aware that Ronal Young planned to show Missy when Ronal Young’s wife, Judy Young, approached Respondent in the stands at the 60th Annual Tennessee Walking Horse National Celebration and informed Respondent that Missy had been “turned down” during a pre-show inspection. Respondent was at the 60th Annual Tennessee Walking Horse National Celebration to see two of his other horses, Silver Dollar and A Shot of Gen. Upon being told Missy had not passed inspection, Respondent attempted to find Ronal Young and Missy but discovered they had both left the grounds. When Respondent confronted Ronal Young the next day, Ronal Young assured Respondent that what had happened did not involve Respondent and Respondent should not worry. (CX 4 at 2; Tr. 152-53, 169, 194-95).

9. Notwithstanding the distance which existed between Respondent’s place of business and residence and Young’s Stables, Respondent made unannounced visits to Young’s Stables and never found Missy to be sore. During these visits to Young’s Stables, Missy’s gait appeared to Respondent to be free, flowing, and natural. (Tr. 152-53, 170).

¹A Designated Qualified Person or DQP is an individual appointed by the management of a horse show and trained under a United States Department of Agriculture-sponsored program to inspect horses for compliance with the Horse Protection Act (15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, .7).

²See 15 U.S.C. § 1821(3).

10. Before employing Ronal Young to board, train, and show Missy, Respondent talked to other trainers to determine whether Ronal Young had previously entered or exhibited a sore horse (Tr. 162-63, 171, 173, 176). Ronal Young had previously been cited for violating the Horse Protection Act, which information was available to Respondent from the Animal and Plant Health Inspection Service (Tr. 212-14, 220-23). However, during the period material to this proceeding, Respondent did not know about Ronal Young's previous citation for violating the Horse Protection Act, and Respondent was unaware of a way to have found that information or to have checked Ronal Young's record (Tr. 162-63, 171, 176-77).

11. Respondent did not maintain control over the training methods which he expected Ronal Young to select and employ when training Missy (CX 4 at 2). Respondent testified that he instructed Ronal Young not to sore or otherwise abuse Missy (Tr. 150-52, 170-71, 194-95). Ronal Young admitted in a written statement that Respondent advised him to refrain from soring Missy or from doing any act which might make Missy be in violation of the Horse Protection Act (RX B). Tim Gray, another trainer hired by Respondent, also submitted a written statement which supports Respondent's testimony that he instructed trainers not to sore his horses (RX C).

12. Respondent continued to employ Ronal Young to board, train, and show Missy for approximately 6 months after Ronal Young entered Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration while she was sore (Tr. 174-76, 187).

DISCUSSION

Congress found "the soring of horses is cruel and inhumane" and "horses shown or exhibited which are sore, where such soreness improves the performance . . . , compete unfairly with horses which are not sore."³ Congress made it unlawful to: (1) show or exhibit a sore horse in any horse show or horse exhibition; (2) enter for the purpose of showing or exhibiting a sore horse in any horse show or horse exhibition; or (3) allow the showing or exhibition of a sore horse in any horse show or horse exhibition.⁴ The term "sore" describes a horse, which, as a result of the use of a substance or practice, suffers, or can reasonably

³ See 15 U.S.C. § 1822(1)-(2).

⁴ See 15 U.S.C. § 1824(2)(A)-(B), (D).

be expected to suffer, “physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving.”⁵

To prove a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), Complainant must establish by a preponderance of evidence⁶ that: (1) the person charged is the owner of the horse in question; (2) the horse was shown, exhibited, or entered in a horse show or exhibition; (3) the horse was sore at the time it was shown, exhibited, or entered; and (4) the owner allowed the showing, exhibition, or entry.

⁵See 15 U.S.C. § 1821(3).

⁶The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in an administrative proceeding conducted under the Horse Protection Act is preponderance of the evidence. *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 at n.7 (2001) (Order Denying William J. Reinhart’s Pet. for Recons.); *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).

Respondent admits he owned Missy on September 4, 1998 (Answer ¶ 2). Complainant presented evidence sufficient to raise the statutory presumption⁷ that Missy was sore on September 4, 1998, when Ronal Young entered Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy. Complainant proved by a preponderance of the evidence that Missy was “sore” as that term is defined in the Horse Protection Act⁸ (CX 3a, CX 3b, CX 3c, CX 4 at 2; Tr. 46-56, 85, 130-39). Respondent failed to present evidence sufficient to rebut either Complainant’s *prima facie* case or the statutory presumption. Respondent concedes that Missy was sore when Ronal Young, the trainer Respondent hired to train Missy, entered Missy for the purpose of showing or exhibiting Missy at the 60th Annual Tennessee Walking Horse National Celebration (CX 4 at 2; Tr. 152-53, 155, 161-62).

The issue in this case is whether Respondent “allowed” the entry of Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration, while she was sore, and thus violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

The United States Department of Agriculture has long held that a horse owner who allows a person to enter the owner’s horse in a horse show or horse exhibition for the purpose of showing or exhibiting the horse is a guarantor that the horse will not be sore when the horse is entered in that horse show or horse exhibition.⁹ The evidence establishes that Respondent did not know that Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration until he was informed by Judy Young that Missy had been “turned down” (CX 4 at 2; Tr. 152-53). Nonetheless, the record is clear that Respondent allowed Ronal Young to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration. Respondent testified that trainers who Respondent

⁷See 15 U.S.C. § 1825(d)(5).

⁸See 15 U.S.C. § 1821(3).

⁹See, e.g., *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, 589-90 (1997) (stating an owner who allows a person to enter the owner’s horse in a horse show or horse exhibition for the purpose of exhibiting the horse is an absolute guarantor that the horse will not be sore when exhibited), *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, 979 (1996) (stating an owner who allows a person to exhibit a horse in a horse show or horse exhibition is an absolute guarantor that the horse will not be sore when the horse is exhibited), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 888 (1996) (stating horse owners who allow the entry of horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition are absolute guarantors that those horses will not be sore when entered).

hired, including Ronal Young, entered Missy in horse shows and horse exhibitions approximately 25 times before September 4, 1998, and Ronal Young entered Missy in at least two horse shows or horse exhibitions after September 4, 1998 (Tr. 151, 174-75). The record contains no evidence that Respondent objected to his trainers entering Missy in horse shows or horse exhibitions, and, specifically, the record contains no evidence that Respondent objected to Ronal Young's entering Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy in that horse show. Moreover, Respondent does not contend that he did not allow Ronal Young to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration. Under these circumstances, Respondent was a guarantor that Missy would not be sore when Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration. Complainant proved by a preponderance of the evidence that Missy was sore when Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration. Thus, Respondent breached his guarantee as a horse owner that Ronal Young (a person who Respondent hired to board, train, and show Missy and a person allowed by Respondent to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration) would not enter Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy while she was sore. Based upon Respondent's breach of this guarantee, I conclude that, on September 4, 1998, Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Respondent cannot escape liability for a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) based on his credible testimony that, prior to the 60th Annual Tennessee Walking Horse National Celebration, he did not have actual knowledge that Ronal Young would enter Missy in the show or based on his credible testimony that he instructed Ronal Young not to sore Missy.

Respondent urges that I refrain from applying the United States Department of Agriculture's test to determine whether he violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Instead, Respondent requests that I apply the tests to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) which have been adopted by the United States Court of Appeals for the Sixth Circuit, the United States Court of Appeals for the Eighth Circuit, and the United States Court of Appeals for the Eleventh Circuit, as follows:

[BY DR. McCLOY:]

In summary, I wish the facts of this case would be considered in the case -- in the light of other cases, *Baird v USDA*, 39 Fed 3d 131 at the Sixth Circuit; *Burton v USDA*, 683 Fed 2d 280 in the Eighth Circuit; and *Lewis v the Secretary of Agriculture*, 73 Fed 3d 312 in the Eleventh Circuit.

I believe if one looks at the evidence in this case with respect to these cases, that the hearing would result in a defense verdict.

Tr. 195.

However, the tests adopted by the United States Court of Appeals for the Sixth Circuit, the United States Court of Appeals for the Eighth Circuit, and the United States Court of Appeals for the Eleventh Circuit are inapposite. Respondent may obtain judicial review of this Decision and Order in the court of appeals of the United States for the circuit in which Respondent resides or has his place of business or the United States Court of Appeals for the District of Columbia Circuit.¹⁰ Respondent does not reside in or have his place of business in the Sixth Circuit, the Eighth Circuit, or the Eleventh Circuit. Instead, the record establishes that Respondent resides in and has his place of business in Oklahoma (Compl. ¶ 1; Answer ¶ 1; RX D). Therefore, Respondent may obtain judicial review of this Decision and Order in the United States Court of Appeals for the Tenth Circuit or the United States Court of Appeals for the District of Columbia Circuit.

Respondent does not cite and I cannot locate any decision by the United States Court of Appeals for the Tenth Circuit in which the Court addresses the test to be used to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). The United States Court of Appeals for the District of Columbia Circuit has addressed the test to be used to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) and has specifically rejected the test adopted by the United States Court of Appeals for the Sixth Circuit and the test adopted by the United States Court of Appeals for the Eighth Circuit, as follows:

That brings us to petitioner's second argument: that on the facts presented, the Department could not conclude that petitioner "allow[ed]" the entry of a sore horse. This textual argument turns on the meaning of

¹⁰See 15 U.S.C. § 1825(b)(2), (c).

the word “allow.” The Department contends that an owner can always *prevent* a horse from being sore, and that therefore an owner is liable if her horse is entered, showed, or exhibited while sore. Petitioner, on the other hand, maintains that the word “allow” necessarily implies knowledge of the sore condition, or at least requires proof of circumstances that would alert the owner that someone—normally, we would suppose, the trainer—was soring the horse. In this case, it will be recalled, the petitioner testified, without contradiction, that she instructed the trainer *not* to sore the horse. Petitioner accuses the Department of interpreting the word “allow” so as to create absolute liability for an owner regardless of the circumstances that caused a horse’s soreness.

This issue has generated much discussion and concern in our fellow circuits. The Eighth Circuit, *Burton v. United States Dep’t of Agriculture*, 683 F.2d 280, 282-83 (8th Cir. 1982), and the Sixth Circuit, *Baird v. United States Dep’t of Agriculture*, 39 F.3d 131, 137-38 (6th Cir. 1994), have rejected the Department’s interpretation and have held that if an owner produced uncontradicted evidence that he or she instructed a trainer not to sore the horse, the Department must in turn show that the instruction was a ruse or that the owner nevertheless had knowledge that the horse was sore. *Compare Thornton v. United States Dep’t of Agriculture*, 715 F.2d 1508, 1511-12 (11th Cir. 1983); *see also Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1488-89 (9th Cir. 1984).

We respectfully disagree with our sister circuits who have required the Department to produce evidence rebutting an owners’ prophylactic instruction. Congress did not state that an owner is liable if she *authorizes* or *causes* a horse to be sore. The word “allow” is a good deal softer, more passive, and it can have varying meanings, *e.g.*, “to permit by neglecting to restrain or prevent,” or “to make a possibility: provide opportunity or basis” or (most strongly) “to intend or plan.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 58 (1971). Since the word is ambiguous, we are obliged under *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984), to defer to the Department’s interpretation of the term (so long as reasonable), which we take to be among the weaker ones in Webster’s, “to permit by neglecting to restrain or prevent.” Accordingly, if an owner enters or shows a sore horse, the Department assumes that he or she has not *prevented* someone in his or

her employ from soring the horse. And, *by itself*, testimony that the owner “instructed” the trainer not to sore the horse will not exculpate the owner. In so concluding, the Department merely takes into account the obvious proposition that the owner has the power to control his or her agents.

The Sixth Circuit recognized (in a footnote) that *Chevron* governed review of the Department’s interpretation, but concluded the Department’s interpretation was unreasonable. *Baird*, 39 F.3d at 137 n. 10. The court looked to Black’s Law Dictionary, which does state that “‘allow’ has no rigid or precise meaning” but then goes on to say, “[t]o sanction, either directly or indirectly, as opposed to merely suffering a thing to be done” (even that dictionary does, in a contradictory fashion, submit as an alternative, “to suffer; to tolerate”). From that language the court concluded that

[A]s the above definition makes clear, there are basically two ways to allow something to happen: either ‘directly,’ *e.g.*, explicitly condoning or authorizing the conduct or act in question; or ‘indirectly,’ *e.g.*, by failing to prevent such conduct or act—in other words, by ‘looking the other way’ or by ‘burying one’s head in the sand.’ . . . Liability would follow in this latter instance if, for example, an owner had cultivated a training atmosphere conducive to soring, or had done nothing to dissuade the practice, knowing the tactics of his trainers in particular and/or the pervasiveness of the practice in general.

Baird v. U.S. Dep’t of Agriculture, 39 F.3d at 137.

The Sixth Circuit’s interpretation of the language is certainly plausible, but we do not agree with its conclusion that the Department’s interpretation is unreasonable or is functionally equivalent to the imposition of absolute liability. The Department merely holds the owner responsible for the actions of her agents (particularly the trainer) and will not permit the owner to escape liability by testifying that she instructed a trainer not to sore. It might well be an entirely different case—we have been able to find none—if an owner were able to show that a horse was sored by a stranger or someone not under, the owner’s control. And, it is of course conceivable that a trainer would flatly disobey an owner’s instruction. If an owner produced such evidence—together, presumably, with a showing that the trainer had been terminated—it might well be that

the Department could not conclude reasonably that the owner “allowed” the entry of a sore horse. That is not this case, however, and that apparently has not been the pattern of most of these cases.

The Sixth Circuit recognized the government’s concern that an owner could easily offer evidence of a prophylactic instruction without real fear of contradiction (trainers would be unlikely to cross the owners), but the court concluded that this risk was simply a hazard of litigation: the government still had the “burden” of disproving the sincerity of the instruction. *Baird*, 39 F.3d at 138 n. 11. That amounts to putting an enormous burden and expense on the Administrator to establish how the horse came to be sored, a burden that would be required if the statute called for a sanction if an owner “caused” or “authorized” the soring. Since the statute uses the term “allow” (*i.e.*, “permit,” or “does not prevent”), we do not think the Administrator must shoulder such a task just because the owner produces evidence of her instruction to the trainer. After all, the instruction is not introduced to establish that the horse was not sore but rather to relieve the owner of any responsibility for the soreness. Yet the instruction, by itself, even were it deemed totally sincere, is not necessarily inconsistent with the proposition that the owner “permitted”—for example, through neglect or lack of vigilance—the horse to be sored. It is unimaginable that an owner would be unfamiliar with soring practices generally, as well as the Department’s enforcement efforts, therefore if an owner’s horse were sored, notwithstanding her instruction, she could be said to have “put her head in the sand”—unless something quite extraordinary occurred.

The Department apparently believes that an owner can and must do a good deal more than simply give the bare instruction to be thought to have “prevented” her own horse from being entered in a sore condition. The issue does not involve so much an allocation of burdens, as the Sixth Circuit thought, but rather the weight the Department must give to evidence of the owner’s instruction in light of the Department’s interpretation of the statute. We do not think, in that context, it is unreasonable for the Department to conclude that such an instruction will not exculpate an owner for the statutory responsibility for allowing the entry of a sore horse.

Crawford v. United States Dep't of Agric., 50 F.3d 46, 50-52 (D.C. Cir.), cert. denied, 516 U.S. 824 (1995) (footnotes omitted).

Based on the test in *Crawford*, I conclude that Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy in the 60th Annual Tennessee Walking Horse National Celebration while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Respondent hired Ronal Young to train Missy in August 1997 and Respondent retained Ronal Young as Missy's trainer until approximately February 1999. During this period, Respondent allowed Ronal Young to enter Missy in a number of horse shows or horse exhibitions, including the 60th Annual Tennessee Walking Horse National Celebration. Respondent had the power to control his trainer and under *Crawford*, Respondent's testimony that he instructed Ronal Young not to sore Missy does not permit Respondent to escape liability for his violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

Moreover, even if I were to apply the test adopted by the United States Court of Appeals for the Eighth Circuit or the test adopted by the United States Court of Appeals for the Eleventh Circuit to determine whether Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as Respondent urges, I would not dismiss the Complaint. The United States Court of Appeals for the Eighth Circuit in *Burton* held, as follows:

[W]e hold that the owner cannot be held to have "allowed" a "sore" horse to be shown [in violation of 15 U.S.C. § 1824(2)(D)] when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a "sore" condition, (2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and (3) there was uncontradicted testimony that the owner had directed the trainer not to show a "sore" horse. All of these factors taken together are sufficient to excuse an owner from liability.

Burton v. United States Dep't of Agric., 683 F.2d 280, 283 (8th Cir. 1982).

The United States Court of Appeals for the Eleventh Circuit in *Lewis* adopted *Burton* with the caveat that the owner's directions to the trainer not to show a sore horse must be meaningful, as follows:

The caveat we put on *Burton* relates to the third factor. Compliance with it (along with the other two factors), frees the owner of the

ineluctable consequences of entry plus the fact of soreness and it frees him of being found to “allow” in the passive sense described in *Baird* by “hiding his head” or doing nothing. But compliance with the third element must be meaningful rather than purely formal or ritualistic. The owner may give firm and certain and suitably repeated directions not to sore and not to show a horse that is in a sore condition. He may maintain a training environment that discourages soring or makes it impossible. He may carry out inspection practices that tend to reveal any efforts to sore. But, whatever the form, his efforts must be meaningful and not a mere formalistic evasion.

Lewis v. Secretary of Agric., 73 F.3d 312, 317 (11th Cir. 1996).

The evidence clearly establishes that on September 4, 1998, two Designated Qualified Persons examined Missy during a pre-show inspection at the 60th Annual Tennessee Walking Horse National Celebration and disqualified her from showing based upon her general appearance, locomotion, and reaction to palpation (CX 3b at 1, CX 3c; RX A; Tr. 51-52, 67, 69). The record contains no evidence that any Designated Qualified Person examined and approved Missy for showing or exhibition at the 60th Annual Tennessee Walking Horse National Celebration. Therefore, Respondent does not meet the requirement in *Burton* and *Lewis* that a Designated Qualified Person examine and approve the horse before the horse enters the ring.

However, if I were to apply the test adopted by the United States Court of Appeals for the Sixth Circuit in *Baird*, I would dismiss the Complaint against Respondent. The Sixth Circuit sets forth the test to determine whether an owner has allowed the entry of the owner’s horse while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as follows:

In our view, the government must, as an initial matter, make out a prima facie case of a § 1824(2)(D) violation. It may do so by establishing (1) ownership; (2) showing, exhibition, or entry; and (3) soreness. If the government establishes a prima facie case, the owner may then offer evidence that he took an affirmative step in an effort to prevent the soring that occurred. Assuming the owner presents such evidence and the evidence is justifiably credited, it is up to the government then to prove that the admonitions the owner directed to his trainers concerning the soring of horses constituted merely a pretext or a

self-serving ruse designed to mask what is in actuality conduct violative of § 1824.

Baird v. United States Dep't of Agric., 39 F.3d 131, 137 (6th Cir. 1994) (footnote omitted).

In *Baird*, the affirmative step to prevent the soring that occurred was the horse owner's direction to his trainers that his horses were not to be sored and his warning that he would take the horses away from trainers he suspected of soring his horses. The Court in *Baird* held that the horse owner's testimony alone, absent evidence to refute it, was sufficient to show that the horse owner did not "allow" his trainers to enter and exhibit his horses while sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). *Baird v. United States Dep't of Agric.*, 39 F.3d at 138.

Respondent testified that he took affirmative steps to prevent the soring of Missy. Specifically, Respondent testified that he instructed Ronal Young not to sore Missy. Moreover, Respondent introduced Ronal Young's written statement (RX B) which corroborates Respondent's testimony that he instructed Ronal Young not to sore Missy. Complainant did not prove that Respondent's admonitions directed to Ronal Young concerning the soring of Missy constituted merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). However, again, I note that Respondent cannot obtain judicial review by the United States Court of Appeals for the Sixth Circuit and *Baird* is inapposite.

CONCLUSION OF LAW

On September 4, 1998, Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

SANCTION

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than \$2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation

effective September 2, 1997, adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from \$2,000 to \$2,200.¹¹ The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation.¹²

Congress has recognized the seriousness of soring horses. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of “soring” horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse’s limb, or by using various action or training devices such as heavy chains or “knocker boots” on the horse’s limbs. When a horse’s front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them

¹¹See 62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(2)(vii).

¹²See 15 U.S.C. § 1825(c).

forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The 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 the 9th Circuit Rule 36-3), as follows:

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

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides that in determining the amount of the civil penalty, the Secretary of Agriculture 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, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

Complainant recommends that I assess Respondent a \$2,200 civil penalty (Complainant's Post-Hearing Brief at 26-27). The extent and gravity of Respondent's prohibited conduct are great. Two United States Department of Agriculture veterinary medical officers found Missy extremely sore. Dr. John Michael Guedron described Missy's pain responses to his examination of her left leg and foot and right leg and foot as "strong" (CX 3b at 1-2), and Dr. Ruth E. Bakker described Missy's pain responses to her examination of Missy's right forelimb and left forelimb as "pronounced" (CX 3c at 2).

Before employing Ronal Young to board, train, and show Missy, Respondent made no attempt, other than talking to other trainers, to determine whether Ronal Young had previously entered or exhibited a sore horse (Tr. 162-63, 171, 173, 176). Ronal Young had previously been cited for violating the Horse Protection Act, which information was available to Respondent from the Animal and Plant Health Inspection Service (Tr. 212-14, 220-23). However, during the period material to this proceeding, Respondent did not know about Ronal Young's previous citation for violating the Horse Protection Act, and Respondent was unaware of a way to have found that information or to have checked Ronal Young's record (Tr. 162-63, 171, 176-77). While Respondent did not maintain control over the training methods which he expected Ronal Young to select and employ when training Missy, Respondent instructed Ronal Young not to sore or otherwise abuse Missy and made several unannounced visits to Young's Stables to determine how Missy was being treated (CX 4; Tr. 150-53, 170-71, 194-95). Weighing all the circumstances, I find Respondent is culpable, but not highly culpable, for the violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

Respondent presented no evidence that he is unable to pay a \$2,200 civil penalty. Further, Respondent is a physician and a \$2,200 civil penalty would not adversely affect Respondent's ability to continue in business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.¹³ Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for each violation of the Horse Protection Act. Therefore, I assess Respondent a \$2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of

¹³See, e.g., *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 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 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.¹⁴

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.¹⁵

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824).

¹⁴See H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

¹⁵*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, 591 (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, 982 (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, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (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, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for the first violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

COMPLAINANT'S APPEAL PETITION

Complainant raises 12 issues in Complainant's Petition for Appeal of Decision and Order [hereinafter Complainant's Appeal Petition]. First, Complainant contends the ALJ's finding that Respondent's testimony is credible, is error (Complainant's Appeal Pet. at 3-6).

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).¹⁶ The Administrative Procedure Act

¹⁶See also *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 559-60 (2001), *appeal docketed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Sept. 10, 2001); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1053-54 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (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 John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating the substantial evidence standard is not modified in any way when the

(continued...)

provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

.....

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT describes the authority of the agency on review of an initial or recommended decision, as follows:

(...continued)

Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating that while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.¹⁷

Complainant contends the ALJ based her credibility finding on Respondent's testimony that he "affirmatively gave the trainer instructions regarding the non-abuse of his horses which included soring" (Initial Decision and Order at 5) but Respondent never testified that he gave Ronal Young any instruction not to sore Missy (Complainant's Appeal Pet. at 6-7). I disagree with Complainant's contention that Respondent never testified that he gave Ronal Young instructions not to sore Missy. Respondent testified that he instructed Ronal Young not to sore Missy, as follows:

¹⁷*In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal docketed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Sept. 10, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, No. 00-3173, 2001 WL 401594 (10th Cir. Apr. 20, 2001) (unpublished); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

[BY DR. McCLOY:]

Ebonys Threats Miss Professor was purchased in January of '95. She went directly to David Landrum's [phonetic] stables. She then, when Link Webb left David Landrum, went with Link Webb. As I mentioned, we were unable to get the horse to canter and Link felt that Ronal Young would be the person to do that, so I called Ronal about August of '97, having had no contact with Ronal since then.

....

Once again, I told Ronal that the training -- the reason the horse was moved to him was because it would not canter. Its show record was excellent in terms of a flat walk and a running walk. There was no need to sore the horse, but I did expect him to stay in compliance with the Horse Protection Act, and he understood that.

....

[BY MS. CARROLL:]

Q. And then you are here testifying that you informed Mr. Young not to sore your horse?

[BY DR. McCLOY:]

A. I informed Mr. Young to not sore the horse.

Q. Okay.

A. I wanted the horse in compliance with the Horse Protection Act and I did not want to own a horse that had to be sored.

Q. And --

A. And I've told all trainers that.

Tr. 151-52, 170-71.

Moreover, Respondent's testimony that he instructed Ronal Young not to sore Missy is corroborated by Ronal Young's written statement in which he states "[w]hen Dr. McCloy placed 'Miss Ebony's Threat's Professor' in training with me, he specifically advised me to refrain from 'soring' his horse or from

doing any act which might make his horse in violation of the Horse Protection Act” (RX B).

Complainant further contends the ALJ cannot both find Respondent credible and conclude Respondent violated the Horse Protection Act (Complainant’s Appeal Pet. at 7-11). I disagree with Complainant’s contention that the ALJ cannot find Respondent credible and conclude Respondent violated the Horse Protection Act. Respondent owned Missy at all times material to this proceeding. Respondent retained Ronal Young to board, train, and show Missy from August 1997 to approximately February 1999. Respondent allowed Ronal Young to enter Missy in horse shows, including the 60th Annual Tennessee Walking Horse National Celebration. On September 4, 1998, Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy at the show while Missy was sore. (CX 1 at 3, CX 2, CX 3a, CX 3b, CX 3c, CX 4; Tr. 19-20, 46-56, 85, 130-39, 151-52, 174-76, 182, 185, 187, 189). The United States Department of Agriculture holds that a horse owner who allows a person to enter the owner’s horse in a horse show or horse exhibition for the purpose of showing or exhibiting the horse is a guarantor that the horse will not be sore when the horse is entered in that horse show or horse exhibition.¹⁸ By itself, credible testimony that the horse owner instructed the person who enters the horse not to sore the horse will not exculpate the owner from a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, the ALJ could find credible Respondent’s testimony that he instructed Ronal Young not to sore Missy and at the same time conclude Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

Complainant further contends the ALJ’s finding that Respondent’s testimony that he instructed Ronal Young not to sore Missy is credible ignores statements in Respondent’s own affidavit and Michael Ray’s testimony (Complainant’s Appeal Pet. at 11-13).

Respondent states in his affidavit “I have given Mr. Young no verbal or written instructions concerning the training of Ebonys Threats. Mr. Young was given complete custody in training the horse.” (CX 4 at 2). Michael Ray, an investigator employed by the Animal and Plant Health Inspection Service, testified that he prepared Respondent’s affidavit based on his interview of Respondent. Michael Ray further testified that, when he asked Respondent about the instructions he had given to Ronal Young, Respondent stated he gave

¹⁸See note 9.

no instructions to Ronal Young. (Tr. 8-10). Respondent's affidavit appears to be inconsistent with Respondent's testimony that he instructed Ronal Young not to sore Missy and this apparent inconsistency causes me some doubt about the ALJ's credibility determination. However, Respondent testified that what he meant in his affidavit was that he gave Ronal Young no instructions regarding legal and non-abusive methods of training Missy (Tr. 194). Moreover, Ronal Young's written statement (RX B) corroborates Respondent's testimony that he instructed Ronal Young not to sore Missy. The ALJ found Respondent credible, and, in light of Respondent's explanation, Ronal Young's written statement, and the great weight I give to the ALJ's credibility determination, I do not set aside the ALJ's credibility determination based on the apparent conflict between Respondent's testimony and Respondent's affidavit.

Second, Complainant states he "does not see why the ALJ would express surprise" about Complainant's characterization of Respondent's testimony as "self-serving" (Complainant's Appeal Pet. at 13-14).

The ALJ states Complainant's characterization of Respondent's testimony is surprising, as follows:

The Complainant seeks to show that Dr. McCloy cannot be believed. In furtherance of its theory that Dr. McCloy allowed the entry, the Government claims that his testimony is "self-serving, and not credible." It is surprising the Government would say this.

Initial Decision and Order at 8.

The record does not reveal the reasons for the ALJ's surprise about Complainant's characterization of Respondent's testimony; therefore, I am not able to provide Complainant with the reasons for the ALJ's surprise. However, the reasons for the ALJ's surprise have no bearing on the disposition of this proceeding. Therefore, I do not remand this proceeding to the ALJ to provide the reasons for her surprise regarding Complainant's characterization of Respondent's testimony. Moreover, I am not surprised by Complainant's characterization of Respondent's testimony as "self-serving." Therefore, I do not adopt the ALJ's expression of surprise.

Third, Complainant contends the ALJ erroneously states it is Respondent's obligation and duty to explain what occurred (Complainant's Appeal Pet. at 14).

The ALJ states that it is Respondent's obligation and duty to explain what occurred (Initial Decision and Order at 8). Neither the Administrative Procedure Act nor the Rules of Practice requires a respondent to testify and explain "what

occurred.” Therefore, I agree with Complainant’s contention that the ALJ’s statement that it is Respondent’s obligation and duty to explain what occurred, is error, and I do not adopt the ALJ’s statement that it is Respondent’s obligation and duty to explain what occurred.

Fourth, Complainant states the ALJ’s statement that self-serving testimony may be received and found credible, is error (Complainant’s Appeal Pet. at 14-15).

The ALJ states “[t]here has never been any legal principle that prevents ‘self-serving’ testimony, or, that precludes such testimony as not credible when the finder of fact (frequently a jury) finds it to be credible” (Initial Decision and Order at 9). Neither the Administrative Procedure Act nor the Rules of Practice prohibits the reception of self-serving testimony. Further, neither the Administrative Procedure Act nor the Rules of Practice provides that self-serving testimony cannot be found credible. Numerous courts have held that self-serving testimony is admissible and may be found credible.¹⁹ Therefore, I reject Complainant’s contention that the ALJ’s statement that self-serving testimony may be received and found credible, is error.

Fifth, Complainant contends the ALJ imprecisely found Respondent’s failure to fire Ronal Young, after Missy was found to be sore, constitutes Respondent’s “condoning” Ronal Young’s treatment of Missy. Complainant contends the ALJ would have been more accurate if she had found that Respondent’s failure to fire Ronal Young indicates that Respondent’s instruction to Ronal Young not to sore Missy was not genuine. (Complainant’s Appeal Pet. at 15).

Respondent testified that he left Missy in Ronal Young’s custody until February 1999, approximately 6 months after Respondent learned Missy had been disqualified during a pre-show inspection from being shown or exhibited at the 60th Annual Tennessee Walking Horse National Celebration (Tr. 174-76). The ALJ states that, by leaving Missy with Ronal Young for a period of months after Missy had been disqualified from being shown or exhibited at the 60th

¹⁹*Winchester Packaging, Inc. v. Mobile Chemical Co.*, 14 F.3d 316, 319 (7th Cir. 1994) (stating self-serving testimony is not as a matter of law unworthy of belief); *Healey v. Chelsea Resources, Ltd.*, 947 F.2d 611, 620 (2d Cir. 1991) (stating the fact that testimony may be self-serving goes to its weight rather than its admissibility); *Wilson v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 841 F.2d 1347, 1355 (7th Cir.) (finding self-serving testimony given by one of the parties was not inherently incredible), *cert. dismissed*, 487 U.S. 1244 (1988); *Shanklin Corp. v. Springfield Photo Mount Co.*, 521 F.2d 609, 616 (1st Cir. 1975) (stating the district court did not err in accepting testimony as credible simply because it was self-serving), *cert. denied*, 424 U.S. 914 (1976); *Robinson v. United States*, 308 F.2d 327, 332 (D.C. Cir. 1962) (rejecting an argument that self-serving testimony should not have been received; stating that an objection to self-serving testimony goes to the weight and not to the substance of the testimony), *cert. denied*, 374 U.S. 836 (1963); *NLRB v. Walton Manufacturing Co.*, 286 F.2d 26, 28 (5th Cir. 1961) (stating a witness’ sworn testimony is not to be discredited because it supports the witness’ contention).

Annual Tennessee Walking Horse National Celebration, "Respondent was indirectly condoning what had previously occurred" (Initial Decision and Order at 13). I infer the ALJ's reference to "what had previously occurred" is a reference to Ronal Young's entry of Missy for the purpose of showing or exhibiting Missy in the 60th Annual Tennessee Walking Horse National Celebration while Missy was sore.

Respondent removed Missy from Ronal Young's custody in February 1999, when he found a suitable trainer; after September 4, 1998, Respondent requested Ronal Young not to sore Missy again; after September 4, 1998, Respondent extracted a promise from Ronal Young that he would not sore Missy again; and Respondent examined Missy each of the two times she was shown during the period she remained in Ronal Young's custody after September 4, 1998 (Tr. 174-76). Respondent's eventual removal of Missy from Ronal Young's custody and the precautions Respondent took to prevent Ronal Young's soring Missy after September 4, 1998, do not appear to be the actions of a horse owner who "was indirectly condoning" the entry of his horse in a horse show while the horse was sore. Based on the record before me, I agree with Complainant that Respondent's failure to remove Missy from Ronal Young's custody expeditiously after she was disqualified from being shown or exhibited at the 60th Annual Tennessee Walking Horse National Celebration does not prove that Respondent "was indirectly condoning what had previously occurred." Therefore, I do not adopt the ALJ's statement that Respondent "was indirectly condoning what had previously occurred."

Moreover, I agree with Complainant that Respondent's failure to remove Missy from Ronal Young's custody after September 4, 1998, is an indication that Respondent's instruction not to sore Missy was not genuine. However, Respondent's testimony that he instructed Ronal Young not to sore Missy is corroborated by Ronal Young's written statement (RX B) and I give great weight to the ALJ's determination that Respondent's testimony that he instructed Ronal Young not to sore Missy is credible. Therefore, I reject Complainant's contention that Respondent's instruction not to sore Missy was not genuine.

Sixth, Complainant contends the ALJ's finding that Respondent made unannounced visits to Young's Stables is not supported by the evidence and even if Respondent made unannounced visits, those visits would not have prevented the soring of Missy (Complainant's Appeal Pet. at 15-17).

The ALJ finds "[n]otwithstanding the distance which existed from Respondent's place of work and residence and the location of Young's Stables, Respondent made unannounced visits and never found the horse to be in a sore

condition, at which time her gait appeared to him to be free, flowing, and natural” (Initial Decision and Order at 4).

I disagree with Complainant’s contention that the evidence does not support the ALJ’s finding that Respondent made unannounced visits to Young’s Stables. Respondent, who the ALJ found to be credible, testified that he checked Missy periodically while she was at Young’s Stables and his visits to Young’s Stables were “generally unannounced visits” (Tr. 152-53). Moreover, Respondent testified that he never found Missy sore when he examined her at Young’s Stables (Tr. 153). Therefore, I adopt with only minor modifications the ALJ’s finding that Respondent made unannounced visits to Young’s Stables and never found Missy in a sore condition.

However, I agree with Complainant’s point that Respondent’s examinations of Missy at Young’s Stables would not have prevented soring. Complainant proved by a preponderance of the evidence that Missy was sore when entered at the 60th Annual Tennessee Walking Horse National Celebration, and Respondent concedes that Missy was sore when Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration. Therefore, I conclude that Respondent’s examinations of Missy at Young’s Stable did not prevent Missy from being sored.

Seventh, Complainant contends the ALJ erred in relying on Respondent’s Exhibit B because it is unreliable. Complainant contends Respondent’s Exhibit B is not reliable because the name of the horse referenced in Respondent’s Exhibit B is “Miss Ebony’s Threat’s Professor”; whereas, the name of the horse that is the subject of this proceeding is “Ebony Threat’s Ms. Professor.” Moreover, Complainant states “[i]t also appears that a date has been changed in paragraph 2 of the document.” (Complainant’s Appeal Pet. at 17-20).

Respondent’s Exhibit B is a one-page document entitled “Affidavit of Ronal Young,” which states, as follows:

AFFIDAVIT OF RONAL YOUNG

I RONAL YOUNG, being first duly sworn, testify as follows:

1. I reside at 2001 Highway 64W, Bedford County, Tennessee;
2. On or about the 25th day of August, 1998 I was the trainer of the horse known as “Miss Ebony’s Threat’s Professor”. Dr. Robert McCloy was the owner of said horse at that time;
3. When Dr. McCloy placed “Miss Ebony’s Threat’s Professor” in training with me, he specifically advised me to refrain from “soring” his horse or from doing any act which might make his horse in violation of

the Horse Protection Act. I told him that I was well aware of and understood the meaning of the Horse Protection Act; and

4. Dr. McCloy did not in any way participate or assist in entering, transporting, preparing for show, or exhibiting the horse "Miss Ebony's Threat's Professor" on the date stated above.

FURTHER AFFIANT SAITH NOT.

/s/
RONAL YOUNG

STATE OF TENNESSEE
CITY OF SHELBYVILLE

Sworn and subscribed before me, this 20th day of December, 1999.

/s/
NOTARY

My commission expires: Sept 9, 2002

The record indicates an inordinate amount of confusion regarding the name of the horse which is the subject of this proceeding. Missy is variously referred to as "Ebony Threat's Ms. Professor" (Compl. ¶ 1), "Ebony Threats Ms Professor" (CX 1 at 3, CX 2), "E.T Miss Professor" (CX 3a), "E.T. Miss Professor" (CX 3b at 1, CX 3c at 1), "Ebonys Threats Ms. Professor" (CX 4 at 1), "Ebonys Threats" (CX 4 at 1), "Ebony Threat's Miss Professor" (CX 6 at 2), "Ebonys Threats Miss Professor" (Tr. 24), "Ebony Threats Miss Professor" (Tr. 37), "Ebonys Threat Miss Professor" (Tr. 47) "ET Miss Professor" (Tr. 135), "ET's Miss Professor" (Tr. 149-50), "Missy" (Tr. 169), and "Miss Ebony's Threat's Professor" (RX B). Despite this apparent confusion regarding Missy's name, the record clearly establishes each of these references is to Missy. I do not find witnesses or documents unreliable merely because they refer to Missy by a name other than "Ebony Threat's Ms. Professor." Specifically, I do not find Ronal Young's written statement unreliable because he referred to Missy as "Miss Ebony's Threat's Professor" (RX B).

Moreover, I reject Complainant's contention that Ronal Young's written statement is unreliable because the date in the first sentence of paragraph 2 appears to be changed. The first sentence in paragraph 2 of Ronal Young's

written statement states “[o]n or about the 25th day of August, 1998 I was the trainer of the horse known as ‘Miss Ebony’s Threat’s Professor’”. The last digit in the year appears to have been typed as a different number than “8” and the number “8” is clearly written in ink over the typed number. I do not find Ronal Young’s written statement unreliable because of this change in the date in the first sentence of paragraph 2. The evidence clearly establishes that Ronal Young was Missy’s trainer during the period from August 1997 to approximately February 1999. Therefore, the date, as changed, is consistent with other evidence in the record which establishes the period during which Ronal Young was Missy’s trainer.

Eighth, Complainant contends the ALJ erroneously admitted Respondent’s Exhibit C. Specifically, Complainant contends Respondent’s Exhibit C is irrelevant because it does not mention Ronal Young or Missy and is silent on whether Respondent instructed Ronal Young not to sore Missy. (Complainant’s Appeal Pet. at 20-21).

