AGRICULTURE DECISIONS

Volume 71

July – December 2012

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 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 (U.S.D.A. 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*. Decisions and Orders found on the OALJ website may be cited as primary sources.

Consent Decisions entered subsequent to December 31, 1986 are no longer published in *Agriculture Decisions*. However, a list of Consent Decisions is included in the printed edition. Since Volume 62, the full texts of Consent Decisions are posted on the USDA/OALJ website (See url below). Consent Decisions are on file in portable document format (pdf) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (OALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be arranged by the controlling statute and will be published chronologically along with decisions from appeals (if any) of those ALJ decisions issued by the Judicial Officer.

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. This 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.

Volumes 57 (circa 1998) through the current volume of *Agriculture Decisions* are available online at http://www.dm.usda.gov/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned, but due to privacy concerns there are no plans that they appear on the OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in reverse chronological order. Decisions and Orders for years prior to the current year are also available in pdf archives by calendar year.

Beginning in Volume 69 (circa 2010), Miscellaneous Orders and Default Decisions by the Administrative Law Judges will continue to be cited but without the full text of the Order/Decision. The full context of the Order/Decision will be published on the OALJ website (see above).

Selected individual softbound and volumes from Vol. 59 (circa 2000) of *Agriculture Decisions* are available until current supplies are exhausted.

Direct all inquires regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 South Building, Washington, D.C. 20250-9200; Telephone: (202) 720-6645; Fax: (202) 690-0790; and e-mail address of Editor.OALJ@dm.usda.gov.

AGRICULTURE DECISIONS

Volume 71

July – December 2012
Part One (General)
Pages 643 - 1064

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

LIST OF DECISIONS REPORTED

JULY – DECEMBER 2012

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

MISCELLANEOUS ORDER

ADMINISTRATIVE WAGE GARNISHMENT ACT

DEPARTMENTAL DECISIONS

MISCELLANEOUS ORDERS

ANIMAL QUARANTINE ACT

DEFAULT DECISION

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

MISCELLANEOUS ORDERS

DEFAULT DECISIONS

EQUAL ACCESS TO JUSTICE ACT

DEPARTMENTAL DECISION

MISCELLANEOUS ORDERS

FOREST RESOURCES CONSERVATION AND SHORTAGE RELIEF ACT

DEPARTMENTAL DECISION

HORSE PROTECTION ACT

DEFAULT DECISION

SALARY OFFSET ACT

DEPARTMENTAL DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

HORNE v. USDA.
No. 11-15748.
Court Decision.
Filed October 2, 2012.

AMAA—Rulemaking.

[Cite as: 494 Fed. Appx. 774 (9th Cir. 2012)].

United States Court of Appeals,
Ninth Circuit.

Before: ALARCÓN, GRABER, and BERZON, Circuit Judges.

MEMORANDUM*

Marvin D. Horne, Laura R. Horne, and Raisin Valley Farms Marketing, LLC ("the Hornes") petitioned the United States Department of Agriculture ("USDA" or "the agency") to engage in rulemaking to change the agency's regulations governing service of final agency orders. USDA denied the petition, and the district court upheld the agency's decision. We have jurisdiction under 28 U.S.C. § 1291 and remand to the agency for further explanation of its reasons for denying the Hornes' petition.

The Hornes are California raisin producers. USDA regulates raisin production according to the Raisin Marketing Order ("RMO"), 7 C.F.R. § 989.1 *et seq.*, promulgated under the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 601 *et seq.* In March 2007, the Hornes petitioned the agency pursuant to AMAA § 608c(15)(A), seeking an exemption from the RMO. A Judicial Officer

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

("JO") dismissed the petition.

Under section 608c(15)(B) of the AMAA, the U.S. District Courts have jurisdiction to review final agency orders, so long as the complaint "is filed within twenty days from the date of the entry of such ruling." 7 U.S.C. § 608c(15)(B). USDA's "Rules of Practice Governing Procedures on Petitions to Modify or to Be Exempted from Marketing Orders" ("Rules of Practice"), 7 C.F.R. § 900.50 *et seq.*, provide that a final agency order "shall be filed with the hearing clerk, who shall serve it upon the parties." *Id.* § 900.66(b). Section 900.69(b) of the Rules of Practice instructs that

> Service shall be made either (1) by delivering a copy of the document or paper to the individual to be served ...; or (2) by leaving a copy of the document or paper at the principal office or place of business of such individual ...; or (3) by registering and mailing a copy of the document or paper, addressed to such individual ... at his or its last known principal office, place of business, or residence. Proof of service hereunder shall be made by the affidavit of the person who actually made the service. The affidavit contemplated herein shall be filed with the hearing clerk, and the fact of filing thereof shall be noted on the docket of the proceeding.

The Hornes were the victims of a failed notice attempt by certified mail, which did not reach them until well-after the twenty-day time limit to seek review in the district court. They nonetheless filed a complaint in the district court seeking review of the JO's decision. The district court, citing the "twenty-day rule" in 7 U.S.C. § 608c(15)(B), dismissed the complaint for lack of subject matter jurisdiction. *Horne v. Dep't of Agric.*, No. 1:08–CV–00402–OWW–SMS, 2008 WL 4911438, at *3–4 (E.D.Cal. Nov. 13, 2008) (unpublished).

We affirmed in an unpublished memorandum disposition, but noted the "obvious unfairness of the result." *Horne v. Dep't of Agric.*, 395 Fed.Appx. 486, 489 (9th Cir.2010). "[I]n response to our explicit inquiry, the USDA ... t [ook] the position that it lack[ed] discretion to remedy the problem" in the Hornes' case—a position we found "dubious" under the

Rules of Practice. *Id.*; *see, e.g.*, 7 C.F.R. § 900.69(c) (providing for discretionary time extensions where "there is good reason"). Nevertheless, we noted that it was "the province of the Department and not this court" to assess the propriety of its own rules. *Horne*, 395 Fed.Appx. at 489.

While their earlier petition was being litigated, the Hornes filed a second petition with the agency requesting that it "engage in rule making to amend the Rules of Practice" to require more prompt notice such as by email or fax. *See* 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."). The Hornes cited the failed service by mail in their own earlier case, pointing out that the existing Rules "have no provision for promptly and expeditiously notifying Petitioners [of final agency orders], despite the ... short time frames for Petitioners to appeal ... decisions" to the district court. USDA responded to the Hornes' rulemaking petition—as it must under the Administrative Procedure Act (APA), 5 U.S.C. § 555(e)[1]—in a one-page letter denying the Hornes' request. *See also* 7 C.F.R. § 1.28 ("Petitions by interested persons in accordance with 5 U.S.C. § 553(e) ... will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions.").

An agency's decision not to engage in rulemaking is entitled to a high level of judicial deference. *See Massachusetts v. EPA*, 549 U.S. 497, 527–28, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). Deference is especially merited where an agency's procedural regulations are involved. *See Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should

---

[1] Title 5 U.S.C. § 555(e) provides:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

be free to fashion their own rules of procedure....” (internal quotation marks omitted)).

At the same time, an agency must provide a “reasoned explanation for its refusal [to initiate rulemaking].” *Massachusetts*, 549 U.S. at 534, 127 S.Ct. 1438. Though the Hornes’ rulemaking petition was admittedly brief, USDA’s response did not adequately explain the basis for its decision. Instead, the denial letter primarily cites the district court’s decision in the Hornes’ previous lawsuit challenging the twenty-day time limit as it applied to their complaint for review of the agency’s final order denying them an exemption from the RMO. The district court’s ruling in that earlier case does not explain why the agency declined to consider amending the Rules of Practice.

Nor does USDA’s statement that it “believes that the procedures under the applicable Rules are adequate to effectuate service of department decisions” provide an adequate explanation for its refusal to conduct rulemaking. *Cf. O’Keeffe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n,* 92 F.3d 940, 943-44 (9th Cir. 1996) (holding that the Commission did not act arbitrarily or capriciously in denying a rulemaking petition because it considered several factors to “determin[e] [whether] an amendment to the regulations was ... appropriate or necessary,” such as “the potential benefits of the requested amendment, potential costs, and the relation between the potential benefits and costs”).

We emphasize that in holding that USDA’s statement of grounds was inadequate, we do not purport to review the merits of the agency’s decision not to amend the Rules of Practice. We hold that the agency failed to do what the APA requires: to provide “a brief statement of the grounds for denial [of the rulemaking petition].” 5 U.S.C. § 555(e). Here, the Hornes’ petition, although itself extremely brief, did note the short time-frame for review of final agency orders as established by the AMAA, cite alternative methods for providing notice, and identify at least one case (their own) in which service of a final agency order failed, thereby precluding judicial review. As we noted in our prior memorandum disposition (filed after the denial of the Hornes’ rulemaking petition), the “unfairness” of precluding review by someone who never received notice is “obvious” and could be remedied by

permitting the exercise of discretion where the agency is aware that notice has failed. *Cf.* Fed. R.App. P. 4(a)(6) ("The district court may reopen the time to file an appeal ... [if] (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment ... sought to be appealed within 21 days after entry.").

In short, the Hornes' identification of specific, viable alternative methods for providing notice merited some brief explanation of why the agency did not find it desirable to consider those alternatives at that time. The bare conclusion that its existing procedural rules were "adequate" was not responsive.

REVERSED and REMANDED to the USDA for further explanation of its reasons for denying the rulemaking petition.

Parallel Citations
2012 WL 4503414 (C.A.9 (Cal.))

———

ADMINISTRATIVE WAGE GARNISHMENT ACT

DEPARTMENTAL DECISIONS

In re: JOSEPH SINIFF, A/K/A JOSEPH E. SINIFF, JR.
Docket No. 12-0348.
Decision and Order.
Filed July 3, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on June 29, 2012. Joseph E. Siniff, Jr., the Petitioner ("Petitioner Siniff, Jr."), participated, representing himself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Siniff, Jr.'s Earnings Statements (two) (filed June 13, 2012), plus completed "Consumer Debtor Financial Statement" with attached sheets (filed June 11, 2012), are admitted into evidence, together with the testimony of Petitioner Siniff, Jr., together with his Hearing Request dated March 2, 2012, and all accompanying documents (filed April 9, 2012).

4. USDA Rural Development's Exhibits RX 1 through RX 12, plus Narrative, Witness & Exhibit List, were filed on May 23, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner. Also admitted into evidence is USDA Rural Development's document filed on June 29, 2012.

5. Petitioner Siniff, Jr. bought a home in Michigan in 2005, borrowing $96,900.00 to pay for it. RX 2. USDA Rural Development's position is that Petitioner Siniff, Jr. owes to USDA Rural Development **$54,026.94** (as of May 21, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for the loan made in 2005 ("the debt"). The loan was made by AmeriFirst Financial Corporation and was sold to JP Morgan Chase Bank, N.A. (Chase Home Finance LLC being the servicing lender); the ***Guarantee*** remained in force.

6. After careful review of all of the evidence, I agree with USDA Rural Development's position. [The loan balance may have changed from the May 21, 2012 balance of $54,026.94 (excluding collection costs), because garnishment was ongoing (*see* RX 12, p. 1); the balance may therefore have been reduced and may continue to change. As will be seen later in this Decision, **the balance will increase when amounts taken from Petitioner Siniff, Jr.'s pay are returned to him**.]

7. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Siniff, Jr., "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

8. The Due Date of the last payment made was July 1, 2008. RX 7, p. 3. Petitioner Siniff, Jr. testified that his employer eliminated his job at the plant in Michigan and wanted him to go where he was needed; he took the job in the Richmond, Virginia facility as a result. Petitioner Siniff, Jr. testified that the home in Michigan wouldn't sell because of the high unemployment rates; no one could afford to borrow enough to buy it; numerous houses were empty. Petitioner Siniff, Jr. testified that when he called Chase to request help such as interest only payments, the Chase representative told him that since he was current, he could miss a couple

of payments and then get back to Chase to request modifying the loan or interest only payments. Petitioner Siniff, Jr. testified that when they called back, Chase treated them like dirt. The foreclosure was initiated on January 26, 2009. RX 7, p. 3. The lender Chase (Chase Home Finance LLC) bid $52,700.00 and acquired the home, which became REO (Real Estate Owned), at the Sheriff's sale on February 27, 2009. RX 3.

9. USDA Rural Development reimbursed the lender $66,114.66 on July 1, 2010 (RX 7, p. 9). Then a recovery, from sale to a third party, yielded $1,620.10 to reduce the debt. RX 9. The debt was then $64,494.56, which is the amount USDA Rural Development seeks to recover from Petitioner Siniff, Jr. under the ***Guarantee***. RX 9. RX 9 details the loss claim paid under the ***Guarantee***, showing how the debt became $64,494.56.

$ 93,489.78	Unpaid Principal Balance
$ 10,949.93	Unpaid Interest Balance
$104,439.71	Principal & Interest Due
+ $ 7,115.82	Lender Expenses to Sell Property
$111,555.53	Total Debt Charged to Petitioner Siniff, Jr.
- $ 45,440.87	Credits (includes liquidation value of $39,600.00, RX 6)
$ 66,114.66	Amount Due Before $1,620.10 Recovery
- $ 1,620.10	Recovery [the portion of the $1,906.00 that went to USDA Rural Development; the other $285.90 went to Chase. RX 8]
$ 64,494.56	

RX 9, USDA Rural Development Narrative, and testimony.

10. Collections from Treasury (an ***offset***, which was an income tax refund from the co-borrower; plus garnishments from Petitioner Siniff, Jr.) applied to the debt (after collection fees are subtracted) leave **$54,026.94** unpaid as of May 21, 2012 (excluding the potential remaining collection fees). *See* RX 12. Interest stopped accruing on the date of the liquidation appraisal, which was March 17, 2010 (*see* RX 7, p. 4).

11. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$54,026.94**, would increase the balance by $15,127.55, to $69,154.49. RX 12. [As indicated, **the balance will increase when amounts taken from Petitioner Siniff, Jr.'s pay are returned to him**.]

12. Petitioner Siniff, Jr. testified that he is currently flat on his back, bedridden, because his heel is fractured in four places. Until the swelling goes down, he cannot undergo the surgery he needs. The plan is to insert a metal plate.

13. Petitioner Siniff, Jr. testified that he has three children to support and is recently divorced. [References to his spouse on his Consumer Debtor Financial Statement are to his now former spouse.] Petitioner Siniff, Jr.'s child support obligation is more than $1,000.00 per month. The child support for his oldest child, who is 17, is deducted as a payroll deduction or garnishment from Petitioner Siniff, Jr.'s paycheck. Petitioner Siniff, Jr. testified that the garnishments to pay the USDA Rural Development debt put him behind in paying child support for his two younger children. [The Earnings Statements mistakenly refer to the garnishments as "Garnish: Stud. Loan". Petitioner Siniff, Jr. testified that there is no student loan; these are the garnishments to pay the USDA Rural Development debt.]

14. Petitioner Siniff, Jr. asks that the garnishments cease, and also that the amounts already garnished be refunded to him so that he can pay the child support for his two younger children that he was unable to pay because of the garnishments. Petitioner Siniff, Jr.'s Consumer Debtor Financial Statement (with attached sheets) filed June 11, 2012 shows that his current living expenses are reasonable (frugal, actually). Petitioner

Siniff, Jr. is heavily burdened with debt, including roughly $35,000.00 still owed for his attorneys' fees for the divorce (to various attorneys and to his parents to repay their payments to his attorneys). His current medical crisis will of course be costly. And he owes various amounts to his former wife; $1,400.00 on back federal income taxes; back rent; payments on his pick-up truck; payments on loans against his 401 K accounts; and payments on medical bills and a credit card.

15.I have carefully considered Petitioner Siniff, Jr.'s request that the amounts already garnished be refunded to him. The garnishments began because Petitioner Siniff, Jr.'s Hearing Request was regarded as LATE. Pioneer Credit Recovery, Inc., in November 2011, was using an old address for him. Petitioner Siniff, Jr. testified that he had been at his current address (the one on his Hearing Request; the one on his Consumer Debtor Financial Statement) since about June or July 2011. Pioneer Credit Recovery, Inc., on January 23, 2012, used that correct address, indicating that a copy of the information that he had previously requested was enclosed. Petitioner Siniff, Jr. responded promptly, with documentation, as can be seen from his letter dated February 26, 2012, included in the accompanying documents to his Hearing Request dated March 2, 2012. The deadline for Petitioner Siniff, Jr. to submit his Hearing Request timely (December 9, 2011) had come and gone long before he got notice of the documents dated November 17, 2011. Petitioner Siniff, Jr. was responsible in his correspondence with Pioneer Credit Recovery, Inc. promptly upon his receiving a copy of the documents dated November 17, 2011 (he received the documents sometime from late January to early February 2012). Further, Petitioner Siniff, Jr. is in dire straits because of his current injury. Consequently, I order that the amounts taken from Petitioner Siniff, Jr.'s pay, through garnishment, be returned to him, even though his Hearing Request was regarded as LATE.

16.Garnishment at 15% of Petitioner Siniff, Jr.'s disposable pay would currently cause Petitioner Siniff, Jr. financial hardship. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Siniff, Jr.'s disposable pay through August 2013; then **up to 5%** of Petitioner Siniff, Jr.'s disposable pay beginning September 2013 through August 2015; then **up to 10%** of Petitioner Siniff, Jr.'s disposable pay beginning September 2015 through

August 2017; then **up to 15%** of Petitioner Siniff, Jr.'s disposable pay thereafter. 31 C.F.R. § 285.11.

17. Petitioner Siniff, Jr., you may want to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

18. I encourage **Petitioner Siniff, Jr. and the collection agency** to **negotiate** the repayment of the debt. Petitioner Siniff, Jr., this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Siniff, Jr., you may want to request apportionment of debt between you and the co-borrower. Petitioner Siniff, Jr., you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Siniff, Jr., you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may wish to include someone else with you in the telephone call when you call to negotiate.

Findings, Analysis and Conclusions

19. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Siniff, Jr. and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

20. Petitioner Siniff, Jr. owes the debt described in paragraphs 5 through 11.

21. Garnishment is authorized, but to prevent financial hardship shall be limited as follows: through August 2013, garnishment limited to **0%** of Petitioner Siniff, Jr.'s disposable pay; beginning September 2013 through August 2015 garnishment **up to 5%** of Petitioner Siniff, Jr.'s disposable pay; beginning September 2015 through August 2017 garnishment **up to 10%** of Petitioner Siniff, Jr.'s disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Siniff, Jr.'s disposable pay. 31 C.F.R. § 285.11.

22. Any amounts collected through garnishment of Petitioner Siniff, Jr.'s pay prior to implementation of this Decision **shall be returned to Petitioner Siniff, Jr.**, and Petitioner Siniff, Jr. **shall first bring his child support obligations current** before spending the balance as he chooses.

23. Repayment of the debt may occur through ***offset*** of Petitioner Siniff, Jr.'s **income tax refunds** or other **Federal monies** payable to the order of Mr. Siniff, Jr.

ORDER

24. Until the debt is repaid, Petitioner Siniff, Jr. shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

25. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to **0%** of Petitioner Siniff, Jr.'s disposable pay through August 2013; then **up to 5%** of Petitioner Siniff, Jr.'s disposable pay beginning September 2013 through August 2015; then **up to 10%** of Petitioner Siniff, Jr.'s disposable pay beginning September 2015 through August 2017; then **up to 15%** of Petitioner Siniff, Jr.'s disposable pay thereafter. 31 C.F.R. § 285.11.

26. USDA Rural Development, and those collecting on its behalf, will be required to **return to Petitioner Siniff, Jr.** any amounts already collected through garnishment of Petitioner Siniff, Jr.'s pay, prior to implementation of this Decision. Petitioner Siniff, Jr. **shall first bring his child support obligations current** before spending the balance as he chooses.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

_____

In re: CINDY A. BATTISONI, F/K/A CINDY A. VANBUREN
Docket No. 12-0349.
Decision and Order.
Filed July 10, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on June 29, 2012. The Petitioner, Cindy A. Battistoni, formerly known as Cindy A. VanBuren ("Petitioner Battistoni"), participated, representing herself (appears *pro se*).

2. The Respondent, Rural Development, an agency of the United States Department of Agriculture ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Admitted into evidence are Petitioner Battistoni's testimony and her Hearing Request dated March 9, 2012.

4. Admitted into evidence are Michelle Tanner's testimony and USDA Rural Development's Exhibits RX 1 through RX 7, plus Narrative, Witness & Exhibit List, which were filed on June 1, 2012.

5. Petitioner Battistoni owes to USDA Rural Development **$23,318.22** (as of May 31, 2012, *see* esp. RX 7, pp. 1, 2), in repayment of a United States Department of Agriculture / Farmers Home Administration loan made in 1994, for a home in New York. The balance is now unsecured ("the debt").

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on

$23,318.22, would increase the balance by $6,529.10 to $29,847.32. *See* esp. RX 7, p. 2.

7. The amount Petitioner Battistoni borrowed in 1994 was $68,000.00. RX 1. Foreclosure was begun in 2009. Petitioner Battistoni's co-borrower, her former husband, Chad D. VanBuren, Sr., filed for Chapter 13 Bankruptcy in 2010. The Bankruptcy stay was modified to allow foreclosure. The foreclosure sale took place in March 2011, when the home was sold to a third party for $55,100.00 (RX 4). By the time the sale proceeds ($54,980.56) were applied to reduce the balance, the USDA Rural Development debt had grown to $80,751.78:

$ 56,387.20	Principal
$ 11,488.86	Interest
$ 12,802.75	Recoverable Costs
$ 72.97	Interest on Recoverable Costs
$ 80,751.78	Amount Due when sale funds were applied on the loan

RX 6, and USDA Rural Development Narrative.

The sale proceeds of $54,980.56 were applied to the Amount Due. Interest stopped accruing when the sale funds were applied on the loan. Collections from Treasury (through ***offset*** of Petitioner Battistoni's income tax refund that was intercepted and applied to the debt, *see* RX 7, p. 1) reduced the debt from $25,771.22 to **$23,318.22** unpaid as of May 31, 2012 (excluding the potential remaining collection fees). *See* RX 7 and USDA Rural Development Narrative.

8. Petitioner Battistoni testified that the home and the debt are the responsibility of her co-borrower, her former husband, Chad D. VanBuren, Sr. Petitioner Battistoni may have recourse against her co-borrower, her former husband, for sums she is required to pay that were his responsibility. Nevertheless, the debt remains her and her co-borrower's joint-and-several obligation. Petitioner Battistoni still owes the balance of **$23,318.22** (as of May 31, 2012, excluding the potential remaining collection fees), and USDA Rural Development may collect

that amount from her. When Petitioner Battistoni entered into the borrowing transaction with her co-borrower in 1994, certain responsibilities were fixed, as to each of them. Petitioner Battistoni testified that she did inquire about a release of liability, but her co-borrower was already delinquent when she asked.

9. **Petitioner Battistoni has held her current job for less than 12 months, and she was involuntarily separated (let go) from her last job.** She may not be garnished until she has held a job for 12 months or longer.

Discussion

10. I recommend that Petitioner Battistoni and Treasury's collection agency negotiate a compromise of the debt. Petitioner Battistoni, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Battistoni, you may want to request apportionment of debt between you and the co-borrower. Petitioner Battistoni, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Battistoni, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Battistoni, you may wish to include someone else with you in the telephone call when you call to negotiate.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Battistoni and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Battistoni owes the debt described in paragraphs 5 through 7.

13. **Garnishment is not authorized through July 2013**. To prevent hardship, beginning **August 2013 through July 2014**, potential garnishment to repay the debt **up to 10%** of Petitioner Battistoni's

disposable pay is authorized; and **up to 15%** thereafter. 31 C.F.R. § 285.11.

14.I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Battistoni's pay, to be returned to Petitioner Battistoni.

15.Repayment of the debt may occur through ***offset*** of Petitioner Battistoni's **income tax refunds** or other **Federal monies** payable to the order of Ms. Battistoni.

ORDER

16.Until the debt is repaid, Petitioner Battistoni shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17.USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment in any amount **through July 2013**. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment **up to 10%** of Petitioner Battistoni's disposable pay beginning **August 2013 through July 2014**; and **up to 15%** thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: FRANK BLACK.
Docket No. 12-0413.
Decision and Order.
Filed July 11, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on July 11, 2012. Frank Black, also known as Frank Black, Jr., the Petitioner ("Petitioner Black"), participated, representing himself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Black's completed "Consumer Debtor Financial Statement" (filed June 28, 2012) is admitted into evidence, together with the testimony of Petitioner Black, together with his Hearing Request dated March 14, 2012.

4. USDA Rural Development's Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List (filed June 13, 2012) are admitted into evidence, together with the testimony of Giovanna Leopardi.

5. Petitioner Black bought a home in Michigan in 2003, borrowing $73,000.00 to pay for it ($68,000.00 for the home; $5,000.00 for closing costs, etc.). RX 1, 2. The loan was made by Chase Manhattan Mortgage Corporation, succeeded by JP Morgan Chase Bank, N.A., with the servicing lender being Chase Home Finance, LLC. A loan modification in 2008 added arrearages to principal: the modified unpaid principal became $71,798.36 in 2008. RX 2, esp. p. 8.

6. USDA Rural Development's position is that Petitioner Black owed to USDA Rural Development $54,719.49 as the loss claim amount that USDA Rural Development paid to the lender on April 1, 2011. RX 6, p. 13. USDA Rural Development paid the loss claim pursuant to the United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for the loan made in 2003 ("the debt"). After careful review of all of the evidence, I agree with USDA Rural Development's position.

7. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Black, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

8. The Due Date of the last payment made was December 1, 2008. RX 6, p. 7. Petitioner Black testified that he was on disability for about 5 months in 2008 and/or 2009. Further, his wife lost her job. Foreclosure was initiated on May 5, 2009. RX 6, p. 8. The lender Chase (Chase Home Finance LLC) bid $52,700.00 and acquired the home, which became REO (Real Estate Owned), at the Sheriff's sale on June 12, 2009. RX 3. *See also* RX 6, p. 8. The lender Chase marketed the home but did not accomplish a sale within the prescribed period. A liquidation appraisal was done on July 2, 2010 (*see* RX 6, p. 9).[1]

9. USDA Rural Development reimbursed the lender $54,719.49 on April 1, 2011. RX 6, p. 13. The $54,719.49 is the amount USDA Rural Development seeks to recover from Petitioner Black under the ***Guarantee***. RX 7. RX 7 details the loss claim paid under the ***Guarantee***, showing how the debt became $54,719.49.

---

[1] The liquidation value, used because the home did not sell within the prescribed period, was only $22,000.00. RX 5, pp. 7, 8; RX 6, p. 9. The sale price was apparently only $9,500.00. RX 6, p. 3.

$ 68,056.05	Unpaid Principal Balance
$ 6,479.31	Unpaid Interest Balance
$ 3,553.80	Protective Advance to Pay Taxes and Insurance
$ 66.71	Interest on Protective Advance
$ 78,155.87	Due from Borrower BEFORE Lender Expenses Added
+ $ 4,712.94	Lender Expenses to Sell Property
$ 82,868.81	Total Debt Charged to Petitioner Black
- $ 28,149.32	Credits (includes liquidation value of $22,000.00, RX 6, exp. p. 9)
$ 54,719.49	Loss Claim

RX 7, USDA Rural Development Narrative, and testimony.

10. Collections from Treasury (an ***offset***, which was an income tax refund; plus garnishments from Petitioner Black) applied to the debt (after collection fees are subtracted) leave **$46,570.00** unpaid as of May 18, 2012 (excluding the potential remaining collection fees). *See* RX 10. Interest stopped accruing on the date of the liquidation appraisal, which was July 2, 2010 (*see* RX 6, p. 9). The debt amount of **$46,570.00** as of May 18, 2012 (excluding collection costs), may have changed, because garnishment was ongoing (*see* RX 10, p. 1); the balance may therefore have been reduced and may continue to change.

11. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$46,570.00**, would increase the balance by $13,039.60, to $59,609.60. RX 10, esp. p. 2.

12. Petitioner Black's Consumer Debtor Financial Statement and testimony show that his current living expenses for himself, his wife, and 3 children, are reasonable. Garnishment at 15% of Petitioner Black's disposable pay is currently causing Petitioner Black and his wife and children financial hardship. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Black's disposable pay through August 2014; then **up to 5%** of Petitioner Black's disposable pay beginning September 2014 through August 2015; then **up to 10%** of Petitioner Black's disposable pay beginning September 2015 through August 2016; then **up to 15%** of Petitioner Black's disposable pay thereafter. 31 C.F.R. § 285.11.

13. Petitioner Black, you may want to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

14. I encourage **Petitioner Black and the collection agency** to **negotiate** the repayment of the debt. Petitioner Black, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Black, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Black, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may wish to include someone else with you in the telephone call when you call to negotiate.

Findings, Analysis and Conclusions

15. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Black and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

16. Petitioner Black owes the debt described in paragraphs 5 through 11.

17. To prevent financial hardship, garnishment shall be limited as follows: through August 2014 garnishment is limited to **0%** of

Petitioner Black's disposable pay; beginning September 2014 through August 2015 garnishment is limited to **up to 5%** of Petitioner Black's disposable pay; beginning September 2015 through August 2016 garnishment is limited to **up to 10%** of Petitioner Black's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Black's disposable pay is authorized. 31 C.F.R. § 285.11.

18. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Black's pay, to be returned to Petitioner Black.

19. Repayment of the debt may occur through ***offset*** of Petitioner Black's **income tax refunds** or other **Federal monies** payable to the order of Mr. Black.[2]

ORDER

20. Until the debt is repaid, Petitioner Black shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

21. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to **0%** of Petitioner Black's disposable pay through August 2014; then **up to 5%** of Petitioner Black's disposable pay beginning September 2014 through August 2015; then **up to 10%** of Petitioner Black's disposable pay beginning September 2015 through August 2016; then **up to 15%** of Petitioner Black's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

[2] Petitioner Black, your spouse is not obligated under the ***Guarantee***. Consequently, if you file a joint income tax return and any of the refund taken is your spouse's, you will want to call Treasury at **1-888-826-3127** to ask how your "injured spouse" may obtain her refund back. You will want to pursue the "injured spouse" claim also if the refund taken in February 2012 had any of your spouse's refund in it.

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: NOREEN CROPPER-LEWIS.
Docket No. 12-0412.
Decision and Order.
Filed July 7, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Noreen Cropper-Lewis ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. A telephonic hearing was set to commence on July 10, 2012 and the parties were directed to provide information and documentation concerning the existence of the debt to the Hearing Clerk for the Office of Administrative Law Judges for the United States Department of Agriculture. The Respondent filed a Narrative, together with supporting documentation, identified as RX-1 through RX-11. Petitioner filed a Consumer Debtor Financial Statement, identified as PX-1.

Hearing commenced as scheduled. Petitioner represented herself, and Respondent was represented by Ms. Leopardi of Rural Development, USDA, Saint Louis, Missouri. Both representatives testified.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

Findings of Fact

1. On May 21, 2007 Petitioner received a home mortgage loan in the amount of $164,209.00 from DHI Mortgage Company, Ltd. for the purchase of real property located in Providence Village, Texas, evidenced by Promissory Note and Deed of Trust. RX -2.

2. Before closing on the real property purchase, Petitioner signed a Request for USDA-RD to guarantee the loan, thereby certifying that she would reimburse Respondent for any loss claim paid to the lender. RX-1.

3. The loan note was sold to Chase MMC on September 20, 2007. RX-3.

4. The Petitioner subsequently defaulted on the loan, and on April 6, 2010, the property was sold to Chase MMC at a foreclosure sale for the amount of $139,000.00. RX-4; RX-5.

5. The property was sold to a third party on August 6, 2010 for $125,000.00. RX-5.

6. Petitioner's loan balance at the time of foreclosure was $195,502.65. RX-6.

7. USDA-RD paid a loss claim to Chase MMC in the amount of $68,551.69. RX-7.

8. The balance on Petitioner's loan after sale proceeds, credits and fees were applied was $68,551.69. RX-*.

9. The loan was forwarded to the U.S. Department of Treasury ("Treasury") for collection, as mandated by law.

10. After application of additional credits and Treasury refund offset, Petitioner's debt as of the date of the hearing is $67,823. 97, with potential additional fees of $18,990.68. RX-10.

11. Petitioner was advised of intent to garnish her wages to satisfy the indebtedness.

12. Petitioner's request for a hearing was not timely and garnishment of her wages has been ongoing.

13. Petitioner works a flexible schedule for an hourly rate; she usually works thirty hours a week, but sometimes works a full-time schedule.
14. Petitioner contended that wage garnishment against her salary would represent a substantial financial hardship.

15. Petitioner's wages are the sole source of income for her and one dependent.

16. Petitioner's income is almost exhausted by her monthly expenses.

17. Petitioner's income can withstand garnishment only by reducing the amount of garnishment to 10% of her disposable income.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Petitioner is indebted to USDA Rural Development in the amount of $67,823.97 exclusive of potential Treasury fees for the mortgage loan extended to her.

3. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

4. The Respondent is entitled to administratively garnish the wages of the Petitioner but may not garnish more than 10% of Petitioner's wage.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment up to 10% of Petitioner's disposable pay. 31 C.F.R. § 285.11.

Petitioner is encouraged to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact.

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

———

In re: JOY KENT, N/K/A JOY OWENS.
Docket No. 12-0409.
Decision and Order.
Filed July 18, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held as scheduled on July 10, 2012. Joy Kent, now known as Joy Owens (Petitioner Kent) did not participate. (Petitioner Kent did not participate by telephone: there was no telephone number for Ms. Kent provided in her Hearing Request; and in response to my instructions in the Hearing Notice [signed April 25, 2012 and filed May 9, 2012], Petitioner Kent provided no telephone number where she could be reached for the hearing by telephone.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Kent owes to USDA Rural Development a balance of **$62,015.88** (as of May 11, 2012, *see* RX 8), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for a loan made in 2006, the balance of which is now unsecured ("the debt"). Petitioner Kent borrowed, with the co-borrower, her then-husband, to buy a home in Virginia. *See* USDA Rural Develop-ment Exhibits RX 1 through RX 8, together with the Narrative, Witness & Exhibit List (filed May 22, 2012); and the testimony of Giovanna Leopardi, all of which I admit into evidence.

4. The ***Guarantee*** (RX 1) establishes an independent obligation of Petitioner Kent, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$62,015.88** would increase the current balance by $17,364.45, to $79,380.33 (as of May 11, 2012). RX 8, p. 4.

6. Petitioner Kent and her co-borrower, her former husband, are jointly and severally liable to pay the debt. Benjamin Kent is held responsible to pay the debt just as Petitioner Kent is, as shown by RX 8. Petitioner Kent stated on her Hearing Request "my exhusband is equally responsible." Yes, but USDA Rural Development may legally collect

more than half, even all, from either one of them. Once Petitioner Kent entered into the borrowing transaction with her co-borrower, certain responsibilities were fixed. Petitioner Kent still owes the balance of **$62,015.**88 (excluding potential collection fees), as of May 11, 2012, and so does her co-borrower, her former husband. Even though Petitioner Kent may have legal recourse against her co-borrower for monies collected from her on the debt, that does not prevent USDA Rural Development from collecting from her, pursuant to the ***Guarantee***. RX 1.

7. Petitioner Kent failed to file a Consumer Debtor Financial Statement, or anything, in response to my instructions in the Hearing Notice [signed April 25, 2012 and filed May 9, 2012]. Thus I cannot calculate Petitioner Kent's current disposable pay. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.)

8. There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot tell whether garnishment to repay "the debt" (*see* paragraph 3) in the amount of 15% of Petitioner Kent's disposable pay creates a financial hardship.

9. Petitioner Kent may choose to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

10.I encourage **Petitioner Kent and the collection agency** to **negotiate** promptly the repayment of the debt. Petitioner Kent, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127. You may want to request apportionment of debt between you and the co-borrower.** You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Kent, you may want to have someone else with you on the line if you call.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Kent and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Kent owes the debt described in paragraphs 3 through 6.

13. **Garnishment up to 15% of Petitioner Kent's disposable pay** is authorized. There is no evidence that financial hardship will be created by garnishment. 31 C.F.R. § 285.11.

14. **No refund** to Petitioner Kent of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

15. Repayment of the debt may also occur through *offset* of Petitioner Kent's income tax refunds or other Federal monies payable to the order of Ms. Kent.

ORDER

16. Until the debt is repaid, Petitioner Kent shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with **garnishment up to 15% of Petitioner Kent's disposable pay**. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: KIMBERLY ANN STEWART.
Docket No. 12-0345.
Decision and Order.
Filed July 19, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on June 26 and July 16, 2012. Kimberly Ann Stewart, the Petitioner, also known as Kimberly A. Stewart ("Petitioner Stewart"), participated, representing herself (appears *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Michelle Tanner.

Summary of the Facts Presented

3. USDA Rural Development's Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List (filed on May 11, 2012), are admitted into evidence, together with the testimony of Michelle Tanner.

4. Petitioner Stewart's completed "Consumer Debtor Financial Statement" (filed on July 10, 2012), is admitted into evidence, together with the testimony of Petitioner Stewart, together with her Hearing Request (dated March 1, 2012).

5. Petitioner Stewart owes to USDA Rural Development **$26,834.77** (as of May 9, 2012), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for a loan made in 2008, the balance of which is now unsecured ("the debt"). Petitioner Stewart borrowed to buy a home in Illinois.

6. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Stewart, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

7. The Due Date of Last Payment Made was October 1, 2008. RX 6, p. 5. Foreclosure was initiated on July 20, 2009. RX 6, p. 5. The lender Chase (Chase Home Finance LLC) bid $29,325.00 and acquired the home, which became REO (Real Estate Owned), at the Sheriff's sale on March 2, 2010. RX 3, esp. p. 6. *See also* RX 6, p. 5. The lender Chase marketed the home but did not accomplish a sale within the prescribed period. A liquidation appraisal was done on September 21, 2010 (*see* RX 5, p. 2).[1]

8. USDA Rural Development reimbursed the lender $28,772.77 on April 28, 2011. RX 6, p. 10. The $1,938.00 recovery from the sale after the liquidation appraisal, reduced the amount of USDA Rural Development's payment to **$26,834.77**, which is the amount USDA Rural Development seeks to recover from Petitioner Stewart under the ***Guarantee***. RX 7. RX 7 details the loss claim paid under the ***Guarantee***, showing how the debt became **$26,834.77**.

$ 41,187.03	Unpaid Principal Balance
$ 5,635.68	Unpaid Interest Balance (10-01-08 to 09-21-10)
$ 988.74	Protective Advance to Pay Taxes and Insurance
$ 24.71	Interest on Protective Advance

[1] The liquidation value, used because the home did not sell within the prescribed period, was only $23,000.00. RX 5, p. 2; RX 6, p. 1. Chase then sold the REO for $25,900.00 after the liquidation appraisal, which resulted in $1,938.00 credited to USDA Rural Development. RX 6, pp. 18-19.

$ 47,836.16	Due from Borrower BEFORE Lender Expenses Added
+ $ 7,117.10	Lender Expenses to Sell Property
$ 54,953.26	Total Debt Charged to Petitioner Stewart
- $ 26,180.49	Credits (includes liquidation value of $23,000.00)
$ 28,772.77	Loss Claim
- $ 1,938.00	Recovery/REO Sale
$ **26,834.77**	

RX 7, USDA Rural Development Narrative, and testimony.

9. Interest stopped accruing on the date of the liquidation appraisal, which was September 21, 2010 (*see* RX 5, p. 2).

10. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$26,834.77**, would increase the balance by $7,513.74, to $34,348.51. *See* USDA Rural Development Exhibits, esp. RX 10, p. 2.

11. Petitioner Stewart works as a dispatcher in a new job that she began just last month. Petitioner Stewart is still recovering from setbacks in about 2008 when she lost the job she had had for 10 years, and her health problems began. Her blood pressure is high, and for health reasons she left the job she had immediately prior to the dispatcher job (a factory job manufacturing headlights). Now, her disposable pay (within the meaning of 31 C.F.R. § 285.11) is roughly $850.00 every 2 weeks, roughly $1,850.00 per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding;

and in certain situations minus other employee benefits contributions that are required to be withheld.]

12. Garnishment at 15% of Petitioner Stewart's disposable pay could yield nearly $280.00 per month to repay the USDA Rural Development debt; but garnishment in any amount now would clearly cause Petitioner Stewart financial hardship (within the meaning of 31 C.F.R. § 285.11). Petitioner Stewart's Consumer Debtor Financial Statement (filed July 10, 2012) shows that her living expenses are understated (she allowed no money for food or clothing or emergencies or recreation, for example). In addition to living expenses, Petitioner Stewart is completing the last payments on medical expenses; paying delinquent federal income taxes (about $300.00); and making payments on several other liabilities, all of which may be paid in full by the first quarter of 2013.

13. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **0%** of Petitioner Stewart's disposable pay through July 2013; then **up to 7%** of Petitioner Stewart's disposable pay beginning August 2013 through July 2014; then **up to 15%** of Petitioner Stewart's disposable pay thereafter. 31 C.F.R. § 285.11.

14. Petitioner Stewart is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

15. Through July 2013, no garnishment is authorized. Beginning August 2013 through July 2014, garnishment up to 7% of Petitioner Stewart's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Stewart's disposable pay is authorized. *See* paragraphs 11, 12 and 13. I encourage **Petitioner Stewart and the collection agency** to **negotiate** the repayment of the debt. Petitioner Stewart, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Stewart, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Stewart, you may want to have someone else with you on the line if you call.

Findings, Analysis and Conclusions

16. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Stewart and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

17. Petitioner Stewart owes the debt described in paragraphs 5 through 10.

18. **Garnishment is authorized**, as follows: through July 2013, **no** garnishment. Beginning August 2013 through July 2014, garnishment **up to 7%** of Petitioner Stewart's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Stewart's disposable pay. 31 C.F.R. § 285.11.

19. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Stewart's pay, to be returned to Petitioner Stewart.

20. Repayment of the debt may occur through ***offset*** of Petitioner Stewart's **income tax refunds** or other **Federal monies** payable to the order of Ms. Stewart (whether or not garnishment is authorized).

ORDER

21. Until the debt is repaid, Petitioner Stewart shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

22. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through July 2013. Beginning August 2013 through July 2014, garnishment **up to 7%** of Petitioner Stewart's disposable pay is authorized; and garnishment **up to 15%** of Petitioner Stewart's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: KAREN M. RATNER.
Docket No. 12-0331.
Decision and Order.
Filed July 20, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was begun on June 13, 2012, resumed on June 20 with little progress, and was completed on July 18, 2012. Karen I. Nordling, also known as Karen R. Nordling, formerly known as Karen M. Ratner ("Petitioner Nordling"), participated, representing herself (appeared *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), also participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. USDA Rural Development's Exhibits RX 1 through RX 7, plus Narrative, Witness & Exhibit List (filed on May 4, 2012), are admitted into evidence, together with the testimony of Michelle Tanner.

4. Petitioner Nordling's completed "Consumer Debtor Financial Statement" plus two pay stubs (filed on July 6, 2012), are admitted into evidence, together with the testimony of Petitioner Nordling, together with her Hearing Request (dated February 29, 2012).

5. Petitioner Nordling owes to USDA Rural Development **$33,977.46** (as of May 3, 2012) in repayment of a USDA Farmers Home Administration loan borrowed in 1996 for a home in Texas, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, esp. RX 5.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$33,977.46**, would increase the current balance by $9,513.69, to $43,491.15. *See* USDA Rural Development Exhibits, esp. RX 7 (adjusted by $789.00; *see* footnote 2).

7. The amount Petitioner Nordling borrowed from USDA Farmers Home Administration in 1996 was $72,570.00. RX 1. Payments were made until about October 18, 2003. Attempted reamortization in 2004 had to be reversed, because of no response from Petitioner Nordling and USDA Rural Development's realization that she was no longer living in the property. RX 2. The loan was accelerated for foreclosure on June 23, 2005 due to "monetary default and abandoned property." RX 3. The foreclosure sale was held on September 2, 2008. RX 4, esp. p. 2.

8. At the time of the foreclosure sale in 2008, the debt balance was $127,179.12.

$ 68,175.29	unpaid principal
$ 23,693.64	unpaid interest
$ 35,098.76	fees/costs (taxes, insurance, the debt to the leverage lender [1] , costs)
$ 211.43	interest on fees/costs
$127,179.12	

RX 6 and Michelle Tanner's testimony.

[1] The leverage lender was paid in full, more than $15,000.00.

The highest bid at the foreclosure sale was $92,794.00, bid by USDA. The $92,794.00 was applied to reduce the debt (leaving a balance owed of $34,385.12). Then an insurance refund of $407.68 was applied to reduce the debt (leaving a balance owed of **$33,977.46**). RX 6 and Michelle Tanner's testimony.[2] Since the foreclosure sale, no additional interest has accrued.

9. Petitioner Nordling still owes the balance of **$33,977.46** (excluding potential collection fees), as of May 3, 2012, and USDA Rural Development may collect that amount from her.

10. Petitioner Nordling testified that she is married, and that her husband receives military retirement pay. Her husband is **not** responsible to repay the USDA Rural Development debt. The two of them are obligated to pay the Internal Revenue Service (IRS) about $20,000.00 for back income taxes, and interest continues to accrue. They are making monthly payments. Their household includes her daughter and son-in-law and two children, who were displaced by a huge wildfire. Her daughter works part-time only, and her son-in-law has been unemployed for about a year.

11. Petitioner Nordling's disposable pay (within the meaning of 31 C.F.R. § 285.11) is roughly $1,400.00 every 2 weeks, roughly $3,000.00 per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance and, here, disability insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.]

12. Garnishment at 15% of Petitioner Nordling's disposable pay could yield nearly $450.00 per month to repay the USDA Rural Development debt, but garnishment in that amount now would cause Petitioner Nordling and the family who live with her financial hardship (within the meaning of 31 C.F.R. § 285.11). Petitioner Nordling's Consumer Debtor Financial Statement (filed July 6, 2012) shows that her living expenses, including what she spends for others in her household are reasonable, and when her payments on debt are added, amount to about $2,900.00

[2] Ms. Tanner subtracted the $789.00 shown on RX 6 as an additional foreclosure fee billed after the foreclosure.

per month. If Petitioner Nordling did not have her husband's support, she would now be able to afford only about $100.00 per month to repay the USDA Rural Development debt.

13. To prevent financial hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **5%** of Petitioner Nordling's disposable pay through July 2013; then **up to 10%** of Petitioner Nordling's disposable pay beginning August 2013 through July 2015; then **up to 15%** of Petitioner Nordling's disposable pay thereafter. 31 C.F.R. § 285.11.

14. Petitioner Nordling is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

15. Garnishment is authorized. *See* paragraphs 10 through 13. I encourage **Petitioner Nordling and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Nordling, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Nordling, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Nordling, you may want to have someone else with you on the line if you call.

Findings, Analysis and Conclusions

16. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Nordling and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

17. Petitioner Nordling owes the debt described in paragraphs 5 through 9.

18. **Garnishment is authorized**, as follows: through July 2013, garnishment **up to 5%** of Petitioner Nordling's disposable pay; beginning August 2013 through July 2015, garnishment **up to 10%** of

Petitioner Nordling's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Nordling's disposable pay. 31 C.F.R. § 285.11.

19. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Nordling's pay, to be returned to Petitioner Nordling.

20. Repayment of the debt may occur through ***offset*** of Petitioner Nordling's **income tax refunds** or other **Federal monies** payable to the order of Ms. Nordling.

ORDER

21. Until the debt is repaid, Petitioner Nordling shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

22. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment **up to 5%** of Petitioner Nordling's disposable pay through July 2013. Beginning August 2013 through July 2015, garnishment **up to 10%** of Petitioner Nordling's disposable pay is authorized; and garnishment **up to 15%** of Petitioner Nordling's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: DONNA CASSELLA.
Docket No. 12-0480.
Decision and Order.
Filed August 22, 2012.

AWG.

Frank W. Jones, Esq., for Petitioner.
Giovanna Leopardi for RD.
Decision and Order entered by James P. Hurt, Hearing Official.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On June 25, 2012, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing. The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-6 on July 18, 2012. Petitioner submitted exhibits on June 23, 2012, July 31, 2012, and August 15, 2012. On August 9, 2012, at the time set for the hearing, both parties were available. Ms. Giovanna Leopardi represented RD. Ms. Cassella was represented by Frank W. Jones, Esq. The parties were sworn.

Petitioner has been employed for more than one year. Petitioner contents that RD's Counter-Offer to settle the debt was accepted by Petitioner or/about December 21, 2004. RD failed to process the documentation to complete the transaction and provide instructions for forwarding of the agreed settlement funds. Treasury thereafter continued to collect tax refunds via the TOPS (Tax Offset) program.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On/about August 20, 1985, Petitioner and her former husband, Joseph Casella, obtained a loan from USDA (formerly FmHA) in the amount of $41,700 United States Department of Agriculture (USDA), now Rural Development (RD). RX-1.

2. The debt went into default.

3. The home was sold in a "short sale" on/about November 2, 1998. RX-3.

4. Petition became divorced from her former husband, Joseph Casella, but had a property settlement agreement between the marital parties.

5. Both Petitioner and her former husband remained jointly and severally liable on the remaining debt to RD.

6. Joseph Casella is now deceased.

7. Petitioner and RD exchanged written offers and counter-offers regarding the terms of settlement of the remaining debt.

8. RD's May 6, 2003 counter-offer of a full and final settlement of $6,000 (RX-4 @ p.29 of 32, & 32 of 32) was communicated to Petitioner's attorney via a phone conversation with RD's collection agent (DSC, Inc.) on/about March 23, 2004.

9. Despite the Petitioner's acceptance of RD's counter-offer, (PX-11) dated December 21, 2004, RD and/or Treasury, and/or its collection agent (DSC, Inc.) continued to utilize tax off-set collection from Petitioner.

10. RD has collected $1,409 (net) from Petitioner. RX-6 @ p. 1 of 3.

11. Despite RD's close relationship with Treasury and familiarity with the debt collection process, RD still embraces "transfer to Treasury for

cross-servicing" as a legalistic excuse for its failure to settle the debt at terms it was willing to accept. RX-3 @ p. 14 of 20.

12. I find that the parties, being variously, the Treasury of United States of America and/or Rural Development agency of USDA, and/or its collection agent (DSC, Inc.) and the Petitioner reached a settlement on the outstanding debt in the amount of $6,000.00.

13. I further find that despite the inchoate settlement, Treasury has collected $1409.00 towards the debt.

14. Petitioner stated during the hearing that she was and has been ready, willing, and able to complete the debt settlement transaction in a lump sum amount.

15. Notwithstanding the counter-offer and acceptance thereof, I have prepared a Financial Hardship Calculation[1] using the Financial Statements signed under oath by Petitioner.

16. The routine Financial Hardship Calculation reveals that even if this debt were not already settled, then RD would not be permitted to garnish her wages under her current financial position.

Conclusions of Law

1. Petitioner is jointly and severally indebted to USDA Rural Development in the amount of $4,591 ($6,000.00 - $1409.00) for the mortgage loan extended to her.

2. The settlement amount of $4,591.00 is valid only if the funds are forwarded to RD or its designee in a lump sum within 14 days of this order.

3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.

---

[1] The Financial Hardship calculation is not posted on the OAJ website.

4. The Respondent is not entitled to administratively garnish the wages of the Petitioner.

ORDER

For the foregoing reasons, I find that Petitioner's debt to RD in the amount of $4,591.00 may be fully satisfied by a lump sum payment in the same amount within 14 days of this order.

The parties may mutually agree in writing to extend the time for concluding the settlement.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: PAULA WARE.
Docket No. 12-0437.
Decision and Order.
Filed July 23, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by James P. Hurt, Hearing Official.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On June 12, 2012, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-10 on June 8, 2012. Petitioner filed a letter with her Request for Hearing dated April 25, 2012 and later she filed her Financial Statement and payroll documents on July 17, 2012, which I now label as PX-1, PX-2, and PX-3, respectively. On July 20, 2012, at the time re-set for the hearing by agreement of the parties, both parties were available. Ms. Giovanna Leopardi represented RD. Ms. Ware was self represented. The parties were sworn.

Petitioner has been employed for more than one year by a local government, but her employment is only part-time in a community where the average wage is low. She stated she had no health insurance and owes the local hospital for a prior medical incident which is paying off for the next thirty months.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On March 25, 2005, Petitioner obtained a loan for a mortgage on a primary home in the amount of $134,640.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase her home on a property located in Columbia, Alabama. RX-2 @ p. 3 of 5.

2. Prior to signing the loan, the borrower signed RD form 1980-21 (Loan Guarantee) RX-1 @ p. 2 of 4.

3. The borrower became delinquent. The loan was accelerated for foreclosure and a judicial sale was duly advertised in the Shelby County, Alabama legal notices. RX-3 @ 2 of 6.

4. The home was sold at a judicial sale on January 26, 2010 for $118,640.72. Narrative, RX-3 @ p. 4 of 6.

5. Prior to the sale the borrower owed $125,980.64 for principal, plus $8,172.57 for interest, plus $833.01 for fees for a total of $134,986.22 to pay off the RD loan. RX-7.

6. After application of the judicial sale proceeds, the borrower owed $47,198.41. RX-7.

7. Treasury has collected an additional $371.76 (net amount) towards the debt. RX-10 @ 1 of 2.

8. The remaining amount due of $46,826.65 was transferred to Treasury for collection on June 6, 2012. RX-10 @ p.2 of 2.

9. The potential Treasury collection fees are $13,111.46. RX-10 @ p. 2 of 2.

10. Ms. Ware is now living in Oregon and working part time as a local government employee and has no health insurance.

11. Ms. Ware raised an issue of financial hardship. Testimony.

12. Ms. Ware has an outstanding debt for hospital treatment and she is paying it off in installments of $25.00 per month.

13. I performed a Financial Hardship Calculation for Ms. Ware gross income[1]. Considering her expenses on PX-2, there was no need to further refine the calculation to arrive at net income.

Conclusions of Law

1. Petitioner is indebted to USDA Rural Development in the amount of $46,826.65 exclusive of potential Treasury fees for the mortgage loan extended to her.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $13,111.46.

---

[1] The Financial Hardship calculation is not posted on the OALJ website.

3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.

4. The Respondent is not entitled to administratively garnish the wages of the Petitioner at this time.

ORDER

For the foregoing reasons, the wages of Petitioner shall not be subjected to administrative wage garnishment at this time. After one year, RD may re-assess the Petitioner's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: DEBORAH BRADFORD, FORMERLY DEBORAH CAMPBELL.
Docket No. 12-0366.
Decision and Order.
Filed July 24, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 10, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on July 24, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on May 23, 2012. The Petitioner filed her documentation with the Hearing Clerk on July 12, 2012. At the hearing held on July 24, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri testified.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On April 6, 1989, the Petitioner and her then husband, James Campbell, Jr. received a home mortgage loan in the amount of $43,500.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Lebanon, Virginia. RX-1.

2. In May of 2002, the marriage of the Petitioner and her husband was dissolved by decree entered on May 13, 2002 in the Circuit Court of Russell County, Virginia. As part of those proceedings, the ex-husband assumed financial responsibility for the related debt. PX-1.

3. Although apparently not disclosed to the divorce court, the property secured by the indebtedness to FmHA had previously been sold at foreclosure sale on November 27, 2001 with proceeds realized from that sale in the amount of $24,815.50, leaving a balance due of $22,360.88 after adding foreclosure expenses of $725.00 to the amount due. RX-5.

4. After receipt of Treasury offsets, the remaining unpaid debt is in the amount of $13,783.80 exclusive of potential Treasury fees. RX-6.

Conclusions of Law

1. Petitioner is indebted to USDA Rural Development in the amount of $13,783.80 for the mortgage loan extended to him/her.

2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: CHRISTINA J. CANOVAS.
Docket No. 12-0367l.
Decision and Order.
Filed July 24, 2012.

AWG.

Kayla Dreyer, Esq., for Petitioner.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 10, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on July 24, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on May 25, 2012. The Petitioner who is represented by Counsel, Kayla Dreyer, filed a Narrative, Memorandum of Law and Request for Interpreter with the Hearing Clerk on July 16, 2012. At the hearing held on July 24, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri testified.

In the Memorandum of Law, Petitioner raises affirmative defenses alleging that USDA failed to timely liquidate the property and in so doing failed to mitigate the loss. Examination of the sequence of events reflects however that the delay was the result of the Petitioner filing for Chapter 13 relief under the Bankruptcy Act and the accumulation of additional debt during that period was the result of the Petitioner's failure to make regular payments reducing the amount owed. Laches, a defense based upon undue delay in asserting a legal right or privilege, has long been held to be inapplicable to actions of the Government. *United States v. Kirkpatrick,* 22 U.S. (9 Wheat) 720 (1824); *See also, Gaussen v. United States,* 97 U.S. 584,590 (1878); *German Bank v. United States,* 148 U.S. 573, 579 (1893); *United States v. Verdier,* 164 U.S. 213, 219 (1896); *United States v. Mack,* 295 U.S. 480, 489 (1935).

Moreover, contrary to Petitioner's assertion that she was not afforded loss mitigation or moratorium relief, the file reflects that payment assistance packages were sent to her. RX-5. No provision currently exists under regulations to provide the services of an interpreter (See generally, 7 C.F.R. §3.62); however, given that the Petitioner is represented and she had the services of an interpreter, it is difficult to see how the Petitioner will be prejudiced by the government's failure to provide such services.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On January 21, 2004, the Petitioner received a home mortgage loan in the amount of $80.000.00 from Rural Development (RD) for property located in Los Fresnos, Texas. RX-1.

2. The loan was accelerated for foreclosure in June of 2006 for monetary default; however, the foreclosure action was held in abeyance when the Petitioner filed for relief under Chapter 13 of the Bankruptcy Act. RX-2, 3.

3. The Bankruptcy proceeding were subsequently dismissed on May 13, 2010 and the foreclosure proceeding were then resumed. RX-3.

4. The property was sold at foreclosure sale on July 6, 2010 and the property was acquired by RD for a bid of $45,025.00. RX-4.

5. Prior to the sale, Petitioner owed $106,340.64 for principal, interest and recoverable costs. After application of the funds, the remaining amount due was $60,900.62. RX-6.

6. After receipt of Treasury offsets, the remaining unpaid debt is in the amount of $53,625.62 exclusive of potential Treasury fees. RX-7.

7. The Petitioner's income is currently exceeded by her expenses. PX-7.

Conclusions of Law

1. Petitioner is indebted to USDA Rural Development in the amount of $53,625.62 for the mortgage loan extended to her.

2. The Petitioner is under a financial hardship at this time.

3. The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner.

ADMINISTRATIVE WAGE GARNISHMENT ACT

ORDER

For the foregoing reasons, the wages of Petitioner **MAY NOT** be subjected to administrative wage garnishment at this time. Should Petitioner's financial position improve, RD may seek to recommence proceedings; however, any subsequent determinations of hardship will be made by Treasury.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

_____

In re: DEBBIE D. HARVEY.
Docket No. 12-0368.
Decision and Order.
Filed July 25, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of the Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 10, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on July 25, 2012.

The Respondent complied with the Prehearing Order and a Narrative was filed, together with supporting documentation on May 25, 2012. The Petitioner has neither filed any material subsequent to the Request

for Hearing nor otherwise complied with the Prehearing Order. At the hearing held on July 25, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri testified.

This case is problematic for a number of reasons. Initially, while possibly waived in order to preserve the sale it appears that Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) failed to secure a first lien on the property prior to all others as the Deed which conveyed the property to the Petitioner and her husband retained a Vendor's Lien for $15,000.00 which was secured by a Deed of Trust to Meier Mortgage, Inc.[1] RX-2. On July 5, 2005, RD undertook to pay off that indebtedness (RX-5; 3 of 29) and in September of 2005 received an Assignment of Note and Deed of Trust from Chase Home Finance. LLC which represented itself to then be the holder of the Note and Deed of Trust. RX-2, (7 and 8 of 9.) The Display History/Notes reflect that the borrowers were contacted to sign a Reamortization Agreement; however, it was never executed or return to RD. RX-5 (5 of 29) That same exhibit then reflects that although the borrowers had notified the field office on or about April 6, 2006 that they were no longer living in the property, on April 17, 2006, the Agency nonetheless sent the Notice of Acceleration to the borrowers at the property address. The record then reflects that the foreclosure sale did not occur until June 3, 2008.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On January 31, 1997, Debbie D. Harvey and her husband James Harvey, III received a home mortgage loan in the amount of $95,500.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Leander, Texas. RX-1.

[1] The record does not contain any information that FmHA was aware of the prior lien or that approval of the prior indebtedness was given.

2. On the same date, Petitioner and her husband executed a Deed of Trust in favor of Meier Mortgage, Inc. securing indebtedness of $15,000.00 arising out of a Vendor's Lien retained in the Deed of Conveyance of the above property to them and having priority over the home mortgage loan to FmHA. RX-2.

3. On July 5, 2005, RD undertook to pay off the prior Deed of Trust indebtedness then amounting to $20,778.36 (RX-5; 3 of 29) and in September of 2005 received an Assignment of Note and Deed of Trust from Chase Home Finance. LLC which represented itself to then be the holder of the Note and Deed of Trust. RX-2, (7 and 8 of 9.)

4. Although the Deed of Trust to Meier Mortgage, Inc. reflects that the recorded document was to be sent to Chase Manhattan Mortgage Corporation, the record does not contain evidence of the assignment from Meier Mortgage, Inc. to any subsequent holder. RX-2.

5. Although there are no intermediate assignments contained in the record, the assignment to United States Department of Agriculture Rural Housing Service reflects that it was received from Chase Home Finance LLC, an entity other than either Meier Mortgage, Inc. or Chase Manhattan Mortgage Corporation. RX-2.

6. Although RD sent a Notice of Acceleration to the property address in April of 2006, the foreclosure sale was not conducted until June of 2008.

7. USDA claims an alleged debt of $32,768.91 and referred that amount to Treasury. RX-7.

8. There is no indication that any amounts have been received via the Treasury Offset Program.

9. For the deficiencies noted in the Conclusions of Law, the amount established to be due will be reduced to $11,990.55, exclusive of potential Treasury fees.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The Agency failed in its obligation to act diligently in the following instances.

a. A first and prior lien on the property was not obtained.

b. The Agency undertook to pay off the prior Deed of Trust indebtedness then amounting to $20,778.36 (RX-5; 3 of 29) and in September of 2005 received an Assignment of Note and Deed of Trust from an entity which the file does not establish to be the then holder of the Note and Deed of Trust. RX-2, (7 and 8 of 9.)

c. Despite Acceleration of the Indebtedness in April of 2006, the foreclosure sale did not take place until June of 2008, over two years later.

3. Petitioner is indebted to USDA Rural Development in the amount of $11,990.55 for the mortgage loan extended to her.

4. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.

5. The Respondent is entitled to administratively garnish the wages of the Petitioner.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

———

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: VANESSA JOHNSON.
Docket No. 12-0371.
Decision and Order.
Filed July 25, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of the Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 10, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on July 25, 2012.

The Respondent complied with the Prehearing Order and a Narrative was filed, together with supporting documentation on June 4, 2012. The Petitioner has neither filed any material subsequent to the Request for Hearing nor otherwise complied with the Prehearing Order. Nothing further having been received from the Petitioner, and there being no compliance with the Prehearing Order, the Petitioner will be deemed to have waived the right to a hearing and the matter will be decided upon the record before me.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On October 20, 2004, Vanessa Johnson and co-borrower John Vix received a home mortgage loan from Bell American Mortgage, LLC in the amount of $122,100.00 for the purchase of property located in Webster, Wisconsin. RX-2.

2. On August 16, 2004, prior to obtaining the loan, the Petitioner and the co-borrower had executed a Loan Guarantee Agreement with Rural Development (RD), USDA in which she agreed to repay to RD any loss incurred in connection with the above loan. RX-1.

3. In 2008, the Petitioner and the co-borrower defaulted on the mortgage loan and the residence was ultimately sold for $36,550.00. RX-3.

4. The record does not contain any foreclosure action pleadings or indicate whether a deficiency judgment obtained.

5. Thereafter, although the Narrative and RX-2 indicate that the Bell America Mortgage was sold to Chase Manhattan Mortgage Corporation, the records reflects that RD paid JP Morgan Chase Bank, N.A., an entity not established to be the then holder of the note, the sum of $45,551.00 on the Loan Guarantee. RX-6, 7.

6. After application of amounts have been received via the Treasury Offset Program, the amount of $27,222.00 remains allegedly due, exclusive of potential Treasury fees. RX-10.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The Agency has failed in its burden of proof of establishing a debt in this matter.

3. USDA paid an entity under the guarantee agreement that was not established by the record to be the then holder of the note entitled to make such a loss claim.

ORDER

1. For the foregoing reasons, no debt being established, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment.

2. All amounts collected from the Petitioner through the Treasury Offset Program subsequent to the foreclosure sale shall be refunded to her.

3. No debt having been established, issuance of a 1099 to the Petitioner reflecting forgiveness of a debt is **NOT** authorized.

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: MICHELLE MARTINEZ.
Docket No. 12-0372.
Corrected Decision and Order.
Filed July 26, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Corrected Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

CORRECTED DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of Michelle Martinez for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 15, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on July 26, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 12, 2012. The Petitioner failed to provide any material to the Hearing Clerk, did not comply with the instructions contained in the Prehearing Order, and refused delivery of the Narrative and related exhibits sent to her by Rural Development. Accordingly, it will be deemed that the Petitioner has waived her right to a hearing and the issues before me will be decided on the basis of the record.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On June 4, 2007, Michelle Martinez applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1.

2. On July 10, 2007, Petitioner obtained a home mortgage loan for the purchase of property located in Coalinga, California from J.P. Morgan Chase Bank, N.A. (Chase) for $180,540.00. RX-2.