Respondent’s Exhibit C is a one-page letter from Tim Gray which states, as follows:

To Whom It May Concern:

I have known Dr. Bob McCloy of Norman, Oklahoma, since 1994. I have also trained horses for Dr. McCloy since the year beginning in ‘94.

Dr. McCloy has always emphasized his strong desire for his Tennessee Walking Horses to be in compliance with the Horse Protection Act.

If you have any further questions, please feel free to contact me at any time. Thank you for your time.

Sincerely,

Tim Gray, WHTA Horse Trainer

TG:pg /s/

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.²⁰ I find Respondent’s

²⁰*Durtsche v. American Colloid Co.*, 958 F.2d 1007, 1012-13 (10th Cir. 1992) (stating relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence

(continued...)

Exhibit C is relevant because it corroborates Respondent's testimony that he instructed the trainers he hired not to sore his horses (Tr. 151, 162, 170-71). This pattern of conduct tends to support Respondent's evidence that he instructed Ronal Young not to sore Missy. I find Respondent's affirmative steps to prevent Ronal Young from soring Missy are relevant to the degree of Respondent's culpability for his violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). The degree of a respondent's culpability is one of the statutory criteria that must be considered when determining the amount of any civil penalty to be assessed for a violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824).²¹

Ninth, Complainant contends the ALJ erroneously refers to Respondent's Exhibit B and Respondent's Exhibit C as "affidavits" (Complainant's Appeal Pet. at 20).

The ALJ refers to Respondent's Exhibit B and Respondent's Exhibit C as affidavits (Initial Decision and Order at 5-6). An affidavit is a sworn statement in writing made under oath or on affirmation before a person having authority to administer the oath or affirmation.²²

(...continued)

to the determination of the action more probable or less probable than it would be without the evidence); *United States v. Hollister*, 746 F.2d 420, 422 (8th Cir. 1984) (stating relevant evidence is evidence probative of a fact of consequence which has a tendency to make the existence of that fact more or less probable than it would have been without the evidence); *Carter v. Hewitt*, 617 F.2d 961, 966 (3d Cir. 1980) (stating evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence); *Grant v. Demskie*, 75 F. Supp.2d 201, 218-19 (S.D.N.Y. 1999) (stating relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence), *aff'd*, 234 F.3d 1262 (2d Cir. 2000) (Table); *Bowers v. Garfield*, 382 F. Supp. 503, 510 (E.D. Pa.) (stating relevant evidence is evidence that in some degree advances the inquiry and thus has probative value), *aff'd*, 503 F.2d 1398 (3d Cir. 1974) (Table); *Stauffer v. McCrory Stores Corp.*, 155 F. Supp. 710, 712 (W.D. Pa. 1957) (stating relevant evidence is evidence that in some degree advances the inquiry and thus has probative value).

²¹See 15 U.S.C. § 1825(b)(1).

²²See *e.g.*, Merriam Webster's Collegiate Dictionary 20 (10th ed. 1997):

affidavit . . . n . . . a sworn statement in writing made esp. under oath or on affirmation before an authorized magistrate or officer.

The Oxford English Dictionary, vol. I, 216 (2d ed. 1991):

(continued...)

(...continued)

affidavit . . . A statement made in writing, confirmed by the maker's oath, and intended to be used as judicial proof.

Black's Law Dictionary 58 (7th ed. 1999):

Affidavit . . . A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.

Bouvier's Law Dictionary 158 (3d ed. 1914):

AFFIDAVIT. A statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation.

See also, e.g., Egger v. Phillips, 710 F.2d 292, 311 n.19 (7th Cir.) (stating a declaration that is not sworn before an officer authorized to administer oaths is, by definition, not an affidavit; the fact that a declarant recites that the statements are made under penalty of perjury does not transform an unsworn statement into an affidavit), *cert. denied*, 464 U.S. 918 (1983); *Robbins v. United States*, 345 F.2d 930, 932 (9th Cir. 1965) (stating a statement that is not notarized, but contains a recital that is made under penalty of perjury is not an affidavit); *Williams v. Pierce County Bd. of Comm'rs*, 267 F.2d 866, 867 (9th Cir. 1959) (per curiam) (stating a document is not an affidavit if there is no certificate that the affiant took an oath or swore to his statement); *Amtorg Trading Corp. v. United States*, 71 F.2d 524, 530 (C.C.P.A. 1934) (citing with approval the definition of *affidavit* in Black's Law Dictionary (3d ed.): a written or printed declaration or statement of facts, made voluntarily, and confirmed by oath or affirmation of the party making it, taken before an officer having authority to administer such oath); *Lamberti v. United States*, 22 F. Supp.2d 60, 71 n.53 (S.D.N.Y. 1998) (stating an unsworn declaration not made under penalty of perjury nor stating the document is true is not an affidavit), *aff'd sub nom. Badalamenti v. United States*, 201 F.3d 430 (2d Cir. 1999) (Table); *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 658 (N.D. Cal. 1994) (stating an affidavit must be confirmed by oath or affirmation); *Adkins v. Mid-America Growers*, 141 F.R.D. 466, 469 (N.D. Ill. 1992) (stating what separates affidavits from simple statements is the certification; the requirement is not trivial for it subjects the affiant to perjury penalties if falsely made); *Brady v. Blue Cross and Blue Shield of Texas, Inc.*, 767 F. Supp. 131, 135 (N.D. Tex. 1991) (stating an acknowledgment is not an affidavit because it contains no jurat); *Miller Studio, Inc. v. Pacific Import Co.*, 39 F.R.D. 62, 65 (S.D.N.Y. 1965) (holding a paper not sworn to is not an affidavit); *In re Central Stamping & Mfg. Co.*, 77 F. Supp. 331, 332 (E.D. Mich. 1948) (citing with approval the definition of *affidavit* in Bouvier's Law Dictionary: a statement or declaration reduced to writing and sworn to or affirmed before some officer who has authority to administer an oath or affirmation); *In re Johnston*, 220 F. 218, 220 (S.D. Cal. 1915) (stating the general definition of the term *affidavit* is a written declaration under oath; therefore, it has been held that, in order for an affidavit to be valid for any purpose, it must be sworn to); *Mitchell v. National Surety Co.*, 206 F. 807, 811 (D. N.M. 1913) (stating it is a matter inherent in the affidavit that it must be under oath); *Crenshaw v. Miller*, 111 F. 450, 451 (M.D. Ala. 1901) (stating an affidavit is a voluntary, ex parte statement, formally reduced to writing and sworn to or affirmed before some officer authorized by law to take it); *United States v. Glasener*, 81 F. 566, 568 (S.D. Cal. 1897) (stating the word *affidavit* is defined by Webster to be "a sworn statement in writing"); *In re Adams*, 229 B.R. 312, 315 (Bankr. S.D.N.Y. 1999) (citing with approval the definition of *affidavit* in Black's Law Dictionary (6th ed. 1990): a written . . . declaration or statement of facts . . . confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation); *Baldin v. Calumet National Bank* (*In*

(continued...)

Tim Gray's undated letter to "To Whom It May Concern" (RX C) is an unsworn statement which clearly does meet the definition of an affidavit. Therefore, I agree with Complainant that the ALJ's characterization of Respondent's Exhibit C as an affidavit, is error. The document entitled "Affidavit of Ronal Young" (RX B) is a written statement sworn and subscribed before a person identified as a notary public. Tennessee notaries public have the power to take affidavits; however, the notary public's seal must be affixed to any affidavit taken by a notary public.²³ The affixation of the notary's seal provides prima facie proof of a notary's official character, and, without the notary's seal, there is no proof that the person signing as a notary is a notary.²⁴ The notary public's seal is not affixed to Respondent's Exhibit B. Therefore, I conclude that there is not sufficient proof that the person before whom Ronal Young swore and subscribed Respondent's Exhibit B is a person having authority to administer Respondent's oath. I agree with Complainant that the ALJ's characterization of Respondent's Exhibit B as an affidavit, is error.

Tenth, Complainant contends the ALJ erroneously states that Complainant was required to prove that Respondent knew of his trainer's compliance records (Complainant's Appeal Pet. at 25-28).

The ALJ states "[o]n the record of this case, the Government completely failed to meet its burden to show that Dr. McCloy had knowledge of Mr. Young's or any other trainer's prior violations" (Initial Decision and Order at 10). I agree with Complainant that the ALJ's statement is error. A horse owner's knowledge of prior violations of the Horse Protection Act by a trainer who the horse owner hires is not an element of a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, I have not adopted the ALJ's statement that Complainant failed to meet his burden to show that Respondent had knowledge of Ronal Young's or any other trainer's previous violations of the Horse Protection Act.

(...continued)

re Baldin, 135 B.R. 586, 600 (Bankr. N.D. Ind. 1991) (citing with approval the definition of *affidavit* in Black's Law Dictionary (6th ed.): a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath or affirmation).

²³Tenn. Code Ann. § 8-16-302.

²⁴*In re Marsh*, 12 S.W.3d 449, 453 (Tenn. 2000).

Eleventh, Complainant contends the ALJ erred by applying *Baird* to determine whether Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Complainant contends the proper test to determine whether Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) is the test in *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995). (Complainant's Appeal Pet. at 28-43).

The ALJ does not explicitly identify the test which she used to determine whether Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). In any event, I agree with Complainant's point that *Baird* is inapposite. Respondent may obtain judicial review of this Decision and Order in the court of appeals of the United States for the circuit in which Respondent resides or has his place of business or the United States Court of Appeals for the District of Columbia Circuit.²⁵ Respondent does not reside in or have his place of business in the Sixth Circuit where *Baird* is applicable. Instead, the record establishes that Respondent resides in and has his place of business in Oklahoma (Compl. ¶ 1; Answer ¶ 1; RX D). Therefore, Respondent may obtain judicial review in the United States Court of Appeals for the Tenth Circuit or the United States Court of Appeals for the District of Columbia Circuit.

The United States Court of Appeals for the District of Columbia Circuit has rejected *Baird*.²⁶ Moreover, I am unable to locate any decision issued by the United States Court of Appeals for the Tenth Circuit which adopts *Baird* or even addresses the test to be used to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, *Baird* is not applicable to this proceeding. Instead, if Respondent obtains review in the United States Court of Appeals for the District of Columbia Circuit, the test to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) in *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995), is applicable. If Respondent obtains review in the United States Court of Appeals for the Tenth Circuit, the test used by the United States Department of Agriculture to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) is applicable.

²⁵See 15 U.S.C. § 1825(b)(2),(c).

²⁶See *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 50-52 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995).

Twelfth, Complainant contends the ALJ erred by not disqualifying Respondent from showing, exhibiting, or entering any horse and from participating in any horse show, horse exhibition, horse sale, or horse auction (Complainant's Appeal Pet. at 43).

I agree with Complainant that the ALJ erred by not imposing a period of disqualification on Respondent, and I disqualify Respondent for a period of 1 year 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. My reasons for imposing the minimum disqualification period on Respondent are fully explicated in this Decision and Order, *supra*.

RESPONDENT'S APPEAL PETITION

Respondent raises one issue in Respondent's Petition for Appeal of Decision and Order and Answer to the Complainant's Petition for Appeal [hereinafter Respondent's Appeal Petition]. Respondent contends the ALJ erroneously based her conclusion that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) on Respondent's failure to remove Missy from Ronal Young's custody as soon as Respondent learned that Missy had been disqualified from being exhibited or shown at the 60th Annual Tennessee Walking Horse National Celebration (Respondent's Appeal Pet. at 3-5).

The ALJ based her conclusion that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) on Respondent's failure to remove Missy from Ronal Young's custody expeditiously after Missy was disqualified from being exhibited or shown at the 60th Annual Tennessee Walking Horse National Celebration, as follows:

Once [Respondent] knew the horse's condition of having been sore, he did not immediately discharge or fire the trainer. By allowing the horse to remain with Mr. Young over a period of months, for boarding, training, and showing, Respondent was indirectly condoning what had previously occurred and possibly subjecting the horse to further abuse. Because of this, I conclude that Respondent violated section 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)).

Initial Decision and Order at 13.

While I agree with the ALJ's conclusion that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), I agree with Respondent that the ALJ's basis for concluding that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), is error. Instead, I conclude Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) based on Respondent's breach of his guarantee as a horse owner that Ronal Young (a person who Respondent hired to board, train, and show Missy and a person allowed by Respondent to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration) would not enter Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy while she was sore.

COMPLAINANT'S EXHIBIT 7

A three-page article by Vickie Mazzola entitled *Everyone likes a silver dollar*, which was apparently copied from an internet website, is attached to the record transmitted to me by Hearing Clerk. This article is marked "CX 7." I find nothing in the record indicating that Complainant's Exhibit 7 was received in evidence. Consequently, I do not find Complainant's Exhibit 7 part of the record, I do not consider Complainant's Exhibit 7, and Complainant's Exhibit 7 forms no part of the basis of this Decision and Order.

Complainant and Respondent have made numerous arguments, contentions, and objections. I have carefully considered the evidence and contentions of both parties. To the extent not adopted, they are found to be irrelevant, immaterial, or not legally sustainable. My decision is based on the record as a whole.

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

ORDER

1. Respondent Robert B. McCloy, Jr., is assessed a \$2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

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

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 30 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0020.

2. Respondent Robert B. McCloy, Jr., is disqualified for a period of 1 year 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.

The disqualification of Respondent shall become effective on the 30th day after service of this Order on Respondent.

3. Respondent Robert B. McCloy, Jr., has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent 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 the notice of appeal by certified mail to the Secretary of Agriculture.²⁷ The date of this Order is March 22, 2002.

²⁷See 15 U.S.C. § 1825(b)(2), (c).

**In re: ROBERT B. McCLOY, JR.
HPA Docket No. 99-0020.
Order Denying Petition for Reconsideration.
Filed June 20, 2002.**

HPA – Allowing entry – Place of business – Judicial review – Guarantor – Judicial officer authority – Crawford test – Lewis test – Baird test – Burton test.

The Judicial Officer (JO) denied Respondent's petition for reconsideration. The JO rejected Respondent's contention that based on *Fleming v. United States Dep't of Agric.*, 713 F.2d 179 (6th Cir. 1983), the United States Court of Appeals for the Sixth Circuit had jurisdiction to review *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ___ (Mar. 22, 2002). The JO also rejected Respondent's contention that the Department's long-standing position that a horse owner is a guarantor that his or her horse will not be sore when entered in a horse show or horse exhibition is an unexplained extension of *In re Keith Becknell*, 54 Agric. Dec. 335 (1995). The JO further rejected Respondent's contention that the JO improperly changed the administrative law judge's initial decision, stating that, under the Administrative Procedure Act (5 U.S.C. § 557(b)) and the Rules of Practice (7 C.F.R. § 1.145(i)), the JO may adopt or reject an administrative law judge's initial decision. The JO rejected Respondent's contention that *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), cert. denied, 516 U.S. 824 (1995), is inapposite. Finally, the JO rejected respondent's request that the JO consider the proceeding in light of *Lewis v. Secretary of Agric.*, 73 F.3d 312 (11th Cir. 1996); *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994); and *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982).

Colleen A. Carroll, for Complainant.

Respondent, Pro se.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Craig A. Reed, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on May 4, 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 September 4, 1998, Robert B. McCloy, Jr. [hereinafter Respondent], allowed the entry of a horse known as "Ebony Threat's Ms. Professor" [hereinafter Missy] for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while

Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ 3). On June 1, 1999, Respondent filed "Respondent's Original Answer" [hereinafter Answer]. Respondent admits he was the owner of Missy during all times material to this proceeding but denies he allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Answer ¶¶ 2-4).

Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] presided at a hearing in Oklahoma City, Oklahoma, on August 22, 2000. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, appeared on behalf of Complainant. Respondent appeared pro se. Allison A. Lafferty assisted Respondent.

On January 3, 2001, Complainant filed "Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof." On April 12, 2001, Respondent filed "Respondent's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof." On July 5, 2001, Complainant filed "Complainant's Reply Brief."

On August 10, 2001, the ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the ALJ concluded Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as alleged in the Complaint, and assessed Respondent a \$2,200 civil penalty (Initial Decision and Order at 13-14).

On November 19, 2001, Complainant appealed to the Judicial Officer. On February 5, 2002, Respondent filed "Respondent's Petition for Appeal of Decision and Order and Answer to the Complainant's Petition for Appeal." On February 25, 2002, Complainant filed "Complainant's Response to Respondent's Appeal of Decision and Order." On February 26, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision.

On March 22, 2002, I issued a Decision and Order: (1) concluding that on September 4, 1998, Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)); (2) assessing Respondent a \$2,200 civil penalty; and (3) disqualifying Respondent for a period of 1 year from

showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____, slip op. at 39, 72-73 (Mar. 22, 2002).

On April 22, 2002, Respondent filed "Respondent's Petition for Reconsideration of the Decision and Order Dated March 22, 2002" [hereinafter Respondent's Petition for Reconsideration]. On June 5, 2002, Complainant filed "Complainant's Response to Respondent's Petition for Reconsideration of the Decision and Order Dated March 22, 2002." On June 6, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002).

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." 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.

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

....

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse

which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

§ 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.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

.....
 (5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

§ 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, 1823(a), (c), 1824(2), 1825(b)(1)-(2), (c), (d)(5), 1828.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

.....

PART VI—PARTICULAR PROCEEDINGS

.....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

.....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any

penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq.*], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq.*], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 *et seq.*], or the Social Security Act [42 U.S.C. 301 *et seq.*], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

(1) multiple of \$10 in the case of penalties less than or equal to \$100;

(2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;

(3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;

(4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;

(5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and

(6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note (Supp. V 1999).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*

....

(2) *Animal and Plant Health Inspection Service. . . .*

....

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of \$2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

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 in a standard dictionary, such as “Webster’s.”

. . . .

Designated Qualified Person or *DQP* means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

Exhibitor means (1) any person who enters any horse, any person who allows his horse to be entered, or any person who directs or allows any horse in his custody or under his direction, control or supervision to be entered in any horse show or horse exhibition; (2) any person who shows or exhibits any horse, any person who allows his horse to be shown or exhibited, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be shown or exhibited in any horse show or horse exhibition; (3) any person who enters or presents any horse for sale or auction, any person who allows his horse to be entered or presented for sale or auction, or any person who allows any horse in his custody or under his direction, control, or supervision to be entered or presented for sale or auction in any horse sale or horse auction; or (4) any person who sells or auctions any horse, any person who allows his horse to be sold or auctioned, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be sold or auctioned.

. . . .

§ 11.7 Certification and licensing of designated qualified persons (DQP's).

(a) *Basic qualifications of DQP applicants.* DQP's holding a valid, current DQP license issued in accordance with this part may be appointed by the management of any horse show, horse exhibition, horse sale, or horse auction, as qualified persons in accordance with section 4(c) of the Act, to inspect horses to detect or diagnose soring and to otherwise inspect horses, or any records pertaining to any horse for the purpose of enforcing the Act. Individuals who may be licensed as DQP's under this part shall be:

(1) Doctors of Veterinary Medicine who are accredited in any State by the United States Department of Agriculture under part 161 of chapter I, title 9 of the Code of Federal Regulations, and who are:

(i) Members of the American Association of Equine Practitioners, or
(ii) Large animal practitioners with substantial equine experience, or
(iii) Knowledgeable in the area of equine lameness as related to soring and soring practices (such as Doctors of Veterinary Medicine with a small animal practice who own, train, judge, or show horses, or Doctors of Veterinary Medicine who teach equine related subjects in an accredited college or school of veterinary medicine). Accredited Doctors of Veterinary Medicine who meet these criteria may be licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department under this part without undergoing the formal training requirements set forth in this section.

(2) Farriers, horse trainers, and other knowledgeable horsemen whose past experience and training would qualify them for positions as horse industry organization or association stewards or judges (or their equivalent) and who have been formally trained and licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department in accordance with this section.

(b) *Certification requirements for DQP programs.* The Department will not license DQP's on an individual basis. Licensing of DQP's will be accomplished only through DQP programs certified by the Department and initiated and maintained by horse industry organizations or associations. Any horse industry organization or association desiring Department certification to train and license DQP's under the Act shall submit to the Administrator a formal request in writing for certification of its DQP program and a detailed outline of such program for Department

approval. Such outline shall include the organizational structure of such organization or association and the names of the officers or persons charged with the management of the organization or association. The outline shall also contain at least the following:

(1) The criteria to be used in selecting DQP candidates and the minimum qualifications and knowledge regarding horses each candidate must have in order to be admitted to the program.

(2) A copy of the formal training program, classroom and practical, required to be completed by each DQP candidate before being licensed by such horse industry organization or association, including the minimum number of hours, classroom and practical, and the subject matter of the training program. Such training program must meet the following minimum standards in order to be certified by the Department under the Act.

(i) Two hours of classroom instruction on the anatomy and physiology of the limbs of a horse. The instructor teaching the course must be specified, and a resume of said instructor's background, experience, and qualifications to teach such course shall be provided to the Administrator.

(ii) Two hours of classroom instruction on the Horse Protection Act and regulations and their interpretation. Instructors for this course must be furnished or recommended by the Department. Requests for instructors to be furnished or recommended must be made to the Administrator in writing at least 30 days prior to such course.

(iii) Four hours of classroom instruction on the history of soring, the physical examination procedures necessary to detect soring, the detection and diagnosis of soring, and related subjects. The instructor teaching the course must be specified and a summary of said instructor's background, experience, and qualifications to teach such course must be provided to the Administrator.

(iv) Four hours of practical instruction in clinics and seminars utilizing live horses with actual application of the knowledge gained in the classroom subjects covered in paragraphs (b)(2)(i), (ii), and (iii) of this section. Methods and procedures required to perform a thorough and uniform examination of a horse shall be included. The names of the instructors and a resume of their background, academic and practical experience, and qualifications to present such instruction shall be provided to the Administrator. Notification of the actual date, time, duration, subject matter, and geographic location of such clinics or seminars must be sent to the Administrator at least 10 days prior to each such clinic or seminar.

(v) One hour of classroom instruction regarding the DQP standards of conduct promulgated by the licensing organization or association pursuant to paragraph (d)(7) of this section.

(vi) One hour of classroom instruction on recordkeeping and reporting requirements and procedures.

(3) A sample of a written examination which must be passed by DQP candidates for successful completion of the program along with sample answers and the scoring thereof, and proposed passing and failing standards.

(4) The criteria to be used to determine the qualifications and performance abilities of DQP candidates selected for the training program and the criteria used to indicate successful completion of the training program, in addition to the written examination required in paragraph (b)(3) of this section.

(5) The criteria and schedule for a continuing education program and the criteria and methods of monitoring and appraising performance for continued licensing of DQP's by such organization or association. A continuing education program for DQP's shall consist of not less than 4 hours of instruction per year.

(6) Procedures for monitoring horses in the unloading, preparation, warmup, and barn areas, or other such areas. Such monitoring may include any horse that is stabled, loaded on a trailer, being prepared for show, exhibition, sale, or auction, or exercised, or that is otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction.

(7) The methods to be used to insure uniform interpretation and enforcement of the Horse Protection Act and regulations by DQP's and uniform procedures for inspecting horses for compliance with the Act and regulations;

(8) Standards of conduct for DQP's promulgated by the organization or association in accordance with paragraph (d)(7) of this section; and

(9) A formal request for Department certification of the DQP program.

The horse industry organizations or associations that have formally requested Department certification of their DQP training, enforcement, and maintenance program will receive a formal notice of certification from the Department, or the reasons, in writing, why certification of such program cannot be approved. A current list of certified DQP programs

and licensed DQP's will be published in the FEDERAL REGISTER at least once each year, and as may be further required for the purpose of deleting programs and names of DQP's that are no longer certified or licensed, and of adding the names of programs and DQP's that have been certified or licensed subsequent to the publication of the previous list.

(c) *Licensing of DQP's.* Each horse industry organization or association receiving Department certification for the training and licensing of DQP's under the Act shall:

(1) Issue each DQP licensed by such horse industry organization or association a numbered identification card bearing the name and personal signature of the DQP, a picture of the DQP, and the name and address, including the street address or post office box and zip code, of the licensing organization or association;

(2) Submit a list to the Administrator of names and addresses including street address or post office box and zip code, of all DQP's that have successfully completed the certified DQP program and have been licensed under the Act and regulations by such horse industry organization or association;

(3) Notify the Department of any additions or deletions of names of licensed DQP's from the licensed DQP list submitted to the Department or of any change in the address of any licensed DQP or any warnings and license revocations issued to any DQP licensed by such horse industry organization or association within 10 days of such change;

(4) Not license any person as a DQP if such person has been convicted of any violation of the Act or regulations occurring after July 13, 1976, or paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976, for a period of at least 2 years following the first such violation, and for a period of at least 5 years following the second such violation and any subsequent violation;

(5) Not license any person as a DQP until such person has attended and worked two recognized or affiliated horse shows, horse exhibitions, horse sales, or horse auctions as an apprentice DQP and has demonstrated the ability, qualifications, knowledge and integrity required to satisfactorily execute the duties and responsibilities of a DQP;

(6) Not license any person as a DQP if such person has been disqualified by the Secretary from making detection, diagnosis, or inspection for the purpose of enforcing the Act, or if such person's DQP license is canceled by another horse industry organization or association.

(d) *Requirements to be met by DQP's and Licensing Organizations or Associations.* (1) Any licensed DQP appointed by the management of

any horse show, horse exhibition, horse sale or auction to inspect horses for the purpose of detecting and determining or diagnosing horses which are sore and to otherwise inspect horses for the purpose of enforcing the Act and regulations, shall keep and maintain the following information and records concerning any horse which said DQP recommends be disqualified or excused for any reason at such horse show, horse exhibition, horse sale or auction, from being shown, exhibited, sold or auctioned, in a uniform format required by the horse industry organization or association that has licensed said DQP:

- (i) The name and address, including street address or post office box and zip code, of the show and the show manager.
- (ii) The name and address, including street address or post office box and zip code, of the horse owner.
- (iii) The name and address, including street address or post office box and zip code, of the horse trainer.
- (iv) The name and address, including street address or post office box and zip code, of the horse exhibitor.
- (v) The exhibitors number and class number, or the sale or auction tag number of said horse.
- (vi) The date and time of the inspection.
- (vii) A detailed description of all of the DQP's findings and the nature of the alleged violation, or other reason for disqualifying or excusing the horse, including said DQP's statement regarding the evidence or facts upon which the decision to disqualify or excuse said horse was based.
- (viii) The name, age, sex, color, and markings of the horse; and
- (ix) The name or names of the show manager or other management representative notified by the DQP that such horse should be excused or disqualified and whether or not such manager or management representative excused or disqualified such horse.

Copies of the above records shall be submitted by the involved DQP to the horse industry organization or association that has licensed said DQP within 72 hours after the horse show, horse exhibition, horse sale, or horse auction is over.

- (2) The DQP shall inform the custodian of each horse allegedly found in violation of the Act or its regulations, or disqualified or excused for any other reason, of such action and the specific reasons for such action.

(3) Each horse industry organization or association having a Department certified DQP program shall submit a report to the Department containing the following information, from records required in paragraph (d)(1) of this section and other available sources, to the Department on a monthly basis:

(i) The identity of all horse shows, horse exhibitions, horse sales, or horse auctions that have retained the services of DQP's licensed by said organization or association during the month covered by the report. Information concerning the identity of such horse shows, horse exhibitions, horse sales, or horse auctions shall include:

(A) The name and location of the show, exhibition, sale, or auction.

(B) The name and address of the manager.

(C) The date or dates of the show, exhibition, sale, or auction.

(ii) The identity of all horses at each horse show, horse exhibition, horse sale, or horse auction that the licensed DQP recommended be disqualified or excused for any reason. The information concerning the identity of such horses shall include:

(A) The registered name of each horse.

(B) The name and address of the owner, trainer, exhibitor, or other person having custody of or responsibility for the care of each such horse disqualified or excused.

(4) Each horse industry organization or association having a Department certified DQP program shall provide, by certified mail if personal service is not possible, to the trainer and owner of each horse allegedly found in violation of the Act or its regulations or otherwise disqualified or excused for any reason, the following information;

(i) The name and date of the show, exhibition, sale, or auction.

(ii) The name of the horse and the reason why said horse was excused, disqualified, or alleged to be in violation of the Act or its regulations.

(5) Each horse industry organization or association having a Department certified DQP program shall provide each of its licensed DQP's with a current list of all persons that have been disqualified by order of the Secretary from showing or exhibiting any horse, or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Department will make such list available, on a current basis, to organizations and associations maintaining a certified DQP program.

(6) Each horse industry organization or association having a Department certified DQP program shall develop and provide a

continuing education program for licensed DQP's which provides not less than 4 hours of instruction per year to each licensed DQP.

(7) Each horse industry organization or association having a Department certified DQP program shall promulgate standards of conduct for its DQP's, and shall provide administrative procedures within the organization or association for initiating, maintaining, and enforcing such standards. The procedures shall include the causes for and methods to be utilized for canceling the license of any DQP who fails to properly and adequately carry out his duties. Minimum standards of conduct for DQP's shall include the following;

(i) A DQP shall not exhibit any horse at any horse show or horse exhibition, or sell, auction, or purchase any horse sold at a horse sale or horse auction at which he or she has been appointed to inspect horses;

(ii) A DQP shall not inspect horses at any horse show, horse exhibition, horse sale or horse auction in which a horse or horses owned by a member of the DQP's immediate family or the DQP's employer are competing or are being offered for sale;

(iii) A DQP shall follow the uniform inspection procedures of his certified organization or association when inspecting horses; and

(iv) The DQP shall immediately inform management of each case regarding any horse which, in his opinion, is in violation of the Act or regulations.

(e) *Prohibition of appointment of certain persons to perform duties under the Act.* The management of any horse show, horse exhibition, horse sale, or horse auction shall not appoint any person to detect and diagnose horses which are sore or to otherwise inspect horses for the purpose of enforcing the Act, if that person:

(1) Does not hold a valid, current DQP license issued by a horse industry organization or association having a DQP program certified by the Department.

(2) Has had his DQP license canceled by the licensing organization or association.

(3) Is disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act, after notice and opportunity for a hearing, when the Secretary finds that such person is unfit to perform such diagnosis, detection, or inspection because he has failed to perform his duties in accordance with the Act or regulations, or because he has been convicted of a violation of any provision of the Act or regulations occurring after July 13, 1976, or has paid any fine or civil penalty in

settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976.

(f) *Cancellation of DQP license.* (1) Each horse industry organization or association having a DQP program certified by the Department shall issue a written warning to any DQP whom it has licensed who violates the rules, regulations, by-laws, or standards of conduct promulgated by such horse industry organization or association pursuant to this section, who fails to follow the procedures set forth in § 11.21 of this part, or who otherwise carries out his duties and responsibilities in a less than satisfactory manner, and shall cancel the license of any DQP after a second violation. Upon cancellation of his DQP license, the DQP may, within 30 days thereafter, request a hearing before a review committee of not less than three persons appointed by the licensing horse industry organization or association. If the review committee sustains the cancellation of the license, the DQP may appeal the decision of such committee to the Administrator within 30 days from the date of such decision, and the Administrator shall make a final determination in the matter. If the Administrator finds, after providing the DQP whose license has been canceled with a notice and an opportunity for a hearing, that there is sufficient cause for the committee's determination regarding license cancellation, he shall issue a decision sustaining such determination. If he does not find that there was sufficient cause to cancel the license, the licensing organization or association shall reinstate the license.

(2) Each horse industry organization or association having a Department certified DQP program shall cancel the license of any DQP licensed under its program who has been convicted of any violation of the Act or regulations or of any DQP who has paid a fine or civil penalty in settlement of any alleged violation of the Act or regulations if such alleged violation occurred after July 13, 1976.

(g) *Revocation of DQP program certification of horse industry organizations or associations.* Any horse industry organization or association having a Department certified DQP program that has not received Department approval of the inspection procedures provided for in paragraph (b)(6) of this section, or that otherwise fails to comply with the requirements contained in this section, may have such certification of its DQP program revoked, unless, upon written notification from the Department of such failure to comply with the requirements in this section, such organization or association takes immediate action to rectify such failure and takes appropriate steps to prevent a recurrence of such noncompliance within the time period specified in the Department

notification, or otherwise adequately explains such failure to comply to the satisfaction of the Department. Any horse industry organization or association whose DQP program certification has been revoked may appeal such revocation to the Administrator in writing within 30 days after the date of such revocation and, if requested, shall be afforded an opportunity for a hearing. All DQP licenses issued by a horse industry organization or association whose DQP program certification has been revoked shall expire 30 days after the date of such revocation, or 15 days after the date the revocation becomes final after appeal, unless they are transferred to a horse industry organization or association having a program currently certified by the Department.

9 C.F.R. §§ 11.1, .7 (1998) (footnotes omitted).

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises five issues in Respondent's Petition for Reconsideration. First, Respondent contends I erroneously concluded that Respondent may only obtain review of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), in the United States Court of Appeals for the Tenth Circuit or the United States Court of Appeals for the District of Columbia Circuit. Respondent asserts he may also obtain review of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), in the United States Court of Appeals for the Sixth Circuit. (Respondent's Pet. for Recons. at 2-3).

Section 6(b)(2) of the Horse Protection Act (15 U.S.C. § 1825(b)(2)) provides that any person found to have violated the Horse Protection Act and assessed a civil penalty under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his or her place of business or in the United States Court of Appeals for the District of Columbia Circuit.

The record establishes that Respondent resides in and has his medical practice in Norman, Oklahoma (Compl. ¶ 1; Answer ¶ 1; RX D).¹ Therefore, Respondent may obtain review of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), in the United States Court of Appeals for the Tenth Circuit or the United States Court of Appeals for the District of Columbia Circuit. However, citing *Fleming v. United States Dep't of Agric.*, 713 F.2d 179 (6th

¹See *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____, slip op. at 21 (Mar. 22, 2002).

Cir. 1983), Respondent contends the United States Court of Appeals for the Sixth Circuit also has jurisdiction to review *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), because Respondent's "place of business, insofar as Tennessee Walkers are concerned, is in Tennessee" (Respondent's Pet. for Recons. at 2).

The record establishes that during the period August 1997 to approximately February 1999, which period includes the time of the violation alleged in the Complaint, Respondent stabled Missy, the horse at issue in this proceeding, at Young's Stables in Lewisberg, Tennessee, where Missy was trained and boarded by Ronal Young (CX 2, CX 4 at 1; Tr. 151-52, 174-76, 187). Respondent also kept other horses with Tim Gray at Sand Creek Farm in Shelbyville, Tennessee (RX C). Respondent made repeated visits to Tennessee to check on his horses (Tr. 153).²

In *Fleming*, a horse owner and resident of Alabama, C.H. Meadows, appealed *In re Albert Lee Rowland*, 40 Agric. Dec. 1934 (1981), an administrative proceeding in which Mr. Meadows was found to have violated section 5 of the Horse Protection Act (15 U.S.C. § 1824) and assessed a civil penalty, to the United States Court of Appeals for the Sixth Circuit. The Court found that it had jurisdiction over Mr. Meadows' appeal based on Mr. Meadows' keeping the horse at issue in the proceeding in Tennessee, as follows:

Title 15 U.S.C. § 1825(b)(2) provides jurisdiction in the United States Court of Appeals for the District of Columbia or in the circuit of the accused parties' residence. In this case the USDA alludes that Mr. Meadows actually resides in Alabama and is not, therefore, within the jurisdiction of the Sixth Circuit. While the record does show that Meadows resides in Alabama it also indicates that his place of business, insofar as Tennessee Walkers are concerned, is in Tennessee. It is there, at the Tennessee farm of Rowland, that Meadows keeps the horse at issue in this case. The USDA does not challenge this basis for jurisdiction. Nor have the parties addressed the issue of whether the language of § 1825(b)(2) imposes a jurisdictional condition or only one of venue. Under these circumstances, we find that this Court may properly exercise jurisdiction over Meadows' appeal.

Fleming v. United States Dep't of Agric., 713 F.2d 179, 181 n.3 (6th Cir. 1983).

²See *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____, slip op. at 21, 24-25, 43, 52, 59 (Mar. 22, 2002).

I did not consider *Fleming* when I issued *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002). However, based on my reading of section 6(b)(2) of the Horse Protection Act (15 U.S.C. § 1825(b)(2)) and *Fleming*, I disagree with Respondent's contention that I erroneously found that Respondent may only obtain review of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), in the United States Court of Appeals for the District of Columbia Circuit or the United States Court of Appeals for the Tenth Circuit. The statutory phrase "has his place of business" in section (6)(b)(2) of the Horse Protection Act (15 U.S.C. § 1825(b)(2)) is written in the present tense, not in the past tense. The plain language of section 6(b)(2) of the Horse Protection Act (15 U.S.C. § 1825(b)(2)) indicates that the phrase refers to the time when notice of appeal is filed. While Respondent had his place of business, insofar as Tennessee Walkers are concerned, in Tennessee at the time the violation occurred, Respondent testified that he no longer owns any horses (Tr. 179, 185-86). Therefore, Respondent does not currently have a place of business, insofar as far as Tennessee Walkers are concerned, in Tennessee or anywhere else, and I conclude Respondent may not obtain review of *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), in the United States Court of Appeals for the Sixth Circuit.

Second, Respondent contends I erred in applying United States Department of Agriculture precedent that a horse owner who allows a person to enter the owner's horse in a horse show or horse exhibition for the purpose of showing or exhibiting the horse is a guarantor that the horse will not be sore when the horse is entered in that horse show or horse exhibition. Respondent argues that the cases I cited in support of this precedent³ are inapposite because each case relies on *In re Keith Becknell*, 54 Agric. Dec. 335 (1995), which states "[i]t has long been held that the exhibitor of a horse is an absolute guarantor that the training methods and the action devices used during a show will not sore the horse." Respondent contends he owned Missy at the time of the violation, but he did not exhibit Missy at any time relevant to this proceeding; therefore, the extension of an exhibitor's guarantor status to him is error. (Respondent's Pet. for Recons. at 3-5).

³See *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____, slip op. at 28 n.9 (Mar. 22, 2002) (citing *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 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 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996)).

As an initial matter, Respondent was an “exhibitor”⁴ of Missy on September 4, 1998, at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee. Therefore, even if I found that the United States Department of Agriculture precedent regarding owner-guarantor status is flawed, as Respondent argues, that finding would not alter the disposition of this proceeding because, as an exhibitor, Respondent was a guarantor that Missy would not be sore when she was entered for the purpose of showing or exhibiting her as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

Moreover, the United States Department of Agriculture’s long-standing position that a horse owner is a guarantor that his or her horse will not be sore when the horse is entered in a horse show or horse exhibition predates *Becknell* and was not modified by *Becknell*.⁵ Therefore, I reject Respondent’s contention that the United States Department of Agriculture’s position on the owner’s status as a guarantor is an unexplained extension of *Becknell*.

⁴ See 9 C.F.R. § 11.1.

⁵ See *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 593 (2001) (stating an owner of a walking horse is an absolute guarantor that the horse he enters, either personally or through an agent, will not be entered in a show while sore), *appeal docketed*, No. 01-4204 (6th Cir. Nov. 14, 2001); *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, 589-90 (1997) (stating an owner who allows a person to enter the owner’s horse in a horse show or horse exhibition for the purpose of exhibiting the horse is an absolute guarantor that the horse will not be sore when exhibited), *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, 979 (1996) (stating an owner who allows a person to exhibit a horse in a horse show or horse exhibition is an absolute guarantor that the horse will not be sore when the horse is exhibited), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 888 (1996) (stating horse owners who allow the entry of horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition are absolute guarantors that those horses will not be sore when entered); *In re Mike Thomas*, 55 Agric. Dec. 800, 843 (1996) (stating persons who enter horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition and owners who allow such activity are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when entered); *In re Jackie McConnell*, 44 Agric. Dec. 712, 724 (1985) (stating the Horse Protection Act and the regulations issued under the Horse Protection Act make the owners and exhibitors absolute guarantors that action devices will not sore the horse), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992); *In re Eldon Stamper*, 42 Agric. Dec. 20, 28 (1983) (stating the Horse Protection Act and the regulations issued under the Horse Protection Act make persons subject to the Horse Protection Act absolute guarantors that the use of action devices does not cause a horse to be sore), *aff’d*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Richard L. Thornton*, 41 Agric. Dec. 870, 888 (1982) (stating the owner or exhibitor of a horse is an absolute guarantor that the action devices used during a show will not sore the horse), *aff’d*, 715 F.2d 1508 (11th Cir. 1983); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1943 (1981) (stating the owner or exhibitor of a horse is an absolute guarantor that the action devices used during a show will not sore the horse), *aff’d*, 713 F.2d 179 (6th Cir. 1983).

Third, Respondent contends that I improperly changed the decision of the ALJ to come to the conclusion that Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Respondent's Pet. for Recons. at 2).

I agree with the ALJ's conclusion that Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).⁶ However, based on my disagreement with portions of the ALJ's discussion and the sanction imposed by the ALJ, I did not adopt the ALJ's Initial Decision and Order as the final Decision and Order.⁷

The Judicial Officer is not bound by an administrative law judge's initial decision and order and may reject the initial decision and order in whole or in part. The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

....

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in

⁶See Initial Decision and Order at 13; *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____, slip op. at 3, 39 (Mar. 22, 2002).

⁷See *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____, slip op. at 3 (Mar. 22, 2002).

making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

Similarly, the Rules of Practice provide that the Judicial Officer *may* adopt the administrative law judge's initial decision and order, as follows:

§ 1.145 Appeal to Judicial Officer.

. . . .

(i) *Decision of the judicial officer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

7 C.F.R. § 1.145(i).

Therefore, I reject Respondent's contention that my failure to adopt the ALJ's Initial Decision and Order as the final Decision and Order is error.

Fourth, Respondent contends that *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), is inapposite because *Crawford* holds that a horse owner is liable for the actions of the owner's agents and, while Respondent hired Ronal Young as a horse trainer, no proof exists in the record that Ronal Young served as Respondent's agent (Respondent's Pet. for Recons. at 5-10).

I disagree with Respondent's contention that *Crawford* is inapposite because it does not relate to a horse owner's liability for the actions of the horse trainers who the horse owner hires. *Crawford* upheld as reasonable the test used by the United States Department of Agriculture to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). The Court describes the United States Department of Agriculture's position as one which "merely holds the owner responsible for the actions of her agents (*particularly the trainer*) and will not permit the owner to escape liability by testifying that she instructed a *trainer* not to sore." *Crawford*, 50 F.3d at 51 (emphasis added). Thus, under *Crawford*, a horse trainer is the horse owner's agent and, specifically, an agent for whose actions the horse owner is liable.

Moreover, I disagree with Respondent's assertion that there is no evidence that Ronal Young served as Respondent's agent. The evidence establishes that Respondent hired Ronal Young to board, train, and show Missy in August 1997, and Respondent continued to employ Ronal Young in this capacity for approximately 6 months after Ronal Young entered Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration while she was sore (CX 4; Tr. 151-52, 174-76, 187). Generally, an agent is one who is authorized to act for or in place of another.⁸ Respondent authorized Ronal Young to act for and in place of Respondent with respect to the boarding, training, and showing of Missy; thus, I find that Ronal Young was Respondent's agent at all times material to this proceeding.

⁸See Black's Law Dictionary 64 (7th ed. 1999). See also *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1278 (10th Cir. 2000) (stating an agent is a person authorized by another to act on his behalf and under his control); *Brunswick Leasing Corp. v. Wisconsin Central, Ltd.*, 136 F.3d 521, 526 (7th Cir. 1998) (stating generally, an agent is one who undertakes to manage some affairs to be transacted for another by his authority, on account of the latter, who is called the principal, and to render an accounting); *Nelson v. Serwold*, 687 F.2d 278, 282 (9th Cir. 1982) (stating the agent acts for or on behalf of the principal and subject to his control, and his acts are those of the principal); *NLRB v. United Brotherhood of Carpenters*, 531 F.2d 424, 426 (9th Cir. 1976) (stating an agent acts for and on behalf of his principal and subject to his control); *Wasilowski v. Park Bridge Corp.*, 156 F.2d 612, 614 (2d Cir. 1946) (stating an agent is a person authorized by another to act on his account and under his control); *Kunz v. Lowden*, 124 F.2d 911, 913 (10th Cir. 1942) (stating whether one is the agent of another for a specific purpose depends upon whether he has power to act with reference to the subject matter).

Fifth, Respondent requests that I consider the instant proceeding in light of *Lewis v. Secretary of Agric.*, 73 F.3d 312 (11th Cir. 1996); *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994); and *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982) (Respondent's Pet. for Recons. at 9-10).

Even if I were to apply the test adopted by the United States Court of Appeals for the Eighth Circuit or the test adopted by the United States Court of Appeals for the Eleventh Circuit to determine whether Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as Respondent requests, I would not dismiss the Complaint. The United States Court of Appeals for the Eighth Circuit in *Burton* held, as follows:

[W]e hold that the owner cannot be held to have "allowed" a "sore" horse to be shown [in violation of 15 U.S.C. § 1824(2)(D)] when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a "sore" condition, (2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and (3) there was uncontradicted testimony that the owner had directed the trainer not to show a "sore" horse. All of these factors taken together are sufficient to excuse an owner from liability.

Burton v. United States Dep't of Agric., 683 F.2d 280, 283 (8th Cir. 1982).

The United States Court of Appeals for the Eleventh Circuit in *Lewis* adopted *Burton* with the caveat that the owner's directions to the trainer not to show a sore horse must be meaningful, as follows:

The caveat we put on *Burton* relates to the third factor. Compliance with it (along with the other two factors), frees the owner of the ineluctable consequences of entry plus the fact of soreness and it frees him of being found to "allow" in the passive sense described in *Baird* by "hiding his head" or doing nothing. But compliance with the third element must be meaningful rather than purely formal or ritualistic. The owner may give firm and certain and suitably repeated directions not to sore and not to show a horse that is in a sore condition. He may maintain a training environment that discourages soring or makes it impossible. He may carry out inspection practices that tend to reveal any efforts to sore. But, whatever the form, his efforts must be meaningful and not a mere formalistic evasion.

Lewis v. Secretary of Agric., 73 F.3d 312, 317 (11th Cir. 1996).

The evidence clearly establishes that on September 4, 1998, two Designated Qualified Persons⁹ examined Missy during a pre-show inspection at the 60th Annual Tennessee Walking Horse National Celebration and disqualified her from showing based upon her general appearance, locomotion, and reaction to palpation (CX 3b at 1, CX 3c; RX A; Tr. 51-52, 67, 69). The record contains no evidence that any Designated Qualified Person examined and approved Missy for showing or exhibition at the 60th Annual Tennessee Walking Horse National Celebration. Therefore, Respondent does not meet the requirement in *Burton* and *Lewis* that a Designated Qualified Person examine and approve the horse before the horse enters the ring.

However, if I were to apply the test adopted by the United States Court of Appeals for the Sixth Circuit in *Baird*, I would dismiss the Complaint against Respondent. The Sixth Circuit sets forth the test to determine whether an owner has allowed the entry of the owner's horse while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as follows:

In our view, the government must, as an initial matter, make out a prima facie case of a § 1824(2)(D) violation. It may do so by establishing (1) ownership; (2) showing, exhibition, or entry; and (3) soreness. If the government establishes a prima facie case, the owner may then offer evidence that he took an affirmative step in an effort to prevent the soring that occurred. Assuming the owner presents such evidence and the evidence is justifiably credited, it is up to the government then to prove that the admonitions the owner directed to his trainers concerning the soring of horses constituted merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of § 1824.

Baird v. United States Dep't of Agric., 39 F.3d 131, 137 (6th Cir. 1994) (footnote omitted).

In *Baird*, the affirmative step to prevent the soring that occurred was the horse owner's direction to his trainers that his horses were not to be sored and

⁹A Designated Qualified Person or DQP is an individual appointed by the management of a horse show and trained under a United States Department of Agriculture-sponsored program to inspect horses for compliance with the Horse Protection Act (15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, .7).

his warning that he would take the horses away from trainers he suspected of soring his horses. The Court in *Baird* held that the horse owner's testimony alone, absent evidence to refute it, was sufficient to show that the horse owner did not "allow" his trainers to enter and exhibit his horses while sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). *Baird v. United States Dep't of Agric.*, 39 F.3d at 138.

Respondent testified that he took affirmative steps to prevent the soring of Missy. Specifically, Respondent testified that he instructed Ronal Young not to sore Missy. Moreover, Respondent introduced Ronal Young's written statement (RX B) which corroborates Respondent's testimony that he instructed Ronal Young not to sore Missy. Complainant did not prove that Respondent's admonitions directed to Ronal Young concerning the soring of Missy constituted merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). However, as discussed in this Order Denying Petition for Reconsideration, *supra*, Respondent cannot obtain judicial review in the United States Court of Appeals for the Sixth Circuit and the test in *Baird* to determine whether a respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) is not applicable to this proceeding.

For the foregoing reasons and the reasons set forth in *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), 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.¹⁰ Respondent's Petition for Reconsideration was timely filed and automatically stayed the March 22, 2002, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), is reinstated; except that the effective date of the 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

1. Respondent Robert B. McCloy, Jr., is assessed a \$2,200 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:

¹⁰*In re William J. Reinhart*, 60 Agric. Dec. 241, 263 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re David Tracy Bradshaw*, 59 Agric. Dec. 790, 793 (2000) (Order Denying Pet. for Recons.).

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Room 2343-South Building
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 30 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0020.

2. Respondent Robert B. McCloy, Jr., is disqualified for a period of 1 year 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.

The disqualification of Respondent shall become effective on the 30th day after service of this Order on Respondent.

3. Respondent Robert B. McCloy, Jr., has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent 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 the notice of appeal by certified mail to the Secretary of Agriculture.¹¹ The date of this Order is June 20, 2002.

In re: ROBERT B. McCLOY, JR.
HPA Docket No. 99-0020.

¹¹See 15 U.S.C. § 1825(b)(2), (c).

Stay Order.
Filed July 17, 2002.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On March 22, 2002, I issued a Decision and Order: (1) concluding that on September 4, 1998, Robert B. McCloy, Jr. [hereinafter Respondent], allowed the entry of a horse known as "Ebony Threat's Ms. Professor" for the purpose of showing or exhibiting the horse as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while the horse was sore, in violation of the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing Respondent a \$2,200 civil penalty; and (3) disqualifying Respondent for a period of 1 year from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002).

On April 22, 2002, Respondent filed a petition for reconsideration of the March 22, 2002, Decision and Order, which I denied. *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (June 20, 2002) (Order Denying Pet. for Recons.).

On July 15, 2002, Respondent filed "Respondent's Motion to Stay Order of the Judicial Officer Dated March 22, 2002" [hereinafter Motion for Stay] requesting a stay of the Order in *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), while he pursues review of the March 22, 2002, Order in the United States Court of Appeals for the Tenth Circuit. On July 16, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Stay.

On July 16, 2002, Colleen A. Carroll, counsel for the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], informed me that Complainant does not object to Respondent's Motion for Stay.

In accordance with 5 U.S.C. § 705, Respondent's Motion for Stay is granted.
For the foregoing reasons, the following Order should be issued.

ORDER

The Order issued in *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. ____ (Mar. 22, 2002), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

PLANT QUARANTINE ACT
DEPARTMENTAL DECISIONS

In re: NOREA IVELISSE ABREU.

P.Q. Docket No. 99-0045.

Decision and Order.

Filed January 24, 2002.

PQ – Default – Admission of material facts – Mangoes – Intent – Payment in installments – Civil penalty.

The Judicial Officer (JO) affirmed the Default Decision issued by Administrative Law Judge Dorothea A. Baker (ALJ): (1) finding that on or about July 9, 1998, Respondent imported one jar of fresh, peeled mangoes from the Dominican Republic into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56 because the importation of mangoes from the Dominican Republic into the United States is prohibited; (2) concluding that Respondent violated 7 C.F.R. § 319.56; and (3) assessing Respondent a \$500 civil penalty. The JO held Respondent's contention that she did not intentionally violate 7 C.F.R. § 319-56 was not relevant to an administrative proceeding for the assessment of a civil penalty under section 10 of the Plant Quarantine Act (7 U.S.C. § 163). At Respondent's request, the JO provided for the payment of the \$500 civil penalty in installments of \$50 per month for 10 months. The JO rejected Complainant's contentions that Respondent did not offer an appropriate basis for an appeal and that Respondent's appeal petition was so deficient that it should be denied.

Tracey Manoff, for Complainant.

Respondent, Pro se.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

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

PROCEDURAL HISTORY

Craig A. Reed, 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 4, 1999. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167) [hereinafter the Plant Quarantine Act]; regulations issued under the Plant Quarantine Act (7 C.F.R. §§ 319.56-.56-8); 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 July 9, 1998, Norea Ivelisse Abreu [hereinafter Respondent] imported one jar of fresh, peeled mangoes from the

Dominican Republic into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56 because the importation of mangoes from the Dominican Republic into the United States is prohibited (Compl. ¶ II). On June 24, 1999, Respondent filed a letter dated January 16, 1999 [hereinafter Answer], admitting the material allegations of the Complaint.

On September 10, 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 Default Decision and Order” and a “Proposed Default Decision and Order.” On October 9, 2001, the Hearing Clerk served Respondent with Complainant’s Motion for Adoption of Proposed Default Decision and Order and a service letter, dated September 11, 2001.¹ Respondent failed to file objections to Complainant’s Motion for Adoption of Proposed Default 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 1, 2001, stating that objections to Complainant’s Motion for Adoption of Proposed Default 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 November 7, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a “Default Decision and Order” [hereinafter Initial Decision and Order]: (1) finding that on or about July 9, 1998, Respondent imported one jar of fresh, peeled mangoes from the Dominican Republic into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56 because the importation of mangoes from the Dominican Republic into the United States is prohibited; (2) concluding that Respondent violated 7 C.F.R. § 319.56; and (3) assessing Respondent a \$500 civil penalty (Initial Decision and Order at 2-3).

On December 27, 2001, Respondent appealed to the Judicial Officer. On January 15, 2002, Complainant filed “Complainant’s Response to Respondent’s Appeal to Judicial Officer.” On January 16, 2002, 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 ALJ’s Initial Decision and Order, except that I issue an Order that provides for Respondent’s payment of the civil penalty in installments. 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 ALJ’s conclusion of law, as restated.

¹“Memorandum to the File” dated October 9, 2001, from Regina Paris, Hearing Clerk’s Office.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

**CHAPTER 8—NURSERY STOCK AND OTHER PLANTS
AND PLANT PRODUCTS**

....

**§ 163. Violations; forgery, alterations, etc., of certificates;
punishment; civil penalty**

Any person who knowingly violates any provision of this chapter or any rule or regulation promulgated by the Secretary of Agriculture under this chapter, or who knowingly forges or counterfeits any certificate provided for in this chapter or in any such rule or regulation, or who, knowingly and without the authority of the Secretary, uses, alters, defaces, or destroys any such certificate shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding \$5,000, by imprisonment not exceeding one year, or both. Any person who violates any such provision, rule, or regulation, or who forges or counterfeits any such certificate, or who, without the authority of the Secretary, uses, alters, defaces, or destroys any such certificate, 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. § 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 319—FOREIGN QUARANTINE NOTICES

.....

SUBPART—FRUITS AND VEGETABLES

QUARANTINE

§ 319.56 Notice of quarantine.

(a) The fact has been determined by the Secretary of Agriculture, and notice is hereby given:

(1) That there exist in Europe, Asia, Africa, Mexico, Central America, and South America, and other foreign countries and localities, certain injurious insects, including fruit and melon flies (Tephritidae), new to and not heretofore widely distributed within and throughout the United States, which affect and may be carried by fruits and vegetables commercially imported into the United States or brought to the ports of the United States as ships' stores or casually by passengers or others, and

(2) That the unrestricted importation of fruits and vegetables from the countries and localities enumerated may result in the entry into the United States of injurious insects, including fruit and melon flies (Tephritidae).

(b) The Secretary of Agriculture, under authority conferred by the act of Congress approved August 20, 1912 (37 Stat. 315; 7 U.S.C. 151-167), does hereby declare that it is necessary, in order to prevent the introduction into the United States of certain injurious insects, including fruit and melon flies (Tephritidae), to forbid, except as provided in the rules and regulations supplemental hereto, the importation into the United States of fruits and vegetables from the foreign countries and localities named and from any other foreign country or locality, and of plants and portions of plants used as packing material in connection with shipments of such fruits and vegetables.

(c) On and after November 1, 1923, and until further notice, the importation from all foreign countries and localities into the United States of fruits and vegetables, and of plants or portions of plants used as packing material in connection with shipments of such fruits and vegetables, except as provided in the rules and regulations supplemental hereto, is prohibited: *Provided*, That whenever the Deputy Administrator for the Plant Protection and Quarantine Programs shall find that existing

conditions as to pest risk involved in the importation of the articles to which the regulations supplemental hereto apply, make it safe to modify, by making less stringent, the restrictions contained in any of such regulations, he shall publish such findings in administrative instructions, specifying the manner in which the regulations shall be made less stringent, whereupon such modification shall become effective; or he may, when the public interests will permit, with respect to the importation of such articles into Guam, upon request in specific cases, authorize such importation under conditions, specified in the permit to carry out the purposes of this subpart, that are less stringent than those contained in the regulations.

(d) This section leaves in full effect all special quarantines and other orders now in force restricting the entry into the United States of fruits and vegetables with the exception of Quarantine No. 49, with regulations, on account of citrus black fly, which is replaced by this section.

(e) As used in this section unless the context otherwise requires, the term "United States" means the continental United States, Guam, Hawaii, Puerto Rico, and the Virgin Islands of the United States.

7 C.F.R. § 319.56.

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

Respondent admitted the material allegations of the Complaint in Respondent's Answer. Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that the admission by the answer of all the material allegations of the complaint shall constitute a waiver of hearing. 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 Norea Ivelisse Abreu is an individual whose mailing address is 708 Evergreen Avenue, Apartment #2, Brooklyn, New York 11207-1134.
2. On or about July 9, 1998, Respondent imported one jar of fresh, peeled mangoes from the Dominican Republic into the United States at Jamaica, New

York, in violation of 7 C.F.R. § 319.56, because the importation of mangoes from the Dominican Republic into the United States is prohibited.

Conclusion of Law

By reason of the findings of fact, Respondent violated 7 C.F.R. § 319.56.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in her letter, dated November 21, 2001, to Ms. Regina Paris [hereinafter Appeal Petition]. First, Respondent states “it was not my intention to break any laws of this country” (Appeal Pet.).

Respondent’s contention that she did not intentionally violate 7 C.F.R. § 319.56 is not relevant to this administrative proceeding for the assessment of a civil penalty. The plain language of section 10 of the Plant Quarantine Act (7 U.S.C. § 163) establishes that intent is not an element of a violation of a regulation issued under the Plant Quarantine Act in a disciplinary administrative proceeding for the assessment of a civil penalty.² The term *knowingly* in section

²See *In re Herminia Ruiz Cisneros*, 60 Agric. Dec. 610, 628-29 (2001) (stating, in order to achieve the congressional purpose of the Plant Quarantine Act, violators are held responsible for their violations irrespective of their lack of evil motive or intent to violate the Plant Quarantine Act or the regulations issued under the Plant Quarantine Act); *In re Rafael Dominguez*, 60 Agric. Dec. 199, 207 (2001) (stating, in order to achieve the congressional purpose of the Plant Quarantine 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); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 195 (2001) (stating, in order to achieve the congressional purpose of the Plant Quarantine 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); *In re Bibi Uddin*, 55 Agric. Dec. 1010, 1021-22 (1996) (stating, in order to achieve the congressional purpose of the Plant Quarantine Act and to prevent the importation of items that could be disastrous to United States agriculture, it is necessary to hold violators responsible irrespective of their lack of evil motive or intent to violate the Plant Quarantine Act or the regulations issued under the Plant Quarantine Act); *In re Francisco Escobar, Jr.*, 54 Agric. Dec. 392, 418 (1995) (stating it is irrelevant to the assessment of a civil penalty under the Federal Plant Pest Act, the Plant Quarantine Act, and the Act of February 2, 1903, that the respondent had no intention of bringing items into the United States), *aff’d per curiam*, 68 F.3d 466 (5th Cir. 1995) (Table); *In re Robert N. Watts, Jr.*, 53 Agric. Dec. 1419, 1428 (1994) (stating, under the Federal Plant Pest Act and the Plant Quarantine Act, intent is not an element of a violation in a disciplinary administrative proceeding for the assessment of a civil penalty); *In re Unique Nursery & Garden Center* (Decision as to Valkering, U.S.A., Inc.), 53 Agric. Dec. 377, 421-22 (1994) (stating, under the Federal Plant Pest Act and the Plant Quarantine Act, intent is not an element of a violation in a disciplinary administrative proceeding for the assessment of a civil penalty), *aff’d*, 48 F.3d 305 (8th Cir. 1995); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 636 (1988) (assessing the respondent a civil penalty under the Plant Quarantine Act for the unlawful importation of approximately 4 peaches and approximately 5 plums placed in the respondent’s baggage without her knowledge); *In re Kathleen D. Warner*, 46 Agric. Dec. 763 (1987) (Ruling on Certified Question) (concluding the respondent could be assessed

(continued...)

10 of the Plant Quarantine Act (7 U.S.C. § 163) is only used in connection with criminal proceedings. Therefore, even if I were to find that Respondent's violation of 7 C.F.R. § 319.56 was unintentional, as Respondent contends, that finding would not constitute a basis for my reversing the ALJ's conclusion that Respondent violated 7 C.F.R. § 319.56.

Second, Respondent requests that she be allowed to pay the \$500 civil penalty assessed against her by the ALJ in installments. Respondent does not indicate either a number of installments or a time between each installment. (Appeal Pet.) Complainant has no objection to my issuing an Order that assesses Respondent a \$500 civil penalty to be paid in 10 monthly installments of \$50 each (Complainant's Response to Respondent's Appeal to Judicial Officer at second and third unnumbered pages).

Pursuant to Respondent's request that she be allowed to pay the \$500 civil penalty assessed against her by the ALJ in installments and Complainant's lack of objection to Respondent's paying a \$500 civil penalty in installments of \$50 per month, I issue an Order assessing Respondent a \$500 civil penalty to be paid in installments of \$50 per month.

Complainant contends Respondent "has not offered an appropriate basis for an appeal and has not satisfied the rules of practice governing appeals." Complainant "believes that Respondent's appeal should be denied." (Complainant's Response to Respondent's Appeal to Judicial Officer at second unnumbered page).

Section 1.145(a) of the Rules of Practice provides the basis for filing an appeal and the requirements for the appeal petition, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights,

(...continued)

a civil penalty for an inadvertent or unintentional violation of the plant quarantine laws caused by a misunderstanding or failure of communication between the respondent and an oriental inspector); *In re Mercedes Capistrano*, 45 Agric. Dec. 2196, 2198 (1986) (assessing the respondent a civil penalty under the Plant Quarantine Act for the unlawful importation of plantains placed in the respondent's luggage without her knowledge); *In re Rene Vallalta*, 45 Agric. Dec. 1421, 1423 (1986) (assessing the respondent a civil penalty under the Plant Quarantine Act for the unlawful importation of a cacao seed pod placed in the respondent's luggage without his knowledge); *In re Richard Duran Lopezain*, 44 Agric. Dec. 2201, 2209 (1985) (stating, under the Plant Quarantine Act, intent is not an element of a violation in a disciplinary administrative proceeding for the assessment of a civil penalty).

may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

Respondent's Appeal Petition establishes that she disagrees with the ALJ's Initial Decision and Order. Moreover, Respondent plainly and concisely states each issue in her Appeal Petition. Respondent fails to number each issue in her Appeal Petition and does not provide citations of the record, statutes, regulations, or authorities upon which she relies. However, based on the small number of issues in Respondent's Appeal Petition and the nature of the issues in Respondent's Appeal Petition, I do not find that Respondent's failure to number the issues which she raises or Respondent's failure to provide citations of the record, statutes, regulations, and authorities upon which she relies, sufficient to deny Respondent's Appeal Petition, as Complainant requests.

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

ORDER

Respondent is assessed a \$500 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, MN 55403

Respondent shall make payments of \$50 each month for 10 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 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 shall 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. 99-0045.

MISCELLANEOUS ORDERS

In re: CAMARA RAISIN PACKING, INC., A CALIFORNIA CORPORATION.

AMMA Docket No. 01-0005.

Complaint Withdrawn.

Filed January 15, 2002.

Colleen A. Colleen, for Complainant.
Respondent, Pro se.

Order issued by Dorothea A. Baker, Administrative Law Judge.

By Notice filed January 9, 2002, the Complainant unilaterally withdrew the Complaint herein, filed January 27, 2001. Accordingly, it is Ordered that said Complaint be withdrawn and the matter concluded.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

In re: PETER A. LANG, d/b/a SAFARI WEST.

AWA Docket No. 96-0002.

Order to Show Cause.

Filed February 25, 2002.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.

Order issued by William G. Jenson, Judicial Officer.

On January 13, 1998, I issued a Decision and Order: (1) concluding that Peter A. Lang, d/b/a Safari West [hereinafter Respondent], violated section 2.131(a)(1) of the regulations (9 C.F.R. § 2.131(a)(1)) issued under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159); (2) assessing Respondent a \$1,500 civil penalty; and (3) ordering Respondent to cease and desist from failing to handle animals as expeditiously and carefully as possible, in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. *In re Peter A. Lang*, 57 Agric. Dec. 59, 70, 91 (1998).

On June 30, 1998, Respondent filed a Motion for Stay pending the outcome of proceedings for judicial review. On July 1, 1998, I granted Respondent's

request for a stay pending the outcome of proceedings for judicial review. *In re Peter A. Lang*, 57 Agric. Dec. 1275 (1998) (Stay Order).

The United States Court of Appeals for the Ninth Circuit affirmed *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998). *Lang v. United States Dep't of Agric.*, 189 F.3d 473 (9th Cir. 1999) (Table). Respondent filed a petition for rehearing *en banc* which the United States Court of Appeals for the Ninth Circuit denied. *Lang v. United States Dep't of Agric.*, No. 98-70807 (9th Cir. Jan. 28, 2000) (Order). Neither the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], nor Respondent sought further judicial review of *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998). Neither Complainant nor Respondent has requested that I lift the July 1, 1998, Stay Order. Within 20 days after service of this Order to Show Cause, Complainant and Respondent are ordered to show cause why I should not lift the July 1, 1998, Stay Order and make effective the Order in *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998).

In re: REGINALD DWIGHT PARR.
AWA Docket No. 99-0022.
Order to Show Cause.
Filed March 4, 2002.

Brian Thomas Hill, for Complainant.
Greg Gladden, 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) [hereinafter the Regulations and Standards]; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a \$7,050 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 3 years 6 months. *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000).

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. On January 25, 2001, I granted Respondent's request for a stay pending the outcome of

proceedings for judicial review. *In re Reginald Dwight Parr*, 60 Agric. Dec. 232 (2001) (Stay Order).

The United States Court of Appeals for the Fifth Circuit affirmed *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000). *Parr v. United States Dep't of Agric.*, 273 F.3d 1095 (5th Cir. 2001) (Table) (per curiam). Neither the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], nor Respondent sought further judicial review of *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000). Neither Complainant nor Respondent has requested that I lift the January 25, 2001, Stay Order. Within 20 days after service of this Order to Show Cause, Complainant and Respondent are ordered to show cause why I should not lift the January 25, 2001, Stay Order and make effective the Order in *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000).

In re: PETER A. LANG, d/b/a SAFARI WEST.

AWA Docket No. 96-0002.

Order Lifting Stay.

Filed April 2, 2002.

Colleen A. Carroll, for Complainant.

Respondent, Pro se.

Order issued by William G. Jenson, Judicial Officer.

On January 13, 1998, I issued a Decision and Order: (1) concluding Peter A. Lang, d/b/a Safari West [hereinafter Respondent], violated section 2.131(a)(1) of the regulations (9 C.F.R. § 2.131(a)(1)) issued under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; (2) assessing Respondent a \$1,500 civil penalty; and (3) ordering Respondent to cease and desist from failing to handle animals as expeditiously and carefully as possible, in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. *In re Peter A. Lang*, 57 Agric. Dec. 59, 70, 91 (1998).

On June 30, 1998, Respondent filed a Motion for Stay pending the outcome of proceedings for judicial review. On July 1, 1998, I granted Respondent's request for a stay pending the outcome of proceedings for judicial review. *In re Peter A. Lang*, 57 Agric. Dec. 1275 (1998) (Stay Order).

The United States Court of Appeals for the Ninth Circuit affirmed *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998). *Lang v. United States Dep't of Agric.*, 189 F.3d 473, 1999 WL 512009 (9th Cir. 1999) (Table). Respondent filed a petition for rehearing *en banc* which the United States Court of Appeals for the

Ninth Circuit denied. *Lang v. United States Dep't of Agric.*, No. 98-70807 (9th Cir. Jan. 28, 2000) (Order). Neither the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], nor Respondent sought further judicial review of *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998). Neither Complainant nor Respondent requested that I lift the July 1, 1998, Stay Order. On March 4, 2002, I issued an Order to Show Cause why I should not lift the July 1, 1998, Stay Order and make effective the Order in *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998). *In re Peter A. Lang*, 61 Agric. Dec. ____ (Mar. 4, 2002) (Order to Show Cause).

On March 20, 2002, Complainant filed "Complainant's Response to Order to Show Cause" in which Complainant states "[t]here is no cause why the July 1, 1998, Stay Order should not be lifted immediately, and the order in *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998), not be made effective." Respondent failed to file a response to the March 4, 2002, Order to Show Cause. On April 1, 2002, the Hearing Clerk transmitted the record to the Judicial Officer to consider whether to lift the July 1, 1998, Stay Order and make effective the Order in *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998).

Proceedings for judicial review of *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998), are concluded. Neither Complainant nor Respondent has shown cause why I should not lift the July 1, 1998, Stay Order and make effective the Order in *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998). Therefore, the Stay Order issued July 1, 1998, is lifted and the Order issued in *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998), is effective as follows:

ORDER

1. Respondent, Peter A. Lang, doing business as Safari West, is assessed a civil penalty of \$1,500. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

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

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 65 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0002.

2. Respondent, Peter A. Lang, doing business as Safari West, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the regulations issued under the Animal Welfare Act, and, in particular, shall cease and desist from failing to handle animals as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

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

**In re: REGINALD DWIGHT PARR.
AWA Docket No. 99-0022.
Order Lifting Stay.
Filed April 3, 2002.**

Brian Thomas Hill, for Complainant.
Greg Gladden, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On August 30, 2000, I issued a Decision and Order: (1) concluding 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) [hereinafter the Regulations and Standards]; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a \$7,050 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 3 years 6 months. *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000).

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. On January 25, 2001, I granted Respondent's request for a stay pending the outcome of proceedings for judicial review. *In re Reginald Dwight Parr*, 60 Agric. Dec. 232 (2001) (Stay Order).

The United States Court of Appeals for the Fifth Circuit affirmed *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000). *Parr v. United States Dep't*

of Agric., 273 F.3d 1095 (5th Cir. 2001) (Table) (per curiam). Neither the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], nor Respondent sought further judicial review of *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000). Neither Complainant nor Respondent requested that I lift the January 25, 2001, Stay Order. On March 4, 2002, I issued an Order to Show Cause why I should not lift the January 25, 2001, Stay Order and make effective the Order in *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000). *In re Reginald Dwight Parr*, 61 Agric. Dec. ____ (Mar. 4, 2002) (Order to Show Cause).

Neither Complainant nor Respondent filed a response to the March 4, 2002, Order to Show Cause. On April 1, 2002, the Hearing Clerk transmitted the record to the Judicial Officer to consider whether to lift the January 25, 2001, Stay Order and make effective the Order in *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000).

Proceedings for judicial review of *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000), are concluded. Neither Complainant nor Respondent has shown cause why I should not lift the January 25, 2001, Stay Order and make effective the Order in *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000). Therefore, the Stay Order issued January 25, 2001, is lifted and the Order issued in *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000), is effective as follows:

ORDER

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

- a. Constructing and maintaining housing facilities for animals that are not structurally sound and in good repair to protect the animals from injury, to contain the animals securely, and to restrict other animals from entering;
- b. Failing to provide animals kept outdoors with shelter from inclement weather;
- c. Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required; and
- d. Failing to establish and maintain a written program of veterinary care, as required.

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

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

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

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

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

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

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

Respondent's Animal Welfare Act license, as provided in paragraph 3 of this Order, and shall not be construed as allowing Respondent to acquire any new animals for regulated activities, the sale and purchase of which is regulated by the Animal Welfare Act and the Regulations.

**In re: SAMUEL K. ANGEL; AND THOMBRA INTERNATIONAL, INC.,
d/b/a LIONSTIGERS.COM AND LIONS, TIGERS, AND TEDDY BEARS
- OH MY!.**

AWA Docket No. 01-0025.

Order Denying Late Appeal as to Samuel K. Angel.

Filed April 24, 2002.

Late appeal.

The Judicial Officer (JO) denied Respondent's late-filed appeal. The JO stated that he had no jurisdiction to hear Respondent's appeal filed after Administrative Law Judge Dorothea A. Baker's Decision and Order Upon Admission of Facts By Reason of Default became final.

Brian T. Hill, for Complainant.
Respondent, Pro se.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Craig A. Reed, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on February 22, 2001. 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: (1) on or about December 18, 1998, Samuel K. Angel [hereinafter Respondent] failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the

Regulations (9 C.F.R. § 2.40); (2) on or about December 19, 1999, Respondent failed to notify the APHIS, REAC sector supervisor of Respondent's change of address within 10 days of the change of address, in violation of section 2.8 of the Regulations (9 C.F.R. § 2.8); (3) on March 4, 2000, during public exhibition, Respondent failed to maintain a sufficient distance or barrier between animals and the general viewing public, in violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)); and (4) on March 4, 2000, Respondent failed to provide a sufficient distance or barrier between animals and the general viewing public, resulting in the injury of Ms. Samatha Iverson, in violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) (Compl. ¶¶ II-V).

On April 17, 2001, the Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Acting Hearing Clerk's service letter dated February 23, 2001.¹ Respondent failed to file an answer with the Hearing Clerk within 20 days after the Hearing Clerk served Respondent with the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On May 11, 2001, the Hearing Clerk sent Respondent a letter informing Respondent that his answer to the Complaint had not been timely filed.

On August 21, 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 as to Samuel K. Angel" [hereinafter Motion for Default Decision as to Samuel K. Angel] and a "Proposed Decision and Order Upon Admission of Facts By Reason of Default" [hereinafter Proposed Default Decision as to Samuel K. Angel]. On September 24, 2001, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision as to Samuel K. Angel and the Hearing Clerk's service letter dated August 22, 2001.² The record contains no indication that the Hearing Clerk served Respondent with Complainant's Proposed Default Decision as to Samuel K. Angel.

Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that a respondent has 20 days after service of a proposed default decision and motion for adoption of the proposed default decision within which to file objections to the proposed default decision and motion for adoption of the proposed default decision. Nonetheless, on September 26, 2001, 2 days after the Hearing Clerk served Respondent with Complainant's Motion for Default Decision as to Samuel K. Angel and the Hearing Clerk's service letter dated August 22, 2001, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a "Decision and Order Upon Admission of Facts By Reason of Default"

¹See Memorandum from "TMFisher" dated April 17, 2001.

²See Memorandum from "TMFisher" dated September 24, 2001.

[hereinafter Decision and Order as to Samuel K. Angel]: (1) finding that on or about December 18, 1998, APHIS found that Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40); (2) finding that on or about December 19, 1999, Respondent failed to notify the APHIS, REAC sector supervisor of Respondent's change of address within 10 days of Respondent's change of address, in violation of section 2.8 of the Regulations (9 C.F.R. § 2.8); (3) finding that on March 4, 2000, during public exhibition, Respondent failed to maintain a sufficient distance or barrier between animals and the general viewing public, in violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)); (4) finding that on March 4, 2000, Respondent failed to provide a sufficient distance or barrier between animals and the general viewing public, resulting in the injury of Ms. Samatha Iverson, in violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)); (5) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and "standards issued thereunder";³ and (6) assessing Respondent a \$8,250 civil penalty (Decision and Order as to Samuel K. Angel at second and third unnumbered pages).

On February 1, 2002, the Hearing Clerk served Respondent with the Decision and Order as to Samuel K. Angel and the Hearing Clerk's service letter dated October 31, 2001.⁴ On March 11, 2002, Respondent appealed to the Judicial Officer. On April 16, 2002, Complainant filed "Complainant's Response to Appeal by Samuel K. Angel." On April 18, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

³The ALJ's reference to "standards issued thereunder" is a reference to the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142). Complainant did not allege and the ALJ did not find that Respondent violated the standards issued under the Animal Welfare Act.

⁴See Memorandum from "TMFisher" dated February 1, 2002.

The record establishes that the Hearing Clerk served Respondent with the Decision and Order as to Samuel K. Angel on February 1, 2002.⁵ Section 1.145(a) of the Rules of Practice provides the time for appealing an administrative law judge's decision, as follows:

§ 1.145 Appeal to Judicial Officer.

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

7 C.F.R. § 1.145(a).

Therefore, Respondent's appeal petition was required to be filed with the Hearing Clerk no later than March 4, 2002.⁶ The next business day after Sunday, March 3, 2002, was Monday, March 4, 2002. Therefore, Respondent was required to file his appeal petition no later than March 4, 2002. On March 11, 2002, Respondent filed an appeal petition with the Hearing Clerk.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.⁷ The ALJ's Decision and

⁵See note 4.

⁶Thirty days after February 1, 2002, was March 3, 2002. However, March 3, 2002, 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 [sic] to include the next following business day.

7 C.F.R. § 1.147(h).

⁷See *In re Paul Eugenio*, 60 Agric. Dec. 676 (001) (dismissing the respondent's appeal petition filed 1 day after the initial decision and order became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the initial decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal

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petition filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the initial decision and order became final, but not filed until 4 days after the initial decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379

(continued...)

Order as to Samuel K. Angel became final on March 8, 2002,⁸ 3 days prior to the date Respondent filed an appeal petition with the Hearing Clerk. Therefore, I have no jurisdiction to hear Respondent's appeal.

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

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

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

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

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

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(1978) (stating failure to file an appeal petition before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

⁸See section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)) and the Decision and Order as to Samuel K. Angel at third unnumbered page.

⁹*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of

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The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an initial decision and order has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.¹⁰ The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an initial decision and order has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the ALJ's Decision and Order as to Samuel K. Angel became final.

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

The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear*

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appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating the filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding pro se does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

¹⁰ See Fed. R. App. P. 4(a)(5).

Regulatory Commission, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.¹¹

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

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

ORDER

Respondent's appeal petition filed March 11, 2002, is denied. The Decision and Order as to Samuel K. Angel, filed by Administrative Law Judge Dorothea A. Baker on September 26, 2001, is the final decision and order as to Respondent Samuel K. Angel in this proceeding.

In re: JERRY GOETZ, d/b/a JERRY GOETZ AND SONS.

BPRA Docket No. 94-0001.

Order Lifting Stay.