3. In 2010, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. A foreclosure sale was conducted on August 6, 2010 and Chase acquired the property with a bid of $59,500.00. RX-3.

4. Chase submitted a loss claim and USDA paid Chase the sum of $151,864.89 for principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-6, 7.

5. After receipt of Treasury offsets, the remaining unpaid debt is in the amount of $148,667.01, exclusive of potential Treasury fees.

Conclusions of Law

1. Michelle Martinez is indebted to USDA Rural Development in the amount of $148,667.01 for the mortgage loan guarantee extended to her.

2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

ORDER

For the foregoing reasons, the wages of Michelle Martinez shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: JORDY WEAVER.
Docket No. 12-0378.
Decision and Order.
Filed July 26, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of Jordy Weaver asking for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 15, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation

concerning the existence of the debt and setting the case for a telephonic hearing on July 26, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 7, 2012. The Petitioner filed her materials, a letter and a Consumer Debtor Financial Statement with the Hearing Clerk on July 11, 2012. At the hearing held on July 26, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri participated.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On July 16, 2008, Jordy Weaver applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1.

2. On August 26, 2008, she obtained a home mortgage loan for the purchase of property located in Casa Grande, Arizona from Wells Fargo Bank, N.A. (Wells Fargo) for $105,458.00. RX-2.

3. In 2010, the Petitioner defaulted on her mortgage loan and foreclosure proceedings were initiated. RX-6. The foreclosure sale was held on September 7, 2010 and Wells Fargo acquired the property with a bid of $56,950.00. RX-4.

4. Wells Fargo submitted a loss claim and USDA paid Wells Fargo the sum of $75,846.75 for principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-7, 8.

5. The remaining unpaid debt after application of Treasury offsets is in the amount of $75,846.75, exclusive of potential Treasury fees.

6. The Consumer Debtor Financial Statement submitted by the Petitioner reflects that she has been employed for only seven months which is short of the twelve continuous month period required for garnishment.

Conclusions of Law

1. Jordy Weaver is indebted to USDA Rural Development in the amount of $75,846.75for the mortgage loan guarantee extended to her.

2. Because the Petitioner has been employed for only seven months, she is not eligible to be garnished at this time.

3. The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner at this time.

ORDER

For the foregoing reasons, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment. Once a continuous twelve month period of employment has been established, garnishment action may be resumed; however, any hardship determination in such case will be made by Treasury.

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

_____

In re: LINDA FAULKNER.
Docket No. 12-0373.
Decision and Order.
Filed July 26, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of Linda Faulkner asking for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 15, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on July 26, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 7, 2012. The Petitioner filed her material, a Consumer Debtor Financial Statement with the Hearing Clerk on July 17, 2012. At the hearing held on July 26, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri participated.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

ADMINISTRATIVE WAGE GARNISHMENT ACT

Findings of Fact

1. On August 19, 2008, Linda Faulkner applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1.

2. On September 16, 2008, she obtained a home mortgage loan for the purchase of property located in Fountain Inn, South Carolina from Carolina Bank for $100,918.00. RX-2.

3. The note and mortgage to Carolina Bank was subsequently sold to JP Morgan Chase Bank, N.A. (Chase). RX-2.

4. In 2009, the Petitioner defaulted on her mortgage loan and foreclosure proceedings were initiated. RX-6. The foreclosure sale was held on March 1, 2010 and Chase acquired the property with a bid of $92,465.73. RX-3.

5. Chase submitted a loss claim and USDA paid Chase the sum of $43,658.59 for principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-6, 7.

6. The remaining unpaid debt after application of Treasury offsets is in the amount of $41,046.61, exclusive of potential Treasury fees.

7. The Consumer Debtor Financial Statement submitted by the Petitioner reflects roughly equal income and expenses, with expenses exceeding income taking into account car insurance and taxes.

8. The petitioner is at further risk of being laid off or having her hours cut by her employer by reason of the current economic situation.

Conclusions of Law

1. Linda Faulkner is indebted to USDA Rural Development in the amount of $41,046.61for the mortgage loan guarantee extended to her.

2. The Petitioner is under a financial hardship at the present time.

3. The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner at this time.

ORDER

For the foregoing reasons, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment. Should RD determine that Petitioner's financial condition has improved, garnishment action may be taken; however, any hardship determination in such case will be made by Treasury.

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: DANIELLE BODLE.
Docket No. 12-0380.
Decision and Order.
Filed July 27, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of Danielle Bodle for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 15, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on July 27, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 8, 2012. The Petitioner failed to provide any material to the Hearing Clerk and did not comply with the instructions contained in the Prehearing Order. Accordingly, it will be deemed that the Petitioner has waived her right to a hearing and the issues before me will be decided on the basis of the record.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On May 1, 2007, Danielle Bodle and her then husband Shaun R. Bodle applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1.

2. On May 31, 2007, Petitioner and her then husband obtained a home mortgage loan for the purchase of property located in Skidmore, Missouri from J.P. Morgan Chase Bank, N.A. (Chase) for $40,816.00. RX-2.

3. In 2010, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-6 A foreclosure sale was conducted on February 10, 2010 and Chase acquired the property with a bid of $32,300.00. RX-3.

4. Chase submitted a loss claim and USDA paid Chase the sum of $30,612.83 for principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-6, 7.

5. After receipt of Treasury offsets, the remaining unpaid debt is in the amount of $25,125.51, exclusive of potential Treasury fees.

Conclusions of Law

1. Danielle Bodle, is indebted to USDA Rural Development in the amount of $25,125.51 for the mortgage loan guarantee extended to her.

2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.

3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

ORDER

For the foregoing reasons, the wages of the Danielle Bodle shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: JASON MCCANLESS.
Docket No. 12-0383.
Decision and Order.
Filed July 31, 2012.

AWG.

William A. Kozub, Esq., for Petitioner.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of Jason McCanless for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 15, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to

direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on July 31, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 7, 2012. The Petitioner filed his material with the Hearing Clerk on July 31, 2012, consisting of a Narrative and a letter from Attorney William Kozub to the Department of the Treasury and a Consumer Debtor Financial Statement setting forth the Petitioner's financial condition. At the hearing held on July 31, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri testified. Petitioner's wife, Samantha McCanless participated as well, but was not sworn.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On September 17, 2008, Petitioner and his wife applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1.

2. On February 12, 2009, the couple obtained a home mortgage loan for the purchase of property located in Queen Creek, Arizona from CNN Mortgage for $159,702.00. RX-2.

3. On April 2, 2009, the note and mortgage were sold to JP Morgan Chase Bank. RX-2 and Petitioner's Narrative.

4. Following an unforeseen job loss in mid 2009, Petitioner and his wife defaulted on the mortgage loan and despite Petitioner's efforts to secure modification of the loan foreclosure proceedings were initiated. Petitioner's Narrative and RX-3.

5. A foreclosure sale was held on April 21, 2011 and the property was sold to a third party for a bid of $64,500.00. RX-3.

6. Chase submitted a loss claim and USDA paid Chase the sum of $96,569.82 for unpaid principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-4, 5.

7. After application of Treasury offsets, the remaining unpaid debt is in the amount of $96,187.00, exclusive of potential Treasury fees.

8. The income and expenses of the Petitioner's household of five are approximately equal.

Conclusions of Law

1. Jason McCanless is indebted to USDA Rural Development in the amount of $96,187.00 for the mortgage loan guarantee extended to him.

2. The Petitioner is under a financial hardship at the current time.

3. The Respondent is NOT entitled to administratively garnish the wages of the Petitioner.

ORDER

For the foregoing reasons, the wages of the Jason McCanless may NOT be subjected to administrative wage garnishment. The debt will remain at Treasury for cross servicing. Should the Petitioner's financial condition improve, proceedings may be reinstituted; however, any hardship determination at that time will be made by Treasury.

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

———

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: JOYCE A. SMITH.
Docket No. 12-0384.
Decision and Order.
Filed July 31, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of Joyce A. Smith for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 15, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on July 31, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 8, 2012. The Petitioner failed to provide any material to the Hearing Clerk and did not comply with the instructions contained in the Prehearing Order. Accordingly, it will be deemed that the Petitioner has waived her right to a hearing and the issues before me will be decided on the basis of the record.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On June 12, 1987, the Petitioner received the first of two home mortgage loan in the amount of $37,500.00 from Farmers Home Administration (FmHA), United States Department of Agriculture

(USDA), now Rural Development (RD) for property located in West Point, Mississippi. RX-1.

2. On November 30, 1987, the second loan in the amount of $1,000.00 was made. RX-1.

3. The loans were accelerated for foreclosure on June 12, 2003 for monetary default and the property was sold at a foreclosure sale on January 12, 2004 for a bid of $14,600.00 from a third party. RX-3.

4. After application of sale proceeds and an insurance refund, the amount due was $25,107.25. RX-3, 4.

5. After application of Treasury offsets, the remaining unpaid debt is in the amount of $21,835.25, exclusive of potential Treasury fees. RX-6.

Conclusions of Law

1. Petitioner is indebted to USDA Rural Development in the amount of $21,835.25 for the mortgage loan extended to her.

2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

———

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: NEIL BUNTYN.
Docket No. 12-0267.
Decision and Order.
Filed August 2, 2012.

AWG—Dismissal—Prejudice, with.

Robert C. Burnett, Esq., for Petitioner.
Michelle Tanner for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER DISMISSING WAGE GARNISHMENT ACTION

This matter is before the Office of Administrative Law Judges ("OALJ") upon the petition of Neil Buntyn ("Petitioner") challenging the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development Agency ("Respondent"; "USDA-RD"); and if established, the propriety of imposing administrative wage garnishment.

On March 5, 2012, Petitioner timely requested a hearing before the Office of Administrative Law Judges ("OALJ") upon notice of intent to garnish his wages. By Order issued March 29, 2012, a hearing was scheduled to commence on April 26, 2012. At the hearing, I continued the matter pending the filing of additional information by both Petitioner and USDA-RD. Both parties filed additional documents with the Hearing Clerk and the hearing was rescheduled to commence on August 1, 2012.

I held the hearing as scheduled. Michelle Tanner appeared and testified on behalf of USDA-RD, and also represented the agency. Petitioner testified, and was assisted by Robert C. Barnett, Esq. I entered into the record all of the documents filed by both parties.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order shall be entered:

Findings of Fact

1. On April 23, 2004, the Petitioner signed a Form RD-1980-21, Request for Single Family Housing Loan Guarantee. RX-1.

2. By signing the certification included in Form RD-1980-21, Petitioner agreed to reimburse USDA-RD for any loss claim paid by USDA-RD to the Lender. RX-1.

3. On April September 28, 2004, Petitioner received a loan from AMSouth Bank ("AM South") to purchase real property located in Brandon, Mississippi. RX-2.

4. AM South assigned the loan to JP Morgan Chase Bank ("Chase"), but the Assignment of the Deed of Trust was not signed until May 5, 2008. RX-2, page 4.

5. Despite this lapse in documentation, Chase became the entity that serviced Petitioner's loan immediately after the loan was made. PX 2; PX-4; PX-5.

6. In 2006, Chase offered Petitioner a moratorium on payments on his loan. PX-4; PX-5.

7. Thereafter, Chase found that Petitioner was in default. PX-4; PX-5.

8. On June 22, 2006, Petitioner received a letter from lawyers for Chase seeking to collect the entire principal and interest due on the loan as well as fees through foreclosure. PX 2.

9. Petitioner had tried to sell the property, but could not get clear title. PX-1.

10. The property was sold to Chase at foreclosure sale on May 13, 2009, after it spent years clearing title for itself. PX-1.

11. Chase did not appear to assist Petitioner in clearing title, nor in properly servicing the account. PX 1 through 4.

12. Chase presented a loss claim to USDA-RD, which refused to pay the claim without additional documentation. PX-1.

13. USDA-RD Loan Specialist Robert Rubin conducted an inquiry into the circumstances underlying this transaction and concurred that one of the lenders had failed to properly file the assignment of the property and failed to properly record the deed of trust. PX 1.

14. USDA-RD finally paid the loss claim to Chase on April 25, 2011. RX-6 – RX-8.

15. Chase sold the property, and USDA-RD recovered $1,760.00 credit against the claim it paid. *Id.*

16. USDA-RD established the loss claim as an account payable by Petitioner. RX-9.

17. USDA-RD referred Petitioner's account to the U.S. Department of Treasury ("Treasury") for collection pursuant to applicable law. RX-10.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Petitioner's request for a hearing was timely filed.

3. The failure to properly record a deed of trust and assignment colored title to the property, and, therefore, USDA paid an entity under the guarantee agreement that had not been legally established as the holder of the note when the purported default on the account occurred.

4. Although the foreclosure action was concluded after the assignment was made, Petitioner had no recourse with respect to his account, which was not properly assigned to Chase until years after that lender evicted Petitioner.

5. Chase's initiation of a foreclosure action during a period when it (1) was not legal title holder to the real property; and (2) according to its

own records, had placed Petitioner's account in a state of moratorium, is inconsistent and not supported by law.

6. There is no evidence that Petitioner was in default with Chase when it initiated foreclosure action in 2006.

7. Chase's failure to prosecute a foreclosure action for a number of years due to the flaws in legal filings demonstrates that Chase failed to comply with USDA regulations.

8. USDA-RD has failed in its burden of proof of establishing a debt in this matter.

9. Petitioner's accounts with USDA-RD and Treasury shall be abolished and no action shall be taken to collect any alleged debt related to this claim.

10. Any amount collected from the Petitioner arising out of the loss claim was improper and should be refunded to him.

11. Petitioner has not benefited from the forgiveness of a debt due to the United States, as the record does not support the existence of a debt related to a loss claim; accordingly, Petitioner has not realized imputed income and a Form 1099 cannot be issued.

12. Both Petitioner and USDA-RD may have a cause of action against Chase for its conduct with respect to this case.

ORDER

For the foregoing reasons, no debt being established, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment.

Any amounts collected from the Petitioner subsequent to acceleration of his account in 2006 **SHALL** be refunded.

Any account established for collection of alleged indebtedness related to the payment of a loss claim to Chase **shall be cancelled and abolished.**

No entity of the United States shall issue Petitioner a Form 1099, as Petitioner has not realized imputed income as the result of this transaction.

This matter is DISMISSED, with prejudice.

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: EUGENE CRANMER.
Docket No. 12-0365.
Decision and Order.
Filed August 8, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing was held as scheduled by telephone on August 8, 2012. Eugene Cranmer ("Petitioner Cranmer") did not participate. (Petitioner Cranmer did not participate by telephone: Petitioner Cranmer provided no telephone number on his Hearing Request; and in response to my Order issued June 12, 2012, Petitioner Cranmer provided no telephone number where he could be reached for the hearing by telephone.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Cranmer owes to USDA Rural Development a balance of **$50,616.31** (as of June 18, 2012) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for a loan made on July 5, 2007, by Wells Fargo Bank, N.A., for a home in New York, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List (filed June 22, 2012), which are admitted into evidence, together with the testimony of Michelle Tanner.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner Cranmer, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$50,616.31** would increase the current balance by $14,172.57, to $64,788.88. *See* USDA Rural Development Exhibits, esp. RX 10, p. 2.

6. The amount Petitioner Cranmer borrowed was $75,849.00 on July 5, 2007. RX 2. Petitioner Cranmer defaulted on the mortgage loan payments to Wells Fargo Bank, N.A. ("Wells Fargo"), and the loan was accelerated for foreclosure. The Due Date of Last Payment Made was July 1, 2008. RX 6, p. 4. Foreclosure was initiated on February 10, 2009. A foreclosure sale was held on March 10, 2010, at which Wells Fargo acquired the property back into inventory with the highest bid, $59,500.00. RX 3.

7. The "As Is" value from one appraisal as of March 19, 2010 was $59,000.00. RX 4, RX 6, p. 5. The "As Is" Value per the Brokers Price Opinion (BPO) as of March 13, 2010 was $49,900.00. RX 6, p. 5. Wells Fargo placed the home "as is" on the market for resale for $59,000.00. RX 5, pp. 1-3. Thus, the Original List Price was $59,000.00. The Final List Price was $47,642.50. The property sold to a third party for $43,500.00, with the closing date being August 3, 2010. RX 5, pp. 6-9.

8. Mr. Cranmer stated in his Hearing Request: "Never dealt with Department of Agriculture. Don't know what it for." But Mr. Cranmer had been contacted by the Department of Agriculture by letter dated August 13, 2011, explaining the loss claim that the Department of Agriculture, Rural Development, paid to Wells Fargo on March 9, 2011 in the amount of $51,922.41. RX 8, RX 6, p. 11, and USDA Rural Development Narrative. Thus $51,922.41, the amount USDA Rural Development paid, is the amount USDA Rural Development recovers from Petitioner Cranmer under the ***Guarantee***. No more interest accrues; no interest, no penalties. The interest stopped accruing when Wells Fargo timely submitted its loss claim.

9. Collections by Treasury from Petitioner Cranmer in 2012, ***offsets***, applied to reduce the debt (after the collection fees were subtracted) leave **$50,616.31** unpaid as of June 18, 2012 (excluding the potential remaining collection fees). *See* RX10, esp. p. 1.

10. Although my Hearing Notice and Prehearing Deadlines, dated June 12, 2012, invited financial disclosure from Petitioner Cranmer, such as filing a Consumer Debtor Financial Statement, he filed nothing. Thus I cannot calculate Petitioner Cranmer's current disposable pay. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.) There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot tell whether garnishment to repay "the debt" (*see* paragraph 3) in the amount of 15% of Petitioner Cranmer's disposable pay creates a financial hardship.

11. Petitioner Cranmer is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

12. Garnishment of Petitioner Cranmer's disposable pay is authorized. I encourage **Petitioner Cranmer and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Cranmer, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Cranmer, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Cranmer, you may want to have someone else with you on the line if you call.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Cranmer and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner Cranmer owes the debt described in paragraphs 3 through 9.

15. **Garnishment up to 15% of Petitioner Cranmer's disposable pay** is authorized. There is no evidence that financial hardship will be created by the garnishment. 31 C.F.R. § 285.11.

16. **No refund** to Petitioner Cranmer of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

17. Repayment of the debt may also occur through ***offset*** of Petitioner Cranmer's **income tax refunds** or other **Federal monies** payable to the order of Mr. Cranmer.

ORDER

18. Until the debt is repaid, Petitioner Cranmer shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

19. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with **garnishment up to 15% of Petitioner Cranmer's disposable pay**. 31 C.F.R. § 285.11.

20. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Cranmer's pay, to be returned to Petitioner Cranmer.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

_____

In re: RUBEN MENDOZA.
Docket No. 12-0460.
Decision and Order.
Filed August 9, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing was held as scheduled on August 8, 2012. Ruben Mendoza ("Petitioner Ruben Mendoza") did not participate; Petitioner Ruben Mendoza had no notice of the hearing: the Hearing Clerk's attempts to reach him by mail failed; USDA Rural Development's attempt to deliver copies to him by UPS failed. The address used was the same address that the U.S. Department of the Treasury used to send to Petitioner Ruben Mendoza, in February 2010, the "Notice of Intent to

Initiate Administrative Wage Garnishment Proceedings". The address was for the home that had been lost to foreclosure in 2002 - - perhaps not the current address for Petitioner Ruben Mendoza.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Michelle Tanner.

Summary of the Facts Presented

3. The hearing was prompted by a copy of Petitioner Ruben Mendoza's divorce decree from 1999 having been FAXed in May 2012 to the U.S. Department of the Treasury, from USDA Rural Development in Amarillo, Texas. A copy of this Decision will be forwarded to that office, for forwarding to Petitioner Ruben Mendoza. In the divorce decree, Petitioner Ruben Mendoza's co-borrower (his former wife, Loretta Mendoza, also known as Loretta Sandoval) was awarded the "real property commonly known as 1012 W. Grand, Dimmitt, Castro County, Texas . . . . **and any indebtedness on the real property**." Emphasis added. Petitioner Ruben Mendoza has no doubt grown weary of payments being taken from him to pay the debt that the divorce decree made his former wife's responsibility.

4. Legally, USDA Rural Development (the U.S. Department of the Treasury collects for USDA Rural Development) could collect the entire debt from Petitioner Ruben Mendoza. Because of the divorce decree, Petitioner may have recourse against his co-borrower, Loretta Mendoza, also known as Loretta Sandoval, to be <u>reimbursed</u> for amounts he has paid on the debt. Petitioner Ruben Mendoza may want to consult with an attorney about that; he may want to pursue that.

5. When Petitioner Ruben Mendoza entered into the borrowing transaction in 1990 with his co-borrower, Loretta Mendoza, certain responsibilities were fixed, as to each of them. The debt is Petitioner Ruben Mendoza and his co-borrower's joint-and-several obligation. The divorce decree did not change the fact that each of them is liable to USDA Rural Development. So far, it appears that all the collections

have been taken from Petitioner Ruben Mendoza and none from his former wife the co-borrower.

6. Beginning in 2007, through 2012, Petitioner Ruben Mendoza's income tax refunds and stimulus money were intercepted and applied to reduce the debt. *See* RX 6, p. 1. These ***offsets*** of Petitioner Ruben Mendoza's **income tax refunds** or other **Federal monies** payable to the order of Mr. Mendoza had reduced the loan (the loan that in 1990 was the larger of the 2 loans), to a remaining balance of $136.61 as of June 21, 2012. RX 6, pp. 1-2.

7. Beginning in 2010, through 2012, Petitioner Ruben Mendoza's wages have been garnished to reduce the debt. *See* RX 6, pp. 5-7. These wage garnishments of Petitioner Ruben Mendoza's **disposable pay** had reduced the loan (the loan that in 1990 was the smaller of the 2 loans), to a remaining balance of $2,138.95 as of June 21, 2012. RX 6, pp. 5-8.

8. Adding together the remaining balances of both loans, as of June 21, 2012, Petitioner Ruben Mendoza owed to USDA Rural Development a balance of **$2,275.56** in repayment of two United States Department of Agriculture / Farmers Home Administration loans made in 1990 for a home in Texas, the balance of which is now unsecured ("the debt"). [Petitioner Ruben Mendoza's co-borrower (his former wife, Loretta Mendoza, also known as Loretta Sandoval) owed this, too.] *See* USDA Rural Development Exhibits RX 1 through RX 6, especially RX 6, plus Narrative, Witness & Exhibit List (filed June 22, 2012), which are admitted into evidence, together with the testimony of Michelle Tanner.

9. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$2,275.56** would increase the current balance by $637.16, to $2,912.72. *See* RX 6 plus USDA Rural Development Narrative.

10. Petitioner Ruben Mendoza is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

11. I encourage **Petitioner Ruben Mendoza and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Ruben Mendoza, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Ruben Mendoza, you may choose to offer to Treasury's collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may ask that **the debt be apportioned between you and your co-borrower**. Petitioner Ruben Mendoza, you may choose to have someone on the line with you when you call.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Ruben Mendoza and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Ruben Mendoza had no notice of the hearing that I held on August 8, 2012, and he is entitled to another hearing before an administrative law judge at the U.S. Department of Agriculture, if he requests one from the U.S. Department of the Treasury.

14. Petitioner Ruben Mendoza may want to contact Michelle Tanner of USDA Rural Development in St. Louis, Missouri to request that the documents be sent to him again. [These documents are the USDA Rural Development Exhibits RX 1 through RX 6 plus Narrative, Witness & Exhibit List (filed June 22, 2012).] Michelle Tanner's contact information is below.

ORDER

15. Until the debt is repaid, Petitioner Ruben Mendoza shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, and a **courtesy copy sent to USDA Rural Development in Amarillo, Texas**, attn. Melissa Torrez (contact information below).

_____

In re: CONNIE PARRISH.
Docket No. 12-0431.
Decision and Order.
Filed August 10, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by James P. Hurt, Hearing Official.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On June 7, 2012, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-4 on June 27, 2012. Ms. Parrish filed her financial statements on July 2, 2012 and July 20, 2012 which I now label as PX-1 and PX-2, respectively. At my request on August 8, 2012, Ms. Parrish filed a statement (which I now label as PX-3) of her recollection of the facts and circumstances surrounding the Power of Attorney used to bind her to the RD loan (See RX- 1 @ page 7 of 11).

On July 18, 2012 and at the time set for the hearing, both parties were available. Ms. Michelle Tanner represented RD. Ms. Parrish was self represented. The parties were sworn.

Petitioner has been employed for more than one year.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On April 7, 1995, Petitioner obtained a loan for the purchase of a primary home in the amount of $51,700.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase her home on a property located in Blanchard, Louisiana. RX-1 @p. 7 of 11.

2. The borrower was called to active military duty and was stationed out of the country at the time of the closing of the mortgage. She states that she granted a notarized limited power of attorney (to her then fiancé – Kenneth Wayne Parrish) to complete the settlement documents for the RD loan. PX-3.

3. The Power of Attorney document was accepted by RD loan processors as "Duly authorized pursuant to Power of Attorney dated March 22, 1995." RX-1 @ 7 of 11.

4. Neither party could produce a copy of the Power of Attorney.

5. The borrower abandoned the property and moved to another state. RX-1 @ 8 of 11. The Borrower's account was delinquent. The loan was accelerated for foreclosure.

6. The home was sold to a third party who assumed the loan in the amount of $46,000 under new rates and terms on March 4, 1998. Narrative, RX-1 @ p. 9 of 11.

7. Prior to the sale the Borrower owed RD for principal, interest, fees, plus late fees for a total of $59,328.75 to pay off the RD loan. Narrative, RX-3.

8. After application of the proceeds of the sale to the third party, an additional $1,030.50 was credited to the unpaid amount prior to the transfer of the delinquent account to Treasury. RX-3.

9. Treasury has collected an additional $1,936.32 (net) towards the debt. RX-3, RX-4 @ p. 1 of 3.

10. The remaining amount due of $10,361.93 was transferred to Treasury for collection on June 25, 2012. RX-4 @ p.2 of 3.

11. The potential Treasury collection fees stated were $2,901.34 RX-4 @ p. 2 of 3. (See paragraph 13 below).

12. The loan servicing company (or bank) improperly issued a IRS 1099-c form for "Debt Cancellation" and "Interest Forgiven." PX -2.

13. IRS collected $2,482.00 as additional income taxes as a result of the improperly issued IRS 1099-c. RX-2 @ p. 17 of 31. I determine that her debt related to the RD loan should be reduced by $2,482.00 from the amount claimed by RD.

14. Ms. Parrish has been employed for more than one year. There are two income earners in her household. There is an autistic minor child in the home. Ms. Parrish's paystub indicates she works less than a 40 week and that her net income is approximately 52% of the household income.

15. Petitioner raised the issue of financial hardship and I utilized her financial statements and payroll information to prepare a Financial Hardship Calculation[1].

[1] The Financial Hardship Calculation is not posted on the OALJ website.

Conclusions of Law

1. Petitioner is indebted to USDA Rural Development in the amount of $7,879.93 ($10,361.93 - $2,482.00) exclusive of potential Treasury fees for the mortgage loan extended to her.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $2,206.38 (28% of $7,879.93).

3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

4. The Respondent is not entitled to administratively garnish the wages of the Petitioner at this time.

ORDER

For the foregoing reasons, the wages of Petitioner shall not be subjected to administrative wage garnishment at this time. After one year, RD may re-assess the Petitioner's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

_____

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: BARBARA A. SMITH.
Docket No. 12-0499.
Decision and Order.
Filed August 13, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone, scheduled for August 23, 2012, is CANCELED, because the issue of whether Barbara A. Smith, the Petitioner ("Petitioner Smith") can withstand garnishment without it causing financial hardship, can be decided based on the written record.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), is represented by Michelle Tanner.

Summary of the Facts Presented

3. Chief Judge Peter M. Davenport's Decision and Order filed November 18, 2010 determined that Petitioner Smith is indebted to USDA Rural Development. USDA Rural Development's Exhibit RX 2. USDA Rural Development's Exhibits RX 1 through RX 3, plus Narrative, Witness & Exhibit List (filed on July 24, 2012), are admitted into evidence. Michelle Tanner's testimony will not be required.

4. Petitioner Smith's completed "Consumer Debtor Financial Statement" plus two recent pay stubs (filed on August 10, 2012), are admitted into evidence, together with Petitioner Smith's Hearing Request (dated June 3, 2012), which included a completed "Consumer Debtor Financial Statement" plus her 2011 W-2 and a recent pay stub. Petitioner Smith's testimony will not be required.

5. Petitioner Smith owes to USDA Rural Development **$12,638.78** (as of July 21, 2012) in repayment of a USDA Farmers Home

Administration loan borrowed in 1994 for a home in Florida, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$12,638.78** would increase the balance by $3,538.86, to $16,177.64. *See* USDA Rural Development Exhibits, esp. RX 3, p. 4.

7. Petitioner Smith's co-borrower, her former husband, Kenneth Smith, is making considerable progress repaying the debt. Petitioner Smith's Consumer Debtor Financial Statement indicates that her former husband is disabled; the monthly ***offsets*** (*see* RX 3, pp. 5-7) may be coming from his disability payments. [He may want to file his own Hearing Request.] Petitioner Smith's income tax refund repaid a considerable amount in February 2011, but she owes the IRS for 2011 taxes.

8. Petitioner Smith's disposable pay (within the meaning of 31 C.F.R. § 285.11) has historically been a little more than $1,000.00 every 2 weeks, roughly $2,100.00 - $2,200.00 per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance and, here, disability insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Lately, though, Petitioner Smith has not been getting full-time hours. ("My work has been slow so I have been doing two days a week 24 hr. When I can I do overtime.") Based on the two most recent pay stubs, Petitioner Smith's disposable pay has been roughly $685.00 every 2 weeks, roughly $1,500.00 per month. Petitioner Smith is trying to help family members cope, including those with medical challenges and the expenses that result. At this time, Petitioner Smith cannot afford to be garnished without it causing Petitioner Smith and the family who depend on her financial hardship (within the meaning of 31 C.F.R. § 285.11).

9. To prevent financial hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **0%** of Petitioner Smith's disposable pay through September 2014; then, beginning October 2014, **up to 5%** of Petitioner Smith's disposable pay. 31 C.F.R. § 285.11.

10. Petitioner Smith is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

11. Garnishment is authorized in limited amount (5% of disposable pay) beginning October 2014. *See* paragraphs 8, 9. I encourage **Petitioner Smith and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Smith, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Smith, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Smith, you may want to request apportionment of debt between you and the co-borrower. Petitioner Smith, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Smith, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Smith and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. **Garnishment is not authorized through September 2014**; thereafter, garnishment is authorized, **up to 5%** of Petitioner Smith's disposable pay. 31 C.F.R. § 285.11.

14. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Smith's pay, to be returned to Petitioner Smith.

15. Repayment of the debt may occur through ***offset*** of Petitioner Smith's **income tax refunds** or other **Federal monies** payable to the order of Ms. Smith.

ORDER

16. Until the debt is repaid, Petitioner Smith shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are not authorized to proceed with garnishment of Petitioner Smith's disposable pay through September 2014. Beginning October 2014, garnishment **up to 5%** of Petitioner Smith's disposable pay is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: ANNIE G. DENMARK, N/K/A ANNIE G. WALTON.
Docket No. 12-0450.
Decision and Order.
Filed August 14, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held as scheduled on August 14, 2012. Annie G. Denmark, full name Annie Gail Denmark Walton (Petitioner Walton) did not participate. (Petitioner Walton did not participate by telephone: she did not answer at the "alternate" telephone number she had provided in May 2012 with her Hearing Request, and voice mail had not been set up, so no message could be left. Further, in response to my instructions in the Hearing Notice filed June 27, 2012, Petitioner Walton

provided no telephone number where she could be reached for the hearing by telephone.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Admitted into evidence are Giovanna Leopardi's testimony and USDA Rural Development's Exhibits RX 1 through RX 5, plus Narrative, Witness & Exhibit List, which were filed on June 22, 2012.
4. Petitioner Walton owes to USDA Rural Development **$5,090.09** (as of June 20, 2012, *see* esp. RX 5, pp. 1, 2), in repayment of a United States Department of Agriculture / Farmers Home Administration loan made in 1991, for a home in Georgia. The balance is now unsecured ("the debt").

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$5,090.09**, would increase the balance by $1,425.23 to $6,515.32. *See* esp. RX 5, p. 2.

7. The amount Petitioner Walton borrowed in 1991 was $40,000.00. RX 1. Foreclosure was begun in 2004. A Chapter 13 Bankruptcy was dismissed on January 3, 2005. A short sale took place in February 2005, for $24,000.00 (RX 3, pp. 7 and 9). By the time the sale proceeds ($24,000.00) were applied to reduce the balance, the USDA Rural Development debt had grown to $41,386.09 (RX 4):

$ 35,415.65	Principal
$ 4,822.32	Interest
$ 1,061.29	Recoverable Costs
$ 86.83	Interest on Recoverable Costs
$ 41,386.09	Amount Due when sale funds were applied on the loan

RX 4, and USDA Rural Development Narrative.