Filed January 17, 2002.

Sharlene A. Deskins, for Complainant.

David R. Klaassen, for Respondent.

Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

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

¹¹*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

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 \$69,244.51 civil penalty; 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, Kenneth C. Clayton, Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter 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 \$69,804.49 civil penalty; 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 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).

On November 26, 2001, Complainant filed a “Motion to Lift Stay.” On January 11, 2002, Respondent filed “Respondent’s Objection to Complainant’s Motion to Lift Stay Combined with Respondent’s Petition for Reconsideration and to Alter, Amend, or Set Aside the Prior Ruling in Light of Recent Change in Controlling Law” [hereinafter Respondent’s Objection to Complainant’s Motion to Lift Stay]. On January 15, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant’s Motion to Lift Stay.

RULING ON COMPLAINANT’S MOTION TO LIFT STAY

Respondent’s Objection to Complainant’s Motion to Lift Stay includes a petition for reconsideration of the November 3, 1997, Decision and Order. 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).

The Hearing Clerk served Respondent with the November 3, 1997, Decision and Order on November 7, 1997.¹ Respondent filed Respondent’s Objection to Complainant’s Motion to Lift Stay on January 11, 2002, 4 years 2 months and

¹Domestic Return Receipt for Article Number P 093 033 757.

4 days after the date the Hearing Clerk served the November 3, 1997, Decision and Order on Respondent. Accordingly, Respondent's January 11, 2002, petition for reconsideration was late-filed and must be denied.²

²*In re Beth Lutz*, 60 Agric. Dec. 68 (2001) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 months and 2 days after the date the Hearing Clerk served the respondent with the decision and order); *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-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).

Moreover, the Rules of Practice do not provide for filing more than one petition for reconsideration of a decision of the Judicial Officer.³ On November 17, 1997, Respondent filed a Petition for Reconsideration of the Decision of the Judicial Officer, and on April 3, 1998, I issued an order denying Respondent'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.). Accordingly, Respondent's second petition for reconsideration, filed January 11, 2002, must be denied.

Furthermore, even if Respondent's January 11, 2002, petition for reconsideration were Respondent's first petition for reconsideration of the November 3, 1997, Decision and Order and had been timely filed, I would deny Respondent's January 11, 2002, petition for reconsideration.

Respondent contends the conclusion in the November 3, 1997, Decision and Order that the Beef Act's requirement that Respondent collect and remit assessments to fund beef and beef product promotion does not violate Respondent's right to free speech under the First Amendment to the Constitution of the United States, is no longer good law. Respondent cites *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), as the basis for his contention. Respondent requests that, in light of *United Foods, Inc.*, I alter, amend, or set aside the November 3, 1997, Decision and Order and strike down the Beef Act as an unconstitutional violation of Respondent's right to free speech under the First Amendment to the Constitution of the United States. (Respondent's Objection to Complainant's Mot. to Lift Stay at 5-11).

As an initial matter, *United Foods, Inc.*, does not address the Beef Act. Instead, *United Foods, Inc.*, addresses the constitutionality of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112). Specifically, the Supreme Court of the United States held that mandatory assessments on handlers of fresh mushrooms to fund advertising of the product violate the First Amendment right to free speech where the assessments are not ancillary to a more comprehensive program restricting market autonomy and the advertising itself is the principal object of the regulatory scheme. Respondent does not cite and I cannot locate any case in which a court has concluded that mandatory assessments under the Beef Act to fund beef and beef product promotion violate the First Amendment right to free speech. Instead, in cases cited by Respondent, courts rejected First Amendment

³ *Cf. In re Fitchett Bros., Inc.*, 29 Agric. Dec. 2, 3 (1970) (Dismissal of Pet. for Recons.) (dismissing a second petition for reconsideration on the basis that the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders do not provide for more than one petition for reconsideration of a final decision and order).

challenges to mandatory assessments under the Beef Act.⁴ Therefore, even if Respondent's January 11, 2002, petition for reconsideration were Respondent's first petition for reconsideration of the November 3, 1997, Decision and Order and had been timely filed, I would reject Respondent's request that, based on *United Foods, Inc.*, I alter, amend, or set aside the November 3, 1997, Decision and Order and strike down the Beef Act as an unconstitutional violation of Respondent's right to free speech under the First Amendment to the Constitution of the United States.

Second, generally an administrative tribunal has no authority to declare unconstitutional a statute that it administers.⁵ Respondent does not cite and I cannot locate any authority which gives me the power to "strike down the Beef Act as being unconstitutional," as Respondent requests. Therefore, even if Respondent's January 11, 2002, petition for reconsideration were Respondent's first petition for reconsideration of the November 3, 1997, Decision and Order and had been timely filed, I would reject Respondent's request that, based on *United Foods, Inc.*, I strike down the Beef Act as unconstitutional.

I issued the June 25, 1998, Stay Order to postpone the effective date 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.), pending proceedings for judicial review of *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), and *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

⁴*United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990); *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).

⁵*Public Utilities Comm'n of California v. United States*, 355 U.S. 534, 539 (1958); *Gilbert v. NTSB*, 80 F.3d 364, 366-67 (9th Cir. 1996); *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1569 (Fed. Cir. 1995), cert. denied, 516 U.S. 1072 (1996); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983); *Motor and Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1115 (D.C. Cir. 1979), cert. denied sub nom. *General Motors Corp. v. Costle*, 446 U.S. 952 (1980); *Buckeye Industries, Inc. v. Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979); *Spiegel, Inc. v. FTC*, 540 F.2d 287, 294 (7th Cir. 1976); *Montana Chapter of Association of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165, 1167 (9th Cir. 1975); *Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974); *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir. 1974); *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973); *Panitz v. District of Columbia*, 112 F.2d 39, 41-42 (D.C. Cir. 1940); *In re Otto Berosini*, 54 Agric. Dec. 886, 913 (1995); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342-43 (1995), aff'd, 112 F.3d 1542 (11th Cir. 1997); *In re Craig Lesser*, 52 Agric. Dec. 155, 167-68 (1993), aff'd, 34 F.3d 1301 (7th Cir. 1994); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re David G. Henner*, 30 Agric. Dec. 1151, 1259 (1971).

Granting in Part Complainant's Pet. for Recons.). Proceedings for judicial review of *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), are concluded.⁶ 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 also concluded.⁷

Respondent does not contend that he is seeking further judicial review of either *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), or *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 the time for filing further requests for judicial review has expired.

For the foregoing reasons, Complainant's Motion to Lift Stay Order is granted, the June 25, 1998, Stay Order is lifted, and 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 effective, as follows:

ORDER

1. Respondent Jerry Goetz, d/b/a Jerry Goetz and Sons, his agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911), the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217), and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) and, in particular, shall cease and desist from:

- (a) failing to remit all assessments when due;
- (b) failing to remit late-payment charges; and
- (c) failing to transmit reports in a timely manner.

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

⁶*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).

⁷*Goetz v. United States*, 99 F. Supp.2d 1308 (D. Kan. 2000), *aff'd*, No. 00-3173, 2001 WL 401594 (10th Cir. Apr. 20, 2001), *cert. denied*, 122 S. Ct. 614 (2001).

2. Respondent Jerry Goetz, d/b/a Jerry Goetz and Sons, is assessed a civil penalty of \$69,804.49 which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

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

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Deskins within 70 days after service of this Order on Respondent.

3. Respondent Jerry Goetz, d/b/a Jerry Goetz and Sons, shall pay past-due assessments and late-payment charges of \$66,913 which shall be paid by certified check or money order, made payable to the Kansas Beef Council, and forwarded to:

Kansas Beef Council
6031 SW. 37th Street
Topeka, KS 66614-5129

Respondent's payment of the past-due assessments and late-payment charges shall be forwarded to, and received by, the Kansas Beef Council within 70 days after service of this Order on Respondent.

**In re: ROYAL CREST DAIRY, INC.
FMP Docket No. 01-0001.
Order Dismissing Petition—Order Canceling Hearing.
Filed June 14, 2002.**

Gregory Cooper, for Respondent.
F.J. "Rick" Dindinger II, for Petitioner.
Order issued by James W. Hunt, Administrative Law Judge.

Petitioner's unopposed motion to dismiss its petition is granted. The petition is dismissed without prejudice.

The hearing scheduled for November 6, 2002, in Denver, Colorado, is canceled.

**In re: NEW YORK STATE OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE.
FSP Docket No. 01-0003.
Order Dismissing Appeal.
Filed February 7, 2002.**

Gena R. Kochran, for Appellee.
Robert Gersowitz, for Appellant.
Order issued by James W. Hunt, Administrative Law Judge.

Appellant moves to withdraw its appeal on the ground that it and Appellee have reached a settlement. Appellee does not oppose the motion to withdraw. Accordingly, the motion to withdraw is granted and the appeal is dismissed without prejudice.

**In re: STATE OF WISCONSIN, DEPARTMENT OF WORKFORCE
DEVELOPMENT.
FSP Docket No. 01-0004.
Order Dismissing Case.
Filed February 11, 2002.**

Gena R. Kochran, for Appellee.
Howard I. Bernstein, for Appellant.
Order issued by Jill S. Clifton, Administrative Law Judge.

By letter dated February 6, 2002, the Wisconsin State agency withdrew its appeal, due to a settlement agreement.

Accordingly, this case is hereby dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

**In re: STATE OF OREGON, DEPARTMENT OF HUMAN SERVICES
CHILDREN, ADULTS AND FAMILIES.**

FSP Docket No. 02-0002.

Order Dismissing Case.

Filed June 20, 2002.

Jill R. Maze, for Appellant.

Jim Neely, for Appellee.

Order issued by Jill S. Clifton, Administrative Law Judge.

By letter dated June 6, 2002, the Oregon State agency withdrew its appeal, due to a plan submitted on May 30, 2002. Appellee U.S. Department of Agriculture, Food and Nutrition Service, has no objection.

Accordingly, this case is hereby dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

**In re: ROGER IVINS, AN INDIVIDUAL; AND FANNIE IVINS, AN
INDIVIDUAL.**

HPA Docket No. 01-0005.

Order Dismissing Complaint as to Fannie Invins.

Filed February 1, 2002.

Sharlene Deskins for Complainant.

Carthel L. Smith, Jr., for Respondent.

Order issued by James W. Hunt, Administrative Law Judge.

The joint motion of attorneys for Complainant and Respondents Roger Ivins and Fannie Ivins to dismiss the complaint as to Respondent Fannie Ivins is granted. The complaint as to Respondent Fannie Ivins is dismissed.

**In re: DERWOOD STEWART AND RHONDA STEWART, d/b/a
STEWART'S NURSERY, a/k/a STEWART'S FARM, STEWART'S**

**FARM & NURSERY, THE DERWOOD STEWART FAMILY, AND
STEWART'S NURSERY FARM STABLES.**

HPA Docket No. 99-0028.

Stay Order as to Derwood Stewart.

Filed March 4, 2002.

Colleen A. Carroll, for Complainant.

L. Thomas Austin and Jennifer Mitchell, for Respondent.

Order issued by William G. Jenson, Judicial Officer.

On September 6, 2001, I issued a Decision and Order as to Derwood Stewart: (1) concluding that on October 28, 1998, Derwood Stewart [hereinafter Respondent] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831), when he entered a horse for the purpose of showing or exhibiting the horse in the 30th Anniversary National Walking Horse Trainers Show, while the horse was sore; (2) assessing Respondent a \$2,200 civil penalty; and (3) disqualifying Respondent for 1 year from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001).

On February 22, 2002, Respondent filed a Motion for Stay requesting a stay of the Order in *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001), pending the outcome of proceedings for judicial review. On February 25, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Stay.

On February 25, 2002, Colleen A. Carroll, counsel for the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], contacted the Office of the Judicial Officer by telephone and informed me that Complainant does not object to Respondent's Motion for Stay. Respondent has appealed *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001), to the United States Court of Appeals for the Sixth Circuit. *Stewart v. United States Dep't of Agric.*, No. 01-4204 (6th Cir. Nov. 14, 2001). Therefore, in accordance with 5 U.S.C. § 705, Respondent's Motion for Stay is granted.

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

ORDER

The Order issued in *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Derwood Stewart shall

remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: AUDREY PALAPALA, a.k.a. AUDREY P. BASQUES.
P.Q. Docket No. 01-0023.
Order Withdrawing Complaint and Dismissing Case.
Filed March 28, 2002.

Margaret Burns, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Complainant's March 27, 2002, Motion to Withdraw Complaint is granted. It is hereby ordered the Complaint, filed herein on September 4, 2001, be withdrawn.

Accordingly, this case is hereby dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

In re: MIDASA PASCUA.
P.Q. Docket No. 02-0003.
Order Dismissing Complaint.
Filed June 10, 2002.

Tracey Manoff, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Pursuant to Complainant's motion, the complaint filed in this matter on December 19, 2001, is dismissed without prejudice.

DEFAULT DECISIONS**ANIMAL QUARANTINE AND RELATED LAWS****In re: ELENA M. TOMESCU.****A.Q. Docket No. 01-0005.****Decision Without Hearing By Reason of Default.****Filed October 15, 2001.****AQ – Default – Failure to answer.**

Rick Herndon, 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 movement of animal products (9 C.F.R. § 94 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Act of August 30, 1890, as amended (21 U.S.C. §§102-105), the Act of February 2, 1903, as amended (21 U.S.C. §111), and the Act of July 2, 1962 (21 U.S.C. §134a-134f)(Acts), and the regulations promulgated thereunder (9 C.F.R. §94 *et seq.*) (regulations), by a complaint filed on March 12, 2001, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Elena M. Tomescu, herein referred to as the respondent, is an individual whose mailing address is 1452 West 81st Street, Cleveland, Ohio 44102.

2. On or about June 14, 2000, the respondent imported one kilogram of pork salami into the United States from Romania at Detroit, Michigan, in violation of 9 C.F.R. §94, because the importation of pork from Romania into the United States is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts. 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 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 01-0005.

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 March 14, 2002.-Editor]

ANIMAL WELFARE ACT

**In re: STAN LOVETT AND KATHY LOVETT.
AWA Docket No. 01-0035.
Decision Without Hearing By Reason Of Default.
Filed November 8, 2001.**

AWA – Default – Failure to answer.

Donald Tracy, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act (“Act”), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act.

Respondent Kathy Lovett signed the certified mail receipt for a copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, on May 16, 2001. Respondent Stan Lovett signed the certified mail receipt for a copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, on May 17, 2001. Respondents were 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.

Respondents Stan and Kathy Lovett have 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**

1. Stan Lovett and Kathy Lovett, hereinafter referred to as respondents, are individuals whose address is 19249 Beaver Lane, Hitchcock, South Dakota 57348.

2. The respondents, at all times material herein, were operating as a dealers as defined in the Act and the regulations.

3. When respondents became licensed and annually thereafter, respondents received copies of the Animal Welfare Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

4. The respondents, at all times material herein, were operating as dealers as defined in the Act and the regulations, without having obtained a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Respondents sold, in commerce, dogs to a licensed dealer on thirteen occasions. The sale of each animal constitutes a separate violation. Each violation occurred on or about the date listed in the following table:

DATE	ANIMALS
11/13/98	6 puppies
01/11/99	9 puppies
03/30/99	4 puppies
04/19/99	9 puppies
05/24/99	12 puppies
07/17/99	8 puppies
07/26/99	3 puppies
08/16/99	3 puppies
09/06/99	12 puppies
09/13/99	4 puppies
09/20/99	5 puppies
10/13/99	14 puppies
11/15/99	4 puppies

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. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a

license is required under the Act and regulations without being licensed as required.

2. The respondents are jointly and severally assessed a civil penalty of \$3,750.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

The provisions of this order shall become effective on the first day after this decision becomes final.

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

7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final February 20, 2002.-Editor]

**In re: RANDY AND LINDA DAUGHERTY, d/b/a LIN-SHE-RAN.
AWA Docket No. 01-0032.
Decision Without Hearing By Reason Of Default.
Filed February 28, 2002.**

AWA – Default – Failure to answer.

Frank Martin, Jr., for Complainant.

Respondents, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

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 Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were personally served upon the respondents. Respondents were 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.

Respondents failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted by respondents’

failure to file an Answer pursuant to the Rules of Practice, are adopted and set forth herein as Findings of Fact.

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

Findings of Fact

Randy and Linda Daugherty hereinafter referred to as respondents, a doing business as Lin-She-Ran, 2100- Lawrence 1040#1, Pierce City, Missouri 65723. The respondents are, and at all times material hereto were operating as a dealer as defined in the Act and the regulations.

On October 21, 2000, the respondents willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40), by failing to provide veterinary care to animals in need of care.

On October 21, 2000, the respondents willfully violated the standards specified below:

The housing facilities for the dogs did not protect the animals from injury, contain the animals securely or restrict other animals from entering (9 C.F.R. §§3.1(a)), 3.6(a) (ii, iii, iv);

Respondents did not provide for the regular and frequent collection, removal and disposal of animal wastes. Dead animals were not kept free from animal areas (9 C.F.R. §3.1 (f));

The dogs were not provided with easy and convenient access to food and water (9 C.F.R. §3.6(a) (viii));

The dogs were not fed at least once each day (9 C.F.R. §3.9(a)); Food receptacles were not provided for the majority of the dogs, and those that were provided were not clean and sanitized (9 C.F.R. §3.9(b));

The dogs were not provided with water. Water receptacles were not provided for the majority of dogs and those that were provided were not clean and sanitized (9 C.F.R. §3.10); and

There were not enough employees to carry out the level of husbandry practices and care required (9 C.F.R. §3.12).

Conclusion

The Secretary has jurisdiction in this matter.

By reason of the facts set forth in the Findings of Fact above, the respondents have violated the Act, as well as the regulations and standards promulgated under the Act.

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

Order

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

Failing to provide proper veterinary care;

Failing to 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;

Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes and dead animals, in a manner that minimizes contamination and disease risks;

Failing to provide animals with food of sufficient quantity and nutritive value to meet their normal daily requirements;

Failing to keep food and water receptacles clean and sanitized;

Failing to provide animals with adequate potable water; and

Failing to utilize a sufficient number of trained employees to maintain the prescribed level of husbandry practices.

The respondents are assessed a civil penalty of \$8,800, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

The respondents' license is revoked and the respondents are permanently disqualified from becoming licensed under the Act and regulations.

The provisions of this Order shall become effective on the first day after service of this decision on the respondents.

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

Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 17, 2002.-Editor]

**In re: EMILA W. ZERBINI, AN INDIVIDUAL d/b/a MAYA AND HER
FRENCH POODLES, A SOLE PROPRIETORSHIP.
AWA Docket No. 01-0031.
Decision Without Hearing By Reason Of Default.
Filed November 8, 2001.**

AWA – Default – Failure to answer.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*)(the “Act”), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act.

On April 25, 2001, the Hearing Clerk sent to the respondent, by certified mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The packages were mailed to the respondent’s current mailing address, which respondent had provided to complainant. 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. Respondent actually received the complaint on May 4, 2001.

The respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are all 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. Emilia W. Zerbini is an individual whose mailing address is 2311 Juniper Place, Sarasota, Florida 34329. At all times material hereto, said respondent was engaged in business as Maya and Her French Poodles, a sole proprietorship located at the same mailing address, and was operating as an exhibitor as that term is defined in the Act.

2. Respondent Emilia W. Zerbini was previously issued Animal Welfare Act license 58-C-488, which license was terminated on December 4, 1998, after respondent failed to submit a license renewal form.

3. On the following dates, respondent Emilia W. Zerbini, doing business as Maya and Her French Poodles, operated as an “exhibitor” for Circus Maximus, Inc., Webb City, Missouri, as that term is defined in the Regulations, without having obtained a license from the Secretary to do so:

- a. January 28, 29, 30, and 31, 1999, at Fort Wayne, Indiana;
- b. April 13 and 14, 1999, at Fort Pierce, Florida;
- c. April 15, 16, 17, and 18, 1999, at Palm Beach, Florida;
- d. April 22, 23, 24, and 25, 1999, at Rockford, Illinois;
- e. April 29 and 30, and May 1 and 2, 1999, at Springfield, Massachusetts;
- f. September 18 and 19, 1999, at Columbus, Georgia;
- g. September 23, 24, 25 and 26, 1999, at Providence, Rhode Island;
- h. October 1, 2 and 3, 1999, at Worcester, Massachusetts;
- i. October 7, 8, 9, and 10, 1999, at Chattanooga, Tennessee;
- j. October 15, 16, and 17, 1999, at Carthage, Missouri;
- k. October 20, 1999, at Asheville, North Carolina;
- l. October 21, 1999, at Winston-Salem, North Carolina; and
- m. May 15, 16, 17, 18, 19, 20, and 21, 2000, in Wilmington, Massachusetts.

4. On the following dates, respondent Emilia W. Zerbini, doing business as Maya and Her French Poodles, operated as an “exhibitor” for Yankee Doodle Circus, also known as Naughton Attractions, Greenville, New York, as that term is defined in the Regulations, without having obtained a license from the Secretary to do so:

- a. February 5, 2000, at Miller Place, New York;
- b. February 6, 2000, at Port Jefferson Station, New York;
- c. February 7, 2000, at Brooklyn, New York;
- d. February 8, 2000, at Greenwood Lake, New York;
- e. February 9, 2000, at Ringwood, New Jersey;
- f. February 10, 2000, at Bloomfield, New Jersey;
- g. February 12, 2000, at Mahopac, New York;
- h. February 13, 2000, at Riverhead, New York;
- i. February 19, 2000, at Smithtown, New York;
- j. February 20, 2000, at Manorville, New York;
- k. February 23 and 24, 2000, at Long Beach, New York;
- l. February 26, 2000, at North Plainfield, New Jersey;
- m. February 27, 2000, at New Brunswick, New Jersey;
- n. February 28, 2000, at Belleville, New Jersey;
- o. March 2, 2000, at Seaford, New York;
- p. March 3, 2000, at Levittown, New York;
- q. March 4, 2000, at North Babylon, New York;
- r. March 5, 2000, at Amityville, New York;
- s. March 6, 2000, at Sag Harbor, New York;

- t. March 9, 2000, at Ryebrook, New York;
- u. March 10, 2000, at Brooklyn, New York;
- v. March 11, 2000, at Hawthorne, New Jersey;
- w. March 12, 2000, at Little Falls, New Jersey;
- x. March 13, 2000, at Jeffersonville, New York;
- y. March 14, 2000, at Margaretville, New York;
- z. March 15, 2000, at Beacon, New York;
- aa. March 16, 2000, at Afton, New York;
- bb. March 17, 2000, at Elmwood Park, New Jersey;
- cc. March 18, 2000, at Howell, New Jersey;
- dd. March 19, 2000, at Lynhurst, New Jersey;
- ee. March 23, 2000, at Englewood, New Jersey;
- ff. March 24, 2000, at Norwood, Massachusetts;
- gg. March 25, 2000, at Middletown, Connecticut;
- hh. March 26, 2000, at Holbrook, Massachusetts;
- ii. March 28, 2000, at Wells River, Vermont;
- jj. March 29, 2000, at Hardwick, Vermont;
- kk. March 30, 2000, at Springfield, Vermont;
- ll. March 31, 2000, at Natick, Massachusetts;
- mm. April 1, 2000, at Weston, Connecticut;
- nn. April 5, 2000, at Westport, Massachusetts;
- oo. April 6, 2000, at Woonsocket, Rhode Island;
- pp. April 7, 2000, at Winchendon, Massachusetts;
- qq. April 8, 2000, at Hartford, Connecticut;
- rr. April 9, 2000, at Jack Heights, New York;
- ss. April 10, 2000, at Brooklyn, New York;
- tt. April 11, 2000, at Yeadon, Pennsylvania;
- uu. April 12, 2000, at Washingtonville, Pennsylvania;
- vv. April 13, 2000, at Glen Mills, Pennsylvania;
- ww. April 14, 2000, at Delran, New Jersey;
- xx. April 15, 2000, at Bohemia, New York;
- yy. April 16, 2000, at Mastic Beach, New York;
- zz. April 22, 2000, at Rockville Centre, New York;
- aaa. April 27 and 28, 2000, at Tom's River, New Jersey;
- bbb. April 29, 2000, at Dingman's Ferry, Pennsylvania; and
- ccc. April 30, 2000, at Blue Bell, Pennsylvania.

5. On May 5, 6 and 7, 2000, at Wilmington, Delaware, respondent Emilia W. Zerbin, doing business as Maya and Her French Poodles, operated as an "exhibitor" for Hamid Circus Royale, Northfield, New Jersey, as that term is

defined in the Regulations, without having obtained a license from the Secretary to do so.

6. On November 23, 1999, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to maintain an adequate program of veterinary care that included employment of an attending veterinarian, and regularly scheduled visits.

7. On November 23, 1999, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to administer a heartworm preventative to her animals regularly, as prescribed in veterinary care program, and retained in use veterinary medication (pyrantel pamoate) that expired in 1997.

8. On November 23, 1999, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to maintain an adequate program of veterinary care that included a mechanism of direct and frequent communication with the attending veterinarian on matters of animal health.

9. On November 23, 1999, APHIS inspected respondent's housing facilities for dogs, and found that respondent failed to comply with the requirements for indoor, sheltered, and mobile or traveling housing facilities:

a. Respondents failed to provide sufficient ventilation in housing facilities for dogs, to provide for the health and well-being of dogs and to minimize odors and ammonia levels; and

b. Respondents failed to ensure that housing facilities for dogs were lighted well enough to permit inspection, and observation of the dogs housed therein.

10. On November 23, 1999, APHIS inspected respondent's facility and animals, and found that respondent failed to comply with the general requirements for housing dogs:

a. Respondent housed at least one dog (Brandy) in an enclosure that did not provide the animal with sufficient floor space; and

b. Respondent housed dogs in a primary enclosure that was not constructed and maintained so as to contain the dogs securely, and specifically, the enclosure was constructed in such a way as to allow a dog contained therein to stick its head and neck outside of the enclosure.

11. On May 19, 2000, APHIS inspected respondent's animals, records and mobile or traveling housing facilities and animals, and found that respondent failed to maintain an adequate program of veterinary care that included employment of an attending veterinarian, and regularly scheduled visits.

12. On May 19, 2000, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to

maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to administer a heartworm preventative to her animals regularly, as prescribed in veterinary care program.

13. On May 19, 2000, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to have dogs wormed quarterly, as prescribed in veterinary care program.

14. On May 19, 2000, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to have fecal tests performed quarterly.

15. On May 19, 2000, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to have attending veterinarian examine skin growth on one dog (Dolly).

16. On May 19, 2000, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease and injuries, and specifically, respondent failed to have animals' nails trimmed.

17. On May 19, 2000, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to have arthritic puppy treated by attending veterinarian.

18. On May 19, 2000, APHIS inspected respondent's animals, records and housing facilities, and found that respondent failed to comply with the requirements for indoor, sheltered, and mobile or traveling housing facilities:

a. Respondents failed to provide sufficient ventilation in housing facilities for dogs, to provide for the health and well-being of dogs and to minimize odors and ammonia levels; and

b. Respondents failed to ensure that housing facilities for dogs were lighted well enough to permit inspection, and observation of the dogs housed therein.

19. On May 19, 2000, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to comply with the housing requirements for dogs:

a. Respondent housed at least one dog (Dolly) in an enclosure that did not provide the animal with sufficient space.

20. On May 19, 2000, APHIS inspected respondent's animals, records and mobile or traveling housing facilities, and found that respondent failed to comply with the primary conveyance requirements:

a. Respondent failed to maintain the interior of the animal cargo space clean; and

b. Respondent failed to construct and maintain the animal cargo space in a manner that protects the health and well-being of the animals at all times, and ensures their safety and comfort.

21. On May 19, 2001, APHIS inspected respondent's records, and found that respondent failed to make, keep and maintain full and correct records concerning each dog acquired by respondent.

CONCLUSIONS OF LAW

1. On forty-three dates between January 28, 1999, and May 21, 2000, respondent Emilia W. Zerbini, doing business as Maya and Her French Poodles, operated as an "exhibitor" for Circus Maximus, Inc., in thirteen locations without having obtained a license from the Secretary to do so, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

2. On fifty-seven dates between February 5, 2000, and April 30, 2000, respondent Emilia W. Zerbini, doing business as Maya and Her French Poodles, operated as an "exhibitor" for Yankee Doodle Circus, without having obtained a license from the Secretary to do so, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

3. On May 5, 6 and 7, 2000, respondent Emilia W. Zerbini, doing business as Maya and Her French Poodles, operated as an "exhibitor" for Hamid Circus Royale, without having obtained a license from the Secretary to do so, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

4. On November 23, 1999, respondent failed to maintain an adequate program of veterinary care that included employment of an attending veterinarian, and regularly scheduled visits, in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40(a)(1)).

5. On November 23, 1999, respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to administer a heartworm preventative to her animals regularly, as prescribed in veterinary care program, and retained in use veterinary medication (pyrantel pamoate) that expired in 1997, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

6. On November 23, 1999, respondent failed to maintain an adequate program of veterinary care that included a mechanism of direct and frequent communication with the attending veterinarian on matters of animal health, in willful violation of section 2.40(b)(3) of the Regulations (9 C.F.R. § 2.40(b)(3)).

7. On November 23, 1999, respondent failed to provide sufficient ventilation in housing facilities for dogs, to provide for the health and well-being of dogs and to minimize odors and ammonia levels, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100), and sections 3.2(b), 3.3(b), and 3.5(b) of the Standards (9 C.F.R. §§ 3.2(b), 3.3(b), 3.5(b)).

8. On November 23, 1999, respondent failed to ensure that housing facilities for dogs were lighted well enough to permit inspection, and observation of the dogs housed therein, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100), and sections 3.2(c), 3.3(c), and 3.5(c) of the Standards (9 C.F.R. §§ 3.2(c), 3.3(c), 3.5(c)).

9. On November 23, 1999, respondent housed at least one dog (Brandy) in an enclosure that did not provide the animal with sufficient floor space, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100), and section 3.6(c) of the Standards (9 C.F.R. § 3.6(c)).

10. On November 23, 1999, respondent housed dogs in a primary enclosure that was not constructed and maintained so as to contain the dogs securely, and specifically, the enclosure was constructed in such a way as to allow a dog contained therein to stick its head and neck outside of the enclosure, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100), and section 3.6(a)(2)(iii) of the Standards (9 C.F.R. § 3.6(a)(2)(iii)).

11. On May 19, 2000, respondent failed to maintain an adequate program of veterinary care that included employment of an attending veterinarian, and regularly scheduled visits, in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40(a)(1)).

12. On May 19, 2000, respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to administer a heartworm preventative to her animals regularly, as prescribed in veterinary care program, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

13. On May 19, 2000, respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to have dogs wormed quarterly, as prescribed in veterinary care program, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

14. On May 19, 2000, respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to have fecal tests performed quarterly, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

15. On May 19, 2000, respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to have attending veterinarian examine skin growth on one dog (Dolly), in violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

16. On May 19, 2000, respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease and injuries, and specifically, respondent failed to have animals' nails trimmed, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

17. On May 19, 2000, respondent failed to maintain an adequate program of veterinary care that included the use of appropriate methods to prevent and control disease, and specifically, respondent failed to have arthritic puppy treated by attending veterinarian, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

18. On May 19, 2000, respondent failed to provide sufficient ventilation in housing facilities for dogs, to provide for the health and well-being of dogs and to minimize odors and ammonia levels, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100), and sections 3.2(b), 3.3(b), and 3.5(b) of the Standards (9 C.F.R. §§ 3.2(b), 3.3(b), 3.5(b)).

19. On May 19, 2000, respondent failed to ensure that housing facilities for dogs were lighted well enough to permit inspection, and observation of the dogs housed therein, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100), and sections 3.2(c), 3.3(c), and 3.5(c) of the Standards (9 C.F.R. §§ 3.2(c), 3.3(c), 3.5(c)).

20. On May 19, 2000, respondent housed at least one dog (Dolly) 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), and section 3.6(c) of the Standards (9 C.F.R. § 3.6(c)).

21. On May 19, 2000, respondent failed to maintain the interior of animal cargo space clean, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100), and section 3.15(g) of the primary conveyance Standards (9 C.F.R. § 3.15(g)).

22. On May 19, 2000, respondent failed to construct and maintain animal cargo space in a manner that protects the health and well-being of the animals at all times, and ensures their safety and comfort, in willful violation of section

2.100(a) of the Regulations (9 C.F.R. § 2.100), and section 3.15(a) of the primary conveyance Standards (9 C.F.R. § 3.15(a)).

23. On May 19, 2001, respondent failed to make, keep and maintain full and correct acquisition records concerning each dog, in willful violation of section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

ORDER

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

2. Respondent is assessed a civil penalty of \$8,250.

3. Respondent's animal welfare license (number 58-C-488) is revoked.

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 June 19, 2002.-Editor]

HORSE PROTECTION ACT

**In re: ALEX R. TAYLOR, a.k.a. RICKY TAYLOR, AN INDIVIDUAL
d/b/a JUSTIN TIME STABLES; AND TIM HOLLEY, AN INDIVIDUAL
d/b/a TIM HOLLEY STABLES.**

HPA Docket No. 01-0029.

Decision and Order as to Tim Holley d/b/a Tim Holley Stables.

Filed February 1, 2002.

HPA – Default – Failure to answer.

Colleen Carroll, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding was instituted under the Horse Protection Act, as amended (15 U.S.C. § 1821 *et seq.*)(the “Act”), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents violated the Act.

The Hearing Clerk served on respondent Tim Holley, d/b/a Tim Holley Stables, by certified mail, return receipt requested, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). Said respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by said respondent’s failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice. Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than \$2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)), the Secretary of Agriculture, by regulation effective September 2, 1997, adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from \$2,000 to \$2,200.¹ The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act

¹62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(2)(vii).

provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation. 15 U.S.C. § 1825(c).

Congress has recognized the seriousness of soring horses. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of “soring” horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse’s limb, or by using various action or training devices such as heavy chains or “knocker boots” on the horse’s limbs. When a horse’s front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly

with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The 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 the 9th Circuit Rule 36-3), as follows:

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

Section 6(b)(1) of the Horse Protection Act provides that the Secretary of Agriculture shall determine the amount of the civil penalty, as follows:

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, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.² Effective September 2, 1997, the Secretary of Agriculture adjusted the maximum civil penalty for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from \$2,000 to \$2,200.³ Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for each violation of the Horse Protection Act. Therefore, I assess Respondent a \$2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of sorring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end sorring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business. See H.R. Rep. No. 94-1174, at 11

²See, e.g., *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 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 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3^d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

³See note 1.

(1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706. Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.⁴ Therefore, pursuant to section 6(c) of the Act, and based upon the record herein, and the recommendations of the complainant, a disqualification of one year is warranted.

FINDINGS OF FACT

1. Respondent Tim Holley is an individual doing business as Tim Holley Stables, and whose mailing address is 35 Tamin Cove, Byhalia, Mississippi 38611. At all times mentioned herein, said respondent was a registered owner of a Tennessee Walking Horse named "A Touch of Genius."

2. On or about May 27, 2000, respondent Tim Holley allowed the entry of "A Touch of Genius" in the Trainers Show as entry number 448 in class number 61, for the purpose of showing the horse in that class.

⁴*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, 591 (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. 892, 982 (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, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (1993), *aff'd*, 28 F.3d 279 (3rd Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

3. Respondent Tim Holley has the ability to pay the maximum civil penalty assessable pursuant to section 6(b)(1) of the Act (15 U.S.C. § 1825(b)(1)), and assessment of such civil penalty will not affect his ability to continue to do business.

CONCLUSIONS OF LAW

On or about May 27, 2000, respondent Tim Holley allowed the entry of "A Touch of Genius" in the Trainers Show as entry number 448 in class number 61, while the horse was "sore," as that term is defined in the Act, for the purpose of showing the horse in that class, in violation of section 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)).

ORDER

1. Respondent Tim Holley, d/b/a Tim Holley Stables is assessed a civil penalty of \$2,200.

2. Respondent Tim Holley, d/b/a Tim Holley Stables is disqualified for one year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction.⁵

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 March 14, 2002 and effective March 15, 2002.-Editor]

⁵"Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in any area where spectators are not allowed, and financing the participation of others in equine events.

PLANT QUARANTINE ACT

**In re: RAMELA TRADING CORPORATION.
P.Q. Docket No. 01-0001.
Decision Without Hearing By Reason Of Default.
Filed October 11, 2001.**

P.Q. – Default – Failure to answer.

Rick Herndon, 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 movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on October 5, 2000, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Ramala Trading Corporation, herein referred to as the respondent, is a corporation with a mailing address of 135-22 123rd Street, Ozone Park, New York 11420.
2. On or about October 3, 1998, respondent imported six boxes of mangoes from the Dominican Republic into the United States in violation of 7 C.F.R. §319.56 because importation of mangoes from the Dominican Republic into the United States is prohibited.
3. On or about October 3, 1998, respondent failed to list six boxes of mangoes from the Dominican Republic in violation of 7 C.F.R. §319.56-5(a).

4. On or about October 4, 1998, respondent imported thirty-eight boxes of mangoes from the Dominican Republic into the United States in violation of 7 C.F.R. §319.56 because such importation is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three thousand dollars (\$3,000.00). 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 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to
P.Q. Docket No. 01-0001.

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 10, 2002.-Editor]

In re: VIBERT SOOKRAJ.
P.Q. Docket No. 99-0044.
Decision Without Hearing By Reason Of Default.
Filed November 2, 2001.

PQ – Default – Failure to answer.

Tracey Manoff, for Complainant.
Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits 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 June 4, 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 3, 1998, the respondent imported thirteen (13) mangoes and approximately one (1) pound of genips from Guyana into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of mangoes and genips from Guyana into the United States is prohibited.

The respondent 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. Vibert Sookraj, respondent herein, is an individual whose mailing address is 164-50 - 75 Ave., Flushing, NY 11366.

2. On or about August 3, 1998, the respondent imported thirteen (13) mangoes and approximately one (1) pound of genips from Guyana into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of mangoes and genips from Guyana into the United States is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of 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. 99-44.

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 13, 2002.-Editor]

In re: EDMUND TELLO.
P.Q. Docket No. 01-0006.
Decision Without Hearing By Reason Of Default.
Filed March 7, 2002.

PQ – Default – Failure to answer.

Susan Golabek, 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 5, 2001, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about February 3, 1999, the respondent imported twenty (20) avocados and twenty (20) tree tomatoes from Guatemala into the United States at Los Angeles, California, in violation of 7 C.F.R. § 319.56, because the importation of avocados and tree tomatoes from Guatemala into the United States is prohibited.

The respondent 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. Edmund Tello, respondent herein, is an individual whose mailing address is 7681 Baylor Dr., #12, Westminster, CA 92683.

2. On or about February 3, 1999, the respondent imported twenty (20) avocados and twenty (20) tree tomatoes from Guatemala into the United States at Los Angeles, California, in violation of 7 C.F.R. § 319.56, because the importation of avocados and tree tomatoes from Guatemala into the United States is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of 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. 01-06.

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 20, 2002.-Editor]

In re: CHRIS VALEK.
P.Q. Docket No. 01-0012.
Decision Without Hearing By Reason Of Default.
Filed January 25, 2002.

PQ – Default – Failure to answer.

Rick Herndon, 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 movement of Hawaiian fruits and vegetables (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 June 6, 2000, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about June 7, 1999, Respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 4.4 pounds of fresh mangoes from Hawaii into the continental United States in violation of Sections 318.13(b) and 318.13-2(a)(1) of the regulations (7 C.F.R. §§ 318.13(b), 318.13-2(a)(1)) because such plant parts are prohibited movement from Hawaii into the continental United States.