The sale proceeds of $24,000.00 were applied to the Amount Due. Interest stopped accruing when the sale funds were applied on the loan. An additional foreclosure fee of $175.00 was added to the balance, resulting in $17,561.09 being due. Collections from Treasury (through ***offsets*** of Petitioner Walton's income tax refunds that were intercepted and applied to the debt, and her stimulus money (*see* RX 5, p. 1), reduced the debt from $17,561.09 to **$5,090.09** unpaid as of June 20, 2012 (excluding the potential remaining collection fees). *See* RX 5 and USDA Rural Development Narrative.

8. Petitioner Walton still owes the balance of **$5,090.09** (as of June 20, 2012, excluding the potential remaining collection fees), and USDA Rural Development may collect that amount from her. The issue is whether she should be garnished. Petitioner Walton failed to file a Consumer Debtor Financial Statement, or anything, in response to my instructions in the Hearing Notice [filed June 27, 2012]. Thus I cannot calculate Petitioner Walton's current disposable pay. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.)

9. There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot determine whether garnishment to repay "the debt" (*see* paragraph 4) in the amount of 15% of Petitioner Walton's disposable pay would create financial hardship. What I can determine is that Petitioner Walton is doing an excellent job of getting the debt repaid through ***offsets*** of her income tax refunds, and she pays a smaller amount toward collection fees through ***offsets***, than she will if she makes payments, so I encourage Petitioner Walton to continue to repay the debt in the way she has been doing. RX 5, p. 1.

Discussion

10. Petitioner Walton, if you wish to contact Treasury's collection agency to negotiate a compromise of the debt, you may telephone Treasury's

collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Walton, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Walton, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Walton, you may wish to include someone else with you in the telephone call when you call to negotiate.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Walton and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Walton owes the debt described in paragraphs 4 through 8.

13. **Garnishment is not authorized through September 2015**. Beginning October 2015, potential garnishment to repay the debt **up to 15%** of Petitioner Walton's disposable pay is authorized. 31 C.F.R. § 285.11.

14. **No refund** to Petitioner Walton of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

15. Repayment of the debt may occur through ***offset*** of Petitioner Walton's **income tax refunds** or other **Federal monies** payable to the order of Ms. Walton.

ORDER

16. Until the debt is repaid, Petitioner Walton shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment in any amount **through**

September 2015. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment **up to 15%** of Petitioner Walton's disposable pay beginning **October 2015**. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: HERBERT BROOKS.
Docket No. 12-0350.
Decision and Order.
Filed August 15, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of Herbert Brooks, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On April 20, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on June 28, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on May 14, 2012. The Petitioner failed to file any additional material with the Hearing Clerk; however, in his Request for Hearing, Mr. Brooks stated that the signature on the documents was not his and had been signed by his ex wife. A comparison of the signatures on the Request for Hearing and the Loan

Guarantee application raised sufficient doubt that Rural Development was asked to see if an individual could be located at the time the document was signed to verify that it was in fact Mr. Brooks that signed the loan guarantee application. Rural Development failed to provide such a person, but instead has submitted a copy of Mr. Brooks' Driver License from the State of Georgia.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On June 31, 2008, an individual whose identity has not been established applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1. The loan guarantee application form does not require notarization and no individual has been produced who was present at the time the document was signed.

2. On July 31, 2008, Herbert T. Brooks and Keyonta Brooks obtained a home mortgage loan for property located in Winder, Georgia from Homestar Financial Corporation for $170,917.00 and before a Notary Public executed a note and Security Deed secured by the property. RX-2.

3. Homestar Financial Corporation subsequently sold the note and mortgage to Chase Manhattan Mortgage. RX-2.

4. In 2009, the mortgage loan was defaulted on and foreclosure proceedings were initiated. RX-3.

5. JP Morgan Chase submitted a loss claim and USDA paid Chase the sum of $80,321.87 for unpaid principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-9.

6. The record does not contain any court records pertaining to foreclosure proceedings, but contains a deed executed by Chase Home Finance, LLC under the powers granted in the Security Deed to Homestar Financial Corporation. The record recites assignment of the

note and mortgage to Chase Home Finance, LLC; however, those assignments are not part of the record.

7. The debt was submitted to Treasury for collection on June 8, 2011 and Petitioner's salary is being garnished.

Conclusions of Law

1. USDA Rural Development failed to establish that Herbert T. Brooks executed the loan guarantee application upon which the debt is alleged to be due.

2. The Respondent is not entitled to administratively garnish the wages of the Petitioner.

ORDER

1. For the foregoing reasons, the wages of Herbert T. Brooks may NOT be subjected to administrative wage garnishment.

2. All amounts collected from the Petitioner by Treasury shall be refunded.

3. As no debt was established, no 1099 may be issued.

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

———

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: DOROTHY JOHNSON.
Docket No. 12-0461.
Decision and Order.
Filed August 16, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on August 15, 2012. Dorothy Johnson, also known as Dorothy A. Johnson and as Dorothy M. Johnson (Petitioner Johnson) participated, accompanied by Mssrs. Michael Large and Gus Smith of South Carolina Legal Services.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Admitted into evidence are Petitioner Johnson's testimony and her August 13, 2012 filing, including Petitioner's Exhibits PX 1 through PX 6; her July 20, 2012 filing; and her Hearing Request dated May 23, 2012.

4. Admitted into evidence are Giovanna Leopardi's testimony and USDA Rural Development's June 25, 2012 filing, including Exhibits RX 1 through RX 5, plus Narrative, Witness & Exhibit List.

5. Petitioner Johnson owes to USDA Rural Development **$26,566.58** (as of June 22, 2012, *see* esp. RX 5, pp. 1, 2), in repayment of a United States Department of Agriculture / Farmers Home Administration loan made in 1992, for a home in Virginia. The balance is now unsecured ("the debt").

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$26,566.58**, would increase the balance by $7,438.64 to $34,005.22. *See* esp. RX 5, p. 2.

7. The amount Petitioner Johnson borrowed in 1992 was $64,000.00. RX 1. Foreclosure was begun in 1997. The foreclosure sale took place on August 19, 1998. USDA Rural Development received the sale proceeds ($44,056.25) on November 13, 1998. By then, the USDA Rural Development debt had grown to $74,090.22 (RX 4):

$ 62,969.92	Principal
$ 9,175.61	Interest
$ 1,942.53	Recoverable Costs
$ 2.16	Interest on Recoverable Costs
$ 74,090.22	Amount Due when sale funds were applied on the loan

RX 4, RX 3, USDA Rural Development Narrative, and Giovanna Leopardi's testimony.

The sale proceeds of $44,056.25 were applied to the Amount Due. Interest stopped accruing either on the day of the foreclosure sale (August 19, 1998) OR when the sale proceeds were applied on the loan (November 13, 1998, RX 3, p. 3). [Based on the Notice of Acceleration which identifies a daily interest rate of $14.2329 after June 10, 1997 (RX 2, p. 1), I believe interest stopped accruing on the day of the foreclosure sale.] An additional foreclosure fee of $425.00 was added to the balance, resulting in $30,458.97 being due (the deficiency) from Petitioner Johnson.

8. USDA Rural Development received no debt settlement package from Petitioner Johnson. (If the forms had been submitted, there would have been an offer of settlement from her with extensive financial documentation to prove what she could afford to pay). By letter dated December 30, 2000, Petitioner Johnson was notified that USDA Rural

Development was referring the debt to Treasury for collection. Collections from Treasury (through ***offsets*** of Petitioner Johnson's income tax refunds that were intercepted and applied to the debt, beginning in 2001, and her stimulus money (*see* RX 5, p. 1)), reduced the debt from $30,458.97 to **$26,566.58** unpaid as of June 22, 2012 (excluding the potential remaining collection fees). *See* RX 5, RX 3 and USDA Rural Development Narrative.

9. Petitioner Johnson still owes the balance of **$26,566.58** (as of June 22, 2012, excluding the potential remaining collection fees), and USDA Rural Development may collect that amount from her. The issue is whether she should be garnished. Petitioner Johnson's Consumer Debtor Financial Statements, earnings records, Affidavit, and all her extraordinarily thorough documentation, permit me to calculate her current disposable pay. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.) Further, I see Petitioner Johnson's entire financial circumstances, including her earnings history for more than four decades. Petitioner Johnson should **not** be garnished, ever.

10. Garnishment to repay "the debt" (*see* paragraph 5) in the amount of 15% of Petitioner Johnson's disposable pay, or in any amount, would create financial hardship. Petitioner Johnson has gotten nearly $4,000.00 of the debt repaid through ***offsets*** of her income tax refunds and a stimulus payment; it is clear that the loss of those funds has caused her financial hardship.

Discussion

11. Petitioner Johnson, if you wish to contact Treasury's collection agency to negotiate a compromise of the debt, you may telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Johnson, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Johnson, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the

claim for less. Petitioner Johnson, you may wish to include someone else with you in the telephone call when you call to negotiate.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Johnson and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Johnson owes the debt described in paragraphs 5 through 9.

14. **Garnishment is not authorized**. Petitioner Johnson's filings and testimony persuade me that garnishment in any amount will cause financial hardship; I conclude that it is highly probable that this will remain true throughout the future. 31 C.F.R. § 285.11.

15. **No refund** to Petitioner Johnson of monies already collected or collected prior to implementation of this Decision through ***offset*** is appropriate, and no refund of ***offsets*** is authorized. If, however, any amounts have been collected through garnishment of Petitioner Johnson's pay prior to implementation of this Decision, those amounts shall be returned to Petitioner Johnson.

16. Repayment of the debt may occur through ***offset*** of Petitioner Johnson's **income tax refunds** or other **Federal monies** payable to the order of Ms. Johnson.

ORDER

17. Until the debt is repaid, Petitioner Johnson shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

18. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment in any amount, ever. 31 C.F.R. § 285.11. USDA Rural Development, and those collecting on its behalf, will be required to **return to Petitioner Johnson** any amounts already collected through garnishment of Petitioner Johnson's pay, if any there be, prior to implementation of this Decision.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. **The Hearing Clerk shall use the mailing address for Petitioner Johnson that she provided on her Contact Information Sheet (p. 2 of her August 13, 2012 filing)**.

———

In re: JAMIE BARELA.
Docket No. 12-0487.
Decision and Order.
Filed August 21, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on August 21, 2012, having been postponed from August 15, 2012 at the request of Jamie Barela, also known as Jamie A. Barela, the Petitioner (Petitioner Barela). Petitioner Barela did not participate. (Petitioner Barela did not participate by telephone: there was no answer at the telephone number for Ms. Barela provided in her Hearing Request; and in response to my instructions in the Hearing Notice [filed June 28, 2012], Petitioner Barela provided no telephone number where she could be reached for the hearing by telephone.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Barela owes to USDA Rural Development a balance of **$95,246.05** (as of July 11, 2012, *see* RX 10, p. 2), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for a loan made in 2008, the balance of which is now unsecured ("the debt"). Petitioner Barela borrowed, with the co-borrower, Brian G. Sanders, to buy a home in Oregon. *See* USDA Rural Development Exhibits RX 1 through RX 11, together with the Narrative, Witness & Exhibit List (filed July 18, 2012); and the testimony of Giovanna Leopardi, all of which I admit into evidence.

4. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Barela, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$95,246.05** would increase the current balance by $26,668.89, to $121,914.94 (as of July 11, 2012). RX 10, p. 2.

6. Petitioner Barela and her co-borrower, Brian G. Sanders, are jointly and severally liable to pay the debt. Brian G. Sanders is held responsible to pay the debt just as Petitioner Barela is, as shown by RX 10. USDA Rural Development may legally collect more than half, even all, from either one of them. Once Petitioner Barela entered into the borrowing transaction with her co-borrower, certain responsibilities were fixed. Petitioner Barela still owes the balance of **$95,246.05** (excluding potential collection fees), as of July 11, 2012, and so does her co-

borrower. Even if Petitioner Barela has legal recourse against her co-borrower for monies collected from her on the debt, that does not prevent USDA Rural Development from collecting from her, pursuant to the ***Guarantee***. RX 1.

7. Petitioner Barela failed to file a Consumer Debtor Financial Statement, or anything, in response to my instructions in the Hearing Notice [filed June 28, 2012]. Thus I cannot calculate Petitioner Barela's current disposable pay. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.)

8. There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot tell whether garnishment to repay "the debt" (*see* paragraph 3) in the amount of 15% of Petitioner Barela's disposable pay creates a financial hardship. Petitioner Barela's Hearing Request dated June 6, 2012 does indicate that she is a single mother of two children and will declare bankruptcy. I encourage Petitioner Barela to obtain advice from a bankruptcy law expert; that may be a good option. Petitioner Barela filed no financial information for me to consider: no Consumer Debtor Financial Statement, no pay stubs, nothing.

9. Petitioner Barela may choose, before filing bankruptcy, to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

10. **Petitioner Barela, if you choose to negotiate with Treasury's collection agency**, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Barela, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. **You may want to request apportionment of the debt between you and the co-borrower**.

Petitioner Barela, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Barela and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Barela owes the debt described in paragraphs 3 through 6.

13. **Garnishment up to 15% of Petitioner Barela's disposable pay** is authorized. There is no evidence that financial hardship will be created by garnishment. 31 C.F.R. § 285.11.

14. **No refund** to Petitioner Barela of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

15. Repayment of the debt may also occur through ***offset*** of Petitioner Barela's **income tax refunds** or other **Federal monies** payable to the order of Ms. Barela.

ORDER

16. Until the debt is repaid, Petitioner Barela shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with **garnishment up to 15% of Petitioner Barela's disposable pay**. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: SARA E. BARROW, N/K/A SARA E. DAVIS.
Docket No. 12-0485.
Decision and Order.
Filed August 22, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by James P. Hurt, Hearing Official.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On June 27, 2012, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-5 on July 24, 2012. Petitioner submitted no exhibits. Petitioner was afforded a prior hearing on December 1, 2010 and a Decision and Order was issued by Administrative Law Judge, Victor W. Palmer, on December 2, 2010. That Order determined the debt owed by Petitioner, but suspended wage garnishment for six (6) months. On August 16, 2012, at the time set for the hearing, both parties were available. Ms. Giovanna Leopardi represented RD. Ms. Barrow was self represented. The parties were sworn.

Petitioner has been self-employed as a home health care giver for more than one year. She does not work for an agency and she has only one patient who pays her directly for her services. As a self-employed contractor, RD conceded that her "wages" could not be garnished, however the debt would remain and could be collected by Treasury, if

and when, Petitioner begins receiving Federal benefits such as social security.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On December 2, 2010, Administrative Law Judge, Victor W. Palmer determined the Petitioner's debt to Rural Development (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to be $14,554.26 plus potential fees to Treasury of $4,075.19.

2. The debt remains at that amount. RX-5 @ p. 2 of 4.

3. Ms. Barrow's (k/n/a Sara E. Davis) present husband is not liable on the Petitioner's debt, however Petitoner and her former husband, Patrick G. Barrow are jointly and severally liable on the debt.

4. Ms. Barrow provided contact information for Patrick G. Barrow.

5. Ms. Barrow is now living in Jonestown, Texas and working as a self-employed home health giver.

Conclusions of Law

1. Petitioner is jointly and severally indebted to USDA Rural Development in the amount of $14,554.26 exclusive of potential Treasury fees for the mortgage loan extended to her.

2. In addition, Petitioner is jointly and severally indebted for potential fees to the US Treasury in the amount of $4,075.19.

3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.

4. The Respondent is entitled to administratively garnish the wages of the Petitioner.

ORDER

For the foregoing reasons, if and when Petitioner earns wages - then the wages of Petitioner shall be subjected to administrative wage garnishment. After one year, RD may re-assess the Petitioner's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

_____

In re: DUSTIN MCQUIGG.
Docket No. 12-0500.
Decision and Order.
Filed August 23, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing was held as scheduled by telephone on August 23, 2012. Dustin McQuigg, also known as Dustin L. McQuigg ("Petitioner McQuigg") did not participate. (Petitioner McQuigg did not participate by telephone: no one answered at the telephone number Petitioner McQuigg provided on his Hearing Request; and contrary to my Order issued July 25, 2012, Petitioner McQuigg provided no telephone number where he could be reached for the hearing by telephone.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner McQuigg owes to USDA Rural Development a balance of **$54,786.16** (as of July 21, 2012) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for a loan made on September 29, 2006 by First National Bank and Trust for a home in Nebraska, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List (filed July 24, 2012), which are admitted into evidence, together with the testimony of Michelle Tanner.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner McQuigg, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$54,786.16** would increase the current balance by $15,340.12, to $70,126.28. *See* USDA Rural Development Exhibits, esp. RX 10, p. 2.

6. The amount Petitioner McQuigg borrowed was $67,450.00 on September 29, 2006. RX 2. The loan was sold to US Bank Home Mortgage ("US Bank"). Petitioner McQuigg defaulted on the mortgage loan payments to US Bank, and the loan was accelerated for foreclosure. The Due Date of Last Payment Made was May 1, 2009. RX 6, p. 5. Foreclosure was initiated on November 13, 2009. A foreclosure sale was held on February 26, 2010, at which US Bank acquired the property back into inventory with the highest bid, $59,500.00. RX 6, p. 5.

7. The "As Is" value from one appraisal as of March 18, 2010 was $45,000.00. RX 6, p. 6. The "As Is" Value per the Brokers Price Opinion (BPO) as of March 11, 2010 was $52,500.00. RX 6, p. 6. US Bank placed the home "as is" on the market for resale for $52,500.00. RX 6, p. 6. Thus, the Original List Price was $52,500.00. The Final List Price was $39,900.00. The lender US Bank marketed the home but did not accomplish a sale within the prescribed marketing period, which ended on August 25, 2010. RX 6, p. 6.
A liquidation appraisal was done for USDA Rural Development on October 19, 2010 (*see* RX 5, p. 8; RX 6, p. 6). [1]

8. USDA Rural Development reimbursed the lender **$54,786.16** on July 29, 2011. RX 6, p. 11. Thus **$54,786.16**, the amount USDA Rural Development paid, is the amount USDA Rural Development recovers from Petitioner McQuigg under the ***Guarantee***. RX 7. No more interest accrues; no interest, no penalties. The interest stopped accruing on the date of the liquidation appraisal, which was October 19, 2010 (*see* RX 5, p. 8; RX 6, p. 6). RX 7 details the loss claim paid under the ***Guarantee***, showing how the debt became **$54,786.16**, including showing the $25,000.00 liquidation value as a credit.

9. Petitioner McQuigg stated in his Hearing Request: "Co-Signor Melinda VanEperen is responsible for Half!!!" Petitioner McQuigg and his co-borrower, Melinda VanEperen, are jointly and severally liable to pay the debt. Melinda VanEperen is held responsible to pay the debt just as Petitioner McQuigg is, as shown by RX 10. USDA Rural Development may legally collect more than half, even all, from either one of them. Once Petitioner McQuigg entered into the borrowing transaction with his co-borrower, certain responsibilities were fixed. Petitioner McQuigg owes the balance of **$54,786.16** (excluding potential collection fees) as of July 21, 2012, and so does his co-borrower. Even if Petitioner McQuigg has legal recourse against his co-borrower for monies collected from him on the debt, that does not prevent USDA Rural Development from collecting from him, pursuant to the ***Guarantee***. RX 1.

---

[1] The liquidation value, used because the home did not sell within the prescribed period, was only $25,000.00. RX 5, p. 8; RX 6, p. 6.

10. Although my Hearing Notice and Prehearing Deadlines, dated July 25, 2012, invited financial disclosure from Petitioner McQuigg, such as filing a Consumer Debtor Financial Statement, he filed nothing. Thus I cannot calculate Petitioner McQuigg's current disposable pay. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.) There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot tell whether garnishment to repay "the debt" (*see* paragraph 3) in the amount of 15% of Petitioner McQuigg's disposable pay creates a financial hardship.

11. Petitioner McQuigg is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

12. Garnishment **up to 15%** of Petitioner McQuigg's disposable pay is authorized. Petitioner McQuigg, if you choose to negotiate with Treasury's collection agency, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. I encourage **Petitioner McQuigg and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner McQuigg, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. **You may want to request apportionment of the debt between you and the co-borrower**. Petitioner McQuigg, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner McQuigg and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner McQuigg owes the debt described in paragraphs 3 through 8.

15. **Garnishment up to 15% of Petitioner McQuigg's disposable pay** is authorized. There is no evidence that financial hardship will be created by the garnishment. 31 C.F.R. § 285.11.

16. **No refund** to Petitioner McQuigg of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

17. Repayment of the debt may also occur through ***offset*** of Petitioner McQuigg's **income tax refunds** or other **Federal monies** payable to the order of Mr. McQuigg.

ORDER

18. Until the debt is repaid, Petitioner McQuigg shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

19. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with **garnishment up to 15% of Petitioner McQuigg's disposable pay**. 31 C.F.R. § 285.11.

20. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner McQuigg's pay, to be returned to Petitioner McQuigg.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

_____

In re: ELVA GARZA, A/K/A ELVA E. GARZA.
Docket No. 12-0346.
Decision and Order.
Filed August 28, 2012.

AWG.

Mike P. Fortune, Esq. for Petitioner.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on June 26 and August 21, 2012. The attorney representing Elva Garza, also known as Elva E. Garza, the Petitioner ("Petitioner Garza"), Mike P. Fortune, Esq., [1] participated on her behalf.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Garza's filings are admitted into evidence, including email sent July 16, 2012 by Mike P. Fortune, Esq., providing copies of the Summons and Complaint filed by Chase Home Finance, LLC, in Case Code 30404 in the Circuit Court, Dodge County, Wisconsin on January 7, 2010; letter over the signature of Mike P. Fortune dated May 25, 2012; email providing Petitioner's contact information filed May 8, 2012; and Petitioner's Hearing Request dated February 2, 2012, including letter over the signature of Mike P. Fortune dated March 2, 2012.

4. USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on May 24, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.

---

[1] Mr. Fortune represents both Ms. Elva Garza and her co-borrower Mr. Javier Garza, but Mr. Garza is not a party to this case.

5. Petitioner Garza bought a home in Wisconsin in 2007, borrowing $148,700.00 to pay for it. RX 2. USDA Rural Development's position is that Petitioner Garza owes to USDA Rural Development **$82,797.27** (as of May 23, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2; RX 10, esp. p. 2) for the loan made in 2007 ("the debt"). The loan was made by Mortgage Specialists LLC, a Wisconsin Limited Liability Company; subsequently sold to Trustcorp Mortgage Co. (RX 2, p. 4); and then sold to Chase Home Finance, LLC. The ***Guarantee*** remained in force.

6. Petitioner Garza's position is that Petitioner Garza owes **nothing** to USDA Rural Development and is **due a refund** for amounts taken from her, because there is no valid debt. [Garnishment was ongoing; and her income tax refunds were intercepted (***offset***). *See* RX 10, p. 1.]

7. Petitioner Garza proved that Chase Home Finance, LLC, in court filings, ***waived*** "judgment for any deficiency against every party who is personally liable for the debt" and "expressly (***waived***) its right to obtain a deficiency judgment against any defendant in this action". Accordingly, the Circuit Court Judge for Dodge County, Wisconsin entered "Findings of Fact, Conclusions of Law and Judgment" on February 16, 2010 that include (a) judgment in the amount of $154,566.46 in favor of Chase Home Finance, LLC; (b) contemplation of a sheriff's sale, a six-month redemption period, and confirmation of the sale ending the Garzas' possession of the premises; and (c) NO DEFICIENCY JUDGMENT against the Garzas.

8. After careful review of all of the evidence, I agree with Petitioner Garza's position. There is **no valid debt** owed by Petitioner Garza to USDA Rural Development. The **amounts taken from Petitioner Garza's pay and from her income tax refunds shall be returned to her**.]

9. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Garza "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies

available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

10. USDA Rural Development did pay a loss claim on the requested loan to the lender. USDA Rural Development reimbursed the lender Chase Home Finance, LLC $88,298.64 on March 30, 2011. RX 6, p. 11; RX 7. That amount, $88,298.64, is what USDA Rural Development seeks to recover from Petitioner Garza under the ***Guarantee***. RX 7, USDA Rural Development Narrative, and testimony.

11. I find that because of the actions of the lender Chase Home Finance, LLC during foreclosure, ***waiving*** the deficiency, the ***Guarantee*** is not enforceable. I find that, instead of benefitting from the ***Guarantee***, as it easily could have, Chase Home Finance, LLC failed to protect the Government's interest during foreclosure and thereby rendered the loan note ***Guarantee*** unenforceable.

12. When the lender Chase Home Finance, LLC ***waived*** the deficiency in the Complaint filed January 7, 2010 in the Circuit Court, Dodge County, Wisconsin, Case Code 30404, instead of maximizing recovery, Chase Home Finance, LLC prevented USDA Rural Development from collecting the deficiency from Petitioner Garza. *See* Complaint attached to email sent July 16, 2012 by Mike P. Fortune, Esq. *See also* 7 C.F.R. § 1980.301, *et seq*., especially 7 C.F.R. § 1980.308 and 7 C.F.R. § 1980.374.

13. Similarly, Chase Home Finance, LLC ***waived*** the deficiency in a case involving a ***Guarantee*** on a loan for a home in South Carolina. In *In re Ronald Haynes*, my colleague, Judge Janice K. Bullard, found that USDA Rural Development had failed to establish the existence of a valid debt.

See
http://www.dm.usda.gov/oaljdecisions/120516_12-0272_DO_RonaldHaynes.pdf

Findings, Analysis and Conclusions

14. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Garza and USDA Rural Development; and over the subject matter (administrative wage garnishment, which requires determining whether Petitioner Garza owes a valid debt to USDA Rural Development).

15. USDA Rural Development relies on *Bank Mutual v. S.J. Boyer Construction, Inc., et al.*, decided by the Wisconsin Supreme Court on July 9, 2010, which shows that a lender that elects a shortened redemption period and thereby waives its right to collect any deficiency from the debtor (S.J. Boyer) under Wis. Stat. § 846.103(2), may still obtain a judgment against the guarantors (the Boyers). *Bank Mutual* does not assist here, because the guarantors (the Boyers) did not seek recourse against the debtor (S.J. Boyer).
http://www.wicourts.gov/sc/opinions/08/pdf/08-0912.pdf *See* especially, footnote 25 on page 44. Here, USDA Rural Development, the guarantor, does seek recourse against the debtor - - except that Petitioner Garza was no longer a debtor once the foreclosure was completed, because no deficiency could be established.

16. The lender Chase Home Finance, LLC during foreclosure ***waived*** the deficiency as to Petitioner Garza in the Complaint it filed on January 7, 2010 in the Circuit Court, Dodge County, Wisconsin, Case Code 30404. Consequently, Circuit Court Judge Andrew P. Bissonnette, Dodge County, Wisconsin, entered "Findings of Fact, Conclusions of Law and Judgment" on February 16, 2010 that included (in accordance with Wis. Stat. § 846.101(2)):

> "IT IS BY THE COURT FOUND, DETERMINED AND ADJUDGED:
>
> ****

12. THAT NO DEFICIENCY JUDGMENT MAY BE OBTAINED AGAINST ANY DEFENDANT."

Petitioner Garza was a Defendant. No deficiency judgment may be obtained against her.

17. By waiving its right to collect any deficiency from Petitioner Garza, the lender Chase Home Finance, LLC has prevented USDA Rural Development from collecting any deficiency from Petitioner Garza.

18. In general, USDA Rural Development may collect administratively pursuant to a ***Guarantee***, even where NO judgment has been entered against a borrower and NO personal deficiency has been established. Here, however, Chase Home Finance, LLC by its filings in the foreclosure action has prevented collection of a deficiency, even administratively. In my opinion, Chase Home Finance, LLC, having done so, should not have been paid $88,298.64, or anything, on its loss claim (RX 6, p. 11), and USDA Rural Development would do well to reclaim its money.

19. Petitioner Garza does **NOT** owe a valid debt to USDA Rural Development; Petitioner Garza does **not** owe the debt described in paragraphs 4, 5, 9 and 10.

20. Garnishment is **not** authorized. ***Offset*** of Petitioner Garza's **income tax refunds** or other **Federal monies** payable to the order of Ms. Garza is **not** authorized.

21. Any amounts collected from Petitioner Garza, including collections from Treasury (***offsets***, which were intercepted income tax refunds due to Petitioner Garza; plus any amounts collected through garnishment of Petitioner Garza's pay prior to implementation of this Decision) **shall be returned to Petitioner Garza**.

ORDER

22. USDA Rural Development shall cancel the debt as to Petitioner Garza.

23. USDA Rural Development, and those collecting on its behalf, shall **return to Petitioner Garza** any amounts already collected through garnishment or ***offset***.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

_____

In re: SAVANNAH TICE.
Docket No. 12-0488.
Decision and Order.
Filed August 28, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on August 15 and 24, 2012. Savannah Tice, once known as Savannah Sanders (Petitioner Tice) participated, accompanied by her grandmother and Terry Wood, Esq. of Adamsville, Tennessee.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Tice's Hearing Request dated May 30, 2012, with all attachments, is admitted into evidence, together with the testimony of Petitioner Tice.

4. USDA Rural Development's Exhibits RX 1 through RX 9, plus Narrative, Witness & Exhibit List, were filed on August 27, 2012, and are admitted into evidence, together with the testimony of Giovanna Leopardi.

5. Petitioner Tice's fiancé Joseph C. Sanders (whom she later married), bought a home in Tennessee in 2005 (before they were married), borrowing $36,000.00 to pay for it. RX 2. USDA Rural Development's position is that Petitioner Tice owes to USDA Rural Development **$15,528.37** (as of August 24, 2012), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 3; RX 9, esp. p. 3) for the loan made to Joseph C. Sanders in 2005 ("the debt"). The loan was made by JP Morgan Chase Bank, N.A. Chase Home Finance, LLC became the holder of or agent for the holder of the indebtedness. RX 3, p. 9.

6. Petitioner Tice's position is that Petitioner Tice owes **nothing** to USDA Rural Development and is **due a refund** for amounts taken from her, because there is no valid debt as to her. [Garnishment of her pay has been ongoing; and her income tax refunds were intercepted (***offset***). *See* RX 9, pp. 1-2.]

7. Petitioner Tice proved through her testimony that the ***Guarantee*** form she signed (*see* RX 1, esp. p. 3) should never have been used. I find that USDA Rural Development documents indicating that Petitioner Tice obtained a mortgage loan are in error; *see*, for example, RX 1, pp. 4-5.

8. Petitioner Tice testified convincingly that when she and her fiancé Joseph C. Sanders met with Rowena Pope on May 3, 2005 at American Heritage Home Loans, Ms. Pope had them sign ***separate Guarantee*** forms because Ms. Pope thought Mr. Sanders might qualify for the loan based on his income alone. He did. Mr. Sanders borrowed the money,

bought the house, and then married Petitioner Tice. They were later divorced. He has filed bankruptcy.

9. Petitioner Tice testified that Ms. Pope's comment on May 3, 2005 was to the effect, "no sense in you both being on it."

10. The crossing-out on RX 1, p. 3 of Rowena Pope's signature and date of signing: ~~5/3/05~~ ~~Rowena Pope~~ - - and the insertion instead, of "6/23/05" and "Josh Mohomed" is of concern, and where RX 1, p. 1 shows a different spelling "Joshua Mohomoed" as the Lender Contact Person. It is reasonable to infer that Rowena Pope, who understood the application process, was no longer in control of the paperwork, which could explain how Petitioner Tice's name was placed by the lender on documents forwarded to USDA Rural Development. *See* RX 2, p. 5.

11. After careful review of all of the evidence, I agree with Petitioner Tice's position. There is **no valid debt** owed by Petitioner Tice to USDA Rural Development. The **amounts taken from Petitioner Tice's pay and from her income tax refunds shall be returned to her**.]

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Tice and USDA Rural Development; and over the subject matter (administrative wage garnishment, which requires determining whether Petitioner Tice owes a valid debt to USDA Rural Development).

13. USDA Rural Development did pay a loss claim on the requested loan to the lender. USDA Rural Development reimbursed the lender $20,738.65 on October 13, 2009. RX 6, p. 7; RX 7. That amount, $20,738.65, is what USDA Rural Development seeks to recover from Petitioner Tice under the ***Guarantee***. RX 1, esp. p. 3; RX 7; USDA Rural Development Narrative; and testimony. Alas, there is no operative ***Guarantee*** as to Petitioner Tice; any ***Guarantee*** was by only Joseph C. Sanders. RX 1, p. 2.

14. Petitioner Tice does **NOT** owe a valid debt to USDA Rural Development; Petitioner Tice does **not** owe the debt described in paragraphs 4, 5 and 13.

15. Garnishment is **not** authorized. ***Offset*** of Petitioner Tice's **income tax refunds** or other **Federal monies** payable to the order of Ms. Tice is **not** authorized.

16. Any amounts collected from Petitioner Tice, including collections from Treasury (***offsets***, which were intercepted income tax refunds due to Petitioner Tice; plus any amounts collected through garnishment of Petitioner Tice's pay prior to implementation of this Decision) **shall be returned to Petitioner Tice**.