Respondent filed an answer which admitted the material allegations of the complaint but indicated that he believed the fine was \$100.00. Complainant seeks a penalty of \$500.00. An Order was issued directing the parties to show cause whether Respondent was advised that the fine would be \$100.00.

In a letter filed on December 7, 2001, Respondent stated that he was unaware that he had committed a violation. Complainant responded to the show cause order that it offered to settle the matter with a \$100.00 fine but that Respondent rejected the offer. In the circumstances, a penalty of \$500.00 will be imposed.

Respondent's admission of the material facts 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 herein as the Findings of Fact. 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. Chris Valek, hereafter referred to as the Respondent, is an individual with a mailing address of 66-619 Kam Highway, Haleiwa, Hawaii 96712. In Respondent's December 7, 2001, letter to the Hearing Clerk, he listed his address as 1354 Chenango Street, Binghamton, New York 13901.

2. On or about June 7, 1999, Respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 4.4 pounds of fresh mangoes from Hawaii into the continental United States in violation of Sections 318.13(b) and 318.13-2(a)(1) of the regulations (7 C.F.R. §§ 318.13(b), 318.13-2(a)(1)) because such plant parts are prohibited movement from Hawaii into the continental United States.

Conclusion

By reason of the facts contained in the Findings of Fact above, Respondent has violated 7 C.F.R. §§ 318.13(b), 318.13-2(a)(1). Therefore, the following Order is issued.

Order

Respondent, Chris Valek, 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 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.

Respondent shall indicate that payment is in reference to P.Q. Docket No. 00-0012. The Hearing Clerk is directed to send copies of this Order to both addresses for Respondent as set forth in paragraph one of the Findings of Fact.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective 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 29, 2002.-Editor]

In re: JEREMY SCHWEIGERT.
P.Q. Docket No. 01-0004.
Decision Without Hearing By Reason Of Default.
Filed January 22, 2002.

PQ – Default – Failure to answer.

James Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrator proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. § 11), and regulations promulgated thereunder (9 C.F.R. § 94.11). This proceeding was instituted by a complaint filed on December 6, 2000, by the Administrator, Animal and Plant Health Inspection Service, United States Department of

Agriculture. Pursuant to an Order filed on March 23, 2001, I extended the time for Respondent to file an answer to the complaint until June 15, 2001. Respondent has not filed an answer to date. Thereafter, Complainant filed a motion for default decision which was served on Respondent on October 31, 2001. Respondent did not file timely objections to the motion.

Pursuant to section 1.136(c) of the Uniform Rules of Practice (7 C.F.R. § 1.136(c)), failure to respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. Therefore, by his failure to answer, Respondent is deemed to have admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. The mailing address of Jeremy Schweigert, Respondent, is HHC 1-77 AR, Unit B6007, APO AE 09226. Respondent was served with a copy of Complainant's motion for default decision at "Department of Army, Headquarters Company, 1st Battalion, 8th Calvary, Fort Hood, TX 76545."

2. On March 10, 2000, at the Dallas/Fort Worth International Airport, Texas, Respondent imported one can of Kalbs-Leberwurst, a meat derived from Ruminant and swine, into the United States from Germany.

Conclusion

By reason of the facts contained in the Findings of Fact above, Respondent has violated 9 C.F.R. § 94.11.

Therefore, the following Order is issued.

Order

Respondent is assessed a civil penalty of five hundred dollars (\$500.00). Respondent shall send a certified check or money order for five hundred (\$500.00), payable to "Treasurer of the United States," to USDA, APHIS, Accounts Receivable, P.O. Box 3334, Minneapolis, Minnesota 55403, within thirty days (30) from the effective date of this Order. The certified check or money order should include the docket number of this proceeding. The Hearing Clerk is directed to send a copy of this Order to both addresses for Respondent as set forth in paragraph one of the Findings of Fact.

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 11, 2002.-Editor].

CONSENT DECISIONS

(Not published herein - Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

R.J. Produce, Inc., d/b/a Walsh Farms, a corporation; and Rita Walsh and Terry Ford, individuals. AMAA Docket No. 02-0002. 6/28/02.

ANIMAL WELFARE ACT

University of Connecticut. AWA Docket No. 01-0028. 1/9/02.

Garry L. Stewart d/b/a Brown Laboratories. AWA Docket No. 01-0057. 1/11/02.

Thomas Coleman and Barbara Coleman, d/b/a Tomber Kennels. AWA Docket No. 98-0026. 3/6/02.

Moddy Wayne Pierce. AWA Docket No. 99-0020. 3/13/02.

Do-Bo-Tri Kennel, LTD., a Missouri corporation; James C. Hughes, a.k.a. Jim Hughes, an individual; Sharon Sue Hughes, also known as Sue Hughes, an individual; John C. "Curtis" Baker, an individual; and Sue Kerr, an individual; and Paul Douglas Hughes, an individual (Consent Decision and Order as to John C. "Curtis" Baker only). AWA Docket No. 01-0020. 3/26/02.

James Rector, Anita Rector, and Mary Jo Lee. AWA Docket No. 00-0011. 3/26/02.

Bruce C. Trammell and Nancy S. Trammell, d/b/a Trammell Trail Treasures. AWA Docket No. 00-0037. 4/8/02.

Do-Bo-Tri Kennel, LTD., a Missouri corporation; James C. Hughes, a.k.a. Jim Hughes, an individual; Sharon Sue Hughes, a.k.a. as Sue Hughes, an individual; John C. "Curtis" Baker, an individual; and Sue Kerr, an individual; and Paul Douglas Hughes, an individual (Consent Decision and Order as to Sue Kerr only). AWA Docket No. 01-0020. 4/11/02.

Diana R. Cziraky, an individual, a.k.a. Diana R. McCourt; The International Siberian Tiger Foundation, an Ohio corporation; The Siberian Tiger Foundation, an unincorporated association; and Siberian Tiger Conservation Association, a Delaware corporation. AWA Docket No. 01-0049. 4/11/02

David B. Kanagy, d/b/a Kanagy Kanine Kennel. AWA Docket No. 01-0051. 5/3/02.

Lou H. Brindley, d/b/a Sunset Kennels. AWA Docket No. 01-0007. 6/7/02.

James Hunsberger, d/b/a DJTI Kennels. AWA Docket No. 01-0041. 6/14/02.

Michele Westfall. AWA Docket No. 01-0010. 6/18/02

Ross Wilmoth, d/b/a Wild Wilderness Safari. AWA Docket No. 01-0046. 6/20/02.

US Airways, Inc., a Delaware corporation. AWA Docket No. 01-0038. 6/21/02.

ANIMAL QUARANTINE AND RELATED LAWS

Edward B. Mantle, Jr., d/b/a Mantle Stockyards, Schmidt Livestock, Inc., and Murphy Family Farms (Consent Decision Regarding Murphy Family Farms only). A.Q. Docket No. 01-0014. 1/4/02

Edward B. Mantle, Jr., d/b/a Mantle Stockyards, Schmidt Livestock, Inc., and Murphy Family Farms (Consent Decision Regarding Edward B. Mantle, Jr., d/b/a Mantle Stockyards only). A.Q. Docket No. 01-0014. 4/15/02

Larry Dolan, Dolan, Ludeman, Sunderland & Co., FRS Farms, Inc., and Valley Pride Pack, Inc. (Consent Decision Regarding Larry Dolan only). A.Q. Docket No. 01-0007. 4/18/02.

Larry Dolan, Dolan, Ludeman, Sunderland & Co., FRS Farms, Inc., and Valley Pride Pack, Inc. (Consent Decision Regarding Dolan, Ludeman, Sunderland & Company only). A.Q. Docket No. 01-0007. 4/18/02.

All-Ways Forwarding International, Inc. A.Q. Docket No. 00-0004. 5/3/02.

Bradley Dean Goodrich. A.Q. Docket No. 02-0002. 6/20/02.

BEEF PROMOTION AND RESEARCH ACT

Wallace McRae, and Rocker Six Cattle Co. BPA Docket No. 00-0001.
4/23/02.

ENDANGERED SPECIES ACT

James B. Potratz. E.S.A. Docket 01-0001. 3/27/02.

HORSE PROTECTION ACT

Roger Ivins, and individual; and Fannie Ivins, and individual (Consent Decision and Order as to Roger Ivins only). HPA Docket No. 01-0005. 1/4/02.

Maxie Wyatt Strickland and Archie Dock Clark. (Consent Decision and Order as to Archie Dock Clark only). HPA Docket No. 01-0014. 1/14/02.

Franklin LaRue McWaters, a/k/a LaRue McWaters. HPA Docket No. 99-0031.
1/17/02.

Red Eagle Farms, also know as Red Eagle Farm, a general partnership or unincorporated association; Randall W. Dixon, an individual; Gloria Dixon, an individual; and Willie Cook, an individual. (Consent Decision and Order as to Willie Cook only). HPA Docket No. 01-0007/HPA Docket No. 01-0009.
2/12/02.

Ronny Davidison, an individual; Ronny Davidison Stables, an unincorporated association; Rodney C. Huddleston, an individual; and Stephanie Huddleston, an individual. (Consent Decision and Order as to Respondents Ronny Davidison and Ronny Davidison Stables only). HPA Docket No. 01-0006. 3/8/02.

PLANT QUARANTINE ACT

Hatem Alrabadi. P.Q. Docket No. 01-0013. 3/28/02.

Sky Chefs, Inc., d/b/a LSG/Sky Chefs. P.Q. Docket No. 02-0005. 5/2/02.

Herman E. Hoffman, Jr., d/b/a Herman and Associates, and Billy G. Turner, d/b/a Wes and Mom Trucking (Consent Decision as to Herman E. Hoffman, Jr., d/b/a Herman and Associates only). P.Q. Docket No. 00-0010. 5/17/02.

VETERINARIAN ACT

Lyle L. Warden. V.A. Docket No. 02-0001. 3/6/02

AGRICULTURE DECISIONS

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

AGRICULTURE DECISIONS

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

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

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

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

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 (from the beginning of the annual Volume) 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.

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PACKERS AND STOCKYARDS ACT

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PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISION

**In re: WAYNE W. COBLENTZ, d/b/a COBLENTZ & SONS
LIVESTOCK.**

P. & S. Docket No. D-01-0013.

Decision and Order.

Filed May 30, 2002.

Packers and Stockyards – Default – Failure to file answer – Failure to file objections – Failure to pay when due – Failure to pay full purchase price – NSF checks.

The Judicial Officer (JO) affirmed the Default Decision issued by Administrative Law Judge Jill S. Clifton (ALJ): (1) finding Respondent issued checks in payment for livestock purchases which checks were returned unpaid by the bank upon which they were drawn because Respondent did not have and maintain sufficient funds on deposit and available in the accounts upon which the checks were drawn to pay the checks when presented; (2) finding Respondent purchased livestock and failed to pay, when due, the full purchase price of the livestock; (3) finding \$281,970.90 of the \$477,591.30 Respondent failed to pay when due remained unpaid at the time the Complaint was issued; (4) concluding Respondent willfully violated 7 U.S.C. §§ 213(a) and 228b; (5) ordering Respondent to cease and desist from violating 7 U.S.C. §§ 213(a) and 228b; and (6) suspending Respondent as a registrant under the Packers and Stockyards Act for a period of 5 years. The JO rejected Respondent's contentions that the Default Decision should be set aside based on Respondent's late payment of livestock sellers, Respondent's agreement with one livestock seller to effect payment in a manner other than required by 7 U.S.C. § 228b(a), and Respondent's belief that an answer to the complaint was not required.

Charles E. Spicknall, for Complainant.

Bruce H. Wilson, for Respondent.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

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

PROCEDURAL HISTORY

JoAnn Waterfield, Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding by filing a "Complaint" on September 26, 2001. Complainant instituted this proceeding under the Packers and Stockyards Act, 1921, as amended and supplement (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that Wayne W. Coblentz, d/b/a Coblentz & Sons

Livestock [hereinafter Respondent], willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b): (1) by issuing checks in payment for livestock purchases which checks were returned unpaid by the bank upon which they were drawn because Respondent did not have and maintain sufficient funds on deposit and available in the accounts upon which the checks were drawn to pay such checks; and (2) by purchasing livestock and failing to pay, when due, the full purchase price of the livestock (Compl. ¶¶ II-III).

On October 2, 2001, the Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated September 27, 2001.¹ 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 October 24, 2001, the Hearing Clerk sent a letter to Respondent informing him that an answer to the Complaint had not been filed within the time required in the Rules of Practice.²

On March 18, 2002, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed "Motion for a Decision Without Hearing By Reason of Default" and a proposed "Decision Without Hearing By Reason of Default." On March 23, 2002, the Hearing Clerk served Respondent with Complainant's Motion for Decision Without Hearing By Reason of Default, Complainant's proposed Decision Without Hearing By Reason of Default, and the Hearing Clerk's service letter dated March 20, 2002.³ Respondent failed to file objections to Complainant's Motion for Decision Without Hearing By Reason of Default and Complainant's proposed Decision Without Hearing By Reason of Default within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 12, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Decision Without Hearing By Reason of Default" [hereinafter Initial Decision and Order]: (1) finding Respondent issued checks in payment for livestock purchases which checks were returned unpaid by the bank upon which they were drawn because Respondent did not have and maintain sufficient funds on deposit and available in the accounts upon which the checks were drawn to pay the checks when presented; (2) finding Respondent purchased livestock and failed to pay, when due, the full purchase price of the livestock; (3) finding \$281,970.90 of the \$477,591.30 Respondent failed to pay, when due, remained

¹See Domestic Return Receipt for Article Number 7099 3400 0014 4578 8393.

²See letter dated October 24, 2001, from Joyce A. Dawson, Hearing Clerk, to Wayne W. Coblentz.

³See Domestic Return Receipt for Article Number 7099 3400 0014 4579 3038.

unpaid at the time the Complaint was issued; (4) concluding Respondent willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b); (5) ordering Respondent to cease and desist from violating sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b); and (6) suspending Respondent as a registrant under the Packers and Stockyards Act for a period of 5 years (Initial Decision and Order at 2-3).

On May 10, 2002, Respondent appealed to and requested oral argument before the Judicial Officer. On May 28, 2002, Complainant filed “Complainant’s Opposition to Respondent’s Appeal Petition.” On May 29, 2002, the Hearing Clerk transmitted the record to the Judicial Officer to rule on Respondent’s request for oral argument and issue a decision.

Respondent’s request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Complainant and Respondent have thoroughly addressed the issues and the issues are not complex; thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the ALJ’s Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(a)), I adopt with minor modifications the 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.

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 9—PACKERS AND STOCKYARDS

....

SUBCHAPTER III—STOCKYARDS AND STOCKYARD DEALERS

§ 201. “Stockyard owner”; “stockyard services”; “market agency”; “dealer”; defined

When used in this chapter—

....

(c) The term “market agency” means any person engaged in the

business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.

§ 213. Prevention of unfair, discriminatory, or deceptive practices

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

....

SUBCHAPTER V—GENERAL PROVISIONS

....

§ 228b. Prompt payment for purchase of livestock

(a) Full amount of purchase price required; methods of payment

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his

duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) Waiver of prompt payment by written agreement; disclosure requirements

Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) Delay in payment or attempt to delay deemed unfair practice

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit

the meaning of the term “unfair practice” as used in this chapter.

7 U.S.C. §§ 201(c)-(d), 213, 228b.

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

Introduction

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 in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, 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).

Findings of Fact

1. Respondent is an individual whose business mailing address is P.O. Box 650, Sugarcreek, Ohio 44681.
2. Respondent, at all times material to this proceeding, was:
 - (a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and
 - (b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock on a commission basis.
3. Respondent, in connection with his operations subject to the Packers and Stockyards Act, on or about the dates and in the transactions set forth in paragraph II of the Complaint, issued checks in payment for livestock purchases which checks were returned unpaid by the bank upon which they were drawn because Respondent did not have and maintain sufficient funds on deposit and available in the accounts upon which the checks were drawn to pay the checks when presented.
4. (a) Respondent, in connection with his operations subject to the Packers and Stockyards Act, on or about the dates and in the transactions set forth in paragraph III(a) of the Complaint, purchased livestock and failed to

pay, when due, the full purchase price of the livestock.

(b) At the time the Complaint was issued, on September 20, 2001, \$281,970.90 of the \$477,591.30 referred to in paragraph III(a) of the Complaint remained unpaid.

Conclusions of Law

By reason of the Findings of Fact in this Decision and Order, Respondent willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in Respondent's Appeal Brief. First, Respondent asserts he has paid all of the debts that are the subject of this proceeding, except his debt to The Kidron Auction, Inc., and that he has an agreement with The Kidron Auction, Inc., to effect payment to The Kidron Auction, Inc., in a manner other than required in section 409(a) of the Packers and Stockyards Act (7 U.S.C. § 228b(a)). Respondent admits that his agreement with The Kidron Auction, Inc., does not "technically satisfy" the requirements in section 409(b) of the Packers and Stockyards Act (7 U.S.C. § 228b(b)) for waiver of the full and prompt payment requirements in section 409(a) of the Packers and Stockyards Act (7 U.S.C. § 228b(a)) because Respondent and The Kidron Auction, Inc., did not agree in writing before Respondent made the purchases of livestock from The Kidron Auction, Inc., which are the subject of this proceeding. (Respondent's Appeal Brief at 1st and 2nd unnumbered pages.)

I agree with Respondent's assertion that the agreement between Respondent and The Kidron Auction, Inc., described in Respondent's Appeal Brief, does not meet the requirements in section 409(b) of the Packers and Stockyards Act (7 U.S.C. § 228b(b)) for waiver of the full and prompt payment requirements in section 409(a) of the Packers and Stockyards Act (7 U.S.C. § 228b(a)).⁴ Therefore, Respondent's assertion in his Appeal Brief

⁴Respondent states the agreement with The Kidron Auction, Inc., does not "technically satisfy" the requirements of section 409(b) of the Packers and Stockyards Act (7 U.S.C. § 228b(b)) because Respondent and The Kidron Auction, Inc., did not agree in writing to effect payment in a manner other than provided in section 409(a) of the Packers and Stockyards Act (7 U.S.C. § 228b(a)) before Respondent made the purchases of livestock from The Kidron Auction, Inc., which are the subject of

(continued...)

that he has an agreement with The Kidron Auction, Inc., for the payment of purchases of livestock, which are the subject of this proceeding, is not a basis for setting aside the ALJ's Initial Decision and Order. Moreover, Respondent's late payment, in violation of section 409(a) of the Packers and Stockyards Act (7 U.S.C. § 228b(a)), to other livestock sellers identified in the Complaint, is not a basis for setting aside the ALJ's Initial Decision and Order.

Second, Respondent contends his failure to answer the Complaint was an honest mistake. Respondent asserts he believed his communication with Charles E. Spicknall, Complainant's counsel; his payment of the debts that are the subject of this proceeding; and his agreement with The Kidron Auction, Inc., would "remedy the present matter." (Respondent's Appeal Brief at 2nd unnumbered page.)

Respondent has raised no meritorious basis for his belief that he was not required to answer the Complaint. Moreover, I cannot find anything in the record before me that would cause Respondent to believe that he would not be deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint if he failed to answer the Complaint within 20 days after the Hearing Clerk served him with the Complaint.

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's September 27, 2001, service letter on October 2, 2001.⁵ Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

(...continued)

this proceeding. I infer Respondent's position is that the requirement of a written agreement *prior* to the livestock purchases is not an important requirement. Respondent cites no basis for this position, and I can find no basis for Respondent's position. The Packers and Stockyards Act explicitly provides that the parties to the purchase and sale of livestock may expressly agree in writing, *before the purchase or sale*, to effect payment in a manner other than required in section 409(a) of the Packers and Stockyards Act (7 U.S.C. § 228b(a)). Legislative history applicable to the 1976 amendment to the Packers and Stockyards Act, which added section 409, emphasizes that a written agreement to waive the prompt and full payment requirements must be made prior to the purchase or sale of livestock, as follows:

This section adds to title IV of the Packers and Stockyards Act a new section 409 which, *absent an express prior agreement in writing between the buyer and seller*, requires each packer, market agency, or dealer purchasing livestock before the close of the next business day following the purchase of livestock and transfer of possession thereof to wire transfer funds to the seller's account or to deliver to the seller or his duly authorized agent, at the point of transfer of possession of the livestock, a check for the full amount of the purchase price.

H.R. Rep. No. 94-1043, at 7 (1976) (emphasis added).

⁵See note 1.

§ 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.

§ 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.

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

Respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, 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 in this complaint.

Compl. at 6.

Similarly, the Hearing Clerk informed Respondent in the September 27, 2001, 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:

September 27, 2001

Mr. Wayne W. Coblentz
d/b/a Coblentz & Sons Livestock
P.O. Box 650
Sugarcreek, Ohio 44681

Gentlemen:

Subject: In re: Wayne W. Coblentz, d/b/a Coblentz & Sons Livestock,
Respondent
P&S Docket No. D-01-0013

Enclosed is a copy of a Complaint, which has been filed with this office under the Packers and Stockyards Act, 1921.

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 three copies of your written and signed answer to the Complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

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 the 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 appear on the last page of the complaint.

Sincerely,

/s/

JOYCE A. DAWSON

Hearing Clerk

On October 24, 2001, the Hearing Clerk sent a letter to Respondent informing him that an answer to the Complaint had not been filed within the time required in the Rules of Practice.⁶ Respondent did not respond to the Hearing Clerk's October 24, 2001, letter.

⁶See note 2.

On March 18, 2002, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Motion for a Decision Without Hearing By Reason of Default and a proposed Decision Without Hearing By Reason of Default. On March 23, 2002, the Hearing Clerk served Respondent with Complainant's Motion for Decision Without Hearing By Reason of Default, Complainant's proposed Decision Without Hearing By Reason of Default, and the Hearing Clerk's service letter dated March 20, 2002.⁷ The Hearing Clerk informed Respondent in the March 20, 2002, service letter that he had 20 days within which to file objections to Complainant's proposed Decision Without Hearing By Reason of Default, as follows:

March 20, 2002

Mr. Wayne W. Coblentz
d/b/a Coblentz & Sons Livestock
P.O. Box 650
Sugarcreek, Ohio 44681

Dear Sir:

Subject: In re: Wayne W. Coblentz, d/b/a Coblentz & Sons Livestock,
Respondent
P&S Docket No. D-01-0013

Enclosed is a copy of Complainant's Motion for Decision Without Hearing by Reason of Default, together with a copy of the Proposed Decision Without Hearing by Reason of Default, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable rules of practice, respondents [sic] will have 20 days from the receipt of this letter in which to file with this office an original and four copies of your objections to the Proposed Decision.

Sincerely,
/s/
JOYCE A. DAWSON
Hearing Clerk

⁷See note 3.

Respondent failed to file objections to Complainant's Motion for Decision Without Hearing By Reason of Default and Complainant's proposed Decision Without Hearing By Reason of Default within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,⁸ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.⁹

⁸See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *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).

⁹See generally *In re Jim Aron*, 58 Agric. Dec. 451 (1999) (holding the administrative law judge properly issued a default decision where the respondent's first filing in the proceeding was 5 months 1 day after the Hearing Clerk served him with the complaint and 133 days after the respondent's answer was due and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations issued under the Packers and Stockyards Act (9 C.F.R. §§ 201.29-30) [hereinafter the Regulations] as alleged in the complaint); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408 (1998) (holding the administrative law judge properly issued the default decision where the

(continued...)

(...continued)

respondents filed an answer 23 days after the Hearing Clerk served them with the complaint and holding the respondents are deemed, by their failure to file a timely answer, to have admitted violating sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) and section 201.43 of the Regulations (9 C.F.R. § 201.43) as alleged in the complaint); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the administrative law judge properly issued the default decision where the respondents' first filing was 46 days after the Hearing Clerk served the complaint on respondents and holding respondent Charles Contris is deemed, by the failure to file a timely answer, to have admitted violating sections 202(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 192(a), 228b) and section 201.200 of the Regulations (9 C.F.R. § 201.200) as alleged in the complaint); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the administrative law judge properly issued the default decision where the respondents' first filing was 46 days after the Hearing Clerk served the complaint on the respondents and holding respondent Spring Valley Meats, Inc., is deemed, by the failure to file a timely answer, to have admitted violating sections 202(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 192(a), 228b) and section 201.200 of the Regulations (9 C.F.R. § 201.200) as alleged in the complaint); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the administrative law judge properly issued the default decision where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted violating sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) as alleged in the complaint); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the administrative law judge properly issued the default decision where the respondent did not file an answer and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29-.30) as alleged in the complaint); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the administrative law judge properly issued the default decision where the respondent did not file an answer and holding the respondent is deemed, by the failure to file a timely answer, to have admitted violating sections 202(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 192(a), 228b) as alleged in the complaint); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the administrative law judge properly issued the default decision where the respondent did not file an answer and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29-.30) as alleged in the complaint); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the administrative law judge properly issued the default decision where the respondent failed to file a timely answer and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating sections 307 and 312(a) of the Packers and Stockyards Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42) as alleged in the complaint); *In re A.W. Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the administrative law judge properly issued the default order where the respondent failed to file a timely answer and holding the respondent is deemed, by the failure to file a timely answer, to have admitted violating 7 U.S.C. §§ 192(a), 204, 228b and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29-.30) as alleged in the complaint); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the administrative law judge properly issued the default decision where the respondent failed to file a timely answer and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) as alleged in the complaint), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (holding the administrative law judge properly issued the default decision where the respondent failed

(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 did not file a timely answer. Respondent's first and only filing in this proceeding was May 10, 2002, 7 months 8 days after the Hearing Clerk served Respondent with the Complaint. 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)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁰

(...continued)

to file a timely answer and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) and section 201.43(b) of the Regulations (9 C.F.R. § 201.43(b)) as alleged in the complaint), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the administrative law judge properly issued the default decision where the respondent failed to file a timely answer and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) and section 201.55 of the Regulations (9 C.F.R. § 201.55) as alleged in the complaint); *In re Pastures, Inc.*, 39 Agric. Dec. 395 (1980) (holding the administrative law judge properly issued the default decision where the respondents failed to file a timely answer to the complaint and holding the respondents are deemed, by failing to file a timely answer, to have admitted violating 7 U.S.C. §§ 192(a), 204, 228b(a) and section 201.43(b) of the Regulations (9 C.F.R. § 201.43(b)) as alleged in the complaint); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171 (1980) (holding the administrative law judge properly issued the default decision where the respondents failed to file a timely answer to the complaint and holding the respondents are deemed, by failing to file a timely answer, to have admitted violating sections 202(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 192(a), 228b(a)) and sections 201.29, 201.30, and 201.43(b) of the Regulations (9 C.F.R. §§ 201.29-30, .43(b)) as alleged in the complaint).

¹⁰See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding 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 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

(continued...)

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

ORDER

Paragraph I

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which the checks are drawn to pay the checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

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

Paragraph II

Respondent is suspended as a registrant under the Packers and Stockyards Act for a period of 5 years; *Provided, however,* That upon application to the Packers and Stockyards Programs a supplemental order may be issued terminating the suspension of Respondent as a registrant under the Packers and Stockyards Act at any time after the expiration of the initial 150 days of the 5-year period of suspension upon demonstration by Respondent that the livestock sellers identified in the Complaint have been paid in full; *And provided further,* That this Order may be modified upon application to the Packers and Stockyards Programs to permit Respondent's salaried employment by another registrant or a packer after the expiration of the initial 150 days of the 5-year period of suspension and upon demonstration of circumstances warranting modification of the Order, such as a reasonable and current schedule of restitution.

The registration-suspension provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

(...continued)

failure to file a timely answer).

PACKERS AND STOCKYARDS ACT**DEFAULT DECISIONS**

In re: MONTE VISTA LIVESTOCK AUCTION, INC., JODY L. PETERSON.

P&S Docket No. D-01-0007.

Decision Without Hearing By Reason of Default.

Filed March 1, 2002.

Ann Parnes, for Complainant.

Respondents, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

P&S – Default – No answer.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain, Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that Respondents willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*). 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 on Respondents by certified mail on June 15, 2001. Accompanying the complaint was a cover letter informing Respondents 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 in the complaint and a waiver of the right to an oral hearing.

Respondents 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, 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. Monte Vista Livestock Auction, Inc., hereinafter referred to as Respondent Monte Vista, is a corporation organized and existing under the laws of the state of Colorado. Its business mailing address is 5660

East Highway 160, Monte Vista, Colorado 81144.

2. Respondent Monte Vista is and at all times material herein was:
 - a) Engaged in the business of conducting and operating Monte Vista Livestock Auction, Inc. Stockyard, a posted stockyard subject to the provisions of the Act;
 - (b) Engaged in the business of a market agency selling livestock on a commission basis and as a dealer buying and selling livestock in commerce for its own account; and
 - (c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.
3. Jody L. Peterson, hereinafter Respondent Peterson, is an individual whose business mailing address is 5660 East Highway 160, Monte Vista, Colorado 81144.
4. Respondent Peterson is, and at all times material herein was:
 - (a) Secretary and Treasurer of Respondent Monte Vista;
 - (b) Owner of 90% of the stock issued by Respondent Monte Vista;
 - (c) Responsible for the direction, management and control of Respondent Monte Vista;
 - (d) A market agency and dealer within the meaning of and subject to the provisions of the Act; and
 - (e) The *alter ego* of Respondent Monte Vista.
5. As set forth in section II of the complaint, during the period July 31, 2000, through August 25, 2000, Respondent Monte Vista, under the direction, management, and control of Respondent Peterson, operated subject to the Act, notwithstanding the fact that its current liabilities exceeded its current assets. Corporate Respondent's current liabilities presently exceed its current assets.
6. As set forth in section III(a) of the complaint, Respondent Monte Vista, under the direction, management and control of Respondent Peterson, issued insufficient funds checks in purported payment of the net proceeds from the sale of consigned livestock.
7. As set forth in section III(b) of the complaint, Respondent Monte Vista, under the direction, management and control of Respondent Peterson, failed to remit, when due, the net proceeds from the sale of consigned livestock.
8. As set forth in section IV of the complaint, Respondent Monte Vista, under the direction, management and control of Respondent Peterson,

failed to maintain and use properly its Custodial Account for Shippers' Proceeds.

Conclusions

By reason of the facts alleged in Finding of Fact 5, Respondent Monte Vista's financial condition does not meet the requirements of the Act (7 U.S.C. § 204), and the Respondents have willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)).

By reason of the facts alleged in Findings of Fact 6 and 7, Respondents have willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and section 201.43 of the regulations (9 C.F.R. § 201.43).

By reason of the facts alleged in Finding of Fact 8, Respondents have willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42).

Respondents did not file an answer within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission of all of the material allegations in the complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, 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.

Order

Respondent Monte Vista, and its *alter ego*, Respondent Peterson, their officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a market agency selling on a commission basis under the Act while their current liabilities exceed their current assets;
2. Issuing checks in payment of the net proceeds from the sale of consigned livestock without having sufficient funds on deposit and available in the custodial account upon which such checks are drawn to pay such checks when presented;
3. Failing to remit, when due, the net proceeds received from the sale of consigned livestock;
4. Failing to deposit in the Custodial Account for Shippers' Proceeds within the

time prescribed by section 201.42 of the regulations (9 C.F.R. § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock; and

5. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42).

Respondent Monte Vista is suspended as a registrant under the Act for a period of 28 days and thereafter until it is demonstrated that Respondent Monte Vista is solvent and the shortage in Respondent Monte Vista's Custodial Account for Shippers' Proceeds has been eliminated. Respondent Peterson is prohibited from being registered under the Act for a period of 28 days. Pursuant to section 303 of the Act, Respondent Peterson is prohibited from carrying on the business of a market agency or dealer without being registered. If after the 28 day suspension period, Respondents demonstrate solvency and the elimination of the custodial account deficiency, a supplemental order will be issued in this proceeding terminating the suspension of Respondent Monte Vista and providing that Respondent Peterson may be registered.

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (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 17, 2002 - Editor]

**In re: WES MYERS d/b/a WES MYERS LIVESTOCK.
P&S Docket No. D-01-0008.
Decision Without Hearing By Reason of Default.
Filed April 15, 2002.**

Eric Paul, for Complainant.
Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

P&S – Default – No answer.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter “the Act”, by a complaint filed by JoAnn Waterfield, Deputy Administrator, Grain Inspection, Packers and Stockyards

Administration (GIPSA), United States Department of Agriculture, alleging that the Respondent wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon Respondent Wes Meyers by a certified mail letter that was forwarded to Respondent's new address, P.O. Box 7292, Bozeman, MT 59771-7292, and signed for on June 27, 2001, by Nita Myers. Respondent Wes Myers has failed to file an answer within the time prescribed in the Rules of Practice (7 C.F.R. § 1.130 *et seq.*), and the material facts alleged in the complaint, which are admitted by the failure of Respondent Wes Myers to file an answer, are adopted and set forth herein as findings of fact.

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

Findings of Fact

1. Respondent Wes Myers, hereinafter referred to as Respondent, is an individual whose current address is P.O. Box 7292, Bozeman, MT 59771-7292, and whose business address at all times material herein was Route 1, Box 114, Tribune, KS 67879.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account and for the account of others; and a market agency buying livestock on a commission basis; and

(b) Registered with the Secretary of Agriculture as an individual doing business as Wes Myers Livestock, as a dealer to buy and sell livestock in commerce.

3. Respondent, on or about the dates and in the transactions set forth below, purchased livestock and failed to pay the full purchase price of such livestock.

Purchase Date	Livestock Seller	No. of Head	Total Invoice Amount	Livestock Purchase Amount	Payment Amount	Payment Date	Unpaid Livestock Amount
06/23/99	F i v e States Livestock Auction, Inc.	101 121	\$46,219.03 <u>49,570.62</u> 95,789.65	\$43,066.49 <u>48,325.57</u> 91,392.06			\$91,392.06

Purchase Date	Livestock Seller	No. of Head	Total Invoice Amount	Livestock Purchase Amount	Payment Amount	Payment Date	Unpaid Livestock Amount
07/09/99	Syracuse Commission Co., Inc.	139	63,061.05	60,454.29			
07/16/99		15	8,252.25 71,313.30	8,166.38 68,620.67	\$41,047.71*	07/23/99	\$30,265.59

*This partial payment was made by wire transfer after checks in the amounts of \$63,061.05 and \$8,252.25 had been returned for insufficient funds[.]

4. Respondent has failed to pay \$121,657.65 for livestock purchased in the above transactions.

5. Respondent, in the transactions set forth below, issued checks in purported payment for livestock which were returned unpaid by the bank upon which they were drawn because Respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

Purchase Date	Livestock Seller	No. of Head	Livestock Purchase Amount	Check No.	Check Date	Check Amount	Date Returned NSF	Date Cleared
05/21/99	Syracuse Commission Co., Inc.	218	\$91,339.72	1367	05/21/99	\$94,516.16	05/28/99	06/03/99
05/28/99	Syracuse Commission Co., Inc.	111	46,918.97	1379	05/28/99	48,600.93	06/04/99	06/09/99
06/18/99	Syracuse Commission Co., Inc.	112	53,048.71	1399	06/18/99	55,051.39	06/25/99	06/30/00
06/23/99	Five States Livestock Auction, Inc.	101	\$43,066.49	1401	06/23/99	\$95,789.65	07/01/99	[Blank]
		121	48,325.57 91,392.06	1408	07/14/99	95,789.65	07/12/99 07/20/99	
06/24/99	Burlington Livestock Exchange, Inc.	151	80,262.24	1402	06/24/99	82,956.59	07/02/99	07/12/99
07/09/99	Syracuse Commission Co., Inc.	139	60,454.29	1405	07/09/99	63,061.05	07/16/99 07/22/99	[Blank]

PACKERS AND STOCKYARDS ACT

07/16/99	Syracuse Commission Co., Inc.	15	8,166.38	1407	07/16/99	8,252.25*	07/22/99	[Blank]
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*Respondent paid \$41,047.71 by wire transfer on 07/23/99 after placing a stop payment on these NSF checks.

6. Respondent, on or about the dates and in the transactions above where payments were made after the return of NSF checks and in the transactions below, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	Livestock Seller	No. of Head	Purchase & Check Amount	Date Payment Due	Date of Check	No. of Days Late
04/29/99	Colby Livestock Auction	15	\$ 7,264.01	04/30/99	05/03/99	3
05/06/99	Colby Livestock Auction	46	16,790.54	05/07/99	05/09/99	2
05/15/99	Oakley Livestock Commission Co., Inc.	312	132,603.13	05/17/99	05/18/99	1

7. Respondent has failed to keep and maintain records that fully and correctly disclose all transactions involved in Respondent's business subject to the Act. Respondent has failed to prepare and keep livestock purchase invoices and livestock sales invoices for all of his livestock purchases and sales. Respondent has also failed to keep and maintain load preparation and inventory records that would permit the tracing of his dealer livestock from purchase through resale.

8. Respondent, although registered to do business under the trade name Wes Myers Livestock, has also regularly used the unauthorized trade names N and W Livestock and 3 M Cattle, Inc. Respondent has unfairly and deceptively used all these three trade names in the same livestock purchase transactions as if they were separate legal entities. For example, Respondent has purchased livestock under the name N and W Livestock (or N and W Cattle Co.), has assessed and collected a buying commission as Wes Myers, has collected for hauling the livestock under the name 3 M Cattle, Inc., and has made payment to the auction

market using a 3 M Cattle, Inc. check.

Conclusion

By reason of the facts found in Findings of Fact 3 through 6 above, Respondent Wes Myers has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

By reason of the facts found in Finding of Fact 7 above, Respondent Wes Myers has violated section 401 of the Act (7 U.S.C. § 221).

By reason of the facts found in Finding of Fact 8 above, Respondent Wes Myers has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)).

Order

Respondent Wes Myers, his agents and employees, directly, doing business as Wes Myers Livestock, or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay the full purchase price of livestock;
2. Failing to pay, when due, the full purchase price of livestock;
3. Issuing checks in payment for livestock purchases without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
- 4 Using multiple and deceptive trade names in any livestock transaction; and
5. Operating under any trade name that is not disclosed and approved pursuant to his registration under the Act.

Respondent Wes Myers shall keep and maintain under his name, and under the trade name Wes Myers Livestock or such other trade name as may subsequently be approved and registered under the Act, accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Act, including, but not limited to: (1) livestock purchase invoices; (2) livestock sales invoices; and (3) load preparation and inventory records that permit the tracing of dealer livestock from purchase through resale.

Respondent Wes Myers is suspended as a registrant under the Act for a period of 5 years provided, however, that this order may be modified to permit Respondent's salaried employment by another registrant or packer after the expiration of the initial 150 days of this suspension term upon demonstration to the Packers and Stockyards Programs, GIPSA, of circumstances warranting

modification of the order.

This decision shall become final and effective without further proceedings 35 days after the date of service upon Respondent Wes Myers, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final May 28, 2002.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PACKERS AND STOCKYARDS ACT

Ravenna Livestock, Inc. and Ronald Lamoreaux. P&S Docket No. D-00-0012. 1/4/2002.

W.W. Livestock, Inc., O. Wayne Clark, Ernie L. Kennedy, and Warren Young. P&S Docket No. D-00-0008. 1/15/2002/. Decision as to Respondent Ernie L. Kennedy.

W.W. Livestock, Inc., O. Wayne Clark, Ernie L. Kennedy, and Warren Young. P&S Docket No. D-00-0008. 1/15/2002. Decision as to Respondents W.W. Livestock, Inc., and O. Wayne Clark.

W.W. Livestock, Inc., O. Wayne Clark, Ernie L. Kennedy, and Warren Young. P&S Docket No. D-00-0008. 1/15/2002. Decision as to Respondent Warren Young.