17. Petitioner Tice calculates the amounts that shall be returned to her to include the amounts garnished from her pay (*see* RX 9, pp. 1-2) and

> $2,127.00 for income tax refunds, consisting of $1,077.00 from the 2009 tax return and $1,050.00 from the 2010 tax return.

ORDER

18. USDA Rural Development shall cancel the debt as to Petitioner Tice.

19. USDA Rural Development, and those collecting on its behalf, shall **return to Petitioner Tice** any amounts already collected through garnishment or ***offset***.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, with a courtesy copy sent also to Terry Wood, Esq.

———

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: VICTOR ALVAREZ.
Docket No. 12-0506.
Decision and Order.
Filed September 6, 2012.

AWG.

Petitioner, pro se.
Linda Russell for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the timely request of Victor Alvarez ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on August 2, 2012, the parties were directed to provide information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on September 5, 2012.

The Respondent USDA-RD filed a Narrative, together with supporting documentation[1] on July 24, 2012 and Petitioner filed a Consumer Debtor Financial Statement[2] on August 15, 2012. On that date, Respondent filed an amended Narrative and document. The hearing commenced as scheduled, with Petitioner representing himself. Respondent was represented by Giovanna Leopardi, Appeals Coordinator for USDA. Both representatives testified and I admitted their evidence to the record.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

---

1 References to Respondent's exhibits herein shall be denoted as "RX-#".
2 This exhibit has been identified, and shall be referred to herein as, "PX-1".

Findings of Fact

1. On March 21, 2005, Petitioner and his wife obtained a home mortgage loan in the amount of $67,346.00 from Major Mortgage to purchase residential property located in Lexington, Maine. RX-2.

2. Before executing the promissory note for the loan, on February 4, 2005, Petitioner and his wife requested a Single Family Housing Loan Guarantee from the United States Department of Agriculture (USDA), Rural Development (RD), which was granted. RX-1.

3. By executing the guarantee request, Petitioner certified that he would reimburse USDA for the amount of any loss claim on the loan paid to the lender or its assigns.

4. The loan guarantee included a "guaranty fee" of $1,346.00, which U.S. Bank included as part of the principal due on the loan. RX-1.

5. The loan was assigned to U.S. Bank, N.A.

6. The Petitioner subsequently defaulted on the loan and it was accelerated for foreclosure.

7. A foreclosure sale was held on February 24, 2010 and U.S. Bank acquired the property for $48,450.00. RX-3.

8. On April 21, 2011, the property was sold for $28,000.00. RX-5.

9. At the time of the foreclosure, the total amount due on the loan was $72,687.31, representing principal, accrued interest, protective advances, attorney fees, appraisal and property inspection fees, and lender closing costs. RX-6; RX-7.

10. USDA paid U.S. Bank a loss claim in the amount of $40,603.64. RX-6; RX-7.

11. USDA sent offers of debt settlement but received no response from Petitioner or his wife. RX-8.

12. USDA-RD entered the amount of the loss claim that it paid as a debt due from Petitioner and his wife and referred the debt to the United States Department of Treasury ("Treasury") for collection. RX 9.

13. Treasury offsets were applied against the loan and the balance stands at $36,129.13 exclusive of Treasury fees. RX-10.Treasury, through its agent, issued a notice to Petitioner of intent to garnish his wages.

14. Petitioner timely requested a hearing, which was held on September 5, 2012.

15. Petitioner does not contest the validity of the debt, but contends that the wage garnishment effected against his salary represented a substantial financial hardship.

16. The Petitioner's spouse is not currently employed, but anticipates returning to work when her infant is older.

17. The family income exceeds the family monthly expenses, except that some of the expenses do not fall within the definition of "necessary" for purposes of calculating ability to withstand wage garnishment.

18. Petitioner's wages are currently subject to garnishment for repayment of debts to creditors that have been reduced to judgment, but his income should withstand garnishment upon his wife's return to work.

19. Even allowing for Petitioner's wife's return to work, the family income will not withstand garnishment at the level of legal limits; however, Petitioner should be able to absorb garnishment at a percentage lower than the maximum.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The initial Lender imposed a fee as principal on the loan that was not authorized under regulation or part of the loan agreement between USDA-RD and Lender

3. There is no consideration for Petitioner paying a fee for guaranteeing the loan, which benefited the Lender by assuring the United States would indemnify losses.

4. Petitioner is entitled to a credit for the fee, plus the interest that had accrued through amortization for the period when the loan was made in March, 2005 until the foreclosure in April, 2005.

5. A credit should be applied to Petitioner's account in the amount of $1,758.36, which consists of the fee of $1,346.00 plus accrued, amortized interest in the amount of $412.36 (calculated on the loan interest rate of 5.09% X 30 years= 6.76 per month X 61 months).

6. Petitioner is indebted to USDA Rural Development in the amount of $34,370.77 ($36,129.13 (-) 1,758.36) exclusive of potential Treasury fees.

7. USDA-RD may have a cause of action against the Lender Major Mortgage to recover the loss payment for the unauthorized fee and interest.

8. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

9. The Petitioner is under a temporary financial hardship.

10. The Respondent is entitled to administratively garnish the wages of the Petitioner when the financial hardship is anticipated to ease within six months time; however Respondent shall not be entitled to garnish more than 5% of Petitioner's wage.

11. Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

USDA-RD shall recall the loan from Treasury in order to make an adjustment to credit Petitioner's account in the amount of $1,758.36, for an illicit fee that was included in the principal, and the accrued interest on that fee amount.

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment at this time. As of April 1, 2013, garnishment up to 5% of Petitioner's disposable pay is authorized. 31 C.F.R. §285.11.

Petitioner is encouraged in the interim to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is further encouraged to consult legal advice regarding the reduction of his indebtedness to all of his creditors.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact.

Petitioner is also advised that so long as a debt remains unsatisfied, he is ineligible for other loans or benefits administered by the federal government.

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

———

In re: LEKENZI ROSS.
Docket No. 12-0432.
Decision and Order.
Filed September 24, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on August 7 and August 24, 2012. Lekenzi Ross, the Petitioner ("Petitioner Ross") participated, representing himself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. USDA Rural Development's Exhibits RX 1 through RX 5, plus Narrative, Witness & Exhibit List, filed on June 22, 2012, are admitted into evidence, together with the testimony of Michelle Tanner. Also admitted into evidence are RX 6 through RX 8, filed on August 13, 2012; and RX 9 through RX 11, filed on August 27, 2012.

4. Petitioner Ross's Hearing Request dated in March 2012 is admitted into evidence, together with the testimony of Petitioner Ross. The record was held open through September 14, 2012 for Petitioner Ross to file a "Consumer Debtor Financial Statement" (or some other income / expense format), and documentation of his income (such as pay stubs), but Petitioner Ross did not submit any such evidence.

5. As of August 24, 2012, Petitioner Ross owed to USDA Rural Development a balance of **$14,055.64** in repayment of the United States Department of Agriculture / Farmers Home Administration loan made to

his mother in 1990, for a home in Georgia. The loan balance ("the debt") is now unsecured. Garnishment has been ongoing for more than 2-1/2 years, so the balance Petitioner Ross owes to USDA Rural Development is repeatedly being reduced. Petitioner Ross assumed the loan balance on June 28, 2000, after his mother's death in 1999. *See* USDA Rural Development Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List, and the testimony of Petitioner Ross.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$14,055.64** would increase the current balance by $3,935.58, to $17,991.22. *See* RX 11.

7. The loan had been reamortized in December 1998, meaning that unpaid past due amounts were added to principal so that the loan could be made current. The reamortized principal balance in December 1998 was $59,958.15. RX 8, p. 3. When Petitioner Ross assumed the loan, on June 28, 2000, the balance was $59,508.88. After the last house payment made, the next payment due date was October 11, 2000. RX 2, p. 4. The house payments were no longer made. Petitioner Ross was at college out-of-state. The subsidy payments stopped when the borrower (Petitioner Ross) no longer occupied the home. *See* RX 6, p. 7. Petitioner Ross's brother still lived in the home. Testimony of Petitioner Ross. A Notice of Acceleration and Intent to Foreclose sent to Petitioner Ross on April 12, 2002 (RX 2, pp. 1-3), showed $58,735.15 unpaid principal and $8,370.94 unpaid interest.

8. Petitioner Ross stated in his Hearing Request: "I do not owe the debt." "House was sold (short sell) For more than owed ($46,313.00) in "02". I owed approx 34,000.00." The sale was on September 3, 2002. The proceeds from sale of the home, available to apply on the loan, were $46,313.00. RX 4. I find that Petitioner Ross is correct about the amount from the sale, but Petitioner Ross is <u>not</u> correct about the amount he owed: the amount was <u>not</u> approximately $34,000.00; the amount owed was $75,684.22.

9. The amount Petitioner Ross's mother borrowed in 1990 was $54,500.00. RX 1. By the time the home was sold on September 3, 2002, the debt had grown to $75,684.22:

$ 58,735.15	Principal Balance prior to sale
$ 10,456.44	Interest Balance prior to sale
$ 6,101.60	Recoverable costs (such as unpaid taxes, insurance, foreclosure costs)
$ 391.03	Interest on recoverable costs
$ 75,684.22	Total Amount Due

RX 4, p. 1, RX 9, RX 10, and the testimony of Michelle Tanner.

10. Interest stopped accruing when sale proceeds were applied on the loan, in 2002. Proceeds from sale of the home reduced the Total Amount Due by $46,313.00. Collections from Treasury applied to the debt (after collection fees are subtracted) have reduced the debt to **$14,055.64** unpaid as of August 24, 2012 (excluding the potential remaining collection fees). *See* RX 4, RX 10 and RX 11, and the testimony of Michelle Tanner.

11. My Hearing Notice and Prehearing Deadlines, dated June 1, 2012, invited financial disclosure from Petitioner Ross, such as filing a Consumer Debtor Financial Statement. Petitioner Ross filed nothing. During both segments of the Hearing I encouraged Petitioner Ross to provide financial information. My notice that Hearing Will Resume filed August 7, 2012 requested Petitioner Ross to provide financial information. Petitioner Ross did not file a Consumer Debtor Financial Statement or pay stubs or any other documentation of his financial situation, so I cannot calculate Petitioner Ross's current disposable pay. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.) There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot tell whether garnishment to repay "the debt" (*see* paragraph 5) in the amount of 15% of Petitioner Ross's disposable pay creates a financial hardship.

12. Petitioner Ross is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

13. Garnishment of Petitioner Ross's disposable pay is authorized. I encourage **Petitioner Ross and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Ross, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Ross, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Ross, you may want to have someone else with you on the line if you call.

Findings, Analysis and Conclusions

14. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Ross and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

15. Petitioner Ross owes the debt described in paragraphs 5 through 10.
16. **Garnishment up to 15% of Petitioner Ross's disposable pay** is authorized. There is no evidence that financial hardship will be created by the garnishment. 31 C.F.R. § 285.11.

17. **No refund** to Petitioner Ross of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

18. Repayment of the debt may also occur through ***offset*** of Petitioner Ross's **income tax refunds** or other **Federal monies** payable to the order of Mr. Ross.

ORDER

19. Until the debt is repaid, Petitioner Ross shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in

his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

20. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with **garnishment up to 15% of Petitioner Ross's disposable pay**. 31 C.F.R. § 285.11.

21. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Ross's pay, to be returned to Petitioner Ross.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: JED LECLAIRE.
Docket No. 12-0438.
Decision and Order.
Filed September 26, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on August 7, 2012. The Petitioner, Jed LeClaire, also known as Jed M. LeClaire ("Petitioner LeClaire"), participated, representing himself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

ADMINISTRATIVE WAGE GARNISHMENT ACT

Summary of the Facts Presented

3. Petitioner LeClaire's Hearing Request dated February 28, 2012 (filed May 14, 2012) is admitted into evidence, together with the testimony of Petitioner LeClaire. The record was held open through August 30, 2012 for Petitioner LeClaire to file a "Consumer Debtor Financial Statement" (or some other income / expense format), and documentation of his income (such as pay stubs), but Petitioner LeClaire did not submit any such evidence.

4. USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on June 22, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner LeClaire borrowed to buy a home in Minnesota. Petitioner LeClaire bought the home in Minnesota in 2005 and borrowed $79,000.00 to pay for it. RX 2.

6. USDA Rural Development's position is that Petitioner LeClaire owes to USDA Rural Development **$54,759.51** (as of about August 7, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for the loan made in 2005 ("the debt"). The loan was made by JP Morgan Chase Bank, N.A. and serviced by Chase Home Finance LLC; the ***Guarantee*** remained in force. *See* USDA Rural Development Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, and the testimony of Michelle Tanner.

7. After careful review of all of the evidence, I agree with USDA Rural Development's position. [The loan balance will likely have been reduced from the August 7, 2012 balance of **$54,759.51** (excluding collection costs), because garnishment is ongoing, including garnishments of Candice Rohde the co-borrower's pay.]

8. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$54,759.51** would increase the current balance by $15,332.66, to $70,092.17. *See* RX 10, p. 2, and the testimony of Michelle Tanner.

9. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner LeClaire, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

10. The Due Date of the last payment made was December 1, 2009. RX 6, p. 5. The foreclosure was initiated on May 7, 2010. RX 6, p. 5. The foreclosure sale was held on June 29, 2010. The lender Chase (Chase Home Finance LLC) acquired the home, which became REO (Real Estate Owned), at the foreclosure sale for the highest bid of $29,750.00. RX 3. The home was listed for sale "as is" for $29,900.00 and sold on April 18, 2011 for $25,900.00. RX 5.

11. The amount Petitioner LeClaire borrowed in 2005 was $79,000.00. RX 2. By the time the home was sold on April 18, 2011, the debt had grown to $90,743.49:

$ 71,933.99	Principal Balance prior to sale
$ 6,071.77	Interest Balance prior to sale
$ 1,438.31	Protective Advances to Pay Taxes and Insurance
$ 25.98	Interest on Protective Advances
$ 79,470.05	
+ $ 11,273.44	Lender Expenses to Sell the Property
$ 90,743.49	Amount Due

RX 7 and USDA Rural Development Narrative and the testimony of Michelle Tanner.

12. Interest stopped accruing in 2011. Proceeds from sale of the home reduced the Amount Due by $25,900.00. Recoveries/Credits/Reductions reduced the Amount Due by $9,811.97. This left $55,031.52 remaining due. RX 7. USDA Rural Development reimbursed the lender $55,031.52 on July 20, 2011, which is the amount USDA Rural Development seeks to recover from Petitioner LeClaire under the ***Guarantee***. RX 7.

13. Collections from Treasury applied to the debt after collection fees are subtracted have reduced the debt to **$54,759.51** as of about August 7, 2012 (excluding the potential remaining collection fees).

14. My Hearing Notice and Prehearing Deadlines filed June 22, 2012 invited financial disclosure from Petitioner LeClaire, such as filing a Consumer Debtor Financial Statement. Petitioner LeClaire filed nothing. During the Hearing I encouraged Petitioner LeClaire to provide financial information. My notice of Record Held Open filed August 8, 2012 requested Petitioner LeClaire to provide financial information. Petitioner LeClaire did not file a Consumer Debtor Financial Statement or pay stubs or any other documentation of his financial situation, so I cannot calculate Petitioner LeClaire's current disposable pay. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.)

15. Petitioner LeClaire testified that there are 4 in his household and he is the only one working. He testified that he has about $20,000.00 to $30,000.00 in medical debt. Without financial documentation, there is insufficient evidence before me to consider the factors under 31 C.F.R. § 285.11. In other words, there is not enough proof that garnishment to repay "the debt" (*see* paragraph 6) in the amount of 15% of Petitioner LeClaire's disposable pay will create a financial hardship.

16. Petitioner LeClaire is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

17. Garnishment of Petitioner LeClaire's disposable pay is authorized. I encourage Petitioner LeClaire and Treasury's collection agency to **negotiate** the repayment of the debt. Petitioner LeClaire, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner LeClaire, you may want to request apportionment of debt between you and the co-borrower. Petitioner LeClaire, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner LeClaire, you may want to have someone else with you on the line if you call.

Findings, Analysis and Conclusions

18. The Secretary of Agriculture has jurisdiction over the parties, Petitioner LeClaire and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

19. Petitioner LeClaire owes the debt described in paragraphs 5 through 13.

20. **Garnishment up to 15% of Petitioner LeClaire's disposable pay** is authorized. There is insufficient evidence that financial hardship will be created by the garnishment. 31 C.F.R. § 285.11.

21. **No refund** to Petitioner LeClaire of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

22. Repayment of the debt may also occur through ***offset*** of Petitioner LeClaire's **income tax refunds** or other **Federal monies** payable to the order of Mr. LeClaire.

ORDER

23. Until the debt is repaid, Petitioner LeClaire shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in

his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

24. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with **garnishment up to 15% of Petitioner LeClaire's disposable pay**. 31 C.F.R. § 285.11.

25. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner LeClaire's pay, to be returned to Petitioner LeClaire.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

_____

In re: CRYSTAL DAVIS SNYDER[1].
Docket No. 12-0507.
Decision and Order.
Filed September 27, 2012.

AWG.

Jane Doe, Esq. for Complainant.
John Smith, Esq. for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the July 23, 2012 request of Crystal Davis ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on August 2, 2012, the parties were directed to provide information and documentation

[1] Petitioner has remarried, and accordingly, the caption is amended to reflect her current name.

concerning the existence of the debt. The matter was set for a telephonic hearing to commence on September 5, 2012 and deadlines for filing documents with the Hearing Clerk's Office were established.

Both parties filed documents as instructed and the hearing commenced as scheduled. At the hearing, Petitioner represented herself and Appeals Coordinator Giovanna Leopardi represented USDA-RD. A review of documents prompted to me to request a search for a request for re-amortization signed by Petitioner, but that document has not been filed. I nevertheless place considerable weight on the contemporaneous notes made to Petitioner's account and find that the account was re-amortized. My conclusion is bolstered by the judgment of foreclosure issued by Florida State court, which would have required all documents pertinent to the balance due on the loan. See, RX-2; RX-3.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

Findings of Fact

1. On October 27, 2005, the Petitioner and her ex-husband[2] received a home mortgage loan in the amount of $96,600.00 from USDA-RD for the purchase of residential property located in Milton, Florida. RX-1.

2.The Petitioner subsequently defaulted on the loan and the account was accelerated on January 20, 2009, when the balance due on the loan was $124,703.33. RX-2.

3. At a foreclosure sale held on August 17, 2011, the property was sold to a third party for $28,100.00. RX-3.

4. After proceeds of the sale were applied against Petitioner's account, the account balance stood at $96,603.33. RX-5.

---

[2] For the sake of clarity, as this matter involves only Petitioner's potential wage garnishment, any reference to Petitioner's account shall include her ex-husband by reference.

5. The outstanding balance was referred to the United States Department of Treasury ("Treasury") for collection. RX 7.

6. The balance is at Treasury in the amount of $96,603.33 plus additional potential fees of $27,048.93.

7. Petitioner timely requested a hearing, which was held on September 5, 2012.

8. Petitioner's income is erratic as she does not work full-time, and has only temporary employment, as documented on income tax returns.

9. Petitioner has a chronic medical condition that requires treatment for which she was not insured, causing accumulation of debt for medical expenses.

10. Much of Petitioner's income consists of child support for her three minor children.

11. Petitioner's debts include taxes due to Alabama.

12. The Petitioner's spouse is self-employed.

13. The family expenses exceed the family monthly expenses.

14. Given Petitioner's limited income, Petitioner is unlikely to be in a position to liquidate the debt owed at this time.

15. Petitioner did not dispute that debt was owed, but she believed that her ex-husband should also be charged for it.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Petitioner is indebted to USDA Rural Development in the amount of $96,603.33 exclusive of potential Treasury fees for the mortgage loan extended to her and her ex-husband.

3. Petitioner's ex-husband is equally and jointly liable for the debt.

4. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

5. Petitioner's expenses exceed her income and Petitioner is under a financial hardship at this time.

6. The Respondent is NOT entitled to administratively garnish the wages of the Petitioner.

7. Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment at this time.

Petitioner is encouraged in the interim to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

_____

In re: STEPHANIE REARDON.
Docket No. 12-0531.
Decision and Order.
Filed September 27, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was begun on August 29 and resumed on September 17, 2012. Stephanie Reardon, full name Stephanie Marie Reardon, the Petitioner ("Petitioner Reardon"), participated, self represented (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Reardon's earnings statement and accompanying note addressed "To Whom It May Concern" requesting that the wage garnishment stop (filed September 7, 2012), are admitted into evidence, together with the testimony of Petitioner Reardon. Also admitted into evidence is Petitioner Reardon's Hearing Request dated July 3, 2012 with all accompanying documents.

4. USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on August 6, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner Reardon bought a home in Ohio in 2006, borrowing $223,206.00 to pay for it. The loan was made by Villa Mortgage, Inc.

and immediately sold to U.S. Bank, N.A.; the ***Guarantee*** remained in force. RX 2. USDA Rural Development's position is that Petitioner Reardon owes to USDA Rural Development **$159,452.49** (as of July 28, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for the loan made in 2006 ("the debt"). *See* USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List.

6. After careful review of all of the evidence, I agree with USDA Rural Development's position. [The loan balance has changed from the July 28, 2012 balance of **$159,452.49** (excluding collection costs), because garnishment was ongoing. Petitioner Reardon's testimony and Michelle Tanner's testimony. The balance has therefore been reduced and may continue to change.] Petitioner Reardon argues that by paying the USDA Rural Development fee for the ***Guarantee*** (*see* RX 1, p. 1, at the bottom), the borrowers as well as the lender should be protected by the ***Guarantee***. The argument is clever, but I conclude that the ***Guarantee*** protects only the lender.

7. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Reardon, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

8. The Servicing Lender was U.S. Bank Home Mortgage. RX 3; RX 6, p. 4. The Due Date of the last payment made was July 1, 2008. RX 6, p. 5. The foreclosure sale date was July 8, 2010. RX 6, p. 23. U.S. Bank acquired the home as the highest bidder for $110.200.00. RX 3, p. 6. U.S. Bank sold the home for $107,500.00 on December 27, 2010. RX 7 details the loss claim paid under the ***Guarantee***, showing how the debt became **$159,452.49**.

$217,892.44	Unpaid Principal Balance
$ 35,368.91	Unpaid Interest Balance
$ 8,959.81	Protective Advances to Pay Taxes and Insurance
$ 197.88	Interest on Protective Advances
$262,419.04	
+ $ 19,964.07	Lender Expenses to Sell Property
	$282,383.11 Total Debt Charged to Petitioner Reardon

The debt was then $282,383.11. RX 7.

- $ 107,500.00	Funds Received from Sale of the home
$ 174,883.11	Amount Due Before $15,430.62 Recoveries/Credits/Reductions
- $ 15,430.62	Recoveries/Credits/Reductions
$ 159,452.49	

RX 7, USDA Rural Development Narrative, and testimony.

9. USDA Rural Development reimbursed the lender **$159,452.49** on September 26, 2011 (RX 6, p. 11), which is the amount USDA Rural Development seeks to recover from Petitioner Reardon under the ***Guarantee***. RX 7.

10. Interest stopped accruing when the sale funds were applied. Collections from Treasury (garnishments from Petitioner Reardon) applied to the debt (after collection fees are subtracted) have reduced the **$159,452.49** balance (which excludes the potential remaining collection fees).

11. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$159,452.49**, would increase the balance by $44,646.69, to $204,099.18. RX 10, p. 2.

12. Petitioner Reardon asks that the garnishments stop. Petitioner Reardon testified that earnings of $12.40 per hour for 30-32 hours per week are barely adequate to support self and the 13 year-old son. The 13 year-old son has a medical card from the State. Petitioner Reardon testified of significant debt in addition to that owed to USDA Rural Development, including school loans, bills for surgery, and payments for a car that was repossessed about the time of the foreclosure.

13. Garnishment of Petitioner Reardon's disposable pay in any amount would currently cause Petitioner Reardon financial hardship. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Reardon's disposable pay through September 2014; then **up to 5%** of Petitioner Reardon's disposable pay beginning October 2014 through September 2016; then **up to 10%** of Petitioner Reardon's disposable pay beginning October 2016 through September 2018; then **up to 15%** of Petitioner Reardon's disposable pay thereafter. 31 C.F.R. § 285.11.

14. Petitioner Reardon, you may want to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

15. I encourage **Petitioner Reardon and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Reardon, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Reardon, you may want to mention the bankruptcy discharge of your co-borrower's obligation to pay the debt. Petitioner Reardon, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Reardon, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to

settle the claim for less. You may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

16. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Reardon and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

17. Petitioner Reardon owes the debt described in paragraphs 5 through 11.

18. Garnishment is authorized, but to prevent financial hardship shall be limited as follows: through September 2014 garnishment limited to **0%** of Petitioner Reardon's disposable pay; beginning October 2014 through September 2016 garnishment **up to 5%** of Petitioner Reardon's disposable pay; beginning October 2016 through September 2018 garnishment **up to 10%** of Petitioner Reardon's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Reardon's disposable pay. 31 C.F.R. § 285.11.

19. **No refund** to Petitioner Reardon of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

20. Repayment of the debt may also occur through ***offset*** of Petitioner Reardon's **income tax refunds** or other **Federal monies** payable to the order of Petitioner Reardon.

ORDER

21. Until the debt is repaid, Petitioner Reardon shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

22. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to **0%** of Petitioner Reardon's disposable pay through September 2014; then **up to 5%** of

Petitioner Reardon's disposable pay beginning October 2014 through September 2016; then **up to 10%** of Petitioner Reardon's disposable pay beginning October 2016 through September 2018; then **up to 15%** of Petitioner Reardon's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: ERIN RAE MCINTIRE.
Docket No. 12-0569.
Decision and Order.
Filed September 27, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the August 6, 2012 request of Erin Rae McIntire ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on August 22, 2012, the parties were directed to provide information and documentation concerning the existence of the debt and the matter was set for a telephonic hearing to commence on September 25, 2012.

The Respondent filed a Narrative, together with supporting documentation[1] on August 21, 2012 and Petitioner filed a Consumer Debtor Financial Statement[2] on September 18, 2012. At the hearing, Petitioner represented herself and testified. Michelle Tanner represented USDA-RD and testified.

---

[1] References to Respondent's exhibits herein shall be denoted as "RX-#".
[2] This exhibit has been identified as, and shall be referred to herein as, "PX-1".

Before I closed the hearing, I offered to hold the record open for a brief period to allow Petitioner to augment her evidence with additional documents or testimony, but Petitioner declined the offer and requested a ruling based upon the extant record.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

Findings of Fact

1. On December 15, 2009, the Petitioner received a home mortgage loan in the amount of $70,897.00 from USDA-RD to purchase residential real property located in Hillman, Michigan. RX-1.

2. The Petitioner experienced a loss of income and requested a moratorium which was eventually granted on May 11, 2011, some months after it was requested. RX-2; Petitioner's credible testimony.

3. Petitioner believed that she could not afford her home loan, and she listed the home for sale. Petitioner's testimony; RX-3.

4. Petitioner's realty agent found a buyer for the property, and the amount realized from the sale and applied to her loan was $63,899.50. RX-3.

5. Because the amount realized from the sale exceeded the amount that Petitioner owed on the loan, she needed approval from the USDA-RD for the "short sale". Testimony of both parties.

6. After application of the sale proceeds, the amount unpaid on the loan was $9,064.89. RX-4.

7. Petitioner testified that she was not aware that she owed the outstanding loan balance to USDA-RD, since a representative from USDA-RD assured her that the sale would take care of her loan

8. Despite this assertion, the record demonstrates that Petitioner had applied to compromise the remaining balance of the loan. RX-3; RX-5.

9. USDA-RD offered to compromise the debt, but Petitioner failed to sign the agreement; Petitioner testified that she could not afford the proposed $98.00 per month payment for a period of 60 months.

10. Petitioner's account was adjusted to a balance of $7,801.89, which USDA-RD entered as a debt due from Petitioner, and referred to the United States Department of Treasury ("Treasury") for collection on May 7, 2012. RX 6.

11. Petitioner has recently lost her job and her sole income is unemployment insurance benefits.

12. Petitioner supports her two minor children.

13. Because Petitioner had worked until approximately one month previous to the hearing, she is not entitled to a statutory finding of presumptive hardship.

14. Petitioner has no wage to garnish at this time.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Petitioner is indebted to USDA Rural Development in the amount of $7,801.89 exclusive of potential Treasury fees for the mortgage loan extended to her.

3. All procedural requirements for administrative wage offset set forth at 31 C.F.R. § 285.11 have been met.

4. The Petitioner is currently not working, and wage garnishment cannot be effected.

5. Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, Petitioner shall **NOT** be subjected to administrative wage garnishment at this time.

Petitioner is encouraged to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

———

In re: ISAIAS RODRIGUEZ.
Docket No. 12-0332.
Decision and Order.
Filed September 28, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was begun on August 6 and resumed on August 10, 2012. Isaias Rodriguez, the Petitioner ("Petitioner

Rodriguez"), who represents himself (appears *pro se*), participated on August 6. His wife, Mrs. Rodriguez, participated both on August 6, and August 10.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Rodriguez's filings on September 13, 2012, including his "Consumer Debtor Financial Statement" with additional extensive financial information, and his Unemployment Benefits Determination, are admitted into evidence, together with the testimony of Petitioner Rodriguez and his wife Mrs. Rodriguez. Also admitted into evidence is Petitioner Rodriguez's Hearing Request dated February 28, 2012 with all accompanying documents.

4. USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on May 4, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner Rodriguez bought a home in Minnesota in 2005, borrowing $180,481.00 to pay for it. The loan was made by JP Morgan Chase Bank, N.A., with the servicing lender being Chase Home Finance, LLC. RX 2; RX 6, p. 4.

6. USDA Rural Development's position is that Petitioner Rodriguez owes to USDA Rural Development **$106,943.42** (as of May 3, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for the loan made in 2005 ("the debt"). *See* USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List.

7. After careful review of all of the evidence, I agree with USDA Rural Development's position. The ***Guarantee*** remained in force, and on April 8, 2011, USDA Rural Development paid a loss claim of $112,491.42 to the lender. RX 6, p. 11.

8. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Rodriguez, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

9. The Due Date of the last payment made was March 1, 2009. RX 6, p. 4. The foreclosure sale date was November 18, 2009. RX 6, p. 5. RX 7 details the loss claim paid under the ***Guarantee***, showing how the loss claim of $112,491.42 was calculated.

$163,841.86	Unpaid Principal Balance
$ 16,536.81	Unpaid Interest Balance
$ 4,092.04	Protective Advances to Pay Taxes and Insurance
$ 4.54	Interest on Protective Advances
$184,475.25	
+ $ 9,218.19	Lender Expenses to Sell Property
$193,693.44	Total Debt Charged to Petitioner Rodriguez

The debt was then $193,693.44. RX 7.

- $ 65,900.00	Funds Received from Sale of the home
$127,793.44	Amount Due Before $15,302.02 Recoveries/Credits/Reductions
- $ 15,302.02	Recoveries/Credits/Reductions
$112,491.42	

RX 7, USDA Rural Development Narrative, and testimony.

10. The home was sold on March 4, 2011 for $65,900.00. RX 6, p. 6. Interest stopped accruing when the sale funds were applied. USDA Rural Development reimbursed the lender $112,491.42 on April 8, 2011 (RX 6, p. 11), which is the amount USDA Rural Development seeks to recover from Petitioner Rodriguez under the ***Guarantee***. RX 7.

11. A collection from Treasury (interception of a $5,565.00 income tax refund) which was applied to reduce the debt (after the $17.00 collection fee was subtracted) resulted in the balance of **$106,943.42** (which excludes the potential remaining collection fees).

12. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$106,943.42**, would increase the balance by $29,944.16, to $136,887.58 (as of May 3, 2012). RX 10, p. 2.

13. Garnishment of Petitioner Rodriguez's disposable pay in any amount would currently cause Petitioner Rodriguez financial hardship. Petitioner Rodriguez and his wife have 3 children to support, in addition to themselves. [Mrs. Rodriguez is not responsible to pay the USDA Rural Development debt.] Petitioner Rodriguez has been laid off from work since August 28, 2012. As his Unemployment Benefits Determination shows, and as his wife's testimony proved, Petitioner Rodriguez's work is seasonal, and during the winter when his income is lower, they get behind. One winter he was laid off for 6 months.

14. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Rodriguez's disposable pay through September 2014; then **up to 5%** of Petitioner Rodriguez's disposable pay beginning October 2014 through September 2016; then **up to 10%** of Petitioner Rodriguez's disposable pay beginning October 2016 through September 2018; then **up to 15%** of Petitioner Rodriguez's disposable pay thereafter. 31 C.F.R. § 285.11.

15. Petitioner Rodriguez, you may want to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

16. Petitioner Rodriguez, you may choose to call Treasury's collection agency to **negotiate** the repayment of the debt. Petitioner Rodriguez, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Rodriguez, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Rodriguez, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

17. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Rodriguez and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

18. Petitioner Rodriguez owes the debt described in paragraphs 5 through 12.

19. Garnishment is authorized, but to prevent financial hardship shall be limited as follows: through September 2014 garnishment limited to **0%** of Petitioner Rodriguez's disposable pay; beginning October 2014 through September 2016 garnishment **up to 5%** of Petitioner Rodriguez's disposable pay; beginning October 2016 through September 2018 garnishment **up to 10%** of Petitioner Rodriguez's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Rodriguez's disposable pay. 31 C.F.R. § 285.11.