Bert Smith, III and Eddie McNally. P&S Docket No. D-00-0013. 1/24/2002. Consent Decision Regarding Respondent Eddie McNally.

Kenneth Koops. P&S Docket No. D-01-0003. 1/28/2002.

Rod Suhr. P&S Docket No. D-00-0005. 2/8/2002.

Agriprocessors, Inc. P&S Docket No. D-02-0009. 3/7/2002.

3-State Stockyards, Inc. and Robert J. Witt. P&S Docket No. D-01-0011. 4/4/2002.

Livestock Auction of Cleburne, Inc., d/b/a Cleburne Livestock Auction and Cleburne Livestock Auction, Inc. and Clyde A. Boyd, Sr. P&S Docket No. D-02-0005. 6/20/2002.

Mammoth Cave Dairy Auction, Inc., Kenneth F. Deputy, and Michael Allen Hatcher. P&S Docket No. D-02-0004. 6/26/2002.

David H. Harris, d/b/a Harris Livestock. P&S Docket No. D-02-0011. 6/27/2002.

AGRICULTURE DECISIONS

Volume 61

January - June 2002
Part Three (PACA)
Pages 356 - 446



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 List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index (from the beginning of the annual Volume) 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.

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PERISHABLE AGRICULTURAL COMMODITIES ACT**DEPARTMENTAL DECISION**

In re: CAPTAIN JACK'S TOMATOES, INC., AND THE FRESH GROUP, LTD., d/b/a MAGLIO AND COMPANY.

PACA Docket No. D-00-0008.

Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company.

Filed April 30, 2002.

PACA – Failure to pay – Willful, flagrant, and repeated violations – Responsibly connected – Civil penalty – Sanction policy – Sanction testimony – Settlement negotiation documents – Waiver of confidentiality – License suspension.

The Judicial Officer (JO) affirmed the Decision and Order issued by Chief Administrative Law Judge James W. Hunt: (1) concluding The Fresh Group, Ltd., d/b/a Maglio and Co. (Respondent), willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce; (2) assessing Respondent a \$150,000 civil penalty; and (3) providing for a 60-day suspension of Respondent's PACA license if the civil penalty is not paid within 90 days after service of the Order on Respondent. The Judicial Officer found that Captain Jack's Tomatoes, Inc. (CJTI), violated 7 U.S.C. § 499b(4) and Respondent was liable for these violations because Respondent exercised complete domination and control over CJTI's day-to-day operations during the time the violations occurred. Respondent was therefore a dealer and bore responsibility for CJTI's unlawful actions. The JO rejected Respondent's contention that Complainant must establish Respondent was responsibly connected with CJTI in order to prove that Respondent violated 7 U.S.C. § 499b(4) stating that administrative proceedings to determine whether a person is "responsibly connected," as defined in 7 U.S.C. § 499a(b)(9), are instituted under 7 U.S.C. § 499h(b). The issue in these "responsibly connected" cases is whether one person is or has been responsibly connected with another person: (1) whose PACA license has been revoked or is currently suspended; (2) who has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b; or (3) against whom there is an unpaid reparation award issued within 2 years. A person found to be responsibly connected is barred from employment by PACA licensees, except as provided in 7 U.S.C. § 499h(b). The JO stated the proceeding before him was not a proceeding instituted under 7 U.S.C. § 499h(b) to determine whether Respondent is responsibly connected with CJTI and barred from employment by PACA licensees. Instead, the proceeding was an administrative disciplinary proceeding instituted under the PACA to determine whether willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) had been committed and, if they had been committed, the identity of the entity or entities that committed the violations. The JO also rejected Respondent's contention that evidence supporting a civil penalty in excess of \$22,000 was inadmissible. The JO stated that oral and documentary evidence supporting Complainant's proposed sanction was relevant and under 7 U.S.C. § 499h(e) the Secretary of Agriculture had authority to assess Respondent a civil penalty in excess of \$22,000. Finally, the JO rejected Respondent's argument that Complainant's sanction witness could not testify about information in documents Respondent provided to Complainant's counsel during settlement negotiations. The JO found that Respondent filed these same documents with the Hearing Clerk as proposed exhibits and Complainant had no reason to treat Respondent's filing of proposed exhibits as confidential.

Ruben D. Rudolph, Jr., for Complainant.

Jordan B. Reich, 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

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on March 14, 2000. 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) Captain Jack's Tomatoes, Inc., under the direction, management, and control of The Fresh Group, Ltd., d/b/a Maglio and Company [hereinafter Respondent], during the period December 7, 1998, through December 29, 1998, failed to make full payment promptly to two sellers (Ledlow & Cole, Inc., and Hiatt Produce, Inc.) of the agreed purchase prices in the total amount of \$169,029.50 for 11 lots of perishable agricultural commodities, which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce; (2) Respondent is the alter ego of Captain Jack's Tomatoes, Inc.; and (3) Captain Jack's Tomatoes, Inc., under the direction, management, and control of Respondent, willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when it failed to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce (Compl. ¶¶ III-IV).

On April 7, 2000, Captain Jack's Tomatoes, Inc., filed "Answer of Captain Jack's Tomatoes, Inc." Captain Jack's Tomatoes, Inc.: (1) admits that it, under the direction, management, and control of Respondent, during the period December 7, 1998, through December 29, 1998, failed to make full payment promptly to two sellers of the agreed purchase prices in the total amount of \$169,029.50 for 11 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce; (2) asserts Ledlow & Cole, Inc., was paid \$2,500 on March 3, 1999, and the balance due Ledlow &

Cole, Inc., and Hiatt Produce, Inc., is \$2,500 less than the \$169,029.50 alleged in the Complaint; (3) denies that it violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (4) admits that Respondent is its alter ego; and (5) asserts that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Answer of Captain Jack's Tomatoes, Inc., ¶¶ III-IV).

On April 20, 2000, Respondent filed "Answer of Respondent, The Fresh Group, d/b/a Maglio and Company" [hereinafter Respondent's Answer]. Respondent: (1) admits that during the period December 7, 1998, through December 29, 1998, Respondent managed Captain Jack's Tomatoes, Inc.; (2) asserts Captain Jack's Tomatoes, Inc., during the period December 7, 1998, through December 29, 1998, failed to make full payment promptly to two sellers of the agreed purchase prices in the total amount of \$169,029.50 for 11 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce; (3) asserts Ledlow & Cole, Inc., was paid \$2,500 on March 3, 1999, and the balance due Ledlow & Cole, Inc., is \$2,500 less than the \$57,475.30 alleged in the Complaint; (4) denies that it violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) asserts Captain Jack's Tomatoes, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent's Answer ¶¶ III-IV).

On May 23, 24, and 25, 2001, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided over an oral hearing in Milwaukee, Wisconsin. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. James O. Vollmar, Waukesha, Wisconsin, represented Captain Jack's Tomatoes, Inc. Jordan B. Reich, Kohner, Mann & Kailas, S.C., Milwaukee, Wisconsin, represented Respondent.

On June 15, 2001, the Chief ALJ entered a Consent Decision agreed to by Complainant and Captain Jack's Tomatoes, Inc.¹ On July 25, 2001, Respondent filed "Respondent, The Fresh Group Ltd d/b/a Maglio & Company's Motion to Dismiss, Proposed Findings of Fact and Conclusions of Law and Proposed Order" [hereinafter Respondent's Post-Hearing Brief] and Complainant filed "Complainant's Proposed Findings of Fact, Conclusions of Law and Proposed Order" [hereinafter Complainant's Post-Hearing Brief]. On September 21, 2001, Respondent filed "Respondent, The Fresh Group Ltd. d/b/a Maglio and Company's Reply Brief" and Complainant filed "Complainant's Reply Brief."

¹See *In re Captain Jack's Tomatoes, Inc.*, 60 Agric. Dec. 381 (2001) (Consent Decision as to Captain Jack's Tomatoes, Inc.).

On November 14, 2001, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent, beginning on December 7, 1998, and continuing through December 29, 1998, committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for 11 lots of perishable agricultural commodities; (2) assessed Respondent a \$150,000 civil penalty; and (3) provided that, in the event Respondent failed to pay the \$150,000 civil penalty within 90 days after the Hearing Clerk served the Initial Decision and Order on Respondent, Respondent's PACA license would be suspended for 60 days (Initial Decision and Order at 16).

On December 21, 2001, Respondent appealed to and requested oral argument before the Judicial Officer. On January 10, 2002, Complainant filed "Complainant's Response to Respondent's Appeal Petition" and "Complainant's Response to Request for Oral Hearing." On January 14, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision and a ruling on Respondent's request for oral argument before the Judicial Officer.

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

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order. Therefore, except for minor modifications, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion of law as restated.

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

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES**§ 499a. Short title and definitions**

....

(b) Definitions

For purposes of this chapter:

....

(6) The term “dealer” means any person 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. . . .

....

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. . . .

....

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.]

....

§ 499c. Liability to persons injured

....

(c) Trust on commodities and sales proceeds for benefit of unpaid suppliers, sellers, or agents; preservation of trust; jurisdiction of courts

....

(2) Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored. The provisions of this subsection shall not apply to transactions between a cooperative association, as defined in section 1141j(a) of title 12, and its members.

....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ

any person, or any person who is or has been responsibly connected with any person--

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

....

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(6), (9), 499b(4), 499e(c)(2), 499h(a), (b), (e), 499p.

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 B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

**PART 46—REGULATIONS (OTHER THAN RULES OF
PRACTICE) UNDER THE PERISHABLE AGRICULTURAL
COMMODITIES ACT, 1930**

Definitions

....

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

....

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.]

7 C.F.R. § 46.2(aa)(5).

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

Statement of the Case

In 1991, Captain Jack's Tomatoes, Inc., received a PACA license to engage in the business of buying and selling perishable agricultural commodities. Jack Santoro was the president of Captain Jack's Tomatoes, Inc. Jack Santoro owned 51 percent of the stock in Captain Jack's Tomatoes, Inc., and Mary Santoro owned 49 percent of the stock in Captain Jack's Tomatoes, Inc. Jack Santoro testified that in 1996 Captain Jack's Tomatoes, Inc., was "not in a good financial condition." Looking for a way to keep Captain Jack's Tomatoes, Inc., going, Jack Santoro contacted Sam Maglio, president and sole stockholder of Respondent, to have Respondent manage and eventually buy Captain Jack's Tomatoes, Inc. Respondent, which operates under a PACA license, is a tomato repacker and produce wholesaler. (Tr. 273, 300, 444; CX 1, CX 2.)

Sam Maglio testified that he was hesitant about acquiring a company in financial trouble. He contemplated becoming a stockholder in Captain Jack's Tomatoes, Inc., but did not contemplate becoming an officer or director. Sam Maglio proposed an arrangement to Jack Santoro whereby he could "get in and look at the company." (Tr. 446-47, 449.) Jack Santoro agreed with Sam Maglio's proposal and on June 18, 1996, they entered into the following agreement:

MANAGEMENT AGREEMENT

THIS AGREEMENT, entered into this 18 day of June 1996, by and between **The Fresh Group, Ltd.** ("TFGL"), by Sam J. Maglio, Jr., its President, and **Captain Jack's Tomatoes, Inc.** ("CJTI"), by Jack J. Santoro, its President, sets forth the terms and conditions upon which TFGL will be engaged to perform certain management services for CJTI. The terms, conditions and other material provisions of this Agreement are as follows:

1. **Services provided.** In general, TFGL will provide industry specific expertise in the daily operations and long term strategic planning for CJTI. In addition, TFGL will provide all necessary support to access TFGL's Produce Pro computer software and an office support staff to handle accounting functions as well as integration of the current data systems with TFGL.

2. **Binding input.** TFGL shall have binding input in all areas of CJTI including, but not limited to, accounting, payables, receiveables [sic], stockholder distributions, payroll, banking, insurance, purchasing, inventory control, sales, human resources, packaging, taxes, transportation, utilities, and other such categories as may arise. In those areas and in any other which may arise, TFGL shall have the full and complete cooperation of the Stockholders in implementing methods and practices to enhance the value of CJTI.

3. **Continuation of employment.** Jack J. Santoro shall continue employment with CJTI at a salary of \$1000.00 per week and benefits comparable with those he his [sic] currently receiving, consistent with the current expense statement records.

4. **Compensation.** As compensation for its services, TFGL shall be paid the sum of \$52,000.00 annually, to be disbursed as determined by TFGL. In recognition of the value created by its association, TFGL shall be entitled to a bonus equal to 90% of the yearly, pre-tax operating profits of CJTI up to \$150,000.00 of such yearly, pre-tax operating profits. Any yearly, pre-tax operating profits in excess of \$150,000.00 in any given year may be retained by CJTI, to pay down debt.

5. **Term.** The term of this Agreement shall be from July 1, 1996 to June 30, 1999. Further, this Agreement shall be terminable upon 90 days written notice by either party. However, in the event that CJTI wishes to terminate, it must first obtain the written release of TFGL from any provider of credit to CJTI, in a form acceptable to TFGL.

6. **Indemnification.** In executing this Agreement, CJTI hereby agrees, except in cases of TFGL's willful misconduct or gross negligence, to indemnify, defend and hold TFGL, its officers, directors,

employees, agents and counsel harmless against and from any and all losses, claims, damages, liabilities, joint and several, suffered, incurred by, or asserted against, TFGL, its officers, directors, employees, agents and counsel, including any amounts paid in settlement of any action, suit or proceeding brought under any statute, at common law or otherwise, which arises in connection with the performance by TFGL of its responsibilities under this Agreement. This agreement to indemnify shall survive, for a period of five years, any termination or other cancellation of this Agreement. Further, although CJTI and TFGL have every expectation that this Agreement and the performance thereof will improve and make more profitable the business of CJTI, CJTI hereby holds harmless TFGL from any losses that it may incur as a result of this Agreement and the performance thereof.

7. **Other Agreements.** The execution, validity and performance of this Agreement is dependent upon the execution on even date herewith of an **Option to Purchase** between TFGL, Jack J. Santoro and Mary C. Santoro. Neither the Option to Purchase nor this Management Agreement shall be enforceable on its own; both Agreements **must** be executed by the parties for either one to be enforceable.

8. **Entire agreement.** Notwithstanding Paragraph 7 (above), this Agreement contains all of the provisions of the Management Agreement. By signing this Agreement, both parties acknowledge that they have read it and understand all of its terms. Any changes hereto shall be made in writing and signed by the parties hereto.

CAPTAIN JACK'S TOMATOES, INC. THE FRESH GROUP, LTD.

By:
/s/ :
Jack J. Santoro, President

By
/s/
Sam J. Maglio, Jr., President

CX 7 at 1-2.

On June 18, 1996, Jack Santoro and Sam Maglio entered into another agreement giving Sam Maglio the option to purchase all the outstanding

stock in Captain Jack's Tomatoes, Inc. (CX 7 at 3-5).

Sam Maglio testified that, according to his understanding of the management agreement, Respondent was both to run the day-to-day operations of Captain Jack's Tomatoes, Inc., and provide the business with long-term strategic planning. He said Captain Jack's Tomatoes, Inc., had not been managed properly in the past and Respondent was to have the authority to run the business without "undue interference" from Captain Jack's Tomatoes, Inc.'s shareholders or past management. (Tr. 450-51.)

Sam Maglio then hired Barbara Maszk to serve as general manager of Captain Jack's Tomatoes, Inc. She was put on Respondent's payroll as Respondent's employee. Sam Maglio said Barbara Maszk was to work briefly at Respondent to learn how it operated under his direction and was then to "take that knowledge and, again, under my direction implement it at Captain's Jack's" where her "primary function was to oversee the operation in my stead, that she should be organizing the accounts payable and accounts receivable . . . and making it a more efficient operation." (Tr. 360, 455-56.) Barbara Maszk confirmed that she ran the day-to-day operations of Captain Jack's Tomatoes, Inc., hired and fired employees, handled accounts receivable and payable, and signed checks (Tr. 360-61).

Sam Maglio initially visited Captain Jack's Tomatoes, Inc., several times a week but less often after Barbara Maszk became general manager. Barbara Maszk, however, continued to keep Sam Maglio informed via a computer system that Sam Maglio installed to hook up Captain Jack's Tomatoes, Inc., with Respondent. Sam Maglio would also initial jackets containing invoices of produce purchases to authorize their payment and at times told Barbara Maszk what bills to pay or not to pay. Barbara Maszk would initiate and sign computer generated checks for invoices to be paid. Captain Jack's Tomatoes, Inc., and Respondent bought produce from each other as well as from others. (Tr. 319-20, 346, 380, 418, 457.)

Jack Santoro, meanwhile, retained the title of president of Captain Jack's Tomatoes, Inc., and continued to buy and sell produce. He had access to the computer to verify produce purchases but not to pay for them or to have access to the computer for accounts payable or receivable. Jack Santoro was allowed to attend management meetings but the record does not indicate whether he provided any input. Despite Jack Santoro's protest, Barbara Maszk fired Jack Santoro's son-in-law. (Tr. 270-73, 279, 281-82, 305, 320-21, 457.) Jack Santoro testified he was only a figurehead (Tr. 277). One of Captain Jack's Tomatoes, Inc.'s perishable agricultural commodity

suppliers, Brian Hiatt, testified that he “felt that The Fresh Group was the one running Captain Jack’s” (Tr. 111).

The relationship between Jack Santoro and Sam Maglio became contentious, and in 1997, Jack Santoro attempted to terminate the management agreement (Tr. 293, 451-52). Sam Maglio, in turn, sought to exercise his option to purchase Captain Jack’s Tomatoes, Inc.’s stock followed by a lawsuit for specific performance (Tr. 460-61). In May 1998, Respondent’s attorney advised Captain Jack’s Tomatoes, Inc., that the shareholders of Captain Jack’s Tomatoes, Inc. (Jack Santoro and Mary Santoro), did not have the power to assign assets and assume liabilities without Respondent’s “binding input” (CX 6 at 1). On December 1, 1998, Sam Maglio told Jack Santoro that “The Fresh Group, Ltd. management will immediately take over the purchasing of all produce, packaging materials and supplies, and transportation services. You are not to make any purchases without the written consent of Dana Summer, [Respondent’s general manager], or Sam Maglio, Jr.” (CX 5).

Beginning on December 7, 1998, and continuing through December 29, 1998, Captain Jack’s Tomatoes, Inc., failed to make full payment promptly to two produce sellers, Ledlow & Cole, Inc., and Hiatt Produce, Inc., for 11 lots of perishable agricultural commodities Captain Jack’s Tomatoes, Inc., had purchased, received, and accepted from them (CX 25-CX 36). Complainant alleges that the amount owed Ledlow & Cole, Inc., was \$57,475.30 and the amount owed Hiatt Produce, Inc., was \$111,554.20 for a total amount owed of \$169,029.50 (Compl. ¶ III). Captain Jack’s Tomatoes, Inc., and Respondent admit Captain Jack’s Tomatoes, Inc., had failed to make full payment promptly as alleged, but contend Captain Jack’s Tomatoes, Inc., owed Ledlow & Cole, Inc., \$54,975.30 rather than \$57,475.30 (Answer of Captain Jack’s Tomatoes, Inc. ¶¶ III-IV; Respondent’s Answer ¶¶ III-IV).

From November 1998 through March 1999, Barbara Maszk issued checks to Respondent in the approximate amount of \$455,000. Barbara Maszk could not recall the purpose of the payments but just that they were for “payment of bills.” (Tr. 369-70.) Sam Maglio indicated that these payments to Respondent included payments for perishable agricultural commodities Captain Jack’s Tomatoes, Inc., had purchased from Respondent (Tr. 483).

Sam Maglio testified “money was very tight” at the end of 1998 and into 1999 and he had Barbara Maszk fax him a list of all bills, including those for

produce. Sam Maglio said he was trying to work out a plan to make payments to Ledlow & Cole, Inc., and Hiatt Produce, Inc., and that “any monies that were left over were provided pro rata between those two vendors.” (Tr. 458-59, 462-63.) Sam Maglio indicated that he directed Barbara Maszk to have Captain Jack’s Tomatoes, Inc., pay Respondent before it paid Ledlow & Cole, Inc., and Hiatt Produce, Inc., because, unless Respondent sold perishable agricultural commodities to Captain Jack’s Tomatoes, Inc., it would have no other source of supply (Tr. 475-76). However, Sam Maglio told Brian Hiatt in February 1999 that Captain Jack’s Tomatoes, Inc., had enough money to pay Hiatt Produce, Inc.’s invoices (Tr. 122-23).

In February 1999, Jack Santoro resigned as an officer of Captain Jack’s Tomatoes, Inc. In March 1999, Captain Jack’s Tomatoes, Inc., ceased as a business. (Tr. 302, 461-62; CX 24-A at 3; Answer of Captain Jack’s Tomatoes, Inc. ¶ II(a); Respondent’s Answer ¶ II.)

Hiatt Produce, Inc., instituted a PACA trust suit against Captain Jack’s Tomatoes, Inc., and Respondent in the United States District Court for the Eastern District of Wisconsin (Tr. 110-11; CX 8). In a March 31, 2000, decision, the Court found that “[b]ecause of the complete control which Fresh Group exercised over Captain Jack’s, it is clear that The Fresh Group, in addition to Captain Jack’s, was a fiduciary of the PACA trust. The Fresh Group breached its fiduciary duty by self dealing and by refusing to pay certain PACA creditors when funds were available apparently to do so” (CX 8 at 10).

Discussion

The failure of Captain Jack’s Tomatoes, Inc., to pay promptly for the purchase of 11 lots of perishable agricultural commodities totaling approximately \$169,029.50 constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Complainant contends Respondent should also be held liable for the violations on the grounds that the violations were committed “while [Respondent was] acting for or employed by [Captain Jack’s Tomatoes, Inc.,] within the scope of its employment” and Respondent dominated and controlled Captain Jack’s Tomatoes, Inc., to the extent that Respondent became Captain Jack’s Tomatoes, Inc.’s alter ego (Complainant’s Post-Hearing Brief at 10-19).

Respondent moves to dismiss the Complaint on the ground that Complainant has failed to state a claim upon which relief can be granted. Respondent argues that it cannot be held liable because it was not “responsibly connected” with Captain Jack’s Tomatoes, Inc., as a partner, officer, or director, or as a holder of more than 10 per centum of the stock of Captain Jack’s Tomatoes, Inc. (Respondent’s Post-Hearing Brief.) This argument is not relevant to this proceeding. Whether a person is responsibly connected arises in proceedings instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)) to determine whether a person is barred from employment by a PACA licensee because of his or her connection with any person: (1) whose PACA license has been revoked or is currently suspended; (2) who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b); or (3) against whom there is an unpaid reparation award issued within 2 years. This proceeding is not a proceeding instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)) to determine whether Respondent is responsibly connected with Captain Jack’s Tomatoes, Inc., and barred from employment by PACA licensees. Instead, this proceeding is an administrative disciplinary proceeding instituted under the PACA to determine whether willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) have been committed and, if they have been committed, the identity of the entity or entities that committed the violations.

Respondent further argues, citing *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239 (1995), the alter ego theory of liability applies only when the alleged alter ego is a stockholder of the entity that committed the violations. In this case, Respondent points out, Respondent did not own any stock of Captain Jack’s Tomatoes, Inc. (Respondent’s Post-Hearing Brief at 5th through 7th unnumbered pages.) *Midland*, however, also held that a person, whether a stockholder or not, who exercises day-to-day direction, management, and control over an entity which buys or sells perishable agricultural commodities is itself a “dealer” as that term is defined in the PACA. *Midland*, 54 Agric. Dec. at 1303.

Midland went on to hold “[i]n determining whether an order should be made applicable to an individual respondent, the Department examines the totality of the circumstances surrounding the violation rather than the form of the business entity involved in order to effectuate the purposes of the statutes it administers.” *Midland*, 54 Agric. Dec. at 1261. In this case, Respondent, through its agents Barbara Maszk and Sam Maglio, was clearly

responsible for decisions relating to Captain Jack's Tomatoes, Inc.'s purchases of and payments for perishable agricultural commodities. As its manager, Respondent exercised complete domination and control over the day-to-day operations of Captain Jack's Tomatoes, Inc., during the time the violations occurred. Respondent was therefore a dealer and bore responsibility for Captain Jack's Tomatoes, Inc.'s unlawful actions. Accordingly, I find Respondent engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for perishable agricultural commodity purchases.

Complainant seeks a \$150,000 civil penalty or, if Respondent does not pay the \$150,000 civil penalty, a 60-day suspension of Respondent's PACA license (Complainant's Post-Hearing Brief at 19-24). Respondent contends that, even assuming it committed a violation, there is no evidentiary basis for any sanction (Respondent's Post-Hearing Brief at 7th unnumbered page).

The factors to consider in imposing a sanction were set forth in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 569 (1998): "(1) the length of time during which a respondent was in violation of the payment requirements of the PACA; (2) the number of a respondent's violations and the dollar amounts involved; (3) the roll-over debt, if any, incurred by the PACA violator; (4) the time that it takes the PACA violator to achieve compliance with the PACA; (5) the impact of the violations on the industry as a whole; and (6) whether the PACA violator's financial condition is such that an appropriate civil penalty, large enough to be an effective deterrent to future violations of the PACA, would not substantially increase the risk that the PACA violator's future produce sellers may not be paid in accordance with the PACA."

Basil Coale, a United States Department of Agriculture senior marketing specialist, testified that the dollar amount of Respondent's violations was over \$160,000; that one of the violative produce transactions was paid over 570 days late; that the average violative produce transaction was paid 480 days late; that, concerning the impact on the industry, Captain Jack's Tomatoes, Inc., has been forced out of business, Hiatt Produce, Inc., can no longer sell to Captain Jack's Tomatoes, Inc., and Hiatt Produce, Inc., was forced to file suit to obtain relief; and that no roll-over debt was incurred. Basil Coale was of the opinion that the recommended sanction was necessary to be an effective deterrent to future violators and that the sanction would not risk Respondent's future payments to its produce sellers (Tr. 537-41).

I find two additional factors significant. First, Respondent failed to pay Captain Jack's Tomatoes, Inc.'s produce sellers promptly despite apparently having the money to do so. Second, Respondent used the money, which it was required by section 5(c)(2) of the PACA (7 U.S.C. § 499e(c)(2)) to hold in trust for the benefit of perishable agricultural commodity sellers, to pay itself. As for evidence on whether Complainant's proposed civil penalty may affect Respondent's financial condition, the burden was on Respondent to present evidence that a \$150,000 civil penalty would substantially increase the risk that Respondent's future produce sellers would not be paid in accordance with the PACA. *Scamcorp*, 57 Agric. Dec. at 569 n.20. Respondent presented no evidence on its financial condition.

Considering all the circumstances, I find Complainant's recommended \$150,000 civil penalty and 60-day suspension of Respondent's PACA license appropriate. The 60-day suspension of Respondent's PACA license will not be imposed if James Frazier receives Respondent's payment of the \$150,000 civil penalty within 90 days after the Order in this Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company, is served on Respondent.

Findings of Fact

1. Captain Jack's Tomatoes, Inc., was a corporation organized and existing under the laws of the State of Wisconsin. Captain Jack's Tomatoes, Inc.'s mailing address was S83 W18890 Saturn Drive, Muskego, Wisconsin 53150. Captain Jack's Tomatoes, Inc., ceased doing business on March 12, 1999.

2. At all times material to this proceeding, Captain Jack's Tomatoes, Inc., was engaged in the business of buying and selling perishable agricultural commodities and was licensed under the PACA. PACA license number 920157 was issued to Captain Jack's Tomatoes, Inc., on November 6, 1991.

3. At all times material to this proceeding, Jack Santoro was the president of Captain Jack's Tomatoes, Inc. At all times material to this proceeding Jack Santoro and Mary Santoro were the stockholders of Captain Jack's Tomatoes, Inc.

4. Respondent is a corporation organized and existing under the laws of the State of Wisconsin. Respondent's business mailing address is 4287 N. Port Washington Road, Milwaukee, Wisconsin 53212.

5. At all times material to this proceeding, Respondent was engaged in the business of buying and selling perishable agricultural commodities and was licensed under the PACA. PACA license number 950744 was issued to Respondent on February 14, 1995. Respondent's PACA license has been renewed on an annual basis and is next subject for renewal on February 14, 2003.

6. At all times material to this proceeding, Sam Maglio was the president and owner of Respondent.

7. On June 18, 1996, Captain Jack's Tomatoes, Inc., and Respondent entered into a management agreement through which Respondent managed Captain Jack's Tomatoes, Inc.'s business operations and had binding input in all areas of the operation of Captain Jack's Tomatoes, Inc., including, but not limited to: accounting, payables, receivables, stockholder distributions, payroll, banking, insurance, purchasing, inventory control, sales, human resources, packaging, taxes, transportation, utilities, and any other categories as may arise. The management agreement also provides Respondent was to have full and complete cooperation of the stockholders of Captain Jack's Tomatoes, Inc.

8. The management agreement directed that Respondent would be entitled to 90 percent of the yearly pre-tax operating profits of Captain Jack's Tomatoes, Inc.

9. Under the management agreement, Respondent was paid \$52,000 per year for its management of Captain Jack's Tomatoes, Inc.

10. Respondent hired Barbara Maszk in August 1996 for the purpose of managing Captain Jack's Tomatoes, Inc. At all times material to this proceeding, Barbara Maszk was Respondent's employee and worked on site at Captain Jack's Tomatoes, Inc., with the specific responsibility of managing Captain Jack's Tomatoes, Inc.'s day-to-day business operations.

11. Barbara Maszk exercised the authority to issue and sign Captain Jack's Tomatoes, Inc.'s checks to pay for perishable agricultural commodities.

12. In May 1998, Respondent's attorney, citing the management agreement, informed Captain Jack's Tomatoes, Inc., that the stockholders of Captain Jack's Tomatoes, Inc. (Jack Santoro and Mary Santoro), no longer had the power to assign assets and assume liabilities without Respondent's binding input.

13. On December 1, 1998, Respondent, operating under the management agreement, removed Jack Santoro's responsibility for produce

sales at Captain Jack's Tomatoes, Inc., and required Jack Santoro to obtain Respondent's written approval for any produce purchases.

14. From November 1998 through March 1999, Barbara Maszk issued checks from Captain Jack's Tomatoes, Inc., payable to her employer, Respondent, in the approximate amount of \$455,000 while debts for perishable agricultural commodities were owed to other perishable agricultural commodity suppliers.

15. While operating under its management agreement with Respondent, Captain Jack's Tomatoes, Inc., failed, during the period December 7, 1998, through December 29, 1998, to make full payment promptly to two sellers (Ledlow & Cole, Inc., and Hiatt Produce, Inc.) of the agreed purchase prices in the total amount of approximately \$169,029.50 for 11 lots of perishable agricultural commodities that Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce.

16. One of the violative produce transactions was paid over 570 days late. The average violative produce transaction was paid 480 days late.

17. The United States District Court for the Eastern District of Wisconsin in a PACA trust hearing over the same debts owed to Hiatt Produce, Inc., by Captain Jack's Tomatoes, Inc., in this case found that Respondent was in complete control of the business operations of Captain Jack's Tomatoes, Inc.

18. At all times material to this proceeding, Respondent dominated and controlled all aspects of the day-to-day management of Captain Jack's Tomatoes, Inc.'s business operations and controlled the timing and amount of payments that Captain Jack's Tomatoes, Inc., made to Respondent and other perishable agricultural commodity suppliers.

Conclusion of Law

Respondent, beginning on December 7, 1998, and continuing through December 29, 1998, committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for 11 lots of perishable agricultural commodities which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in its "Appeal Petition to the Judicial

Officer” [hereinafter Appeal Petition] and “Brief of the Respondent, The Fresh Group Ltd. d/b/a Maglio & Company, In Support of Its Appeal Petition to the Judicial Officer” [hereinafter Appeal Brief]. First, Respondent contends the Chief ALJ’s conclusion that Respondent can be held liable for the failures of Captain Jack’s Tomatoes, Inc., to pay for perishable agricultural commodities in accordance with the PACA, is contrary to the facts and law (Respondent’s Appeal Pet. at 1; Respondent’s Appeal Brief at 4-8). Specifically, Respondent contends the record contains no evidence to establish that it was “responsibly connected,” as that term is defined in section 1a(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Captain Jack’s Tomatoes, Inc., and Complainant must prove Respondent was responsibly connected with Captain Jack’s Tomatoes, Inc., in order to establish that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent’s Appeal Brief at 5).

I disagree with Respondent’s contention that Complainant must establish Respondent was responsibly connected with Captain Jack’s Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Administrative proceedings to determine whether a person is “responsibly connected,” as that term is defined in section 1a(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), are instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)). The issue in these “responsibly connected” cases is whether one person is or has been responsibly connected with any person: (1) whose PACA license has been revoked or is currently suspended; (2) who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b); or (3) against whom there is an unpaid reparation award issued within 2 years. A person found to be responsibly connected is barred from employment by PACA licensees, except as provided in section 8(b) of the PACA (7 U.S.C. § 499h(b)).

This proceeding is not a proceeding instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)) to determine whether Respondent is responsibly connected with Captain Jack’s Tomatoes, Inc., and barred from employment by PACA licensees. Instead, this proceeding is an administrative disciplinary proceeding instituted under the PACA to determine whether willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) have been committed and, if they have been committed, the identity of the entity or entities that committed the violations.

Respondent cites *Hart v. Department of Agric.*, 112 F.3d 1228 (D.C. Cir.

1997), *Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966), *Bronia, Inc. v. Ho*, 873 F. Supp. 854 (S.D.N.Y. 1995), and *Shepard v. K.B. Fruit & Vegetable, Inc.*, 868 F. Supp. 703 (E.D. Pa. 1994), to support its contention that Complainant must establish Respondent was responsibly connected with Captain Jack's Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent's Appeal Brief at 5). I have reviewed each of these cases. None of the cases cited by Respondent supports Respondent's contention that Complainant must establish Respondent was responsibly connected with Captain Jack's Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Hart, *Bell*, and *Birkenfield*, are "responsibly connected" cases. The issue in *Hart* and *Bell* is the connection between persons alleged to be responsibly connected with PACA licensees found to have flagrantly and repeatedly violated section 2 of the PACA (7 U.S.C. § 499b). The issue in *Birkenfield* is the connection between a person alleged to be responsibly connected with a PACA licensee against which there was an unpaid reparation award. *Hart*, *Bell*, and *Birkenfield* do not concern the issues in this proceeding; namely, whether willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) have been committed and, if they have been committed, the identity of the entity or entities that committed the violations. None of these "responsibly connected" cases supports or even addresses Respondent's contention that Complainant must establish Respondent was responsibly connected with Captain Jack's Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Bronia is a PACA trust case involving private litigants in which the United States District Court for the Southern District of New York held that unpaid sellers of perishable agricultural commodities properly preserved their trust claims against a corporate produce purchaser and held that the sole shareholder, director, and president of the corporate produce purchaser was personally liable for the corporate produce purchaser's breach of the PACA statutory trust. The Court does not discuss or mention the term "responsibly connected." Similarly, *Shepard* is a PACA trust case involving private litigants in which the United States District Court for the Eastern District of Pennsylvania held that, based on their active involvement in the business operations of a PACA licensee and their failure to supervise the person who actually ran the PACA licensee, the owners, officers, and

directors of a PACA licensee were personally liable for a PACA licensee's failure to pay a produce supplier.

Respondent also contends the record does not support a finding that Respondent is Captain Jack's Tomatoes, Inc.'s alter ego (Respondent's Appeal Brief at 5-7). Even if I were to agree with Respondent, I would not find the Chief ALJ erred because the Chief ALJ did not base his conclusion that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) on a finding that Respondent was Captain Jack's Tomatoes, Inc.'s alter ego. Instead, the Chief ALJ found that, during the time the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) occurred, Respondent completely dominated and controlled the day-to-day operations of Captain Jack's Tomatoes, Inc., including decisions related to the purchases of and payments for perishable agricultural commodities. The Chief ALJ concluded that: (1) Respondent was a "dealer," as defined in section 1(b)(6) of the PACA (7 U.S.C. § 499a(b)(6)), in connection with the payment violations that are the subject of this proceeding; (2) Respondent bore direct responsibility for the failures to pay for perishable agricultural commodities that are the subject of this proceeding; and (3) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). (Initial Decision and Order at 11.)

I agree with the Chief ALJ's conclusions. Even if a person is not an owner of an entity, that person may still be found responsible for willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by the entity. The person's liability may attach because: (1) the person is subject to the PACA; (2) the person is the day-to-day manager of the violating entity; (3) the person exercises direction, management, and control of the violating entity; and (4) the person is the one most responsible for the entity's violations. As discussed in this Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company, *supra*: (1) Respondent was a "dealer," as defined in section 1(b)(6) of the PACA (7 U.S.C. § 499a(b)(6)), in connection with the payment violations that are the subject of this proceeding; (2) Respondent was the day-to-day manager of Captain Jack's Tomatoes, Inc., during the period the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) occurred; (3) Respondent exercised direction, management, and control of Captain Jack's Tomatoes, Inc., during the period the violations of section 2(4) of the PACA occurred (7 U.S.C. § 499b(4)); and (4) Respondent was the one most responsible for the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) that are the

subject of this proceeding.

Second, Respondent contends the Chief ALJ erroneously denied Respondent's "Motion in Limine Barring the Complainant From Offering or Introducing Any Evidence to Support a Civil Penalty in Excess of \$22,000.00" and erroneously denied Respondent's motion during the hearing to place a \$22,000 limit on the civil penalty that Complainant's sanction witness could recommend. Respondent contends the assessment of a civil penalty against Respondent in excess of \$22,000 is contrary to law. (Respondent's Appeal Pet. at 3; Respondent's Appeal Brief at 8-9.)

I reject Respondent's contention that the Chief ALJ erroneously denied Respondent's "Motion in Limine Barring the Complainant From Offering or Introducing Any Evidence to Support a Civil Penalty in Excess of \$22,000.00" and erroneously denied Respondent's motion to place a \$22,000 limit on the civil penalty that Complainant's sanction witness could recommend. Even if I agreed with Respondent's contention that the assessment of a civil penalty against Respondent in excess of \$22,000 is contrary to law (which I do not), I would not find that the Chief ALJ erroneously denied Respondent's "Motion in Limine Barring the Complainant From Offering or Introducing Any Evidence to Support a Civil Penalty in Excess of \$22,000.00" and erroneously denied Respondent's motion during the hearing to place a \$22,000 limit on the civil penalty that Complainant's sanction witness could recommend.

The Administrative Procedure Act provides, as follows:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

.....

(d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

§ 1.141 Procedure for hearing.

.....

(h) *Evidence.* (1) *In general.*

.....
(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

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 recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA 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. Therefore, oral or documentary evidence introduced by Complainant to support a recommended sanction is relevant and may be received. Moreover, even if Complainant introduced evidence in an attempt to support a sanction that is not warranted in law or administrative officials testified in support of a sanction that is not warranted in law, neither the Administrative Procedure Act nor the Rules of Practice prohibits the introduction and receipt of such evidence. Complainant's

recommended sanction is not controlling,² and an administrative law judge may and should reject a sanction recommended by administrative officials, if the recommended sanction is not warranted in law.

Moreover, assessment of a civil penalty against Respondent in excess of \$22,000 is not contrary to law, as Respondent contends. The record supports the Chief ALJ's conclusion that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for 11 lots of perishable agricultural commodities which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce. Respondent argues that section 8(e) of the PACA (7 U.S.C. § 499h(e)) provides that the Secretary of Agriculture may assess a civil penalty not to exceed \$2,000 for each of Respondent's 11 violative transactions (Respondent's Appeal Brief at 9). However, section 8(e) of the PACA (7 U.S.C. § 499h(e)) clearly provides that the Secretary of Agriculture may assess a civil penalty not to exceed \$2,000 for each violative transaction *or* each day the violation continues. Complainant proved by a preponderance of the evidence that Respondent's violative transactions were past due for an average of 480 days before they were paid and there was one transaction that was paid over 570 days late (Tr. 539). Applying the average number of days for each of Respondent's 11 violative

²*In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. ____, slip op. at 35 (Jan. 4, 2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *appeal docketed*, No. 02-3006 (6th Cir. Jan. 2, 2002); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *appeal docketed*, No. 01-71486 (9th Cir. Sept. 10, 2001); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *appeal docketed*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, No. 01-3508 (6th Cir. Apr. 17, 2002); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal docketed*, No. 01-6214 (2d Cir. Oct. 9, 2001); *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).

transactions, Respondent could be assessed a \$10,560,000 civil penalty.³ Therefore, I reject Respondent's contention that the assessment of a civil penalty against Respondent in excess of \$22,000 is contrary to law.

Third, Respondent contends the Chief ALJ's assessment of a \$150,000 civil penalty against Respondent and the Chief ALJ's imposition of a 60-day suspension of Respondent's PACA license are not supported by relevant and credible evidence. Specifically, Respondent contends the civil penalty assessed by the Chief ALJ is based on Complainant's sanction witness' recommended sanction which in turn is based upon documents Respondent provided to Complainant's counsel during settlement negotiations. (Respondent's Appeal Pet. at 1-2; Respondent's Appeal Brief at 10-13.)

The record supports Respondent's contention that Basil Coale, Complainant's sanction witness, based his civil penalty recommendation on, among other things, Respondent's financial condition and that his knowledge of Respondent's financial condition was based on documents obtained from Complainant's counsel, who obtained the documents from Respondent during settlement negotiations, as follows:

[BY MR. RUDOLPH:]

Q. In calculating this sanction how did the agency know Fresh Group's financial information to make all these determinations?

[BY MR. COALE:]

A. They had submitted copies of financial statements.

Q. They being the Fresh Group?

A. Yes.

MR. REICH: Your Honor, at this time I'd like to voir dire the witness, because I have some -- maybe a specific objection as to how

³I calculate this \$10,560,000 civil penalty by multiplying the average number of days each violation continued times the number of violative transactions times the maximum civil penalty that may be assessed for each day a violation continues. (480 x 11 x \$2,000 = \$10,560,000.)

they obtained that financial information and when they obtained that financial information and under what circumstances they did.

JUDGE HUNT: Do you need it on voir dire or cross-examination?

MR. RUDOLPH: Your Honor, I would object to that.

JUDGE HUNT: Do you need to do that by voir dire or by cross-examination?

MR. REICH: I would do it by voir dire because then I might have an evidentiary objection.

JUDGE HUNT: All right. I'll allow him to voir dire on that one point.

VOIR DIRE

BY MR. REICH:

Q. When did you obtain this financial information?

A. I believe it was in March of this year?

Q. How did you obtain it?

A. From -- it came to me through Mr. Rudolph.

Q. Do you know how he obtained it?

A. Yes, I do.

Q. How did he obtain it?

A. From Fresh Group counsel.

MR. REICH: Your Honor, let me raise this objection. During the course of settlement discussions we provided certain financial information to try to reach a settlement. I'm sure the Court realizes that under the federal rules of evidence any materials, any discussions held in regards to settlement cannot be used in a court of law as far as evidence, and I find this to be both extremely objectionable -- and I'll be very frank with counsel for the department -- extremely unethical.

He was aware of the fact that this information was submitted on the basis of settlement discussions. If they had wanted financial information they had ways of obtaining it.

JUDGE HUNT: Did you obtain that in the course of settlement discussions?

MR. RUDOLPH: Yes, Your Honor, we did. We'd been asking for that information for many months prior, and the agency routinely asks for this information to come up with a sanction that we can discuss. It happens in every case.

JUDGE HUNT: I know, but you did obtain it though through -- as part of the settlement discussion.

MR. RUDOLPH: As part of the overall settlement discussion. That was part of it as well, but the agency does this routinely in --

JUDGE HUNT: Not routinely using material from settlement -- in litigation, do they?

MR. RUDOLPH: I believe they do. Yes, Your Honor.

JUDGE HUNT: I'm not familiar with that.

I sustain Mr. Reich's objection to relying on information obtained as part of the settlement proceeding. I'll sustain it. You're referring to their financial statement, financial situation. That's provided -- if you know about it only through your settlement discussion I find that inappropriate.

MR. REICH: Then I would ask that this witness's entire testimony be stricken and that the Government is unable to prove a sanction amount, and then their case has to be dismissed.

JUDGE HUNT: Well, I'll deny the motion to strike, but to the extent that he's relying on information obtained through settlement in recommending a sanction I'll not consider that.

MR. REICH: If that's --

JUDGE HUNT: To that extent --

MR. REICH: -- if that's the only basis for his --

JUDGE HUNT: I don't know if it is. I'll allow Mr. Rudolph to pursue that further.

MR. REICH: I was going to ask as part of the voir dire, is that the sole basis for your determination as to what the sanction is?

JUDGE HUNT: Well, you can do that on cross-examination.

MR. REICH: Okay. Thank you, Your Honor.

JUDGE HUNT: And I would take exception to the ruling on this. The department believes that in most of its negotiations and discussions with Respondents it's quite common that they share information with regards to the financial situation of a firm, and they may do that, but to use that information, that's rather -- it is confidential. At that point, that's -- well, go -- if you think the -- if that's the department's policy I'm not aware of that --

MR. RUDOLPH: All right.

JUDGE HUNT: -- but if the department uses it then that's not for me to take up apart from this case. Go ahead.

MR. RUDOLPH: Thank you.

....

CROSS EXAMINATION

BY MR. REICH:

....

Q. Let me go on then, assuming there are no Jencks materials. Is the sole basis of your questioned [sic] sanction based on the financial documents provided to you by Mr. Rudolph?

A. That is the how monetary penalty assessed was calculated.

Q. And that's the sole basis?

A. Yes, sir.

Q. You had no other financial information?

A. Not that I'm aware of.

Q. Without that financial information you could not have arrived at any type of penalty. Correct?

A. That's correct.

MR. REICH: Again, I'm going to move to strike the entire line of testimony if that is the sole basis, because the material -- we want to use it in the criminal sense -- is ill-gotten fruit.

MR. RUDOLPH: Your Honor, on redirect -- I think we should be allowed to redirect before you make any kind of ruling.

JUDGE HUNT: All right. I'm going to deny the motion to strike.

BY MR. REICH:

Q. How would you arrive at a penalty if you didn't have financial information?

A. If we didn't have financial information and we could not find out adequate information to meet the requirements of the judicial officer as he set out in Scamcorp then we could not go down the road of a monetary penalty and we would have to look then at suspension.

.....
REDIRECT EXAMINATION

BY MR. RUDOLPH:

Q. Mr. Coale, with regards to the financial information through which you based your decision isn't it true that as part of the Respondent's litigation -- in preparation for this litigation you shared with the department as part of this proposed exhibits copies of the financial information of the Fresh Group?

MR. REICH: Your Honor, again, I'm going to object. They have not been introduced into evidence. They are again the initial offering was part of the settlement. The only reason they were put in as potential evidence was to refute any sanctions. If in fact they're unavailable -- I'm not intending to use them nor do I think the department can use them.

MR. RUDOLPH: Your Honor --

JUDGE HUNT: He's referring to pretrial exhibits.

MR. RUDOLPH: But the idea is that we had this information anyway as part of the litigation. The department had this information.

JUDGE HUNT: I haven't sustained the objection. Proceed further on. I don't know what this information is or how you obtained it.

MR. RUDOLPH: All right. But the point being that we had it already as part of the litigation if not settlement.

JUDGE HUNT: Well, I don't know how you obtained it.

MR. RUDOLPH: All right. I understand.

JUDGE HUNT: That's the key here, how did you obtain that information?

MR. RUDOLPH: All right. I have nothing further on redirect.

Tr. 541-45, 551-53, 557-58.

Complainant responds that Respondent filed with the Hearing Clerk a copy of the documents Basil Coale used as a basis for his testimony regarding Respondent's financial condition. Complainant contends once Respondent voluntarily filed these documents with the Hearing Clerk, Complainant's sanction witness was free to testify regarding the contents of Respondent's documents despite Respondent's earlier provision of the documents in connection with settlement negotiations. (Complainant's Response to Respondent's Appeal Petition at 22.)

The record establishes that on April 20, 2001, Respondent filed with the Hearing Clerk Respondent's proposed witness list, Respondent's proposed exhibit list, and Respondent's proposed exhibits. Respondent states in the cover letter transmitting these documents to the Hearing Clerk that, under separate cover, copies are being provided to Complainant's counsel and Captain Jack's Tomatoes, Inc.'s counsel. Respondent's proposed exhibits include Respondent's December 31, 2000, balance sheet and income statement. Basil Coale's testimony regarding Respondent's financial condition is consistent with the information contained in the December 31, 2000, balance sheet and income statement filed with the Hearing Clerk by Respondent. Respondent's April 20, 2001, filing was not supplied in the context of settlement negotiations, and Complainant had no reason to treat Respondent's April 20, 2001, filing as confidential. Therefore, I agree with Complainant's contention that once Respondent filed the December 31, 2000, balance sheet and income statement with the Hearing Clerk, Complainant's sanction witness could testify regarding their contents and base his sanction recommendation on their contents. Therefore, I reject Respondent's contention that the sanction imposed by the Chief ALJ is not supported by admissible evidence.

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

ORDER

Respondent, The Fresh Group, Ltd., d/b/a/ Maglio and Company, is assessed a \$150,000 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:

James Frazier
United States Department of Agriculture
Agricultural Marketing Service
Fruit and Vegetable Division
PACA Branch
Room 2095 South Building
1400 Independence Avenue, SW
Washington, DC 20250-0242

Respondent's payment of the civil penalty shall be forwarded to, and received by, James Frazier within 90 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. D-00-0008. In the event James Frazier does not receive a certified check or money order in accordance with this Order, Respondent's PACA license shall be suspended for 60 days beginning 91 days after service of this Order on Respondent.

MISCELLANEOUS ORDERS

**In re: PMD PRODUCE BROKERAGE CORP.
PACA Docket No. D-99-0004.
Order Denying Petition for Reconsideration and Petition for New
Hearing on Remand.
Filed February 14, 2002.**

**PACA -- Petition for reconsideration -- Petition for new hearing -- Failure to pay --
Discharge of official duties -- Agreement to extend payment -- Burden of proof --
Publication of facts and circumstances.**

The Judicial Officer (JO) denied Respondent's petition for a new hearing because it was filed after the date the JO issued the Decision and Order on Remand. The Rules of Practice (7 C.F.R. § 1.146(a)(2)) require that a petition to reopen the hearing must be filed prior to the issuance of the JO's decision. The JO also denied Respondent's petition for reconsideration. The JO rejected Respondent's contention that Administrative Law Judge Edwin S. Bernstein (ALJ) did not consider the record before issuing the November 17, 1999, oral decision. The JO stated in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties. An administrative law judge must consider the record in a proceeding prior to the issuance of a decision in that proceeding and an administrative law judge is presumed to have considered the record prior to the issuance of his or her decision. The JO rejected Respondent's contention that, because of the similarity between one of Complainant's filings and the ALJ's decision, the ALJ should not be presumed to have properly discharged his duty to consider the record. The JO also rejected Respondent's contention that Complainant had the burden of proving the non-existence of an agreement between Respondent and its creditors. The JO found that Respondent, as the party with the better knowledge of the purported agreement and the party which affirmatively asserts the existence of the agreement, has the burden of proving the existence of the agreement. The JO stated the record does not establish that Respondent entered into written agreements with its creditors electing to use different times of payment than those set forth in 7 C.F.R. § 46.2(aa)(1)-(10) before entering into the perishable agricultural commodities transactions that are the subject of the proceeding. The JO stated he could find no basis and Respondent cited no basis for Respondent's contention that the agreement Respondent entered into with its creditors after the transactions that are the subject of the Complaint precludes Complainant from a statutory interest in the transactions that are the subject of the Complaint.

Ruben D. Rudolph, Jr., for Complainant.

Paul T. Gentile, for Respondent.

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

Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable

Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a “Complaint” on 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) [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: (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,

¹On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance). On August 3, 2001, Ruben D. Rudolph, Jr., entered an appearance on behalf of Complainant and gave notice that he was replacing Jane McCavitt as counsel for Complainant (Notice of Substitution of Counsel).

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 "Bench Decision," which is the written excerpt of the decision orally announced at the close of the November 17, 1999, 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 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 January 7, 2000, appeal petition on the ground that it was late-filed. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order 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 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 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. On April 6, 2001, I denied Respondent's petition to reopen the hearing and remanded the proceeding to Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] to: (1) provide Respondent with an 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)); and (2) issue a decision. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 364 (2001) (Order Denying Pet. to Reopen Hearing and Remand Order).

On May 17, 2001, Respondent filed "Respondent's Proposed Findings of

Fact, Conclusions and Order.” On June 6, 2001, the Chief ALJ issued a “Decision on Remand” [hereinafter Initial Decision and Order on Remand] in which the Chief ALJ adopted the ALJ’s November 30, 1999, Bench Decision.

On July 25, 2001, Respondent filed “Respondent’s Petition for Reconsideration” requesting that the Chief ALJ reverse the Bench Decision and the Initial Decision and Order on Remand or order a new hearing. On September 7, 2001, Complainant filed “Complainant’s Reply to Respondent’s Petition for Reconsideration.” On September 12, 2001, the Chief ALJ issued “Order Denying Petition for Reconsideration.”

On October 22, 2001, Respondent filed a petition for a new hearing and appealed to the Judicial Officer. On November 9, 2001, Complainant filed “Complainant’s Response to Respondent’s Appeal.” On November 15, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent’s petition for a new hearing and a decision.

On November 26, 2001, I issued a “Decision and Order on Remand:” (1) finding that, 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) finding that 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 during the time period set forth in the Complaint; (3) concluding that Respondent’s failures to make full payment promptly of the agreed purchase prices for 633 lots of perishable agricultural commodities which 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)); (4) ordering publication of the facts and circumstances set forth in the Decision and Order on Remand; and (5) denying Respondent’s petition for a new hearing. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780, 788, 796, 798 (2001) (Decision and Order on Remand).

On January 10, 2002, Respondent filed a “Petition to Reconsider.” On February 1, 2002, Complainant filed “Complainant’s Response to Respondent’s Petition for Reconsideration.” On February 4, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the November 26, 2001, Decision and Order

on Remand.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.]

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish

the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

**PART 46—REGULATIONS (OTHER THAN RULES OF
PRACTICE) UNDER THE PERISHABLE
AGRICULTURAL COMMODITIES ACT, 1930**

DEFINITIONS

....

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be

construed as follows:

....

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. “Full payment promptly,” for the purpose of determining violations of the Act, means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly”: *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises three issues in Respondent’s Petition to Reconsider. First, Respondent requests a new hearing. Respondent contends the November 17, 1999, hearing is flawed because the ALJ denied Respondent’s request to submit proposed findings of fact and proposed conclusions of law prior to the ALJ’s issuance of the oral decision, the ALJ ignored some of the evidence, and the ALJ issued an oral decision that was verbatim from Complainant’s Proposed Findings of Fact, Conclusions, and Order. Respondent asserts “[a] new hearing would permit the presentation of evidence that was generated by litigation in the Federal District Court case, including evidence that has been developed after the initial decision by the ALJ in 1999.” (Respondent’s Pet. to Reconsider at 1-2.)

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing prior to the issuance of the decision of the Judicial Officer, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or

reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite. . . .*

(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 issued the Decision and Order on Remand on November 26, 2001. Respondent did not file the Petition to Reconsider containing a petition for a new hearing until January 10, 2002, 1 month 15 days after I issued the Decision and Order on Remand. Therefore, Respondent's petition for a new hearing is untimely and is denied.²

Moreover, even if Respondent's petition for a new hearing had been timely filed, I would deny it because Respondent has not stated the nature and purpose of the evidence to be adduced, as required by section 1.146(a)(2) of the Regulations (7 C.F.R. § 1.146(a)(2)). Respondent merely states how the evidence to be adduced was generated and the date after which some of the evidence to be adduced was developed. Finally, the purported flaws in the initial hearing cited by Respondent do not provide a basis for reopening the

²*In re Judie Hansen*, 58 Agric. Dec. 390, 392 (1999) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 4 months 1 week after the Judicial Officer issued the decision); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 1704, 1709 (1998) (Order Denying Pet. for Recons. and for Reopening Hearing) (denying the respondent's petition to reopen hearing because the respondent filed the petition to reopen hearing 26 days after the Judicial Officer issued an order denying late appeal); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 718 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 57 days after the Judicial Officer issued the decision); *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing approximately 2 months after the Judicial Officer issued the decision); *In re King Meat Co.*, 40 Agric. Dec. 1910 (1981) (Order Denying Pet. for Recons., Rehearing and Reopening) (stating since the petition to reopen the hearing was filed after the issuance of the Judicial Officer's decision, it cannot be considered).

hearing to adduce additional evidence.

The ALJ's failure to permit Respondent to submit proposed findings of fact and proposed conclusions of law would not be corrected by holding a new hearing to adduce evidence, but instead would be corrected by providing Respondent with the opportunity to file proposed findings of fact and proposed conclusions of law. On April 6, 2001, I remanded the proceeding to the Chief ALJ with an instruction that he was to provide Respondent with an opportunity to submit for consideration proposed findings of fact, proposed conclusions, a proposed order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 364 (2001) (Order Denying Pet. to Reopen Hearing and Remand Order). The Chief ALJ provided Respondent with the opportunity to make such a filing, and on May 17, 2001, Respondent took advantage of that opportunity. Therefore, I find no basis for holding a new hearing, as Respondent requests, to provide Respondent with another opportunity to file proposed findings of fact and proposed conclusions of law.

The ALJ's purported failure to consider some of the evidence would not be corrected by holding a new hearing, as Respondent requests, but instead could be corrected by Respondent's appeal to the Judicial Officer requesting consideration of the evidence that the ALJ purportedly ignored. In this proceeding, after the ALJ issued a decision orally at the close of the November 17, 1999, hearing, the Chief ALJ reviewed the record (Initial Decision and Order on Remand at 2) and adopted the ALJ's November 30, 1999, Bench Decision, which is the written excerpt of the ALJ's decision orally announced at the close of the November 17, 1999, hearing. Moreover, after Respondent's October 22, 2001, appeal, I carefully considered the evidence in the record and I adopted, except for minor, non-substantive changes, the Chief ALJ's Initial Decision and Order on Remand. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780 (2001) (Decision and Order on Remand). Therefore, I find no basis for holding a new hearing, as Respondent requests, because the ALJ purportedly ignored some of the evidence.

The ALJ's issuance of an oral decision that was verbatim from Complainant's Proposed Findings of Fact, Conclusions, and Order would not be corrected by holding a new hearing, as Respondent requests, but instead any error in the ALJ's oral decision could be corrected on appeal to the Judicial Officer. In this proceeding, after the ALJ issued a decision orally at the close of the November 17, 1999, hearing, the Chief ALJ reviewed the record (Initial Decision and Order on Remand at 2) and adopted the ALJ's November 30,

1999, Bench Decision, which is the written excerpt of the ALJ's decision orally announced at the close of the November 17, 1999, hearing. Moreover, after Respondent's October 22, 2001, appeal, I carefully considered the record and I adopted, except for minor, non-substantive changes, the Chief ALJ's Initial Decision and Order on Remand. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780 (2001) (Decision and Order on Remand). Therefore, I find no basis for holding a new hearing, as Respondent requests, because the ALJ issued an oral decision that was verbatim from Complainant's Proposed Findings of Fact, Conclusions, and Order.

Second, Respondent contends the ALJ should not have received the benefit of the presumption that he considered the record prior to the issuance of the November 17, 1999, oral decision. Respondent bases this contention on the similarity between the ALJ's November 17, 1999, oral decision and Complainant's Proposed Findings of Fact, Conclusions, and Order. (Respondent's Pet. to Reconsider at 2.)

In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.³ Administrative law

³See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), cert. denied, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity, which attaches to official acts, can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent

(continued...)

(...continued)

Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), cert. denied, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. 406, 435-36 (2001) (stating, in the absence of clear evidence to the contrary, administrative law judges are presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision in the proceeding), *appeal docketed*, No. 01C0890 (E.D. Wis. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal docketed*, No. 01-6214 (2d Cir. Oct. 9, 2001); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001), *appeal docketed*, No. 01-3257 (8th Cir. Sept. 17, 2001); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating, instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), remanded, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, *reinstated nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts

(continued...)

judges must consider the record in a proceeding prior to the issuance of a decision in that proceeding.⁴ An administrative law judge is presumed to have considered the record prior to the issuance of his or her decision. I draw no inference from a similarity between a party's filing and an administrative law judge's decision that the administrative law judge failed to properly discharge his or her duty to consider the record prior to the issuance of a decision. Therefore, I reject Respondent's contention that I should not presume the ALJ properly discharged his duty to consider the record before he issued the November 17, 1999, oral decision because the ALJ's oral decision is similar to Complainant's Proposed Findings of Fact, Conclusions, and Order.

Moreover, the record establishes the ALJ presided at the reception of the evidence during the November 17, 1999, hearing. Further still, the ALJ's oral decision at the close of the hearing is supported by evidence in the record. The ALJ's presence during the reception of the evidence and the support in the record for the ALJ's oral decision belies Respondent's assertion that the ALJ did not consider the record prior to the issuance of the oral decision. Therefore, I reject Respondent's assertion that the ALJ did not consider the record before issuing the oral decision at the close of the November 17, 1999, hearing.

Third, Respondent contends I incorrectly determined that Respondent failed to prove that Respondent and its creditors entered into an agreement for payment that precludes Complainant from a statutory interest in the transactions that are the subject of the Complaint. Respondent states: (1) I misconstrued the Regulations regarding extension of payment terms which permits the parties to extend the time for payment by written agreement; (2) it introduced credible evidence of an agreement; and (3) Complainant had the burden to identify and prove the non-existence of an agreement or set forth the true nature of the agreement that would permit Complainant to retain an interest in the transactions that are the subject of the Complaint. (Respondent's Pet. to Reconsider at 2-3.)

Generally, the burden of proof rests with the party having the best

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of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

⁴See 5 U.S.C. § 556(d).

knowledge of the particular disputed facts.⁵ Further, generally, the burden of proof rests with the party asserting the affirmative of an issue.⁶ Respondent has

⁵See *United States v. New York, New Haven & Hartford R.R.*, 355 U.S. 253, 256 n.5 (1957) (stating the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary); *Greenleaf's Lessee v. Birth*, 31 U.S. (6 Pet.) 302, 312 (Jan. Term 1832) (stating, while the rule is not universal, in many cases the burden of proof is on the party within whose peculiar knowledge and means of information the fact lies); *National Communications Ass'n v. AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) (stating, all else being equal, the burden of proof is better placed on the party with easier access to the relevant information); *United States v. 194 Quaker Farms Road*, 85 F.3d 985, 990 (2d Cir.) (stating burden shifting where one party has superior access to evidence on a particular issue is a common feature of our law, *cert. denied sub nom. Scianna v. United States*, 519 U.S. 932 (1996)); *Lindahl v. OPM*, 776 F.2d 276, 280 (Fed. Cir. 1985) (stating one factor that is usually considered in the allocation of the burden of proof between parties is which side has the best knowledge of the particular disputed facts); *Browzin v. Catholic University of America*, 527 F.2d 843, 849 (D.C. Cir. 1975) (stating ordinarily a litigant does not have the burden of establishing facts peculiarly within the knowledge of the opposing party); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643 (D.C. Cir. 1973) (stating when certain material lies particularly within the knowledge of a party he is ordinarily assigned the burden of adducing the pertinent information and this assignment of burden to a party is fully appropriate when the other party is confronted with the often formidable task of establishing a negative averment); *United States v. Hayes*, 369 F.2d 671, 676 (9th Cir. 1966) (stating it is well-settled that in the interest of fairness the burden of proof ordinarily resting upon one party as to a disputed issue may shift to his adversary when the true facts relating to the disputed issue lie peculiarly within the knowledge of the latter); *Mangoang v. Boyd*, 186 F.2d 191, 195 (9th Cir. 1950) (stating the burden of showing a fact falls upon the one who has peculiar knowledge thereof); *Fleming v. Harrison*, 162 F.2d 789, 792 (8th Cir. 1947) (stating it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge or of which he is supposed to be cognizant); *Miller v. Lykes Bros.-Ripley S.S. Co.*, 98 F.2d 185, 186 (5th Cir.) (stating the litigant who has control of the proof must produce it), *cert. denied*, 305 U.S. 641 (1938).

⁶*Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1878) (stating, beyond question, the general rule is that the burden of proof in civil cases lies on the party who substantially asserts the affirmative of the issue); *United States v. Linn*, 42 U.S. (1 How.) 104, 111 (Jan. Term 1843) (stating the general rule is that he who holds the affirmative must prove it); *National Communications Ass'n v. AT&T Corp.*, 238 F.3d 124, 131 (2d Cir. 2001) (stating, all else being equal, courts should avoid requiring a party to shoulder the more difficult burden of proving a negative; the general rule is that the party that asserts the affirmative of an issue has the burden of proving the facts essential to its claim); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 589 (1st Cir.) (stating normally the party asserting the affirmative of a proposition should bear the burden of proving that proposition), *cert. denied*, 444 U.S. 866 (1979); *Marcum v. United States*, 452 F.2d 36, 39 (5th Cir. 1971) (stating the burden of proving disputed facts rests on the one affirming their existence and claiming rights and benefits therefrom); *Joseph A. Bass Co. v. United States*, 340 F.2d 842, 844 (8th Cir. 1965) (stating it is fundamental that the burden of proof in any cause rests upon the party who, as determined by the pleadings or nature of the case, asserts the affirmative of an issue and remains there until the termination of the action); *Florida Fruit Cannery, Inc. v. Walker*, 90 F.2d 753, 758 (5th Cir.) (stating the burden of proof rests primarily on him who has the affirmative of the issue), *cert. denied*, 302 U.S. 738 (1937); *Barnett v. Kunkel*, 259 F. 394, 401 (8th Cir. 1919) (stating an affirmative claim must be proven by the

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better knowledge than Complainant of any agreement Respondent has with its creditors and Respondent affirmatively asserts that it has an agreement with its creditors. Moreover, while section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a transaction involving perishable agricultural commodities may elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)), the agreement must be reduced to writing before the parties enter the transaction and the party claiming the existence of the agreement has the burden of proving it. Therefore, I reject Respondent's contention that Complainant has the burden of proving the non-existence of an agreement Respondent purportedly has with its creditors. Instead, I hold that Respondent has the burden of proving the existence of any agreement that it has with its creditors.

Respondent did not carry its burden of proving that it has an agreement with its produce sellers that was reduced to writing before Respondent and its produce sellers entered the transactions that are the subject of the Complaint. Mark Werner, Respondent's principal owner, testified that in 1996, after Respondent stopped doing business, Respondent entered into an agreement with its creditors in accordance with which Respondent was to pay its debts over an extended period of time (Tr. 90-93). However, neither Mr. Werner nor any other witness testified that Respondent entered into written agreements electing to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)) before entering into the perishable agricultural commodities transactions that are the subject of this proceeding. To the contrary, Mr. Werner's testimony establishes that the agreement Respondent made with its creditors to extend the time for payment was made in 1996 after Respondent entered the transactions that are the subject of this proceeding. Further, Michael Saunders, the United States Department of Agriculture investigator who investigated Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), testified that, during his review of Respondent's records, he did not find any evidence of written agreements between Respondent and any of its produce sellers in which the parties elected to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)) (Tr. 27).

(...continued)

party who seeks its benefit).

Finally, while Respondent did introduce evidence that in 1996, after Respondent stopped doing business, Respondent entered into an agreement with its creditors in accordance with which Respondent was to pay its debts over an extended period of time (Tr. 90-93), Respondent provides no basis for its contention that such an agreement “precludes the Complainant from having a ‘statutory interest’ in the transactions that are the subject of the Complain[.]t.” Moreover, I cannot find any basis in the PACA, the Regulations, or case law that supports Respondent’s position that such an agreement precludes Complainant from a “statutory interest” in the transactions that are the subject of the Complaint.

For the foregoing reasons and the reasons set forth in *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780 (2001) (Decision and Order on Remand), Respondent’s Petition to Reconsider 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.⁷ Respondent’s Petition to Reconsider was timely filed and automatically stayed the November 26, 2001, Decision and Order on Remand. Therefore, since Respondent’s Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in the Decision and Order on Remand filed November 26, 2001, is reinstated: except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration and Petition for New Hearing on Remand.

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

ORDER

⁷*In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (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 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 JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *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 Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying 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 Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances set forth in *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780 (2001) (Decision and Order on Remand) and this Order Denying Petition for Reconsideration and Petition for New Hearing on Remand shall be published, effective 60 days after service of this Order on Respondent.

**In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.**

and

**In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES; AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.**

**Order Lifting Stay as to JSG Trading Corp
Filed March 4, 2002.**

PACA—Lift stay.

Judicial Officer lifted the Stay Order imposed on the outcome of the proceedings after Respondent's appeals were denied.

Andrew Y. Stanton, for Complainant.

Richard M. Adler, for Respondent.

Order issued by William G. Jenson, Judicial Officer.

On November 29, 1999, I issued a Decision and Order on Remand as to JSG Trading Corp.: (1) concluding that JSG Trading Corp. [hereinafter Respondent] committed willful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) revoking Respondent's PACA license, effective 61 days after service of the Order on Respondent. *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

On January 13, 2000, Respondent filed a petition for review of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.),

58 Agric. Dec. 1041 (1999), with the United States Court of Appeals for the District of Columbia Circuit. On January 21, 2000, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], requested a stay of the November 29, 1999, Order pending the outcome of proceedings for judicial review. On January 27, 2000, I granted Complainant's request for a stay. *In re JSG Trading Corp.*, 59 Agric. Dec. 487 (2000) (Stay Order as to JSG Trading Corp.).

On January 5, 2001, the United States Court of Appeals for the District of Columbia Circuit issued a decision upholding the November 29, 1999, Decision and Order on Remand. *JSG Trading Corp. v. United States Dep't of Agric.*, 235 F.3d 608 (D.C. Cir. 2001). Subsequently, Respondent filed a petition for a writ of certiorari, which the Supreme Court of the United States denied. *JSG Trading Corp. v. United States Dep't of Agric.*, 122 S. Ct. 458 (2001).

On January 29, 2002, Complainant filed a Motion to Lift Stay Order as to Respondent JSG Trading Corp. [hereinafter Motion to Lift Stay] requesting that I lift the January 27, 2000, Stay Order as to JSG Trading Corp. [hereinafter Stay Order] and reinstate the November 29, 1999, Decision and Order on Remand, except that Complainant requests that the revocation of Respondent's PACA license be effective 7 days after service of the reinstated Order on Respondent.

On February 7, 2002, the Hearing Clerk served Respondent with Complainant's Motion to Lift Stay.¹ Respondent failed to file a response to Complainant's Motion to Lift Stay within 20 days after service, as required by section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(d)). On February 28, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Proceedings for judicial review of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), are concluded. Therefore, I grant Complainant's January 29, 2002, request that I reinstate the Order issued in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). However, I deny Complainant's January 29, 2002, request that I modify the Order issued in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), to make the revocation of Respondent's PACA license effective 7 days after service of the reinstated Order on

¹Domestic Return Receipt for Article Number 70993400001388058492.

Respondent. The Order in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), revoking Respondent's PACA license was to be effective 61 days after service of the Order on Respondent. Complainant provides no basis for modifying the time after which the revocation of Respondent's PACA license is effective. Therefore, I issue an Order revoking Respondent's PACA license, effective 61 days after service of the Order on Respondent.

The Stay Order issued January 27, 2000, is lifted and the Order issued in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), is effective, as follows:

ORDER

JSG Trading Corp.'s PACA license is revoked, effective 61 days after service of this Order on JSG Trading Corp.

**In re GLACIER DISTRIBUTION COMPANY, INC.,
PACA Docket No. D-00-0026.
Supplemental Order Revoking Respondent's License.
Filed March 5, 2002.**

Christopher P. Young-Morales, for Complainant.
Respondent, Pro se.
Decision and Order issued by Judge James W. Hunt, Chief, Administrative Law Judge.

PACA – Sanctions – Agreement, breach of payment terms.

Parties entered into a Compliance Agreement whereby civil money penalties were agreed to be paid by the Respondent upon a date certain. Respondent failed to fully comply with the payment terms therein. Under the terms of the agreement, a breach of the payment terms would, upon unilateral request by the Complainant, result in the revocation of the Respondent's license without further administrative action.

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 September 7, 2000, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleged that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA by failing to make full payment promptly of \$208,089.80 to 10 sellers for 17 lots of perishable agricultural commodities sold in interstate commerce from July 1999 through February 2000. The complaint requested the issuance of an order finding that Respondent had committed willful, flagrant and repeated violations of the PACA and ordering Respondent's violations published.

On May 3, 2001, a Decision Without Hearing By Reason of Consent was issued in this case whereby Respondent Glacier Distribution Company, Inc. (hereinafter Respondent) was found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA. The order required Respondent to pay a civil penalty of \$75,000 and to comply with all the terms of an Understanding Regarding Civil Penalty and Compliance Agreement, entered into by Respondent and Complainant on May 1, 2001.

The Understanding Regarding Civil Penalty and Agreement required, *inter alia*, that Respondent pay the civil penalty in two separate payments. The first payment in the amount of \$30,000 was to be paid immediately upon receipt and signature of the Decision Without Hearing By Reason of Consent, and the second payment of \$45,000 "shall be made no later than May 31st by check or money order payable to the United States Treasury." The first payment in the amount of \$30,000 was received by USDA, PACA Branch on May 15, 2001. A check for the second payment in the amount of \$45,000 was received by USDA, PACA Branch on June 13, 2001. On August 23, 2001, USDA, PACA Branch received notice from USDA, National Finance Center that Respondent's check for the second payment in the amount of \$45,000 had been returned by Respondent's financial institution for Non-Sufficient Funds.

Complainant has filed a motion for a Supplemental Order Revoking Respondent's license and implementation of all sanctions prescribed by the Act following such revocation, stating that the civil penalty has not been paid in accordance with the Understanding Regarding Civil Penalty and Agreement or the Decision Without Hearing By Reason of Consent. Complainant points to The Understanding Regarding Civil Penalty and Agreement which provides that "in the event the payment required to be made by Respondent . . . is not made, Respondent's license and the license of it's successors or assigns will be revoked without further administrative proceedings, . . . and all of the sanctions prescribed by the Act following such revocation or publication will be in effect."

The Understanding Regarding Civil Penalty and Agreement did not state the

year in which the second payment in the amount of \$45,000 was to be paid. I find that the parties intended that the second payment was to be made by May 31, 2001. Respondent indicated it believed that this was the deadline for making the payment by sending a check to Complainant dated May 31, 2001, and it did not file objections to Complainant's Motion for Supplemental Order in which Complainant stated that Respondent failed to make the required second payment by May 31, 2001.

Therefore, as Respondent has failed to pay the \$45,000 portion of the civil penalty by the date agreed to in the Understanding Regarding Civil Penalty and Agreement, Respondent is in violation of both the Understanding Regarding Civil Penalty and Agreement and the Decision Without Hearing By Reason of Consent.

Accordingly, Respondent's license is hereby revoked, and all of the sanctions prescribed by the Act following such revocation will be in effect. This Decision and Order will become final without further proceedings upon its issuance, pursuant to section 1.138 of the Rules of Practice (7 C.F.R. § 1.138).

Copies of this order shall be served upon the parties.

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.

PACA Docket No. D-94-0508.

and

In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES; AND ANTHONY GENTILE.

PACA Docket No. D-94-0526.

Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction.

Filed May 1, 2002.

PACA – Pardon, granting of, not appropriate in civil proceeding – Reopen, motion to, late filed – Perjury, suggestion of, not compelling.

The Judicial Officer (JO) denied each of JSG Trading Corp.'s (Respondent) motions and requests. The JO rejected Respondent's contention that *Finer Foods, Inc. v. United States Dep't of Agric.*, 274 F.3d 1137 (7th Cir. 2001), compelled vacating *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), because the Court in *Finer*

Foods found that a factual inquiry was necessary to determine whether Joan Colson committed perjury in a declaration filed in *Finer Foods*. The JO stated the accuracy of Joan Colson's declaration filed in *Finer Foods*, a case which has no connection with *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), is not relevant to Joan Colson's credibility in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). The JO denied Respondent's motion to reopen the hearing because it was not filed before the JO issued the Decision and Order on Remand as to JSG Trading Corp., as required by 7 C.F.R. § 1.146(a)(2). The JO denied Respondent's motion for a stay pending further proceedings against Ms. Colson pursuant to *Finer Foods* stating the Court in *Finer Foods* did not order further proceedings against Ms. Colson. The JO denied Respondent's request for a pardon or a lesser sanction stating Respondent's request was a petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), which was not filed within 10 days after Respondent was served with *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), as required by 7 C.F.R. § 1.146(a)(3). The JO stated that even if the petition for reconsideration had not been late-filed, he would have rejected Respondent's request for a pardon. The JO, citing *United States v. Wilson*, 32 U.S. 150, 160 (Jan. Term 1833), stated a pardon is an act which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he or she has committed. The JO stated Respondent has not been convicted of a crime. Further, the JO stated Respondent raised no meritorious basis for its request for a reduction of the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

Andrew Y. Stanton, for Complainant.
John M. Himmelberg and Gary C. Adler, for Respondent.
Rulings issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On November 29, 1999, I issued a Decision and Order on Remand as to JSG Trading Corp.: (1) concluding that JSG Trading Corp. [hereinafter Respondent] committed willful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) revoking Respondent's PACA license.¹

On January 13, 2000, Respondent filed a petition for review of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), with the United States Court of Appeals for the District of Columbia Circuit. On January 21, 2000, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], requested a stay of the

¹*In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1094 (1999).

November 29, 1999, order revoking Respondent's PACA license, pending the outcome of proceedings for judicial review. On January 27, 2000, I granted Complainant's request for a stay.²

On January 5, 2001, the United States Court of Appeals for the District of Columbia Circuit issued a decision upholding the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp.³ Subsequently, Respondent filed a petition for a writ of certiorari, which the Supreme Court of the United States denied.⁴

On January 29, 2002, Complainant filed a Motion to Lift Stay Order as to Respondent JSG Trading Corp. [hereinafter Motion to Lift Stay] requesting that I lift the January 27, 2000, Stay Order as to JSG Trading Corp. and reinstate the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. Respondent failed to file a timely response to Complainant's Motion to Lift Stay, and on March 4, 2002, I issued an Order Lifting Stay as to JSG Trading Corp.⁵

On March 4, 2002, subsequent to my issuing the Order Lifting Stay as to JSG Trading Corp., Respondent filed a letter requesting that I pardon Respondent, Jill Goodman, and Steven Goodman or reduce the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). On March 22, 2002, Respondent filed "Respondent JSG Trading Corp.'s Motion to Vacate the Decision and Order, To Reopen the Hearing or to Stay the Decision and Order, or In the Alternative to Consider JSG Trading Corp.'s Request for a Pardon or to Impose a Lesser Sanction" [hereinafter March 22, 2002, Motions]. On April 10, 2002, Complainant filed "Complainant's Opposition to JSG Trading Corp.'s Motion to Vacate Decision and Order, Reopen the Hearing or Stay the Decision and Order or, In the Alternative, Consider JSG Trading Corp.'s Request for Pardon or to Impose a

²*In re JSG Trading Corp.*, 59 Agric. Dec. 487 (2000) (Stay Order as to JSG Trading Corp.).