20. **No refund** to Petitioner Rodriguez of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

21. Repayment of the debt may occur through ***offset*** of Petitioner Rodriguez's **income tax refunds** or other **Federal monies** payable to the order of Petitioner Rodriguez.

ORDER

22. Until the debt is repaid, Petitioner Rodriguez shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

23. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to **0%** of Petitioner Rodriguez's disposable pay through September 2014; then **up to 5%** of Petitioner Rodriguez's disposable pay beginning October 2014 through September 2016; then **up to 10%** of Petitioner Rodriguez's disposable pay beginning October 2016 through September 2018; then **up to 15%** of Petitioner Rodriguez's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: BRIAN CALLAHAN.
Docket No. 12-0285.
Decision and Order.
Filed October 3, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by James P. Hurt, Hearing Official.

DECISION AND ORDER

ADMINISTRATIVE WAGE GARNISHMENT ACT

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On July 9, 2012, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-9 prior to my order on April 10, 2012. Mr. Callahan originally stated that he had legal counsel, however no attorney has filed an appearance in the case. Mr. Callahan filed his financial statements, pay stubs and later documentation on certain monthly expenses on September 7, 2012 which I now label as PX-1, PX-2, and PX-3, respectively. After review of his financial statements, August 29, 2012, I issued an Order requesting further information related to his financial statement. RD requested a follow-up oral hearing and I concurred.

On September 27, 2012 and at the time set for the follow up hearing, both parties were available. Ms. Michelle Tanner represented RD. Mr. Callahan was self represented. The parties were sworn.

Petitioner has been employed for more than one year. Mr. Callahan is remarried. He and his wife have recently had a child. His wife will return to work on/about October 17, 2012. He provided her net bi-weekly income which was used in the Financial Hardship calculation as family monthly disposable income. The family unit owes substantial IRS payments for the next 7 months (April 2013). His wife is the owner of the residence that the family lives in and they share all household expenses. There are five persons in the household and two automobiles. Mr. Callahan has court-ordered child support related to his prior marriage. He and his current wife work at a location where there are highway tolls in both directions. The family unit has balances on five credit cards with large balances. He states that daycare for the two minor children will be required. There are no school loans. There is a monthly payment on one of the two automobiles. There are anticipated monthly

out-of-pocket medical expenses. Petitioner's pay statement shows he is paid bi-weekly - instead of bi-monthly (26 not 24 pay periods per year). I added a Medicare tax at 1.45% of his gross wages.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On June 28, 2003, Petitioner obtained a loan for the purchase of a primary home in the amount of $117,918.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase his home on a property located in Lakeland, Florida. RX-2 @ p. 3 of 3.

2. Prior to obtaining the loan, borrower signed a mortgage guarantee agreement on RD form 1980-21. RX-1.

3. The borrower defaulted on the loan and it was accelerated for foreclosure. RX – 3 @ p. 8 of 15 & 10 of 15.

4. At the foreclosure sale, Bank of America acquired and held the property for re-sale.

5. On/about June 30, 2010, the property was purchased by a third party for the listed price of $104,900.

6. Prior to the sale the Borrower owed RD for $110,857.65 as principal, $8,577.42 as interest, $8,694.83 as fees, plus interest on the fees of $266.26 for a total of $128,396.16 to pay off the RD loan. Narrative, RX-6.

7. In addition, borrower owes $14,741.47 to RD under the terms of the loan guarantee. RX-6.

8. Treasury recovered $3,291.43 after the foreclosure towards the loan. RX-6.

9. After application of the proceeds of the sale to the third party, borrower owed $34,946.20. RX-6.

10. The remaining amount due of $34,946.20 was transferred to Treasury for collection on April 9, 2012. RX-9 @ p.2 of 3.

11. The potential Treasury collection fees were stated to be $9,784.94 RX-9 @ p. 2 of 3.

12. Mr. Callahan has been employed for more than one year. There are two income earners in his household. There are three minor children in the home and Mr. Callahan is under a court ordered child support order for another child by a prior marriage.

13. Petitioner raised the issue of financial hardship and I utilized his financial statements and payroll information to prepare a Financial Hardship Calculation[1].

Conclusions of Law

1. Petitioner is indebted to USDA Rural Development in the amount of $34,946.20- exclusive of potential Treasury fees for the mortgage loan extended to him.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $9,784.94.

3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.

4. The Respondent is entitled to administratively garnish the wages of the Petitioner at the rate of one percent (1%) of his monthly disposable income through April 2013.

5. From and after April 2013, the Respondent is entitled to administratively garnish the wages of the Petitioner at the rate of nine percent (9%) of his monthly disposable income.

[1] The Financial Hardship Calculation is not posted on the OALJ website.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 1% of his monthly disposable income. After April 2013, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 9% of his monthly disposable income.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

_____

In re: JEFFREY HOUTMAN.
Docket No. 12-0417.
Decision and Order.
Filed October 15, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The Hearing by telephone was held as scheduled on July 12, 2012. Jeffrey Houtman, the Petitioner (Petitioner Houtman), represents himself (appears *pro se*) and did not participate.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Houtman failed to file a completed "Consumer Debtor Financial Statement" or anything, and he failed to testify. Admitted into evidence are Petitioner Houtman's Hearing Request dated April 12, 2012 and the accompanying Settlement Statement. The Settlement Statement shows that in July 2010 Petitioner Houtman sold the Greenville, Michigan home that secured the debt at issue here. The Settlement Statement shows that Petitioner Houtman received more than $14,000.00 back from the sale after the "loan Payoff" of $33,647.76 was subtracted from proceeds. [The $33,647.76 was not adequate to pay off the loan but was adequate to get the property free and clear so it could be sold.]

4. USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on June 13, 2012, and are admitted into evidence, together with the testimony of Giovanna Leopardi. Also admitted into evidence are Giovanna Leopardi's Supplementation to the Narrative filed August 10, 2012, and her additional Narrative, Witness & Exhibit List filed October 11, 2012.

5. Petitioner Houtman bought a home in Michigan in February 2009, borrowing $43,367.00 to pay for it. The loan was made by JP Morgan Chase Bank, N.A., with the servicing lender being Chase Home Finance, LLC. RX 2; RX 6, p. 4. Frequently I refer to the lender as "Chase".

6. USDA Rural Development's position is that Petitioner Houtman owes to USDA Rural Development **$12,570.09** (as of May 31, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for the loan made in February 2009 ("the debt"). *See* USDA Rural Development's Exhibits RX 1 through RX 10, plus Narratives.

7. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Houtman, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the

guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

8. USDA Rural Development paid a loss claim of $12,973.09 to the lender Chase on April 11, 2011 (RX 6, p. 10). RX 7 details the loss claim paid. After careful review of all of the evidence, I agree with USDA Rural Development's position.

9. The Due Date of the last payment made was April 1, 2009. RX 6, p. 5. The foreclosure sale date was May 13, 2010. RX 6, p. 5. RX 7 accurately shows that even after $33,424.74 from the sale of the home was applied, Chase was still out $12,973.09.

10. The actions of the lender Chase were to buy the home at the mortgage foreclosure sale for $33,150.00 (*see* Sheriff's Deed, RX 3, p. 1), and thereafter, during the redemption period, to certify that $33,424.76 was payment in full for the redemption from Sheriff's Sale on Foreclosure. RX 3, p. 2. Once Petitioner Houtman paid the $33,424.76 (which was not enough to cover even the Principal amount of $43,319.54) and redeemed the property, he had the right to sell the property. Nevertheless, Petitioner Houtman still owed Chase the deficiency ($12,973.09), which Chase had the right to collect as unsecured debt. Chase claimed the $12,973.09 from USDA Rural Development under the ***Guarantee*** (RX 1).

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Houtman and USDA Rural Development; and over the subject matter (administrative wage garnishment, which requires determining whether Petitioner Houtman owes a valid debt to USDA Rural Development).

12. USDA Rural Development paid a loss claim to the lender Chase, $12,973.09 on April 11, 2011 (RX 6, p. 10). RX 7 details the loss claim. That amount, $12,973.09, is what USDA Rural Development seeks to

recover from Petitioner Houtman under the ***Guarantee***. RX 1, RX 7; USDA Rural Development Narratives; and testimony.

13. Petitioner Houtman owes a valid debt to USDA Rural Development. When the lender Chase certified that $33,424.76 was payment in full for the redemption from Sheriff's Sale on Foreclosure (RX 3, p. 2), that amount was not the total that Petitioner Houtman owed Chase. Rather, that amount was all that was needed to redeem the property. That amount is calculated as required under Michigan law, and it is based on what the lender Chase bid in, at the Sheriff's Sale on Foreclosure. After Petitioner Houtman redeemed the home, Petitioner Houtman still owed the lender Chase money, but the remaining debt was merely unsecured.

14. USDA Rural Development may collect administratively pursuant to a ***Guarantee***, even where NO judgment has been entered against a borrower and NO personal deficiency has been established.

15. Against the $12,973.09 deficiency / loss claim, Petitioner Houtman is credited with the collection from Treasury (an ***offset***, the $420.00 TOP payment February 17, 2012). *See* RX 10. Thus, Petitioner Houtman owes to USDA Rural Development $12,570.09 as of May 31, 2012 [plus potential Treasury collection fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%), which would increase the current balance by $3,519.63, to $16,089.72.] *See* RX 10, p. 2.

16. Garnishment **up to 15%** of Petitioner Houtman's disposable pay is authorized. 31 C.F.R. § 285.11.

17. **No refund** to Petitioner Houtman of monies already collected or collected prior to implementation of this Decision will be ordered.

18. Repayment of the debt may also occur through ***offset*** of Petitioner Houtman's **income tax refunds** or other **Federal monies** payable to the order of Mr. Houtman.

ORDER

19. Until the debt is repaid, Petitioner Houtman shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

20. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment **up to 15%** of Petitioner Houtman's disposable pay. 31 C.F.R. § 285.11.

21. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Houtman's pay, to be returned to Petitioner Houtman.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: BARBARA GREER, F/K/A BARBARA EVANS, F/K/A BARBARA JEFFREY.
Docket No. 12-0528.
Decision and Order.
Filed October 15, 2012.

AWG.

John W. Erramouspe, III, Esq. for Petitioner.
Michelle Tanner for RD.
Decision and Order entered by James P. Hurt, Hearing Official.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On August 2, 2012, I issued a Prehearing Order to facilitate a meaningful conference with the parties as

to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-7 prior to my order on August 1, 2012. At the date and time set for the oral hearing, Ms. Greer was self represented and although she did not have RD's documentation (see above) with her at the time of the hearing, she elected to proceed with the hearing. She acknowledged that she had received RD's Narrative and Exhibits. Ms. Greer f/k/a Evans is now represented by attorney John W. Erramouspe, III Esq. who filed his appearance after the oral hearing. On September 25, 2012, Ms. Greer through her counsel filed a proposal for settlement which was forwarded to RD. At my request, on October 4, 2012, Ms. Greer filed her financial statements, payroll stub (for herself and Darrin Jeffrey) and explanation of some overtime benefits (soon to be ended) which I now label as PX-1, PX-2, and PX-3, respectively. On September 11, 2012 at the time set for the hearing, both parties were available. Ms. Michelle Tanner represented RD. The parties were sworn.

Petitioner has been employed for more than one year. Ms. Greer is remarried. There are four minor children in the household. She receives child support for three of the minor children. She borrowed money from her mother and has submitted a schedule of regular payments for the past 33 months. She states that layoffs at her work place are expected. She provided net weekly income of Darrin Jeffrey which was used in the Financial Hardship calculation as family monthly disposable income. Ms. Greer has student loans and credit union loans. There are six persons in the household and one automobile. The family unit does not list any credit card balances. There is no automobile monthly payment listed. There are no listed anticipated monthly out-of-pocket medical expenses. Since there are four minor children, I will assume that failure to claim out-of-pocket medical expenses is an oversight and I will, sua sponta, make a monthly allowance in the Financial Hardship calculation. I will utilize only straight time pay rates in my calculation. Petitioner's pay statement shows she is paid bi-weekly - instead of bi-monthly (26 not 24 pay periods per year). She has a deduction for Medical insurance which

will be considered, but the deduction for her 401K will not. I utilized a married filing separately tax rate to calcualate the Federal income taxes with a standard deduction. I calculated Iowa income tax at 0.039%.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On April 22, 1998, Petitioner and James Evans obtained a loan for the purchase of a primary home in the amount of $55,000 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase their home on a property located in Cherokee, Iowa. RX-1 @ p. 3 of 3.

2. The borrowers defaulted on the loan and it was accelerated for foreclosure on November 5, 2001. RX–2 @ p. 1 of 7.

3. As a result of the discovery of the presence of asbestos siding and lead based paint, RD determined that the property was a valueless lien. RX-4.

4. As of July 29, 2002, the Borrowers owed RD for $49,829.06 as principal, $722.60 as recoverable fees, plus $1,550.71 as negative escrow balance for a total of $52,102.37 to pay off the RD loan. Narrative, RX-5.

5. Since 2002, Treasury recovered substantial portions of the debt through the tax offset program (TOP) such that the debt has been reduced to $25,518.56. RX-5.

6. The remaining amount due of $25,518.56 was transferred to Treasury for collection on July 28, 2012. RX-6 @ p.2 of 5.

7. The potential Treasury collection fees were stated to be $7,145.20 RX-6 @ p. 2 of 5.

8. Ms. (Evans) Greer has been employed for more than one year. There are two income earners in her household. There are four minor children in the home. Ms. Greer is receiving child support for children by prior marriage(s).

9. Petitioner raised the issue of financial hardship and I utilized her financial statements and payroll information to prepare a Financial Hardship Calculation[1].

Conclusions of Law

1. Petitioner is jointly and severally indebted to USDA Rural Development in the amount of $25,518.56 - exclusive of potential Treasury fees for the mortgage loan extended to her.

2. In addition, Petitioner is jointly and severally indebted for potential fees to the US Treasury in the amount of $7,145.20.

3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

4. The Respondent is entitled to administratively garnish the wages of the Petitioner at the rate of fifteen percent (15%) of her monthly disposable income

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of her monthly disposable income. In the event that the family unit income involuntarily decreases, RD shall recalculate the allowable garnishment proportionally.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

---

[1] The Financial Hardship Calculation is not posted on the OALJ website.

_____

In re: BRENDA GORDER.
Docket No. 12-0606.
Decision and Order.
Filed October 26, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on October 23, 2012 (in two segments, each lasting about an hour). Brenda Gorder, the Petitioner, full name Brenda Lee Gorder ("Petitioner Gorder"), participated, representing herself (appears *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. USDA Rural Development's Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List (filed on September 13, 2012), are admitted into evidence, together with the testimony of Michelle Tanner.

4. Petitioner Gorder's completed "Consumer Debtor Financial Statement" (submitted with her Hearing Request) and her Hearing Request (dated August 14, 2012) are admitted into evidence, together with her letter to the Hearing Clerk filed October 22, 2012, together with the testimony of Petitioner Gorder.

5. Petitioner Gorder owes to USDA Rural Development **$44,012.23** (as of September 11, 2012), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for a loan made in 2007, the balance of which is now unsecured ("the debt"). Petitioner Gorder borrowed to buy a home in Missouri. The lender was First Midwest Bank of Dexter, which sold to U.S. Bank N.A. (servicing lender U.S. Bank Home Mortgage). The ***Guarantee*** remained in effect. Frequently herein I refer to the lender as U.S. Bank.

6. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Gorder, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

7. Petitioner Gorder borrowed $128,750.00 on July 27, 2007 to buy the home. RX 2. Petitioner Gorder testified that she had moved in after a divorce, and within the second year she and her daughter had medical problems. The Due Date of Last Payment Made was September 1, 2008. RX 7, p. 4. Foreclosure was initiated on December 10, 2009. RX 7, p. 5. At the foreclosure sale on January 6, 2010, the lender U.S. Bank bid $102,000.00 and acquired the home, which became REO (Real Estate Owned). RX 4, esp. p. 2. The lender U.S. Bank then sold the home for $102,650.00 on March 23, 2010. RX 6, p. 8.

8. Petitioner Gorder owes the interest that accrued beginning September 1, 2008 through March 23, 2010 (about a year-and-a-half), plus the foreclosure costs, the sales costs afterward, and the costs of maintaining the home until it was sold March 23, 2010. The costs are summarized on RX 8. Petitioner Gorder testified that she is very responsible - - has been working since the 8th grade - - but had not been well for months. She testified that for months, her non-functioning gall bladder was not detected in spite of tests and specialists she saw. She had become toxic.

Finally, following gall bladder surgery, she began to recover. She testified that, as a single mom, her own medical expenses, plus expenses for removal of her daughter's wisdom teeth, are a large part of her failure to stay current on her mortgage.

9. USDA Rural Development reimbursed the lender $47,429.23 on June 24, 2010. RX 7, p. 9. RX 7 details the loss claim paid under the ***Guarantee***, showing how the debt became $47,429.23. USDA Rural Development's payment of $47,429.23 is the amount USDA Rural Development seeks to recover from Petitioner Gorder under the ***Guarantee***.
RX 8. Petitioner Gorder has made substantial progress repaying the debt, as shown on RX 11, p. 1. Her income tax refund of more than $3,000.00 was intercepted and applied to reduce the debt (***offset***), and garnishment had begun at the job she used to have. As of September 11, 2012, Petitioner Gorder's debt had been reduced to **$44,012.23**, RX 11.

10. Interest stopped accruing on March 23, 2010 when the home was sold, which makes repayment of the debt more manageable. The costs of collection are considerably lower when income tax refunds are ***offset***, because the flat fee (now $17.00) is usually lower than the percentage (up to 28%) that is applied to collection costs from garnishments and voluntary payments, before the balance is applied to reduce the debt.

11. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$44,012.23**, would increase the balance by $12,323.42, to $56,335.65. RX 11, p. 2.

12. Petitioner Gorder is no longer employed. She moved out-of-state about a month ago to be near her 77-year old mother to be able to provide assistance if necessary. Petitioner Gorder will be working again, but she will require some time to catch up on obligations from moving and needs that are not being met while she has no income.

13. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **0%** of Petitioner Gorder's disposable pay through November 2013; then **up to 7%** of Petitioner Gorder's

disposable pay beginning December 2013 through November 2014; then **up to 15%** of Petitioner Gorder's disposable pay thereafter. 31 C.F.R. § 285.11.

14. Petitioner Gorder is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

15. Through November 2013, no garnishment is authorized. Beginning December 2013 through November 2014, garnishment up to 7% of Petitioner Gorder's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Gorder's disposable pay is authorized. *See* paragraphs 12 and 13. I encourage **Petitioner Gorder and the collection agency** to **negotiate** the repayment of the debt. Petitioner Gorder, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Gorder, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Gorder, you may want to have someone else with you on the line if you call.

Findings, Analysis and Conclusions

16. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Gorder and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

17. Petitioner Gorder owes the debt described in paragraphs 5 through 11.

18. **Garnishment is authorized**, as follows: through November 2013, **no** garnishment. Beginning December 2013 through November 2014, garnishment **up to 7%** of Petitioner Gorder's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Gorder's disposable pay. 31 C.F.R. § 285.11.

19. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Gorder's pay, to be returned to Petitioner Gorder.

20. Repayment of the debt may occur through ***offset*** of Petitioner Gorder's **income tax refunds** or other **Federal monies** payable to the order of Ms. Gorder (whether or not garnishment is authorized).

ORDER

21. Until the debt is repaid, Petitioner Gorder shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

22. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through November 2013. Beginning December 2013 through November 2014, garnishment **up to 7%** of Petitioner Gorder's disposable pay is authorized; and garnishment **up to 15%** of Petitioner Gorder's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. **Petitioner Gorder's address has CHANGED**. The Hearing Clerk shall serve Petitioner Gorder at the address Petitioner Gorder provided during the hearing, which I will send to the Hearing Clerk by email.

———

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: BRENDA BISHOP MORGAN, FORMERLY BRENDA B. BISHOP.
Docket No. 12-0337.
Decision and Order.
Filed November 2, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On April 20, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on June 28, 2012.

During the hearing, the Petitioner testified raising questions concerning the amount owed and the recovery from the foreclosure sale of the property. She was also allowed additional time to submit additional information and filed a Consumer Debtor Financial Statement which was received by the Hearing Clerk on July 6, 2012.

Rural Development indicated that the original sale conducted on February 13, 2003 was voided because of government error in the legal description of the property and the property was not resold until July 21, 2004. Because of that error, the Agency expressed willingness to waive any interest accruing between February 13, 2003 and July 21, 2004, the date of the second sale.

By Order dated August 31, 2012, the parties were directed to provide the following information:

1. Rural Development was to provide:

   a. The payoff figure for the loan as of February 13, 2003.

   b. A copy of any deficiency judgment entered by the United States District Court for the Northern District of Florida, Panama City Division in Docket No. 5:99-CV-127-SPM.

2. In light of her statement that she anticipated being unemployed as her job was ending, the Petitioner, Brenda Bishop Morgan, was to provide current information concerning her employment, if any, indicating if she was unemployed, and if so for how long.

Neither party having provided the information that they were directed to provide, on the basis of the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On October 6, 1994, the Petitioner (then known as Brenda B. Bishop) received a home mortgage loan in the amount of $40,250.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Cottondale, Florida. RX-1.

2. The loan was accelerated for foreclosure on August 26, 1998 as a result of monetary default and a Judgment of Foreclosure was entered on November 2, 1999. RX-2, 4.

3. On November 24, 1999, Petitioner filed for protection under Chapter 13 of the Bankruptcy Act and the foreclosure proceedings were stayed.

4. The bankruptcy proceedings were dismissed on March 8, 2002, the foreclosure proceedings were resumed and the property was sold by the U.S. Marshal on the steps of the Jackson County Courthouse in Marianna, Florida on February 13, 2003. RX-4.

5. The sale by the U.S. Marshal was found to be defective by reason of an error in the property description and was voided. A revised Judgment of Foreclosure was entered on March 19, 2004 and the property was again sold on July 21, 2004. RX-4, 5.

6. The amount due as of February 13, 2003 will be found to be $46,831.74. RX-5.

7. Funds received from the sale amounted to $45,329.39. The additional amount of $534.04 was received as an insurance refund; however, it appears that amount was advanced by USDA to keep the property insured and will not be credited to the Petitioner. RX-6.

8. After application of the proceeds of sale, the remaining unpaid debt is in the amount of $1,502.35 exclusive of potential Treasury fees.

Conclusions of Law

1. Petitioner is indebted to USDA Rural Development in the amount of $1,502.35 for the mortgage loan extended to her.

2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: STEVEN JOHNSON.
Docket No. 12-0574.
Decision and Order.
Filed November 8, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges upon the request of Steven Johnson ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"); and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. The petition was not timely filed, and therefore, wage garnishment has been in place.

By Order issued August 24, 2012 the parties were directed to exchange information and documentation and the matter was set for a telephonic hearing. Petitioner did not submit any documentation, nor did he provide in his petition or in any other manner, a telephone number where he could be reached for the telephonic hearing. The Order of August 24, 2012 was not returned as undeliverable.

USDA-RD filed a Narrative, together with supporting documentation. On the scheduled date for the hearing, September 27, 2012, USDA-RD's representative, Giovanna Leopardi appeared and testified. I held the hearing open to allow Petitioner to participate at a later date. By Order issued September 28, 2012, I directed Petitioner to provide contact information to the Hearing Clerk for the Office of Administrative Law Judges by not later than October 7, 2012. Petitioner has not responded to my Order as of the date of this Decision and Order, and the Order directing contact was not returned as undeliverable.

Consequently, I find it appropriate to decide this matter on the record before me, and the following Findings of Fact, Conclusions of Law, and Order shall be entered:

Findings of Fact

9. On February 15, 2008, the Petitioner[1] received a loan in the amount of $61,200.00 from JP Morgan Chase Bank, N.A. ("Lender") for the purchase of real property located in Poplar Bluff, Missouri, evidenced by Promissory Note. RX-2.

10. Prior to signing the promissory note, Petitioner signed RD Form 1980-21, whereby he promised to repay the US for any loss claim that USDA-RD paid to the Lender as the result of Petitioner's default. RX-1.

11. The loan fell into default and on January 13, 2011, a foreclosure sale was scheduled and held. RX-3.

12. At the sale, a division of the Lender, Homesales Inc., acquired the property for $31,875.00. RX-3.

13. The property was sold to a third party on April 25, 2011 for $45,585.00. RX-5.

14. At the time of the sale to the third party, the amount due on Petitioner's loan was $72,317.12, comprised of principal, interest, fees, and costs related to the foreclosure and sale. RX-6; RX-7.

15. USDA-RD paid a loss claim of $25,898.75 to the Lender, for the difference between the amount due and the amount realized by the Lender upon the sale. RX-6; RX-7.

16. Petitioner did not respond to USDA-RD's attempts to settle this outstanding amount due. RX-8.

---

[1] Another Borrower also received the loan, but information pertaining to that Borrower is not relevant as the instant action is confined to Petitioner.

17. USDA-RD referred Petitioner's account to the U.S. Department of Treasury ("Treasury") for collection on January 9, 2012 pursuant to applicable law. RX-9.

18. Petitioner's wages have been garnished and the amount due has been reduced to $25,227.21, plus potential fees. RX-10.

Conclusions of Law

4. The Secretary has jurisdiction in this matter.

5. Respondent USDA-RD has established the existence of a valid debt from Petitioner to USDA-RD.

6. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

7. Upon consideration of all of the evidence, I find that wage garnishment is appropriate.

8. USDA-RD/Treasury may administratively garnish Petitioner's wages at the statutory maximum rate of 15% of his disposable income.

9. Petitioner is advised that only Treasury has authority to compromise the amount of the debt, and that he may be able to negotiate settlement of the debt with the representatives of Treasury.

10. The toll free number for Treasury's agent is **1-888-826-3127**.

11. Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner, including income tax refunds.

12. Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

ADMINISTRATIVE WAGE GARNISHMENT ACT

ORDER

1. Administrative wage garnishment at the statutory maximum of 15% of Petitioner's disposable income may be effected.

2. Treasury may continue to collect the debt through offset of any funds due to Petitioner from the United States.

3. Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf at Treasury, notice of any change in his address, phone numbers, or other means of contact.

4. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: MICHAEL A. BEENE.
Docket No. 12-0647.
Decision and Order.
Filed November 9, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges upon the September 24, 2012, request of Michael A. Beene ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"); and if established, the terms of any repayment prior to imposition of an administrative wage garnishment.

By Order issued October 5, 2012 the parties were directed to exchange information and documentation and the matter was set for a telephonic hearing. Petitioner did not submit any documentation. USDA-RD filed a Narrative, together with supporting documentation.

On the scheduled date for the hearing, November 8, 2012, USDA-RD's representative, Michelle Tanner appeared and testified. I admitted USDA-RD's evidence, RX-1 through RX-6 to the record. Petitioner did not answer at the telephone number that he provided. The Order issued on October 5, 2012 was not returned as undeliverable. I held the record open until the close of business on the date of the hearing, but Petitioner did not respond to a voice mail message left for him.

Consequently, I find it appropriate to decide this matter on the record before me, and the following Findings of Fact, Conclusions of Law, and Order shall be entered.

Findings of Fact

19. On March 26, 1990, the Petitioner[1] received a loan in the amount of $32,000.00 from USDA-RD for the purchase of real property located in Deming, New Mexico evidenced by Promissory Note. RX-1.

20. The loan fell into default and was accelerated on October 20, 2003. RX-2.

21. A foreclosure sale was held on October 27, 2004 and the property was sold to the highest bidder for the amount of $29,050.00. RX-4.

22. At the time of the sale, the amount due on Petitioner's loan was $40,029.93, comprised of principal, interest, fees, and costs related to the foreclosure and sale. RX-5.

23. USDA-RD applied the proceeds of the sale to the Petitioner's account and a balance of $10,979.93 remained due. RX-5.

---

[1] Another Borrower also received the loan, but information pertaining to that Borrower is not relevant as the instant action is confined to Petitioner.

24. Petitioner did not respond to USDA-RD's attempts to settle the outstanding amount due. RX-8.

25. USDA-RD referred Petitioner's account to the U.S. Department of Treasury ("Treasury") for collection on May 9, 2005, pursuant to applicable law. RX-4.

26. At the time of the submission of USDA-RD's exhibits to this record, the amount of Petitioner's account at Treasury was $4,965.99, plus remaining potential fees.

Conclusions of Law

13. The Secretary has jurisdiction in this matter.

14. Respondent USDA-RD has established the existence of a valid debt from Petitioner to USDA-RD.

15. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

16. Upon consideration of all of the evidence, I find that wage garnishment is appropriate.

17. USDA-RD/Treasury may administratively garnish Petitioner's wages at the statutory maximum rate of 15% of his disposable income.

18. Petitioner is advised that only Treasury has authority to compromise the amount of the debt, and that he may be able to negotiate settlement of the debt with the representatives of Treasury.

19. The toll free number for Treasury's agent is **1-888-826-3127**.

20. Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner, including income tax refunds.

21. Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

ORDER

1. Administrative wage garnishment at the statutory maximum of 15% of Petitioner's disposable income may be effected.

2. Treasury may continue to collect the debt through offset of any funds due to Petitioner from the United States.

3. Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf at Treasury, notice of any change in his address, phone numbers, or other means of contact.

4. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: DAVID MAYNEZ.
Docket No. 12-0608.
Decision and Order.
Filed November 14, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing, by telephone, was held on October 23, 2012. David Maynez, the Petitioner ("Petitioner Maynez") participated, representing himself (appearing *pro se*). The record was held open for Petitioner Maynez to file a new Consumer Debtor Financial Statement.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Maynez's filings on October 31, 2012, including his "Consumer Debtor Financial Statement" dated October 29, 2012, and copies of numerous recent bills documenting debt, especially for his wife's health care including hospitalization, are admitted into evidence. Petitioner Maynez's filings on October 24, 2012, including his 2 most recent pay stubs, are admitted into evidence. Petitioner Maynez's filings on October 9, 2012, including his 3-page letter and his "Consumer Debtor Financial Statement" dated September 27, 2012, are admitted into evidence. Petitioner Maynez's Hearing Request dated August 6, 2012 with all accompanying documents, including his "Consumer Debtor Financial Statement" dated August 6, 2012, is also admitted into evidence, together with the testimony of Petitioner Maynez.

4. USDA Rural Development's Exhibits RX 1 through RX 9, plus Narrative, Witness & Exhibit List, were filed on September 10, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner Maynez bought a home in Texas in 2008, borrowing $89,100.00 to pay for it. The loan was made by American Southwest Mortgage Corp., then sold to JP Morgan Chase Bank, N.A. (RX 2, p. 7), with the servicing lender being Chase Home Finance, LLC.

6. USDA Rural Development's position is that Petitioner Maynez owes to USDA Rural Development **$19,998.62** (as of September 7, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for the loan made in 2008 ("the debt"). *See* USDA Rural Development's Exhibits RX 1 through RX 9, plus Narrative, Witness & Exhibit List.

7. Petitioner Maynez's letter dated 10/08/2012 documents his efforts to pay Chase; and he testified that the Branch refused his payments after he

got behind. Petitioner Maynez testified that Chase did not treat him fairly.

8. After careful review of all of the evidence, I agree with USDA Rural Development's position. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Maynez, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

9. Pursuant to the ***Guarantee***, on September 12, 2011, USDA Rural Development paid a loss claim of $22,600.16 to the lender (Chase). RX 5, p. 11. The Due Date of the last payment made was November 1, 2009. RX 5, p. 4. The foreclosure sale date was October 5, 2010. RX 5, p. 5. RX 6 details the loss claim paid under the ***Guarantee***, showing how the loss claim of $22,600.16 was calculated.

10. At the foreclosure sale on October 5, 2010, the Bank (through a substitute Trustee) was the highest bidder ($68,000.00). RX 2, p. 9. Thereafter, Chase sold the home for $83,900.00 on May 13, 2011 RX 4, p. 2. Interest stopped accruing when the sale funds were applied. USDA Rural Development reimbursed the lender $22,600.16 on September 12, 2011 (RX 5, p. 11), which is the amount USDA Rural Development seeks to recover from Petitioner Maynez under the ***Guarantee***. RX 6.

$ 87,489.45	Unpaid Principal Balance
$ 6,419.09	Unpaid Interest Balance [11/01/2009 to 05/13/2011]
$ 229.88	Protective Advances to Pay Taxes and Insurance
$ 94,138.42	
+ $ 12,797.98	Lender Expenses to Sell Property
$106,936.40	Total Debt Charged to Petitioner Maynez

The debt was then $106,936.40. RX 6.

- $ 83,900.00	Funds Received from Sale of the home
$ 23,036.40	Amount Due Before $436.24 Recoveries/Credits/Reductions
- $ 436.24	Recoveries/Credits/Reductions
$ 22,600.16	

RX 6, RX 5, USDA Rural Development Narrative, and testimony.

11. Collections from Treasury (interception of a $2,079.00 income tax refund, plus numerous garnishments) which have been applied to reduce the debt, have resulted in the balance of **$19,998.62** as of September 7, 2012 (which excludes the potential remaining collection fees).

12. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$19,998.62**, would increase the balance by $5,599.61, to $25,598.23 (as of September 7, 2012). RX 9, p. 2.

13. Garnishment began because Petitioner Maynez's Hearing Request was LATE. RX 9, p. 1. The "Notice of Intent to Initiate Administrative

Wage Garnishment Proceedings," dated June 7, 2012, gave Petitioner Maynez until June 28, 2012 to request a hearing:

> Request A Hearing. You may request a hearing from the Federal Agency by completing and mailing the enclosed Request for Hearing to the address listed below (Pioneer Credit Recovery, Inc., in Arcade, New York). If we receive your written request for a hearing on or before 06/28/2012, Treasury will not issue a wage garnishment order on behalf of the Federal Agency until your hearing is held and a decision is reached.

Petitioner Maynez's Hearing Request was not received until August 2012, so it was LATE.

14. Garnishment of Petitioner Maynez's disposable pay has caused Petitioner Maynez financial hardship. Petitioner Maynez and his wife have 4 children to support, in addition to themselves. [Mrs. Maynez is not responsible to pay the USDA Rural Development debt.] Petitioner Maynez has no health insurance. His wife was injured, requiring surgery and hospitalization. The bill for Emergency Room service to his wife on August 28, 2011 from University Medical Center was nearly $2,000.00. The past due balance owed to Acute Surgical Care Specialist LLP at the end of 2011 was greater than $4,500.00. The Del Sol Medical Center delinquent account alone is currently greater than $10,000.00. Petitioner Maynez has an excellent job, but his income does not stretch far enough to cover all his responsibilities. Petitioner Maynez testified that he is barely making ends meet.

15. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Maynez's disposable pay through November 2014; then **up to 5%** of Petitioner Maynez's disposable pay beginning December 2014 through November 2016; then **up to 10%** of Petitioner Maynez's disposable pay beginning December 2016 through November 2018; then **up to 15%** of Petitioner Maynez's disposable pay thereafter. 31 C.F.R. § 285.11.

16. Petitioner Maynez, you may want to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

17. Petitioner Maynez, you may choose to call Treasury's collection agency to **negotiate** the repayment of the debt. Petitioner Maynez, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Maynez, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Maynez, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

18. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Maynez and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

19. Petitioner Maynez owes the debt described in paragraphs 5 through 12.

20. Garnishment is authorized, but to prevent financial hardship shall be limited as follows: through November 2014 garnishment limited to **0%** of Petitioner Maynez's disposable pay; beginning December 2014 through November 2016 garnishment **up to 5%** of Petitioner Maynez's disposable pay; beginning December 2016 through November 2018 garnishment **up to 10%** of Petitioner Maynez's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Maynez's disposable pay. 31 C.F.R. § 285.11.

21. **No refund** to Petitioner Maynez of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

22. Repayment of the debt may occur through ***offset*** of Petitioner Maynez's **income tax refunds** or other **Federal monies** payable to the order of Petitioner Maynez.

ORDER

23. Until the debt is repaid, Petitioner Maynez shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

24. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to **0%** of Petitioner Maynez's disposable pay through November 2014; then **up to 5%** of Petitioner Maynez's disposable pay beginning December 2014 through November 2016; then **up to 10%** of Petitioner Maynez's disposable pay beginning December 2016 through November 2018; then **up to 15%** of Petitioner Maynez's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

_____

In re: OTHA HARRIS.
Docket No. 12-0529.
Decision and Order.
Filed November 21, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was begun on August 30, 2012, resumed on September 17, and was completed on October 9, 2012. Otha Harris, also

known as Otha Ree Harris and as Otha M. Harris and called "Marie" ("Petitioner Harris"), participated, representing herself (appeared *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), also participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Harris's completed "Consumer Debtor Financial Statement" plus pay stubs (filed on October 18, 2012), are admitted into evidence, together with the testimony of Petitioner Harris, together with her Hearing Request (filed in mid-2012).

4. USDA Rural Development's Exhibits RX 1 through RX 6, plus Narrative, Witness & Exhibit List (filed on August 6, 2012), are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner Harris owed to USDA Rural Development **$15,341.18** (as of July 28, 2012) in repayment of a USDA Farmers Home Administration loan borrowed in 1994 for a home in Texas, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, esp. RX 1, RX 6.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$15,341.18**, would increase the current balance by $4,295.53, to $19,636.71. *See* USDA Rural Development Exhibits, esp. RX 6.

7. The amount Petitioner Harris borrowed from USDA Farmers Home Administration in 1994 was $40,720.00. RX 1. The loan became delinquent and was reamortized. Reamortization made the loan current, by adding the delinquent amount to the principal balance. Reamortization did not change the total amount owed, which all became principal. Because of the reamortization, more principal was owed on August 9, 2000 than had been owed at the beginning: $46,325.00 principal owed. RX 2.

8. Petitioner Harris testified that she left the home in 1999. [My baby daughter went to college and I left, too.] Petitioner Harris testified that the previous year, in 1998, Petitioner Harris's son died, on Petitioner Harris's birthday. The loss of her son was devastating, and the memories in the house were overwhelming. Petitioner Harris testified that she gave up.

9. USDA Rural Development's "Notice of Acceleration" was dated August 9, 2000, and the foreclosure sale was held on April 3, 2001. RX 5. At the time of the foreclosure sale in 2001, the debt balance was $51,042.47.

$ 46,325.80	unpaid principal
$ 3,464.86	unpaid interest
$ 1,245.56	fees/costs (taxes, insurance, costs)
$ 6.25	interest on fees/costs
$ 51,042.47	

RX 5 and Michelle Tanner's testimony.

10. The highest bid at the foreclosure sale was $36,000.00, bid by USDA. The $36,000.00 was applied to reduce the debt (leaving a balance owed of $15,042.47). Then additional costs and fees were billed and a refund applied (leaving a balance owed of **$15,341.18**). RX 5 and Michelle Tanner's testimony. Since 2001, no additional interest has accrued.

11. Petitioner Harris owes the balance of **$15,341.18** (excluding potential collection fees) as of July 28, 2012, and USDA Rural Development may collect that amount from her.
RX 6.

12. Michelle Tanner testified that from 2002 until 2011, U.S. Treasury had the wrong social security number for Petitioner Harris. This was discovered in 2011, when an income tax refund was intercepted to be applied to reduce the debt, but it was learned that the social security

number belonged to a gentleman who does not owe the debt. RX 4, p. 2. The income tax refund was returned to the gentleman. RX 6, p. 1.

13. Petitioner Harris testified that she supports herself. When she can, Petitioner Harris sends some support to her daughter, who has 3 children. Petitioner Harris works hard; she is a Certified Nursing Assistant (CNA), and she works 2 jobs. She testified that she had a recent knee injury and has other health problems; she requires blood pressure medication and has high cholesterol. Petitioner Harris's disposable pay (within the meaning of 31 C.F.R. § 285.11) is as much as $2,000.00 per month combined (both jobs). [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance; and in certain situations minus other employee benefits contributions that are required to be withheld.]

14. Garnishment at 15% of Petitioner Harris's disposable pay could yield as much as $300.00 per month to repay the USDA Rural Development debt, but garnishment in that amount now would cause Petitioner Harris financial hardship (within the meaning of 31 C.F.R. § 285.11). Petitioner Harris's Consumer Debtor Financial Statement (filed October 18, 2012) shows that her living expenses are reasonable, frugal in fact. It is important that she contribute to the well-being of her daughter and her daughter's 3 children.

15. To prevent financial hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **5%** of Petitioner Harris's disposable pay through November 2013; then **up to 10%** of Petitioner Harris's disposable pay thereafter. 31 C.F.R. § 285.11.

16. Petitioner Harris is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

17. Garnishment is authorized. *See* paragraphs 13 through 15. I encourage **Petitioner Harris and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Harris, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner

Harris, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Harris, you may want to have someone else with you on the line if you call.

Findings, Analysis and Conclusions

18. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Harris and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

19. Petitioner Harris owes the debt described in paragraphs 5 through 12.

20. **Garnishment is authorized**, as follows: through November 2013, garnishment **up to 5%** of Petitioner Harris's disposable pay; and thereafter, garnishment **up to 10%** of Petitioner Harris's disposable pay. 31 C.F.R. § 285.11.

21. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Harris's pay, to be returned to Petitioner Harris.

22. Repayment of the debt may occur through ***offset*** of Petitioner Harris's **income tax refunds** or other **Federal monies** payable to the order of Ms. Harris.

ORDER

23. Until the debt is repaid, Petitioner Harris shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

24. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment **up to 5%** of Petitioner Harris's disposable pay through November 2013. Beginning December 2013 and thereafter, garnishment **up to 10%** of Petitioner Harris's disposable pay is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

_____

In re: JOSEPH BURTON.
Docket No. 13-0015.
Decision and Order.
Filed November 28, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges upon the October 11, 2012 request of Joseph Burton ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"), and if established, the propriety of administrative wage garnishment.

By Order issued October 15, 2012 the parties were directed to exchange information and documentation and the matter was set for a telephonic hearing. Petitioner did not submit any documentation. USDA-RD filed a Narrative, together with supporting documentation.
On the scheduled date for the hearing, November 27, 2012, USDA-RD's representative, Giovanni Leopardi, appeared and testified. I admitted USDA-RD's evidence, RX-1 through RX-6 to the record. Petitioner also appeared and testified.

The following Findings of Fact, Conclusions of Law, and Order is based upon the entire record.

Findings of Fact

27. On May 29, 1987, the Petitioner[1] received a loan in the amount of $42,400.00 from USDA-RD for the purchase of real property located in Hitchcock, Texas, evidenced by Promissory Note and Real Estate Deed. RX-1.

28. Petitioner and his ex-wife divorced, and he conveyed the property to her as part of the divorce proceedings; Petitioners' ex-wife occupied the house after the divorce.

29. Subsequently, the loan fell into default and was accelerated on December 23, 2002. RX-2.

30. A foreclosure sale was held on March 2, 2004 and the property was sold to the highest bidder for the amount of $49,000.00. RX-4.

31. At the time of the sale, the amount due on Petitioner's loan was $66,490.82, comprised of principal, interest, fees, and costs related to the foreclosure and sale. RX-5.

32. USDA-RD applied the proceeds of the sale to the Petitioner's account and a balance of $17,490.82 remained due. RX-5.

33. Petitioner filed an untimely response to USDA-RD's attempts to settle this outstanding amount due, which was received on December 6, 2006 after the debt had been referred to the United States Department of Treasury ("Treasury"). RX-4.

34. USDA-RD referred Petitioner's account to Treasury for collection on June 7, 2004, pursuant to applicable law. RX-3.

35. Offsets and collections by Treasury have reduced the debt by $16,780.78. RX-5.

---

[1] Petitioner's ex-wife also signed the note.

36. At the time of the submission of USDA-RD's exhibits, the amount of Petitioner's account at Treasury was $1,088.04, plus remaining potential fees.

37. Additional amounts have been applied to the account due to ongoing wage garnishments.

Conclusions of Law

22. The Secretary has jurisdiction in this matter.

23. Respondent USDA-RD has established the existence of a valid debt from Petitioner to USDA-RD.

24. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

25. Petitioner's request for a hearing on wage garnishment was not timely filed, and therefore his wages have been garnished.

26. Upon consideration of all of the evidence, I find that USDA-RD/Treasury may administratively garnish Petitioner's wages; however Petitioner's income and expenses cannot sustain the maximum rate of 15% of his disposable income.

27. Petitioner is advised that only Treasury has authority to compromise the amount of the debt, and that he may be able to negotiate settlement of the debt with the representatives of Treasury.

28. In order to allow Petitioner to consider negotiations with Treasury, garnishment shall be supsended for a period of sixty (60) days.

29. At the expiration of the sixty (60) days suspension, garnishment of Petitioner's wages may be imposed at a rate of not more than 5% of his disposable income.

30. Petitioner is encouraged to contact Treasury's agent is **1-888-826-3127** if Petitioner is in the position to negotiate the debt.

31. Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner, including income tax refunds.

32. Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

ORDER

1. Administrative wage garnishment is hereby suspended for a period of sixty (60) days.

2. At the expiration of the sixty (60) day suspension period, Petitioner's wages may be garnished at the rate of no more than 5% of Petitioner's disposable income.

3. Treasury may continue to collect the debt through offset of any funds due to Petitioner from the United States.

4. Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf at Treasury, notice of any change in his address, phone numbers, or other means of contact.

5. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

———

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: GEORGE STEWART.
Docket No. 13-0003.
Decision and Order.
Filed December 7, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on December 4, 2012. George Stewart, also known as George Stewart, Jr., the Petitioner ("Petitioner Stewart"), failed to participate. He represents himself (appears *pro se*).

2. The mobile phone number on Petitioner Stewart's Consumer Debtor Financial Statement was disconnected. The phone number on Petitioner Stewart's Hearing Request had an automated recording that said no calls were being taken at that time. Petitioner Stewart gave us no other way to contact him for the hearing, even though the Hearing Notice advised him to.

3. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development"). USDA Rural Development participated, represented by Giovanna Leopardi.

Summary of the Facts Presented

4. Petitioner Stewart's completed "Consumer Debtor Financial Statement" (filed November 14, 2012) is admitted into evidence, together with his Hearing Request dated September 13, 2012.

5. USDA Rural Development's Exhibits RX 1 through RX 5, plus Narrative, Witness & Exhibit List (filed November 30, 2012) are admitted into evidence, together with the testimony of Giovanna Leopardi.

6. The loan was made by the United States Department of Agriculture, Farmers Home Administration, in 1984, for a home in Mississippi. RX 1, pp. 1-10. Petitioner Stewart and his wife Gwendolyn Stewart, on January 20, 1995, signed a Deed of Trust for the home (RX 1, pp. 13-17), the loan having been assumed on that date. Petitioner Stewart then assumed the loan on March 23, 1995 ("the debt"). RX 1, pp. 11-12.

7. USDA Rural Development's position is that Petitioner Stewart owes to USDA Rural Development **$14,963.21** as of November 28, 2012. After careful review of all of the evidence, I agree with USDA Rural Development's position.

8. The Notice of Acceleration dated October 21, 1998 (RX 2, pp. 14-16), indicates that the balance of the account was $36,383.92 unpaid principal plus $5,066.83 unpaid interest as of October 21, 1998. At the foreclosure sale on June 7, 1999, a third party bought the home. RX 3, p. 9. No interest has accrued since the proceeds were applied, in June 1999.

9. The proceeds, $30,715.00, were applied first to pay recoverable costs that included unpaid taxes and unpaid insurance and the costs of sale ($1,775.39); then applied to pay the unpaid interest, which by then was $6,722.14; and then applied to pay $22,217.47 of the principal. The remaining balance owed was $14,166.45. To that amount, adjustments were made to add interest ($69.28) and to add costs ($727.48), resulting in **$14,963.21** unpaid (excluding the potential remaining collection fees). *See* RX 4.

10. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$14,963.21**, would increase the balance by $4,189.70, to $19,152.91. [My calculation differs from that found on RX 5, p. 2 by nearly $300.00].

11. Petitioner Stewart's Consumer Debtor Financial Statement shows that his current living expenses are minimal, and that his only income is Supplemental Security Income (SSI) of $698.34 monthly. He pays $300.00 monthly on a $7,000.00 debt to Triple-B, a car payment. He is eligible for Medicaid.

12. It does not appear that Petitioner Stewart has any disposable pay that could be garnished to pay the debt. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Stewart's disposable pay.

Petitioner Stewart's SSI will not be ***offset*** to pay the debt.

13. Petitioner Stewart, you may want to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

14. I recommend that Petitioner Stewart be granted **a financial hardship discharge** of the debt. Petitioner Stewart, this will require **you** to telephone Treasury's collection agency after you receive this Decision. To be considered (the decision whether to grant you a financial hardship discharge will be made by Treasury's collection agency), you will be required to provide, timely, all financial documentation requested. The toll-free number for you to call is **1-888-826-3127**. Petitioner Stewart, if you are not granted a financial hardship discharge (and it is difficult to qualify), you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Stewart, you may wish to include someone else with you in the telephone call when you call to negotiate.

Findings, Analysis and Conclusions

15. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Stewart and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

16. Petitioner Stewart owes the debt described in paragraphs 6 through 10.

17. **Garnishment is not authorized**. Garnishment in any amount would cause Petitioner Stewart financial hardship. 31 C.F.R. § 285.11.

18.I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Stewart's pay, to be returned to Petitioner Stewart.

19.Repayment of the debt may occur through ***offset*** of Petitioner Stewart's **income tax refunds** or other **Federal monies** payable to the order of Mr. Stewart. [Petitioner Stewart's SSI will not be ***offset*** to pay the debt.]

ORDER

20.Until the debt is repaid, Petitioner Stewart shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

21.USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: PATRICIA GREEN.
Docket No. 12-0588.
Decision and Order.
Filed December 14, 2012.

AWG.

Petitioner, pro se.
Esther McQuaid for RD.
Decision and Order entered by James P. Hurt, Hearing Official.

DECISION AND ORDER

ADMINISTRATIVE WAGE GARNISHMENT ACT

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On October 11, 2012, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-10 on October 17, 2012. On November 28[1], 2012, at the time set for the hearing, both parties were available. Ms. Esther McQuaid represented RD. Ms. Green was self-represented. The parties were sworn.

Petitioner did not submit any written evidence. Her defense to RD's claim of unauthorized rental assistance is that she did not contract as alleged.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

38. On July 1, 2007 (RX-9 @ p. 1 of 28), and on July 1, 2008 (RX-9 @ p. 6 of 28), and on July 1, 2009 (RX-9 @ p. 10 of 28) and on July 1, 2010 (RX-9 @ p. 17 of 28) and on July 1, 2011 (RX-9 @ 24 of 28), Ms. Green signed RD 3560-6. (The USDA-Rural Housing Service Tenant Certification).

39. In each case, Ms. Green's signature appeared on the form below the printed words "I will reimburse the agency the unauthorized amount."

40. Along with each annual certification, Ms. Green submitted a separate "UNEMPLOYMENT STATEMENT that she was "currently unemployed."

---

[1] The hearing date was corrected from November 31, 2012.

41. For all of the annual rental assistance renewal periods, Ms. Green was gainfully employed at Trinity Industries. RX-4.

42. On February 1, 2012, Ms. Green met with the apartment management company, where her finances were reviewed and where it was determined that Ms. Green was ineligible for rental assistance. RX-3.

43. Based upon Wage match records from the state of Louisiana (RX-7) and the prescribed calculations for unauthorized rental assistance, RD calculated her unauthorized rental assistance to be $18,114.00. RX-10.

44. Ms. Green raised an additional issue that her adult son was not in the household for a potion of the 2011 certification period.

45. RD recalculated the unauthorized rental assistance without the income from the adult child for that period of time resulting in a lowered amount of unauthorized rental assistance to $17,784. See Addition to Narrative, RX-11.

46. In addition, Ms. Green is liable for potential treasury fees of up to 28 percent of the amount of any garnished wages.

47. RD categorized Ms. Green's actions as "fraudulent." See Narrative page 1, third paragraph.

Conclusions of Law

33. Petitioner is indebted to USDA Rural Development in the amount of $17,784 exclusive of potential Treasury fees for the unauthorized rental assistance given to her.

34. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $4,979.52.

35. Because RD classified her unauthorized rental assistance as "fraudulent," I decline to make a financial hardship calculation.

36. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

37. The Respondent is entitled to administratively garnish the wages of the Petitioner at this time.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at this time. After one year, RD may re-assess the Petitioner's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

_____

In re: ANDY SCHLAGETER, A/K/A ANDREW SCHLAGETER.
Docket No. 12-0526.
Decision and Order.
Filed December 17, 2012.

AWG.

Petitioner, pro se.
Esther McQuaid for RD.
Decision and Order entered by James P. Hurt, Hearing Official.

DECISION AND ORDER

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On October 11, 2012, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-7 on October 31, 2012. Petitioner submitted his financial statements along with his petition for hearing. On November 28, 2012, at the time set for the hearing, both parties were available. Ms. Esther McQuaid represented RD. Mr. Schlageter was self-represented. The parties were sworn.

Petitioner did not submit any written evidence relating to the unauthorized rental assistance. RD's exhibit Narrative at page 2 indicates that the Tenant Certification Form RD 3560-8 signed on on/about 9/22/2008. The usual accompanying documents to the tenant certification require the tenant to report any increases in income. RX-1 @ p. 4 of 6 however, RD's exhibits do not include any statement of tenant's duty signed by the tenant for the initial rent subsidy period. For the recertification of eligibility on/about September 1, 2009, RD's exhibits included a signed notice to the tenants that they had a duty to report any increase in income. RX-1 @ p. 4 of 6. The tenant failed to report an increase in income beginning the 4th quarter of 2008. An investigation of the family unit income shows that the undeclared employment income justified a recalculation of the tenant's eligibility or amount of authorized rental assistance.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

48. On October 1, 2008 (RX-1 @ p. 1 of 6), and on September 1, 2009 (RX-1 @ p. 5 of 6), Andy Schlageter and Dawn Schlageter signed RD 3560-6. (The USDA-Rural Housing Service Tenant Certification).

49. In each case, Mr. Schlageter's signature appeared on the form below the printed words "I will reimburse the agency the unauthorized amount."

50. Along with the annual September 1, 2009 re-certification, Andy Schlageter and Dawn Schlageter signed a separate "Recertification Interview Checklist" that they had no form of income except child support." RX-1 @ p. 3 of 6.

51. In the same Recertification form, Andy Schlageter and Dawn Schlageter committed to report and increases in income. RX-1 @ p.3 of 6.

52. From the fourth quarter of 2008, Dawn Schlageter was gainfully employed at Target Corporation. RX-3 @ page 2 of 2.

53. From the first quarter of 2009, Andy Schlageter was gainfully employed at Action Temporary Services, and then Heartland Indiana Food Corp., and then Express Services, and then Gibson County Quality Assurance. RX-3 @ p. 1 of 2.

54. On February 26, 2010, Andy Schlageter and Dawn Schlageter vacated the premises. RX- 7 @ p. 2 of 2.

55. Based upon Wage match records from the state of Indiana (RX-3) and the prescribed calculations for unauthorized rental assistance, RD calculated their combined unauthorized rental assistance to be $5,004.00. RX-5 @ p. 5 of 5.

56. Andy Schlageter is jointly and severally liable for the unauthorized rental assistance.

57. In addition, Andy Schlageter is jointly and severally liable for potential treasury fees of up to 28 percent of the amount of any garnished wages.

58. RD did not categorize Andy Schlageter's actions as "fraudulent," therefore I would consider his request for a future financial hardship calculation at the time when his income becomes subject to garnishment.

59. Andy Schlageter has worked only approximately 7 months without interruption or voluntary unemployment, therefore he is not subject to wage garnishment at this time.

Conclusions of Law

38. Petitioner is jointly and severally indebted to USDA Rural Development in the amount of $5,004.00 exclusive of potential Treasury fees for the unauthorized rental assistance given to him.

39. In addition, Petitioner is jointly and severally indebted for potential fees to the US Treasury in the amount of $1,401.12.

40. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

41. The Respondent is not entitled to administratively garnish the wages of the Petitioner at this time. RD may reconsider Petitioner's income in May 2013.

ORDER

For the foregoing reasons, the wages of Petitioner shall not be subjected to administrative wage garnishment at this time. After 5 months, RD may re-assess the Petitioner's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

_____

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: ALLISON MOSSBERGER.
Docket No. 12-0637.
Decision and Order.
Filed December 18, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The Hearing (by telephone) was held on November 7, 2012. Ms. Allison Mossberger, also known as Allison L. Mossberger ("Petitioner Mossberger") participated, representing herself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Mossberger's documents filed on October 12, 2012 are admitted into evidence, together with the testimony of Petitioner Mossberger. The documents filed on October 12 include Petitioner's "Consumer Debtor Financial Statement" and additional documents showing payments deferred and claims of financial hardship. Also admitted into evidence is Petitioner's Hearing Request dated August 13, 2012.

4. USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on October 9, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.

5. The first issue is whether Petitioner Mossberger owes to USDA Rural Development a balance of **$40,427.49** (as of October 2, 2012) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for a loan made on January 5, 2005 by Draper and Kramer Mortgage

Corp., for a home in Illinois, the balance of which is now unsecured ("the debt"). That alleged debt was $51,290.49 (*see* RX 7), until Petitioner Mossberger's income tax refund ($9,992.00) was ***offset*** and her co-borrower's income tax refund ($905.00) was ***offset***. *See* RX 10. Her co-borrower is Nickolas Zitek.

6. Draper and Kramer Mortgage Corp. sold the loan to JP Morgan Chase Bank, N.A., on the day the loan was made. RX 2, p. 5. JP Morgan Chase Bank, N.A. (the Holding Lender) is the parent company of Chase Home Finance LLC (the Servicing Lender). RX 3; RX 6, pp. 3-4. I refer to these entities as Chase, or the lender.

7. Petitioner Mossberger's promise to pay USDA Rural Development, if USDA Rural Development paid a loss claim to the lender, is contained on the same page of the ***Guarantee*** that Petitioner Mossberger signed, and is recited in the following paragraph, paragraph 8.

8. The ***Guarantee*** establishes an **independent** obligation of Petitioner Mossberger, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

9. USDA Rural Development paid Chase $51,290.49 on April 12, 2010. RX 6, p. 8; RX 7. This, the amount USDA Rural Development paid, is the amount USDA Rural Development seeks to recover from Petitioner Mossberger under the ***Guarantee*** (less the amounts already collected from Petitioner Mossberger and her co-borrower, through ***offset***). *See* RX 10.

10. Potential Treasury collection fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another

3%) on **$40,427.49** would increase the current balance by $11,319.69, to $51,747.18. *See* RX 10, p. 2.

11. The amount Petitioner Mossberger borrowed from Draper and Kramer Mortgage Corp. on January 5, 2005, was $116,800.00. RX 2, pp. 1-3. The Due Date of the Last Payment Made was September 1, 2008. RX 6, p. 4. Petitioner Mossberger wrote (RX 8) and testified that the co-borrower, Nickolas Zitek, agreed to make all the payments; he stayed in the home when she left the home. She testified she was in the home only 6 weeks.

12. Foreclosure was initiated on February 13, 2009. RX 6, p. 4. At the Foreclosure Sale on September 30, 2009, the lender was not outbid, so the home sold to the lender, Chase. Chase then sold the REO (real estate owned) on January 8, 2010, for $80,001.00. RX 6, p. 5; RX 7.

13. Getting the security (the home) resold was an expensive process, First, all the costs of foreclosure were incurred, and Petitioner Mossberger is expected to reimburse for those costs; because no one outbid the lender at the foreclosure sale, all the costs to sell the REO were then incurred, and Petitioner Mossberger is expected to reimburse for those costs as well. Meanwhile, interest continued to accrue, taxes continued to become due, and insurance premiums continued to be paid. Interest alone from September 1, 2008 (the Due Date of the Last Payment Made) until January 8, 2010 (when the REO was sold for $80,001.00), was $9,973.20. RX 7. No additional interest has accrued since January 8, 2010.

14. Interest stopped accruing when the proceeds of sale ($80,001.00) were applied to the debt. Collections from Treasury since then (from Petitioner Mossberger, and from her co-borrower, through ***offset***), leave **$40,427.49** unpaid as of October 2, 2012 (excluding the potential remaining collection fees). *See* RX 10 and USDA Rural Development Narrative, plus Michelle Tanner's testimony.

15. Does Petitioner Mossberger owe to USDA Rural Development a balance of **$40,427.49** (as of October 2, 2012) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing

Service ***Guarantee*** (*see* RX 1, esp. p. 2)? I conclude that she does. My reasons are the same as those found in RX 8, p. 3.

16. Although Petitioner Mossberger may well recover the amounts she has paid on the debt from her co-borrower, Nickolas Zitek, she remains legally liable to repay USDA Rural Development. The debt is Petitioner Mossberger's and her co-borrower's joint-and-several obligation. When Petitioner Mossberger entered into the borrowing transaction eight years ago with her co-borrower, Nickolas Zitek, certain responsibilities were fixed, as to each of them.

17. The second issue is whether Petitioner Mossberger can withstand garnishment without it causing financial hardship. Petitioner Mossberger's Consumer Debtor Financial Statement and other filings and her testimony provide the evidence necessary for me to evaluate the factors to be considered under 31 C.F.R. § 285.11. Petitioner Mossberger is responsible to support not only herself, but also her three children. She does have the help of child support, and help from her parents, but her day care expenses alone cost roughly $1,300.00 per month. Petitioner Mossberger makes good money in car sales, but some seasons are better than others. Further, she was on maternity leave for nearly half-a-year in 2011 with her youngest child, and she is still catching up financially. She has had to adjust some payment schedules and carries unpaid credit card debt. Petitioner Mossberger's disposable pay (within the meaning of 31 C.F.R. § 285.11) is not sufficient to meet all the reasonable demands on that pay. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] 31 C.F.R. § 285.11.

18. Garnishment at 15% of Petitioner Mossberger's disposable pay would cause Petitioner Mossberger financial hardship. I find that Petitioner Mossberger's earnings, plus the child support, permit her to pay, after meeting her needs and those of her dependent children, garnishment of **no more than 5%** of her disposable pay. Consequently, to prevent further hardship, potential garnishment to repay "the debt" (*see* paragraph 5) shall be limited to **no more than 5%** of Petitioner

Mossberger's disposable pay. 31 C.F.R. § 285.11. Further, even that should begin **no sooner than July 2013**.

19. Petitioner Mossberger is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

20. Petitioner Mossberger, I do not have reason to invalidate your obligation under the ***Guarantee***. Petitioner Mossberger, you may want to appeal my Decision in U.S. District Court.

21. Garnishment of Petitioner Mossberger's disposable pay is authorized in limited amount, **none** through **June 2013**; then **beginning July 2013**, **up to 5%** of Petitioner Mossberger's disposable pay. *See* paragraphs 17 & 18. Petitioner Mossberger, you may want to telephone Treasury's collection agency to **negotiate** repayment of the debt, after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Mossberger, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may ask that **the debt be apportioned between you and your co-borrower**. Petitioner Mossberger, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Mossberger, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

22. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Mossberger and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

23. Petitioner Mossberger owes the debt described in paragraphs 5 through 16.

24. To prevent financial hardship, **garnishment is not authorized through June 2013**; thereafter, garnishment is authorized, **up to 5%** of Petitioner Mossberger's disposable pay. 31 C.F.R. § 285.11.

25.I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Mossberger's pay, to be returned to Petitioner Mossberger.

26.Repayment of the debt may occur through ***offset*** of Petitioner Mossberger's **income tax refunds** or other **Federal monies** payable to the order of Ms. Mossberger.

ORDER

27.Until the debt is repaid, Petitioner Mossberger shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

28.USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment of Petitioner Mossberger's disposable pay **through June 2013**. **Beginning July 2013**, garnishment **up to 5%** of Petitioner Mossberger's disposable pay is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

ADMINISTRATIVE WAGE GARNISHMENT ACT

In re: LARRY V. ROSCOE.
Docket No. 12-0648.
Decision and Order.
Filed December 18, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on November 7, 2012. Larry V. Roscoe, the Petitioner ("Petitioner Roscoe") participated, representing himself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

Summary of the Facts Presented

3. Petitioner Roscoe's letter dated August 30, 2012 is admitted into evidence, together with the testimony of Petitioner Roscoe.

4. USDA Rural Development's Exhibits RX 1 through RX 6, plus Narrative, Witness & Exhibit List, filed on October 9, 2012, are admitted into evidence, together with the testimony of Michelle Tanner. Also admitted into evidence is RX 7, FAXed and filed on November 7, 2012.

5. Petitioner Roscoe owed to USDA Rural Development a balance of **$4,773.37** (as of November 7, 2012), in repayment of two United States Department of Agriculture / Farmers Home Administration loans, for a home in Pennsylvania. The balance of the two loans ("the debt") is now unsecured. Petitioner Roscoe's income tax refunds have been ***offset*** several years (beginning in 2001), and garnishment began in August or September 2012, so the balance Petitioner Roscoe owes to USDA Rural

Development has repeatedly been reduced. *See* USDA Rural Development Exhibit RX 7, especially p. 2.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$4,773.37** would increase the current balance by $1,336.54, to $6,109.91. *See* RX 7, p. 2.