³*JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608 (D.C. Cir. 2001).

⁴*JSG Trading Corp. v. Department of Agric.*, 122 S. Ct. 458 (2001).

⁵*In re JSG Trading Corp.*, 61 Agric. Dec. ___ (Mar. 4, 2002) (Order Lifting Stay as to JSG Trading Corp.).

Lesser Sanction” [hereinafter Response to March 22, 2002, Motions]. On April 17, 2002, Respondent filed “Respondent JSG Trading Corp.’s Reply to Complainant’s Opposition to Motion to Vacate Decision and Order, Reopen the Hearing or Stay the Decision and Order or, In the Alternative, Consider JSG Trading Corp.’s Request for a Pardon or to Impose a Lesser Sanction” [hereinafter Reply to Complainant’s Response].⁶ I did not order Respondent to file Respondent’s Reply to Complainant’s Response. Therefore, I do not consider Respondent’s Reply to Complainant’s Response. On April 25, 2002, Complainant filed “Complainant’s Response to JSG Trading Corp.’s Reply.”⁷ On April 25, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for rulings on Respondent’s March 22, 2002, Motions.

RULING DENYING RESPONDENT’S MOTION TO VACATE

Joan Colson, an auditor for the United States Department of Agriculture, audited Respondent. Ms. Colson appeared as a witness on behalf of Complainant during the hearing in this proceeding and testified regarding her audit of Respondent. Complainant introduced into evidence a number of documents that Ms. Colson obtained and prepared during the course of her audit of Respondent.⁸

Respondent asserts that in *Finer Foods, Inc. v. United States Dep’t of Agric.*, 274 F.3d 1137 (7th Cir. 2001), “the United States Court of Appeals for the Seventh Circuit made the extraordinary finding that a factual inquiry is

⁶The 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], which are applicable to this proceeding, provide no right to reply to a response to a motion or request, as follows:

§ 1.143 Motions and requests.

....

(d) *Response to motions and requests.* Within 20 days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response; however, the Judge or Judicial Officer, in their discretion, may order that a reply be filed.

7 C.F.R. § 1.143(d).

I did not order Respondent to file Respondent’s Reply to Complainant’s Response. Therefore, I do not consider Respondent’s Reply to Complainant’s Response.

⁷Since the Rules of Practice provide no right to reply to a response to a motion or request (7 C.F.R. § 1.143(d)) and I do not consider Respondent’s Reply to Complainant’s Response, I also do not consider Complainant’s Response to JSG Trading Corp.’s Reply.

⁸*See In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999) (describing Ms. Colson’s audit of Respondent, referencing Ms. Colson’s testimony, and referencing the documents Ms. Colson obtained and prepared during her audit of Respondent).

warranted as to whether Joan Colson, a Department of Agriculture auditor, committed perjury and fraud on the Court” (Respondent’s March 22, 2002, Motions at 1). Respondent moves to vacate *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on the ground that *Finer Foods* “compels vacating the Decision and Order against JSG in the instant case which was based on Ms. Colson’s testimony” (Respondent’s March 22, 2002, Motions at 2).

In *Finer Foods*, a perishable agricultural commodity distributor, Finer Foods, Inc. [hereinafter Finer Foods], sought a stay pending judicial review of a United States Department of Agriculture order suspending Finer Foods’ PACA license, effective beginning November 16, 2001. The United States Department of Agriculture opposed the stay arguing that Finer Foods could not show irreparable harm because it went out of business before November 16, 2001. To support this contention, the United States Department of Agriculture filed a declaration of Ms. Colson which states that she had visited Finer Foods’ business premises and found the premises locked and abandoned and that Finer Foods’ former customers and suppliers said they are now doing business with Mid West Institutional Food Distributors. In response, Finer Foods accused Ms. Colson of perjury and filed an affidavit of Finer Foods’ corporate secretary, Mary Ann Fitzgerald, stating that Finer Foods had operated without interruption until November 16, 2001, when the United States Department of Agriculture suspended Finer Foods’ PACA license. These inconsistent statements drew the following response from the Court:

Someone is not telling this court the truth. *Who* is trying to deceive the court we do not know—though the fact that Finer Foods is paying counsel in an effort to have its license reinstated supports an inference that the status of the license matters (which it does only if Finer Foods remains in business). Going deeper into this dispute requires a factual inquiry that appellate courts are not set up to conduct. Perhaps it will prove necessary for this court to appoint a special master to hold an evidentiary hearing, or refer the dispute to the United States Attorney General for a criminal perjury investigation. For now, however, the Fitzgerald affidavit supplies an adequate basis to adjudicate the current request on the merits. If as the Department believes Finer Foods is defunct, then an order restoring its license will have no effect and cannot harm the public interest. But if the Department is wrong, and Finer Foods remains a viable concern, then allowing the suspension to

continue may kill it—and the United States does not afford a damages remedy to firms put out of business by administrative high-handedness.

Finer Foods, Inc., 274 F.3d at 1140.

I do not find the Seventh Circuit’s response to Ms. Colson’s and Ms. Fitzgerald’s statements a “finding that a factual inquiry is warranted as to whether Joan Colson . . . committed perjury and fraud on the Court” as Respondent contends. Instead, the Seventh Circuit speculates that perhaps an evidentiary hearing or a criminal perjury investigation is necessary to determine whether Ms. Colson’s or Ms. Fitzgerald’s statement accurately reflects Finer Foods’ status on November 16, 2001. In any event, the accuracy of Ms. Colson’s statement filed in *Finer Foods*, a case which has no connection with the instant proceeding, is not relevant to Ms. Colson’s credibility in this proceeding. Moreover, Ms. Colson’s credibility in this proceeding is supported by documentary evidence introduced in this proceeding. Therefore, I reject Respondent’s contention that *Finer Foods* compels vacating *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), and I deny Respondent’s motion to vacate *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

RULING DENYING RESPONDENT’S MOTION TO REOPEN THE HEARING

Respondent moves to reopen the hearing to allow Respondent “to pursue evidence and testimony concerning Ms. Colson’s credibility” (Respondent’s March 22, 2002, Motions at 2). Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing prior to the issuance of the decision of the Judicial Officer, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite.* . . .

. . . .

(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 issued *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on November 29, 1999. Respondent filed its petition to reopen the hearing to allow Respondent “to pursue evidence and testimony concerning Ms. Colson’s credibility” on March 22, 2002, 2 years 3 months 21 days after I issued *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Therefore, Respondent’s petition to reopen the hearing is untimely and is denied.⁹

RULING DENYING RESPONDENT’S MOTION FOR A STAY

Respondent requests that I stay *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999),

⁹See *In re PMD Produce Brokerage Corp.*, 61 Agric. Dec. ____, slip op. at 11-12 (Feb. 14, 2002) (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand) (denying the respondent’s petition to reopen the hearing because the respondent filed the petition to reopen the hearing 1 month 15 days after the Judicial Officer issued the decision on remand); *In re Judie Hansen*, 58 Agric. Dec. 390, 392 (1999) (Order Denying Pet. to Reopen Hearing) (denying the respondent’s petition to reopen the hearing because the respondent filed the petition to reopen the hearing 4 months 1 week after the Judicial Officer issued the decision); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 1704, 1709 (1998) (Order Denying Pet. for Recons. and for Reopening Hearing) (denying the respondent’s petition to reopen the hearing because the respondent filed the petition to reopen the hearing 26 days after the Judicial Officer issued an order denying late appeal); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 718 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (denying the respondent’s petition to reopen the hearing because the respondent filed the petition to reopen the hearing 57 days after the Judicial Officer issued the decision); *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing) (denying the respondent’s petition to reopen the hearing because the respondent filed the petition to reopen the hearing approximately 2 months after the Judicial Officer issued the decision); *In re King Meat Co.*, 40 Agric. Dec. 1910 (1981) (Order Denying Pet. for Recons., Rehearing and Reopening) (stating since the petition to reopen the hearing was filed after the issuance of the Judicial Officer’s decision, it cannot be considered).

“pending further proceedings against Ms. Colson pursuant to the Seventh Circuit’s decision” (Respondent’s March 22, 2002, Motions at 2). The Seventh Circuit did not order further proceedings against Ms. Colson in *Finer Foods*. Instead, the Seventh Circuit speculates that perhaps an evidentiary hearing or a criminal perjury investigation is necessary to determine whether Ms. Colson’s or Ms. Fitzgerald’s statement accurately reflects Finer Foods’ status on November 16, 2001. Further, even if a proceeding were instituted against Ms. Colson in connection with the her declaration filed in *Finer Foods*, that proceeding would not be relevant to the instant proceeding. Therefore, I deny Respondent’s motion for a stay of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

**RULING DENYING RESPONDENT’S REQUEST FOR
A PARDON OR LESSER SANCTION**

Respondent requests that I consider Respondent’s previously-filed request for a pardon or lesser sanction (Respondent’s March 22, 2002, Motions at 5).

On January 29, 2002, Complainant filed Complainant’s Motion to Lift Stay. The Hearing Clerk served Respondent with Complainant’s Motion to Lift Stay on February 7, 2002.¹⁰ Respondent’s response to Complainant’s Motion to Lift Stay was required to be filed within 20 days after the Hearing Clerk served Respondent with Complainant’s Motion to Lift Stay.¹¹ Respondent failed to file a timely response to Complainant’s Motion to Lift Stay. On March 4, 2002, at 10:39 a.m., I filed an Order Lifting Stay as to JSG Trading Corp. granting Complainant’s Motion to Lift Stay.¹² On March 4, 2002, at 10:56 a.m., Respondent filed a letter dated February 14, 2002, in response to Complainant’s Motion to Lift Stay requesting that I pardon Respondent, Jill Goodman, and Steven Goodman or reduce the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999) (Letter from Steven Goodman to Judicial Officer dated February 14,

¹⁰See Domestic Return Receipt for Article Number 70993400001388058492.

¹¹See 7 C.F.R. § 1.143(d).

¹²See the Hearing Clerk’s time and date stamp on Order Lifting Stay as to JSG Trading Corp. at 1.

2002).¹³ Since Respondent's letter dated February 14, 2002, was a late-filed response to Complainant's Motion to Lift Stay filed after I issued the Order Lifting Stay as to JSG Trading Corp., I did not consider Respondent's March 4, 2002, filing in connection with Complainant's Motion to Lift Stay.

However, based on Respondent's March 22, 2002, Motions, I now consider Respondent's request for a pardon or a lesser sanction. After examining Respondent's March 4, 2002, filing, I find that it is a petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). 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).

The Hearing Clerk served Respondent with the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. on December 6, 1999.¹⁴ Respondent filed its request that I reconsider the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading

¹³See the Hearing Clerk's time and date stamp on Respondent's letter to the Judicial Officer dated February 14, 2002, at 1st unnumbered page.

¹⁴See Domestic Return Receipt for Article Number Z 599 734 371.

Corp.), 58 Agric. Dec. 1041 (1999), on March 4, 2002, 2 years 2 months 26 days after the date the Hearing Clerk served the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. on Respondent. Accordingly, Respondent's petition for reconsideration was late-filed and is denied.¹⁵

¹⁵See *In re Jerry Goetz*, 61 Agric. Dec. ____ (Jan. 17, 2002) (Order Lifting Stay) (denying, as late-filed, a petition for reconsideration filed 4 years 2 months 4 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Beth Lutz*, 60 Agric. Dec. 68 (2001) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 months 2 days after the date the Hearing Clerk served the respondent with the decision and order); *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 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 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-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).

Moreover, even if Respondent's request for reconsideration of the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would deny it. As an initial matter, Respondent's request for a pardon is inapposite to this proceeding. A pardon is an act which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he or she has committed.¹⁶ This proceeding is not a criminal proceeding and Respondent has not, in this proceeding, been convicted of a crime.

Further, Respondent raises no meritorious basis for a reduction of the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Respondent raises six issues in support of its request for a lesser sanction. First, Respondent contends that Anthony Gentile and Albert Lomoriello, Jr., were independent agents or independent brokers and not employed purchasing agents; hence, Respondent's payments to Messrs. Gentile and Lomoriello could not constitute an activity that falls within the traditional definitions of commercial bribery (Letter from Steven

¹⁶See *United States v. Wilson*, 32 U.S. 150, 160 (Jan. Term 1833) (stating a pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed); *In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (per curiam) (citing with approval the definition of *pardon* in *United States v. Wilson*); *United States v. Garfinkel*, 166 F.2d 887, 889 n.2 (3d Cir. 1948) (stating the definition of *pardon* in *United States v. Wilson* is the one usually quoted); *Groseclose v. Plummer*, 106 F.2d 311, 313 (9th Cir.) (stating a pardon does nothing more than abolish all restrictions upon the liberty and civil rights of the pardoned one that follow a felony conviction and sentence), *cert. denied*, 308 U.S. 614 (1939); *Lettsome v. Waggoner*, 672 F. Supp. 858, 863 (D. V.I. 1987) (per curiam) (citing with approval the definition of *pardon* in Black's Law Dictionary (5th ed.): an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed); *Petition of De Angelis*, 139 F. Supp. 779, 780 (E.D.N.Y. 1956) (stating a pardon is an act of grace, exempting the individual on whom it is bestowed from the punishment the law has inflicted for a crime he has committed); *Gerrish v. State of Maine*, 89 F. Supp. 244, 245 (D. Maine 1950) (citing with approval the definition of *pardon* in *United States v. Wilson*); *United States v. Hughes*, 175 F. 238, 242 (W.D. Pa. 1892) (stating pardons are granted to individual criminals by name); *In re De Puy*, 7 F. Cas. 506, 510-11 (S.D.N.Y. June Term 1869) (No. 3814) (citing with approval the definition of *pardon* in *United States v. Wilson*).

See also Black's Law Dictionary 1137 (7th ed. 1999):

pardon, *n.* The act or an instance of officially nullifying punishment or other legal consequences of a crime.

Goodman to Judicial Officer dated February 14, 2002, at 2nd unnumbered page).

Respondent's March 4, 2002, filing is not the first time Respondent has raised the issue of Mr. Gentile's and Mr. Lomoriello's status. I previously rejected Respondent's contention that Respondent's payments to Mr. Gentile and Mr. Lomoriello could not have violated the PACA because Messrs. Gentile and Lomoriello were partners in L&P and American Banana, respectively, or independent brokers, as follows:

V. Messrs. Gentile and Lomoriello Were Not Partners or Independent Brokers.

Respondent contends that Messrs. Gentile and Lomoriello were partners in limited joint venture arrangements with L&P and American Banana, respectively. Respondent contends that, as a matter of law, Respondent's payments to Messrs. Gentile and Lomoriello could not constitute an activity that falls within the traditional definitions of commercial bribery because knowledge of payment to one partner must be attributed to the other partners and such payments could not be considered secret. Alternatively, Respondent asserts that Messrs. Gentile and Lomoriello were independent brokers and that payments to independent brokers are permissible under the PACA. (Respondent's Reply at 15-19.)

Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, in accordance with which Mr. Gentile shared profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Mr. Gentile became ill in late 1990 or early 1991 and from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446, 2909). L&P continued to compensate Mr. Gentile on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).

Mr. Gentile described himself as being employed by L&P (Tr. 2819). Mr. Prisco, the president of L&P, described Mr. Gentile as an employee of L&P and stated that L&P uses joint account arrangements with

salespersons because the joint account arrangement gives a salesperson an incentive to work hard (Tr. 442-47). Mr. Beni, the secretary-treasurer of L&P, testified that Mr. Gentile was a salesperson for L&P and that L&P paid Mr. Gentile a salary for his fruit sales and had a joint account arrangement with Mr. Gentile with respect to his tomato sales (Tr. 2890, 2892-93). Mr. Beni testified that joint account arrangements are used because they give people "an incentive to sell more stuff" (Tr. 2893). Mr. Beni testified that his partner at L&P was in charge of the office, and when asked who his partner was, Mr. Beni identified his partner as Mr. Prisco (Tr. 2890-91).

Mr. Lomoriello became employed by American Banana in approximately December 1991 (Tr. 1256). Mr. Lomoriello had a joint account arrangement with American Banana in accordance with which Mr. Lomoriello shared profits and losses with American Banana on the produce that he purchased (Tr. 1245-46).

Mr. Contos, American Banana's vice-president, described Mr. Lomoriello as working for American Banana as a night salesperson and described himself as supervising Mr. Lomoriello (Tr. 314, 323). While Mr. Lomoriello characterized himself as an independent contractor, who sold services to American Banana (Tr. 1244), and a partner (Tr. 1277-78), he also described his duties at American Banana, which description supports Mr. Contos' view that Mr. Lomoriello was a salesperson working for American Banana (Tr. 1258-66). Mr. Contos testified that the president of American Banana was Alfred Allega and testified that he (Mr. Contos) had two partners. Mr. Contos identified Mr. Allega as one of those partners, but did not identify the other partner. (Tr. 323-24.)

A partnership is an association of two or more persons to carry on business for a profit. An essential element of partnership is sharing of profit and losses and sharing of profits and losses generally constitutes prima face evidence of the existence of a partnership. However, the fact that an individual shares profits and losses is not dispositive of partnership status and whether partnership status exists turns on several factors, including the intention of the parties that they be partners, sharing in profits and losses, exercising joint control over the business,

making capital investment, and possessing an ownership interest in the partnership.

The party alleging the existence of a partnership bears the burden of proof on the issue. The record does not support a finding that Mr. Gentile was a partner with L&P or the principals at L&P or a finding that Mr. Lomoriello was a partner with American Banana or the principals at American Banana. Instead, the record establishes that the joint account arrangements that Messrs. Gentile and Lomoriello had with L&P and American Banana, respectively, were merely methods by which L&P and American Banana compensated Messrs. Gentile and Lomoriello, respectively, for services. I find that Mr. Gentile was a purchasing agent working for a principal, L&P, and that Mr. Lomoriello was a purchasing agent working for a principal, American Banana.

In re JSG Trading Corp. (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1091-94 (1999) (footnotes omitted).

Similarly, the United States Court of Appeals for the District of Columbia Circuit rejected Respondent's contention that Messrs. Gentile and Lomoriello were principals in L&P and American Banana or independent brokers and Respondent's payments to them could not have violated the PACA, as follows:

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 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 negotiate "for or on behalf of the vendor or the purchaser." 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.

JSG Trading Corp. v. Department of Agric., 235 F.3d 608, 615-16 (D.C. Cir. 2001) (footnotes omitted).

I agree with the Court's findings concerning Mr. Gentile's status and Mr. Lomoriello's status, and I reject Respondent's contention that Messrs. Gentile and Lomoriello were independent agents or independent brokers and not employed purchasing agents. Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on Respondent's contention that Messrs. Gentile and Lomoriello were independent agents or independent brokers.

Second, Respondent contends its PACA license expired on January 19, 2002, and I cannot revoke a PACA license that has already expired (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 2nd and 3rd unnumbered pages).

Respondent's timely petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on the ground that Respondent's PACA license expired may have been a basis for changing the form of the sanction from revocation of Respondent's PACA license to publication of the facts and circumstances of Respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, this change in the form of the sanction would not be a reduction of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Publication of the facts and circumstances of Respondent's violations and revocation of Respondent's PACA license would have the same effect on Respondent and persons responsibly connected¹⁷ with

¹⁷The term "responsibly connected" is defined in section 1a(b)(9) of the PACA, as follows:

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an

(continued...)

Respondent.

Section 4(b) of the PACA places identical licensing restrictions on an applicant who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b) and on an applicant whose PACA license has been revoked, as follows:

§ 499d. Issuance of license

....

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision

(...continued)

owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

7 U.S.C. § 499d(b)(A)-(B).

Similarly, section 8(b) of the PACA places identical employment restrictions on persons responsibly connected with any person who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b) and on persons responsibly connected with any person whose PACA license has been revoked, as follows:

§ 499h. Grounds for suspension or revocation of license

.....

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary; [or]

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

7 U.S.C. § 499h(b)(1)-(2).

Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as

to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on Respondent's contention that its PACA license expired on January 19, 2002.

Third, Respondent contends that any sanction imposed on Respondent, Jill Goodman, or Steven Goodman must be effective on January 19, 2002, the day Respondent's PACA license expired because Respondent failed to pay its PACA license fee¹⁸ (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

Respondent cites no basis for its contention that a sanction imposed under the PACA must become effective on the date a PACA licensee chooses to allow its PACA license to expire by failing to pay the PACA license fee. Moreover, I can find no basis in the PACA that supports Respondent's contention.

Respondent contends Jill Goodman and Steven Goodman will receive a sanction greater than the sanction "intended by PACA" if the effective date of the revocation of Respondent's PACA license is after January 19, 2002. Jill Goodman and Steven Goodman are not parties to this proceeding, and no sanction is imposed on Jill Goodman or Steven Goodman in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). However, I infer Respondent contends that Jill Goodman and Steven Goodman are, and at all times material to this proceeding were, responsibly connected with Respondent and that pursuant to section 8(b) of the PACA (7 U.S.C. § 499h(b)), no PACA licensee may employ Jill Goodman and Steven Goodman after the order revoking Respondent's PACA license becomes effective on May 8, 2002.¹⁹

Pursuant to section 8(b) of the PACA (7 U.S.C. § 499h(b)), the Secretary of Agriculture may approve employment of a person responsibly connected with any person whose license has been revoked after 1 year following the PACA license revocation. Respondent appears to contend that since Jill Goodman and Steven Goodman have not been employed by a PACA licensee since January 19, 2002, the revocation of Respondent's PACA license must become

¹⁸Section 3(b)(2) of the PACA (7 U.S.C. § 499c(b)(2)) requires PACA licensees to pay license fees annually or at such longer interval as the Secretary of Agriculture may prescribe.

¹⁹The order revoking Respondent's PACA license is effective 61 days after the Hearing Clerk served Respondent with the Order Lifting Stay as to JSG Trading Corp. *See In re JSG Trading Corp.*, 61 Agric. Dec. ____, slip op. at 4 (Mar. 4, 2002) (Order Lifting Stay as to JSG Trading Corp.). The Hearing Clerk served Respondent with the Order Lifting Stay as to JSG Trading Corp. on March 8, 2002. *See* Domestic Return Receipt for Article Number 70993400001388101433. Therefore, the order revoking Respondent's PACA license becomes effective May 8, 2002.

effective January 19, 2002, so that the Secretary of Agriculture may approve a PACA licensee's employment of Jill Goodman and Steven Goodman beginning January 20, 2003, 1 year after Jill Goodman and Steven Goodman ceased being employed by a PACA licensee. Respondent contends, if the revocation of Respondent's PACA license is effective after January 19, 2002, Jill Goodman and Steven Goodman would be barred from employment by a PACA licensee for a period longer than that provided in section 8(b) of the PACA (7 U.S.C. § 499h(b)).

I disagree with Respondent's contention. *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), does not prohibit a PACA licensee from employing Jill Goodman or Steven Goodman until the Order in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), becomes effective on May 8, 2002. Thus, no employment bar applied to Jill Goodman and Steven Goodman beginning January 19, 2002, as Respondent contends. Instead, Jill Goodman and Steven Goodman apparently voluntarily ceased employment with PACA licensees beginning January 19, 2002. Respondent has confused Jill Goodman's and Steven Goodman's voluntary decision not to continue employment by a PACA licensee beginning on January 19, 2002, with an employment bar. The Secretary of Agriculture may approve a PACA licensee's employment of Jill Goodman and Steven Goodman 1 year after PACA licensees are prohibited from employing Jill Goodman and Steven Goodman. The effect of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on Jill Goodman and Steven Goodman is not greater than that provided in section 8(b) of the PACA (7 U.S.C. § 499h(b)). Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not change the effective date of the order revoking Respondent's PACA license, as Respondent requests.

Fourth, Respondent requests that I review the United States Department of Agriculture's "admitted compliance with SUBRFA and former Vice President Gore's Regulatory Reform Act" (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

Respondent provides no reference to the portion of the extensive record in this proceeding in which the United States Department of Agriculture "admitted compliance with SUBRFA and former Vice President Gore's Regulatory Reform Act," and I cannot locate the purported admission. Therefore, I am not

able to review the admission Respondent contends the United States Department of Agriculture made.

Fifth, Respondent contends that its violations of the PACA “cannot possibly be considered willful in any standard except per-se [sic]” (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

In *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), I did not apply a per se test to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).²⁰ Instead, I applied the following test to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)):

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.

The commission merchant, dealer, or broker may rebut the presumption by showing that: (1) the commission merchant, dealer, or broker did not make a payment to or offer to pay a purchasing agent; (2) the value of the payment or offer was *de minimis*; (3) the payment or offer was not intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; or (4) the purchasing agent’s principal or employer was fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent.

In re JSG Trading Corp. (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1051 (1999).

²⁰*In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1052 n.8 (1999).

Applying this test to the facts in the instant proceeding, I concluded that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).²¹ The United States Court of Appeals for the District of Columbia Circuit concluded that I did not use the wrong legal standard to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the Court agreed with my conclusion that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).²²

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.²³ In light of the need to

²¹*In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1094 (1999).

²²*See JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608, 612-17 (D.C. Cir. 2001).

²³*See, e.g., Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re PMD Produce Brokerage, Inc.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 n.5 (2001), *appeal docketed* No. 02-3006 (6th Cir. Jan 3, 2002); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (2d Cir. 1998) (Table), 1998 WL 863340, *cert. denied*, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also* *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

prove intent to induce, I cannot now conceive of a situation in which a respondent would be found to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) using the test I applied in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1051 (1999), and not be found to have willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent has not provided any basis for its contention that its violations of the PACA “cannot possibly be considered willful in any standard except per-se [sic]” and I reject Respondent’s contention. Therefore, even if Respondent’s March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on Respondent’s contention that its violations of the PACA “cannot possibly be considered willful in any standard except per-se [sic].”

Sixth, Respondent requests that I reduce the sanction against Respondent based on its 1993 transformation into a model produce company (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

Respondent’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are extremely serious and warrant revocation of Respondent’s PACA license. The United States Court of Appeals for the District of Columbia Circuit found the United States Department of Agriculture acted well within its discretion in revoking Respondent’s PACA licence, as follows:

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). 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 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.

JSG Trading Corp. v. Department of Agric., 235 F.3d at 616-17 (footnote omitted).

Revocation of Respondent’s PACA license is necessary to deter not only Respondent from future violations of the PACA, but also other potential PACA violators. Although Respondent may not have committed any PACA violations since 1993, when Respondent states it transformed into a model produce company, and may not commit future violations of the PACA, revocation of Respondent’s PACA license is necessary to deter other potential violators from future violations of the PACA. Therefore, even if Respondent’s March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on

Respondent's contention that since 1993 Respondent has been a model produce company.

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.

PACA Docket No. D-94-0508.

and

In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES; AND ANTHONY GENTILE.

PACA Docket No. D-94-0526.

Ruling Denying JSG Trading Corp.'s April 9, 2002, Motion for Stay.

Filed May 1, 2002.

PACA – Lift stay denied.

Judicial Officer denied Respondent's motion for Stay because Respondent stated that it may seek appeal.

Andrew Y. Stanton, for Complainant.

John M. Himmelberg and Gary C. Adler, for Respondent.

Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On November 29, 1999, I issued a Decision and Order on Remand as to JSG Trading Corp.: (1) concluding that JSG Trading Corp. [hereinafter Respondent] committed willful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) revoking Respondent's PACA license.¹

On January 13, 2000, Respondent filed a petition for review of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), with the United States Court of Appeals for the District of Columbia Circuit. On January 21, 2000, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States

¹*In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1094 (1999).

Department of Agriculture [hereinafter Complainant], requested a stay of the November 29, 1999, order revoking Respondent's PACA license, pending the outcome of proceedings for judicial review. On January 27, 2000, I granted Complainant's request for a stay.²

On January 5, 2001, the United States Court of Appeals for the District of Columbia Circuit issued a decision affirming the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp.³ Subsequently, Respondent filed a petition for a writ of certiorari, which the Supreme Court of the United States denied.⁴

On January 29, 2002, Complainant filed a Motion to Lift Stay Order as to Respondent JSG Trading Corp. [hereinafter Motion to Lift Stay] requesting that I lift the January 27, 2000, Stay Order as to JSG Trading Corp. and reinstate the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. Respondent failed to file a timely response to Complainant's Motion to Lift Stay, and on March 4, 2002, I issued an Order Lifting Stay as to JSG Trading Corp.⁵ Pursuant to the Order Lifting Stay as to JSG Trading Corp., the order revoking Respondent's PACA license becomes effective on May 8, 2002.⁶

On April 9, 2002, Respondent filed "JSG Trading Corp.'s Motion for a Stay" [hereinafter April 9, 2002, Motion for Stay]. On April 22, 2002, Complainant filed "Complainant's Opposition to JSG Trading Corp.'s Motion for a Stay." On April 25, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's April 9, 2002, Motion for Stay.

Respondent requests that I stay the order in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), for two reasons. First, Respondent states subsequent to my March 4, 2002, issuance of the Order Lifting Stay as to JSG Trading Corp., Respondent

²*In re JSG Trading Corp.*, 59 Agric. Dec. 487 (2000) (Stay Order as to JSG Trading Corp.).

³*JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608 (D.C. Cir. 2001).

⁴*JSG Trading Corp. v. Department of Agric.*, 122 S. Ct. 458 (2001).

⁵*In re JSG Trading Corp.*, 61 Agric. Dec. ____ (Mar. 4, 2002) (Order Lifting Stay as to JSG Trading Corp.).

⁶The order revoking Respondent's PACA license is effective 61 days after the Hearing Clerk served Respondent with the Order Lifting Stay as to JSG Trading Corp. See *In re JSG Trading Corp.*, 61 Agric. Dec. ____, slip op. at 4 (Mar. 4, 2002) (Order Lifting Stay as to JSG Trading Corp.). The Hearing Clerk served Respondent with the Order Lifting Stay as to JSG Trading Corp. on March 8, 2002. See Domestic Return Receipt for Article Number 70993400001388101433. Therefore, the order revoking Respondent's PACA license becomes effective May 8, 2002.

filed “Respondent JSG Trading Corp.’s Motion to Vacate the Decision and Order, To Reopen the Hearing or to Stay the Decision and Order, or In the Alternative to Consider JSG Trading Corp.’s Request for a Pardon or to Impose a Lesser Sanction” [hereinafter March 22, 2002, Motions]. Respondent contends it is quite possible that I will not rule on Respondent’s March 22, 2002, Motions before May 8, 2002. Respondent further contends that, if I do not grant Respondent’s April 9, 2002, Motion for Stay and I grant the relief requested in Respondent’s March 22, 2002, Motions, Respondent’s PACA license would be revoked for a period of time when it should not have been revoked. (Respondent’s April 9, 2002, Motion for Stay at 1-2.)

Earlier today, May 1, 2002, I denied Respondent’s March 22, 2002, Motions.⁷ Therefore, I reject Respondent’s first basis for its April 9, 2002, request for a stay of the order revoking Respondent’s PACA license.

Second, Respondent states that, if I deny Respondent’s March 22, 2002, Motions, Respondent “is likely to seek judicial review of that decision” and Respondent requests a stay pending the outcome of proceedings for judicial review of that decision (Respondent’s April 9, 2002, Motion for Stay at 2). As stated in this Ruling Denying JSG Trading Corp.’s April 9, 2002, Motion for Stay, *supra*, I previously denied Respondent’s March 22, 2002, Motions. Nevertheless, I do not grant Respondent’s request for a stay based on Respondent’s speculation that it may seek judicial review of *In re JSG Trading Corp.* 61 Agric. Dec. ____ (May 1, 2002) (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction) because, if Respondent were to elect not to seek judicial review, a stay of the order in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), would serve no purpose.

For the foregoing reasons, Respondent’s April 9, 2002, Motion for Stay is denied.

⁷*In re JSG Trading Corp.* 61 Agric. Dec. ____ (May 1, 2002) (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction).

DEFAULT DECISIONS

**In re: REBECCA A. BALLARD, d/b/a RUDY BROKERAGE CO.
PACA Docket No. D-01-0019.
Decision Without Hearing by Reason of Default.
Filed November 9, 2001.**

PACA – Default – Payment, failure to make, prompt --Late payment of sellers.

David A. Richman, for Complainant.
Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture 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 20, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period November 1999 through July 2000, Respondent Rebecca A. Ballard, d/b/a Rudy Brokerage Co., (hereinafter “Respondent”) failed to make full payment promptly to 20 sellers, of the agreed purchase prices, or balances thereof, in the total amount of \$634,902.10 for 143 lots of perishable agricultural commodities which it received, accepted and sold in interstate commerce.

A copy of the Complaint was served upon Respondent on July 9, 2001, which Respondent has not answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Finding of Fact

1. Respondent is an individual organized and existing under the laws of the state of Texas. Its business mailing address is 3100 Produce Row, #104, Houston, Texas 77023.
2. At all times material herein, Respondent was licensed under the

provisions of the PACA. License number 981257 was issued to Respondent on May 19, 1998. This license terminated on January 2, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent was discharged from debt in bankruptcy.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph III of the Complaint, during the period November 1999 through July 2000, Respondent purchased, received, and accepted in interstate commerce, from 20 sellers, 143 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$634,902.10.

Conclusions

Respondent's failure to make full payment promptly with respect to the 143 transactions set forth in Finding of Fact No. 4 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final February 9, 2002.-Editor]

**In re: DIAMOND FRUIT & VEGETABLE EXCHANGE, INC.
PACA Docket No. D-01-0033.
Decision Without Hearing by Reason of Default.
Filed January 18, 2002.**

PACA – Default – Payment, failure to make, prompt – Late payment of sellers.

Clara Kim, for Complainant.
Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter referred to as the “Act” or “PACA”) , instituted by a complaint filed on September 21, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period June 2000 through February 2001, Respondent Diamond Fruit & Vegetable Exchange, Inc., (hereinafter “Respondent”) failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of \$ 419,418.00 for 113 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent which Respondent has not answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Florida. Its business address while operating was Plant City State Farmers Market, 1307 West Martin Luther King, Jr., Boulevard, Plant City, Florida 33566. Its mailing address was P.O. Box 5126, Plant City, Florida 33564. Its current address is c/o Shari S. Jansen, Trustee, P.O. Box 49974, Sarasota, Florida 34230.

2. At all times material herein, Respondent was licensed under the

provisions of the PACA. License number 991398 was issued to Respondent on August 6, 1999. This license terminated on August 8, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee.

3. During the period June 2000 through February 2001, Respondent purchased, received, and accepted in interstate and foreign commerce, from 30 sellers, 113 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$ 419,418.00.

Conclusions

Respondent's failure to make full payment promptly with respect to the 113 transactions set forth in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final March 12, 2002.-Editor]

In re: SHAMROCK TRADING, L.L.C.
PACA Docket No. D-01-0030.
Decision Without Hearing By Reason of Default.
Filed January 18, 2002.

PACA – Default – Payment, failure to make, prompt -- Late payment of sellers.

Clara Kim, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter referred to as the “Act” or “PACA”) , instituted by a complaint filed on August 30, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period November 1999 through October 2000, Respondent Shamrock Trading, L.L.C., (hereinafter “Respondent”) failed to make full payment promptly to 32 sellers of the agreed purchase prices in the total amount of \$ 1,068,064.74 for 274 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent which Respondent has not answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a limited liability company organized and existing under the laws of the State of Washington. Its business address while operating was 1630 North Wenatchee Avenue, Suite 2, Wenatchee, Washington 98801. Its current address is c/o Mary T. Wynne, Trustee, P.O. Box 1218, Okanogan, Washington 98840-1218.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 981670 was issued to Respondent on July 27, 1998. This license terminated on July 27, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee.

3. During the period November 1999 through October 2000, Respondent purchased, received, and accepted in interstate and foreign commerce, from 32 sellers, 274 lots of fruits and vegetables, all being perishable agricultural

commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$ 1, 068,064.74.

Conclusions

Respondent's failure to make full payment promptly with respect to the 274 transactions set forth in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties. [This Decision and Order became final March 12, 2002.-Editor]

In re: GEORGIA MUSHROOM, INC.
PACA Docket No. D-01-0020.
Decision Without Hearing By Reason of Default.
Filed January 18, 2002.

PACA – Default – Payment, failure to make, prompt -- Late payment of sellers.

Ann K. Parnes, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture

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 21, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period November 1999 through November 2000, Respondent Georgia Mushroom, Inc., (hereinafter “Respondent”) failed to make full payment promptly to four sellers in the total amount of \$232,730.29 for 168 lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

A copy of the complaint was served upon Respondent on July 3, 2001. This complaint has not been answered. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Georgia. Its business mailing address is P.O. Box 1225, Forest Park, Georgia 30298.

2. Respondent never applied for and never received a license under the provisions of the PACA, but has operated subject to the PACA at all times material to this proceeding.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. During the period November 1999 through November 2000, Respondent purchased, received, and accepted in interstate commerce 168 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$232,730.29.

Conclusions

Respondent’s failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. 499b(4)), and the facts and circumstances of the violations, set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service, as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[Note: This decision became final April 15, 2002]

**In re: DEMMA FRUIT COMPANY.
PACA Docket No. D-01-0029.
Decision Without Hearing By Reason of Default.
Filed March 7, 2002.**

PACA – Default – Payment, failure to make, prompt -- Late payment of sellers.

Charles Spicknall, for Complainant.
Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as “the Act,” instituted by a complaint filed on August 30, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that from October 24, 1999 through October 1, 2000, Demma Fruit Company, Ltd. (hereinafter “Respondent”) purchased, received and accepted, in interstate and foreign commerce, from 59 sellers, 1577 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of

\$4,397,950.91.

A copy of the complaint was mailed to Respondent by certified mail and was refused or unclaimed. Therefore, pursuant to section 1.147(c)(1) of the Rules of Practice, (7 C.F.R. § 1.147), the complaint was served on Respondent on September 19, 2001 by regular mail. The complaint has not been answered. The time for filing an answer having run, and upon Complainant's motion for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Demma Fruit Company, Ltd., is a corporation organized and existing under the laws of the State of Nebraska. Respondent's business mailing address is 11235 John Gault Boulevard, Omaha, Nebraska 68137.

2. At all times material herein, Respondent was licensed under the Act. License number 890859 was issued to Respondent on March 14, 1989. This license terminated on March 14, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period from October 24, 1999 through October 1, 2000, Respondent failed to make full payment promptly to 59 sellers for 1577 lots of fruits and vegetables that it purchased, received and accepted in interstate and foreign commerce in the total amount of \$4,397,950.91.

Conclusions

Respondent's failure to make full payment promptly with respect to the 1577 transactions described above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above shall be published.

This Order shall take effect on the 11th day after this Decision becomes

final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 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 parties.

[This Decision and Order became final June 11, 2002.-Editor]

CONSENT DECISIONS

(Not published herein – Editor)

Robert C. Downs. PACA Docket No. APP-01-0003. 3/12/02.

Stanley Orchards Sales, Inc. PACA Docket No. D-01-0001. 5/3/02.

Weatherhead Potato Corp. PACA Docket No. D-01-0025. 6/5/02.

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AGRICULTURE DECISIONS

Volume 61

January - June 2002

Part Four

List of Decisions Reported (Alphabetical Listing)

Index (Subject Matter)



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 List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index (from the beginning of the annual Volume) 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.

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