7. Petitioner Roscoe's obligation to repay the loans was established on June 30, 1992, when he and his former wife (then, Tammy E. Roscoe) assumed one loan and borrowed a second loan. The total they owed on June 30, 1992 was $76,491.19 (RX 1, p. 5). The debt was Petitioner Roscoe's and his co-borrower's joint-and-several obligation. Each of them was legally liable to repay USDA Rural Development. Payments were not made as required. Due to monetary default, a Notice of Acceleration and Intent to Foreclose was sent to Petitioner Roscoe on November 2, 1998 (RX 2, pp. 1-3). The Notice showed $75,367.94 unpaid principal (for both loans together) and $3,721.18 unpaid interest (which did not include both loans). *But see* RX 6, p. 1, which, although calculated as of more than 8 months later, correctly accounts for accrued interest on both loans.

8. Petitioner Roscoe testified that he wanted to hold onto the house. He testified that he was going through a divorce, and he was the only one working. He testified that a gentleman from Rural Housing in York talked to him and indicated that Rural Housing would work with him. But, his former wife would not work with him, and the home was sold in a short sale.

9. No payments were being made. The "next payment due date" was March 28, 1996. RX 2, p. 7. The home sold for $74,900.00 on July 16, 1999. More than three years' worth of interest had accrued and not been paid - - from March 28, 1996 to July 16, 1999. What else was not being paid were real estate taxes and insurance. By the time the home was sold on July 16, 1999, the debt had grown to $97,262.17 (both loans together, *see* RX 6, p. 1):

$ 75,367.94	Principal Balance prior to sale
$ 8,082.19	Interest Balance prior to sale
$ 1,132.89	Negative Escrow Balance
$ 12,623.15	Recoverable Costs, Fees (unpaid taxes, insurance, maintenance, etc.)
$ 56.00	Interest on Costs, Fees
$ 97,262.17	Total Amount Due (on both loans)

RX 6, p. 1; and the testimony of Michelle Tanner.

10. Proceeds from sale of the home ($73,402.00) paid (a) all the Recoverable Costs and Fees ($12,623.15); (b) all the Interest on Costs and Fees ($56.00); (c) all the Negative Escrow Balance ($1,132.89); (d) all the Interest ($8,082.19); and (e) all the principal on only one ($37,537.72) of the two loans (the older loan, the one that had been assumed). Petitioner Roscoe also benefitted from a $1,193.62 Refund and return of $1,498.00, a 2% Down Payment. That left $16,661.67 to be applied on the principal of the newer loan, the one that Petitioner Roscoe and his former wife borrowed as a new loan on June 30, 1992.

11. What was still owed after all those proceeds and refunds had been applied? Part of the principal balance ($21,168.55) on the newer loan was still owed. No interest was owed though; additional interest has not been required after July 16, 1999. Once the short sale proceeds were applied on the loan, interest stopped accruing.

12. Petitioner Roscoe's loan balance was forwarded to U.S. Treasury for collection on April 12, 2002. RX 3, p. 26. Petitioner Roscoe's loan balance had been reduced even before the loan went to Treasury. *See* RX 6, p. 1. Numerous ***offsets*** beginning in 2001 (and an Escrow Refund) have reduced the debt to **$4,773.37** unpaid as of November 7, 2012 (excluding the potential remaining collection fees). *See* RX 7, especially p. 2, and the testimony of Michelle Tanner. *See also* RX 6, p. 1.

13. Garnishment to repay "the debt" (*see* paragraph 5) in the amount of 15% of Petitioner Roscoe's disposable pay has created financial hardship for Petitioner Roscoe and his wife. (Disposable pay is gross pay minus

income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.) 31 C.F.R. § 285.11. Petitioner Roscoe's letter dated August 30, 2012, joined by his wife, shows that he is diabetic and requires medications. The letter states that garnishments would cause their home to be foreclosed upon.

Discussion

14. Petitioner Roscoe, as I told you during the Hearing, I am proud of you for the steady progress you have made getting the debt repaid. The $21,168.55 balance that remained after the short sale has been brought down to a **$4,773.37** balance (excluding the potential remaining collection fees), mostly because of your income tax refunds. Petitioner Roscoe, you may choose to telephone Treasury's collection agency to **negotiate** the repayment of the remaining debt. Petitioner Roscoe, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Roscoe, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may ask that **the debt be apportioned between you and your co-borrower**, your former wife. Petitioner Roscoe, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Roscoe, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

15. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Roscoe and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

16. Petitioner Roscoe owes the debt described in paragraphs 5 through 12.

17. To prevent financial hardship, **garnishment is not authorized through 2014**; thereafter, garnishment is authorized, **up to 5%** of Petitioner Roscoe's disposable pay. 31 C.F.R. § 285.11.

18. **No refund** to Petitioner Roscoe of monies already collected or collected prior to implementation of this Decision is appropriate, and I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Roscoe's pay, to be returned to Petitioner Roscoe.

19. Repayment of the debt may occur through ***offset*** of Petitioner Roscoe's **income tax refunds** or other **Federal monies** payable to the order of Mr. Roscoe.

ORDER

20. Until the debt is repaid, Petitioner Roscoe shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

21. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment of Petitioner Roscoe's disposable pay **through 2014**. **Beginning January 2015**, garnishment **up to 5%** of Petitioner Roscoe's disposable pay is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

———

In re: ANGELA R. SHEELE, N/K/A ANGELA R. KERSHAW.
Docket No. 12-0649.
Decision and Order.
Filed December 21, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on November 7, 2012. Angela R. Kershaw, formerly known as Angela R. Sheele (Petitioner Kershaw) participated, representing herself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Kershaw's Exhibits PX 1 through PX 9 (filed October 11 & 15, 2012) , and her Hearing Request dated August 21, 2012, are admitted into evidence, together with the testimony of Petitioner Kershaw.

4. USDA Rural Development's Exhibits RX 1 through RX 4, plus Narrative, Witness & Exhibit List (filed October 18, 2012), are admitted into evidence, together with the testimony of Giovanna Leopardi.
5. Petitioner Kershaw owed to USDA Rural Development **$10,220.81** (as of October 16, 2012) in repayment of a USDA Rural Development / Rural Housing Service loan borrowed in December 1999 for a home in New Mexico, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, esp. RX 1, RX 4.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on

$10,220.81, would increase the balance by $3,066.24, to $13,287.05. RX 4, p. 2.

7. The amount Petitioner Kershaw borrowed from USDA Rural Development / Rural Housing Service in December 1999 was $58,100.00. RX 1. The loan became delinquent.
USDA Rural Development approved foreclosure September 15, 2004, showing $55,673.87 principal due (RX 2, p. 24), and the foreclosure sale was held on April 7, 2005. RX 2, p. 29.

$ 55,673.87	unpaid principal
$ 3,704.59	unpaid interest
$ 1,010.01	fees/costs (taxes, insurance, other costs)
$ 357.07	late charges, other fees/costs
$ 60,745.54	

RX 3.

8. Proceeds from the foreclosure sale were $39,500.00. RX 2, p. 29. The $39,500.00 was applied to reduce the debt (leaving a balance owed of $21,245.54). RX 3. Then additional costs and fees were billed ($1,761.69), leaving a balance owed of $23,007.23. RX 3. U.S. Treasury ***offsets*** have since reduced the balance to **$10,220.81**. RX 4. These ***offsets*** were substantial income tax refunds of Petitioner Kershaw, intercepted by U.S. Treasury in 2010, 2011, and 2012. RX 4. Since 2005 (when the proceeds from the foreclosure sale were applied), no additional interest has accrued.

9. Petitioner Kershaw owes the balance of **$10,220.81** (excluding potential collection fees) as of October 16, 2012, and USDA Rural Development may collect that amount from her. RX 4.

10. Petitioner Kershaw testified and wrote (PX 9) that she and her 5-year old son have experienced financial hardship because of the ***offsets*** of her income tax refunds. She was newly divorced - - a single mom - - when the first one happened. She testified that now finally, her former husband has begun to pay child support regularly. Petitioner Kershaw

works full-time and must provide day care for her son after school and on school holidays. Petitioner Kershaw had been in her current job only about one month at the time of the Hearing.

11. Petitioner Kershaw's disposable pay (within the meaning of 31 C.F.R. § 285.11) is required, together with child support, together with a small amount of support from New Mexico, to meet her reasonable and necessary living expenses for herself and her son. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance; and in certain situations minus other employee benefits contributions that are required to be withheld.]

Discussion

12. Petitioner Kershaw, you may choose to telephone Treasury's collection agency to **negotiate** the repayment of the remaining debt. Petitioner Kershaw, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Kershaw, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Kershaw, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Kershaw, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Kershaw and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner Kershaw owes the debt described in paragraphs 5 through 9.

15. To prevent financial hardship, **garnishment is not authorized through 2014**; thereafter, garnishment is authorized, **up to 5%** of Petitioner Kershaw's disposable pay. 31 C.F.R. § 285.11.

16.I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Kershaw's pay, to be returned to Petitioner Kershaw.

17.Repayment of the debt may occur through ***offset*** of Petitioner Kershaw's **income tax refunds** or other **Federal monies** payable to the order of Ms. Kershaw.

ORDER

18.Until the debt is repaid, Petitioner Kershaw shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

19.USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment of Petitioner Kershaw's disposable pay **through 2014**. **Beginning January 2015**, garnishment **up to 5%** of Petitioner Kershaw's disposable pay is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

_____

In re: DEBRA A. HAYES, N/K/A DEBRA A. CHRISTENSEN.
Docket No. 12-0636.
Decision and Order.
Filed December 26, 2012.

AWG.

Petitioner, pro se.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on November 7, 2012. Debra A. Christensen, formerly known as Debra A. Hayes (Petitioner Christensen) participated, representing herself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Christensen's documents including her Consumer Debtor Financial Statement (filed November 2, 2012), plus her Hearing Request and attached letter, both dated August 20, 2012, plus Notice of Default and Election to Sell (dated April 3, 2006), are admitted into evidence, together with the testimony of Petitioner Christensen.

4. USDA Rural Development's Exhibits RX 1 through RX 6, plus Narrative, Witness & Exhibit List (filed October 16, 2012), are admitted into evidence, together with the testimony of Giovanna Leopardi.

5. Petitioner Christensen owed to USDA Rural Development **less than $2,045.90** (as of November 7, 2012) in repayment of a USDA Farmers Home Administration loan borrowed in July 1994 for a home in Utah, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, esp. RX 1, RX 6.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$2,045.90**, would increase the balance by $572.85, to $2,618.75. RX 6, p. 2.

7. The amount Petitioner Christensen borrowed from USDA Farmers Home Administration in July 1994 was $56,280.00. RX 1. The loan became delinquent and foreclosure was approved, but the foreclosure was canceled in May 2006. In August 2006 the home was sold in a short sale. The purchaser thereby obtained the real estate free and clear from the deed of trust, even though the sale proceeds did not pay in full the remaining loan balance owed.

8. The purchaser paid $35,000.00, of which $34,185.84 was available to apply on the remaining loan balance owed. RX 3, p. 39. The sale proceeds would not have paid even the principal balance owed, which was $39,997.93. RX 3, p. 39. *See* RX 5, p. 1.

$ 39,997.93	unpaid principal
$ 1,845.72	interest
$ 749.89	uncollected interest
$ 1,787.46	fees/costs (taxes, insurance, other costs)
$ 44,381.00	remaining loan balance owed

RX 5, p. 1.

9. The sale proceeds ($34,185.84) were applied to reduce the remaining loan balance owed, leaving $10,195.16 still owed. RX 5, p. 1. Then, the uncollected interest was waived ($749.89), leaving a balance owed of $9,445.27. RX 5, p. 1. Then, through debt settlement, Petitioner Christensen received **forgiveness** of $6,445.27, so long as she would pay $3,000.00. It is the $3,000.00 that Petitioner Christensen is still working to repay. Since August 2006 (when the proceeds from the short sale were applied), no additional interest has accrued.

10. U.S. Treasury ***offsets*** and other payments processed at U.S. Treasury have since reduced the balance to **less than $2,045.90**. *See* RX 6, esp. p. 1. Petitioner Christensen owes the balance of **less than $2,045.90**

(excluding potential collection fees) and USDA Rural Development may collect that amount from her. RX 6.

11. Petitioner Christensen testified and wrote that she has experienced financial hardship because of the ***offsets*** and other payments she has made. When the debt was still at USDA Rural Development (Centralized Servicing Agency), the plan (in anticipation of the short sale) was for Petitioner Christensen to pay $50.00 per month for 60 months. RX 5, pp. 3 and 5. Petitioner Christensen never made any of those payments. Still USDA Rural Development did **not** add back in, the $6,445.27 that was forgiven, which remains forgiven.

12. Petitioner Christensen is married, but her husband has no obligation to repay the debt. Her husband pays rent and utilities, which gives Petitioner Christensen greater freedom in paying her own bills. Petitioner Christensen's disposable pay (within the meaning of 31 C.F.R. § 285.11) is currently not adequate for her to make the $100 and $75 payments she has on occasion made to U.S. Treasury. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance; and in certain situations minus other employee benefits contributions that are required to be withheld.]

Discussion

13. Petitioner Christensen, you may choose to telephone Treasury's collection agency to **negotiate** the repayment of the remaining debt. Petitioner Christensen, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Christensen, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Christensen, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Christensen, you may wish to include someone else with you in the telephone call if you call to negotiate.

ADMINISTRATIVE WAGE GARNISHMENT ACT

Findings, Analysis and Conclusions

14. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Christensen and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

15. Petitioner Christensen owes the debt described in paragraphs 5 through 10.

16. To prevent financial hardship, **garnishment is not authorized through June 2013**; thereafter, garnishment is authorized, **up to $50 per month** of Petitioner Christensen's disposable pay. 31 C.F.R. § 285.11.

17. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Christensen's pay, to be returned to Petitioner Christensen.

18. Repayment of the debt may occur through ***offset*** of Petitioner Christensen's **income tax refunds** or other **Federal monies** payable to the order of Ms. Christensen.

ORDER

19. Until the debt is repaid, Petitioner Christensen shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

20. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment of Petitioner Christensen's disposable pay **through June 2013**. **Beginning July 2013**, garnishment **up to $50 per month** of Petitioner Christensen's disposable pay is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

_____

In re: JANET PACHECO.
Docket No. 13-0006.
Decision and Order.
Filed December 27, 2012.

AWG.

Petitioner, pro se.
Michelle Tanner for RD.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on December 4, 2012. Janet Pacheco, the Petitioner (Petitioner Pacheco), participated, representing herself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

3. The record was held open through December 18, 2012.

Summary of the Facts Presented

4. Petitioner Pacheco's documents (filed on December 17, 2012) are admitted into evidence, together with her Hearing Request (dated September 21, 2012), together with the testimony of Petitioner Pacheco.

5. USDA Rural Development's Exhibits RX 1 through RX 7, plus Narrative, Witness & Exhibit List (filed on October 25, 2012), are admitted into evidence, together with the testimony of Michelle Tanner.
6. Petitioner Pacheco owes to USDA Rural Development **$60,035.77** (as of October 22, 2012) in repayment of a USDA Farmers Home Administration loan borrowed in 1986 for a home in New Jersey, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Narrative and RX 1. The Narrative **corrects and updates** RX 7, p. 2, explaining that $24,272.91 was incorrectly charged by USDA

Rural Development before the account was sent to U.S. Treasury for collection.

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$60,035.77**, would increase the current balance by about $16,810.02, to $76,845.79. RX 7, p. 1, plus the Narrative.

8. The amount Petitioner Pacheco borrowed in 1986 from USDA Farmers Home Administration was $50,000.00. RX 1. Reamortization in 1989 brought the past due amount current, by adding overdue amounts to the principal, resulting in a principal balance of $48,316.11. RX 1, p. 3.

9. The loan was accelerated for foreclosure on June 28, 1999 due to "monetary default". RX 2. The "next due" date was March 18, 199**5**; that is, the loan was 52 months past due when accelerated for foreclosure. RX 2, p. 4. The Notice of Acceleration (and of Intent to Foreclose) shows $47,518.95 unpaid principal and $16,461.74 unpaid interest (as of June 28, 1999). RX 2, p. 1. This did not include other costs, such as the unpaid insurance and unpaid real estate taxes that had to be advanced by USDA Rural Development.

10. Before a foreclosure sale was held, a buyer purchased the home by assuming the loan, based on an "As Is" appraised value of $35,000.00 for the home. RX 3. The planned assumption was approved July 9, 1999. RX 3. The buyer (the one assuming the loan) was to borrow an additional $40,000.00 to make repairs, with December 17, 1999 being the effective date of assumption. RX 3. [Petitioner Pacheco has no obligation regarding the buyer's additional loan for making repairs.]

11. As of the date of the assumption (short sale) on December 17, 1999, the debt balance was $97,048.63.

$ 47,518.95	unpaid principal
$ 18,589.02	unpaid interest
$ 29,391.34	fees/costs (includes unpaid taxes, unpaid insurance, and other costs)
$ 1,549.32	interest on fees/costs

$ 97,048.63
========

RX 6 and Michelle Tanner's testimony.

Interest had accrued to December 17, 1999 (56 months past due). RX 6. Since the loan assumption (short sale) on December 17, 1999, no additional interest has accrued.

The $35,000.00 from the buyer (the one assuming the loan) was applied to reduce the debt, leaving a balance owed of $62,048.63.

$ 97,048.63
- $ 35,000.00

$ 62,048.63
========

The cost of 2 inspections and additional taxes were then added ($749.14 added, leaving a balance owed of $62,797.77). This $62,797.77 figure is what should have been sent to U.S. Treasury for collection.

$ 62,048.63
+ $ 749.14

$ 62,797.77
========

Michelle Tanner is thanked for her excellent work, finding and correcting the $24,272.91 error. [U.S. Treasury corrected the balance by subtracting $24,272.91 on October 27, 2012.]

12.U.S. Treasury intercepted an income tax refund of $2,779.00 in February 2012; this ***offset*** of Petitioner Pacheco's income tax refund brought the balance to **$60,035.77**. RX 7 and Michelle Tanner's testimony. Petitioner Pacheco still (as of October 22, 2012) owes the

balance of **$60,035.77** (excluding potential collection fees), and USDA Rural Development may collect that amount from her.

13. Petitioner Pacheco testified that she is unemployed, having had to stop working because of her chronic obstructive pulmonary disease (COPD). The plastic molding machines were intolerable. The letter from MedPlast dated September 21, 2012 and other documents filed December 17, 2012 prove that Petitioner Pacheco was involuntarily separated from her last job. When Petitioner Pacheco is successful in finding work that does not aggravate her condition, she will need some time to catch up financially before garnishment would be appropriate. Legally, she is allowed 12 months in her next job before her wages will be garnished.

14. Petitioner Pacheco's documents filed December 17, 2012 and her testimony persuade me that to prevent financial hardship, potential garnishment to repay "the debt" (*see* paragraph 6) must be limited to **0%** of Petitioner Pacheco's disposable pay through July 2014; then, subject to the limitation not to garnish for her first 12 months in her next job, **up to 5%** of Petitioner Pacheco's disposable pay beginning August 2014 through July 2015; and **up to 10%** of Petitioner Pacheco's disposable pay thereafter. 31 C.F.R. § 285.11.

15. Petitioner Pacheco is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

16. Garnishment is **not** authorized until August 2014, and then only in limited amount. *See* paragraphs 13 and 14. I encourage **Petitioner Pacheco and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Pacheco, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Pacheco, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Pacheco, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years.

Petitioner Pacheco, you may wish to include someone else with you in the telephone call if you call to negotiate.

Findings, Analysis and Conclusions

17. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Pacheco and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

18. Petitioner Pacheco owes the debt described in paragraphs 6 through 12.

19. Garnishment is **not authorized through July 2014**. Subject to the limitation not to garnish for her first 12 months in her next job, beginning August 2014 through July 2015, garnishment **up to 5%** of Petitioner Pacheco's disposable pay, and thereafter, garnishment **up to 10%** of Petitioner Pacheco's disposable pay, is authorized. 31 C.F.R. § 285.11.

20. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Pacheco's pay, to be returned to Petitioner Pacheco.

21. Repayment of the debt may occur through ***offset*** of Petitioner Pacheco's **income tax refunds** or other **Federal monies** payable to the order of Ms. Pacheco.

ORDER

22. Until the debt is repaid, Petitioner Pacheco shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

23. USDA Rural Development, and those collecting on its behalf, are **not authorized** to proceed with garnishment of Petitioner Pacheco's disposable pay through July 2014. Subject to the limitation not to garnish for her first 12 months in her next job, beginning August 2014 through July 2015, garnishment **up to 5%** of Petitioner Pacheco's

disposable pay, and garnishment **up to 10%** of Petitioner Pacheco's disposable pay thereafter, is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

_____

In re: STACY WANDER, N/K/A STACY SASSEN.
Docket No. 12-0497.
Decision and Order.
Filed December 28, 2012.

AWG.

James W. Hess, Esq. for Petitioner.
Giovanna Leopardi for RD.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

1. The hearing by telephone was held on September 5 and 26, 2012. Stacy Sassen, formerly known as Stacy Wander (Petitioner Sassen) participated, represented by James W. Hess, Esq.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Giovanna Leopardi.

Summary of the Facts Presented

3. Petitioner Sassen's documents (filed September 4, 20, and 26, 2012), together with the Milinkovich opinion dated October 17, 2012 (Exhibit A), together with Petitioner Sassen's Hearing Request dated June 7, 2012, are admitted into evidence, together with the testimony of Petitioner Sassen.

4. USDA Rural Development's Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List (filed July 17, 2012) and supplemental

Narratives (filed September 26, 2012 and October 5, 2012), together with Notice of Mortgage Foreclosure Sale, and the RD Instruction 1980, are admitted into evidence, together with the testimony of Giovanna Leopardi.

5. My exhibit, ALJX 1 (filed October 17, 2012), which is the Lamoreaux Form 1099-A, is admitted into evidence.

6. USDA Rural Development's position is that Petitioner Sassen owes to USDA Rural Development **$61,280.38** (as of July 13, 2012), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for a loan made in 2008 ("the debt"). The loan was made by Wells Fargo Bank, N.A. ("Wells Fargo"). RX 2.

7. Petitioner Sassen's position is that Petitioner Sassen owes **nothing** to USDA Rural Development and is **due a refund** for the amount taken from her, because there is no valid debt. Petitioner Sassen's income tax refund was intercepted (***offset***), $2,386.00 taken in February 2012 (*see* RX 10, p. 1).

8. Petitioner Sassen testified that she understood from Wells Fargo that there was to be forgiveness of debt of the difference between the balance owed ($157,769.84 principal) and the proceeds from sale of the home.

9. Wells Fargo did not need to look to Petitioner Sassen because it had the ***Guarantee***. Wells Fargo looked to USDA Rural Development to be made whole under the ***Guarantee***, and its claim was paid, $63,666.38, on August 16, 2011. RX 6, p. 10. This case is an *administrative* collection action brought by an agency of the United States government, USDA Rural Development. The rules that apply here, concerning a ***Guarantee*** by which Petitioner Sassen promised to reimburse USDA Rural Development if it paid a loss claim to Wells Fargo, are different from the rules that would have applied in Minnesota courts if Wells Fargo sought to collect a personal deficiency. *Administrative* collections such as this do not require a valid judgment to support garnishment or ***offset***.

10. After careful review of all of the evidence and the excellent argument by Petitioner Sassen's attorney, James W. Hess, Esq., I agree with USDA Rural Development's position. This is in part because of the independent nature of the ***Guarantee***; and in part because an agency of the United States government collecting administratively has rules that differ from those of the various jurisdictions in which the loans were made. Even if Petitioner Sassen was protected under Minnesota law from personal deficiency being entered against her in favor of Wells Fargo, USDA Rural Development may still collect from her administratively, pursuant to the ***Guarantee***.

11. Petitioner Sassen owes to USDA Rural Development **$61,280.38** (as of July 13, 2012), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 1, esp. p. 2) for a loan made in 2008, the balance of which is now unsecured ("the debt"). Petitioner Sassen borrowed to buy a home in Minnesota.

12. The ***Guarantee*** (RX 1) establishes an **independent** obligation of Petitioner Sassen, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

13. Petitioner Sassen borrowed $159,000.00 on August 14, 2008 to buy the home. RX 2. The Due Date of Last Payment Made was June 1, 2009. RX 6, p. 4. Foreclosure was initiated on April 26, 2010. RX 6, p. 5.

14. At the foreclosure sale on August 12, 2010, the lender Wells Fargo bid $126,650.00 and acquired the home, which became REO (Real Estate Owned). RX 3; RX 6, p. 5. From the date of the foreclosure sale, six months was allowed for redemption. RX 3. Thus, Wells Fargo would obtain marketable title February 14, 2011. RX 3; RX 6, p. 5; *see*

note at bottom of RX 6, p. 9. The six-month marketing period would expire August 13, 2011. Wells Fargo sold the home for $135,000.00 on April 20, 2011. RX 5, pp. 5-8.

15. USDA Rural Development reimbursed Wells Fargo $63,666.38 on August 16, 2011. RX 6, p. 10. RX 7 details the loss claim paid under the ***Guarantee***, showing how the debt became $63,666.38. USDA Rural Development's payment of $63,666.38 is the amount USDA Rural Development seeks to recover from Petitioner Sassen under the ***Guarantee***.
RX 8.

16. Petitioner Sassen's income tax refund of $2,386.00 was intercepted and applied to reduce the debt (***offset***). As of July 13, 2012, Petitioner Sassen's debt had been reduced to **$61,280.38**. RX 10.

17. Interest stopped accruing on April 20, 2011. Repayment of the debt is more manageable with no interest accruing. When income tax refunds are ***offset***, the costs of collection to be paid by Petitioner Sassen, are the flat fee (now $17.00). These costs can be considerably lower than the percentage (up to 28%) of the garnishment or voluntary payment applied to collection costs (before the balance is applied to reduce the debt).

18. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$61,280.38**, would increase the balance by $17,158.51, to $78,438.89. RX 10, p. 2.

Findings, Analysis and Conclusions

19. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Sassen and USDA Rural Development; and over the subject matter (administrative wage garnishment, which requires determining whether Petitioner Sassen owes a valid debt to USDA Rural Development).

20. I determine that Petitioner Sassen does owe the debt described in paragraphs 6 through 18.

21. Petitioner Sassen's attorney, James W. Hess, Esq., argued that Wells Fargo lost its opportunity to pursue a deficiency under Minnesota law, by choosing foreclosure **by advertisement** which, under Minnesota law, required it to forego obtaining a deficiency (instead of choosing foreclosure **by action**, which would have included establishing a deficiency). I conclude that the debt here is based not on Wells Fargo establishing a deficiency, but instead on Petitioner Sassen's promise to reimburse contained in the ***Guarantee***, Form RD 1980-21. USDA Rural Development here, in this *administrative* collection action brought by an agency of the United States government, is not subject to state foreclosure laws or deficiency judgment statutes.

22. Mr. Hess argued that the Form 1099-A utilized by Wells Fargo (filed on September 20, 2012) **is** further proof of debt forgiveness, and the expert opinion of Peter L. Milinkovich dated October 17, 2012 (Exhibit A) supports the argument. The Wells Fargo Form 1099-A shows that the lender acquired the property on February 14, 2011 (when the 6-month redemption period expired and Wells Fargo obtained marketable title). It shows the "Balance of principal outstanding" to be $157,769.84, and the "Fair market value of property" to be $126,650.00 (Wells Fargo's bid at the foreclosure sale). Thus, a deficiency is suggested. Further, the box is checked, where the Form instructs, "Check here if the borrower was personally liable for repayment of the debt." The Form 1099-A is **not** a Form 1099-C. A Form 1099-C which would suggest that the remainder of the debt has been canceled.

23. Keeping Mr. Hess's argument and the evidence from Peter L. Milinkovich in mind, I compare the Wells Fargo Form 1099-A with the Lamoreaux Forms 1099-A (ALJX-1, filed October 17, 2012), prepared by Chase Home Finance LLC ("Chase"). The differences are striking. The Chase Form 1099-A shows the "Balance of principal outstanding" to be $47,565.40, and the "Fair market value of property" to be $65,000.00, **not** suggesting a deficiency. Further, the box "No" is checked, where the Form asks, "Was borrower personally liable for repayment of the debt." So, even though the Lamoreauxs won their administrative wage garnishment cases, the issues in their cases are distinguishable from the issues here. The Lamoreaux cases are found on the USDA website, search "OALJ" then choose "Miscellaneous Orders" 2012.

http://www.dm.usda.gov/oaljdecisions/120518_12-0312_OD_JamesLamoreaux.pdf

http://www.dm.usda.gov/oaljdecisions/120518_12-0311_OD_JenniferLamoreaux.pdf

24.I conclude that Form 1099s must be evaluated in context with all the other evidence to determine whether forgiveness or cancellation of the remaining debt happened. Here, I conclude that the debt was **not** forgiven and **not** canceled.

25.The Notice of Mortgage Foreclosure Sale (filed September 26, 2012) does **not** lead Petitioner Sassen to believe that no deficiency will be established. Thus, the issues in the Garza administrative wage garnishment case, which Garza won, are distinguishable from the issues here. The Garza case is found on the USDA website, search "OALJ" then choose "Initial Decisions" 2012.

http://www.dm.usda.gov/oaljdecisions/120828_12-0346_DO_AWG_ElvaGarza.pdf

26.The authority of USDA Rural Development to collect here can be found in the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996 (DCIA) (31 U.S.C. § 3701 *et seq*.). Under 31 U.S.C. § 3701(b), I find that Petitioner Sassen does owe the balance of **$61,280.38** (as of July 13, 2012) to the United States, on account of a loan guaranteed by the Government. Next, I find that the regulations that apply here are 7 C.F.R. Part 3 (Debt Management), particularly 7 C.F.R. § 3.53, especially 7 C.F.R. § 3.53(d) and (e).

27.Petitioner Sassen's Consumer Debtor Financial Statement, payroll data, and other financial documentation (filed September 4, 2012) are thoroughly and beautifully presented. Petitioner Sassen has a demanding job, and she is well-compensated. She is responsible for three minor children in addition to herself. At present her reasonable and necessary living expenses consume her disposable pay plus child support. To prevent financial hardship, garnishment is authorized, as follows:

through 2013, **no** garnishment. During 2014, garnishment **up to 7%** of Petitioner Sassen's disposable pay; and beginning 2015, garnishment **up to 15%** of Petitioner Sassen's disposable pay. 31 C.F.R. § 285.11.

28. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Sassen's pay, to be returned to Petitioner Sassen.

29. Repayment of the debt may occur through ***offset*** of Petitioner Sassen's **income tax refunds** or other **Federal monies** payable to the order of Ms. Sassen (whether or not garnishment is authorized).

30. Petitioner Sassen is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

31. I encourage **Petitioner Sassen and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Sassen, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Sassen, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Sassen, you may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. Petitioner Sassen, you may wish to include someone else with you in the telephone call if you call to negotiate.

ORDER

32. Until the debt is repaid, Petitioner Sassen shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

33. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through 2013. During 2014, garnishment **up to 7%** of Petitioner Sassen's disposable pay is

authorized; and beginning 2015, garnishment **up to 15%** of Petitioner Sassen's disposable pay is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: TERRANOVA ENTERPRISES, INC., A TEXAS CORPORATION, D/B/A ANIMAL ENCOUNTERS, INC.; DOUGLAS KEITH TERRANOVA, AN INDIVIDUAL; WILL ANN TERRANOVA, AN INDIVIDUAL; FARIN FLEMING, AN INDIVIDUAL; SLOAN DAMON, AN INDIVIDUAL; CRAIG PERRY, AN INDIVIDUAL D/B/A PERRY'S EXOTIC PETTING ZOO; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION; EUGENE "TREY" KEY, III, AN INDIVIDUAL; AND KEY EQUIPMENT COMPANY, INC., AN OKLAHOMA CORPORATION, D/B/A CULPEPPER & MERRIWEATHER CIRCUS.
Docket No. 09-0155.
Decision and Order.
Filed July 19, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Larry J. Thorson, Esq. for Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO CRAIG PERRY AND PERRY'S WILDERNESS RANCH & ZOO, INC.

Procedural History

On July 23, 2009, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. On June 8, 2010, the Administrator filed an Amended Complaint, which is the operative pleading in this proceeding. The Administrator alleges: (1) during the period August 7, 2008, through August 17, 2008, Craig Perry operated as an "exhibitor," as that term is

defined in 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], without an Animal Welfare Act license, in willful violation of 9 C.F.R. § 2.1(a); and (2) on December 15, 2009, during business hours, Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc. [hereinafter PWR], failed to allow Animal and Plant Health Inspection Service officials to enter Mr. Perry and PWR's place of business and conduct an inspection of their facilities, animals, and records, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). The Administrator also alleges Mr. Perry and PWR willfully violated the Animal Welfare Act and the Regulations at the Iowa State Fair, during the period August 7, 2008, through August 16, 2008. These violations [hereinafter the Iowa State Fair violations] concern handling, care, housing, and feeding of elephants exhibited at the Iowa State Fair by Terranova Enterprises, Inc., and Douglas Keith Terranova [hereinafter the Terranova Respondents].[1] On June 30, 2010, Mr. Perry and PWR filed an answer denying the material allegations of the Amended Complaint and raising affirmative defenses.

During the period February 17, 2011, through February 25, 2011, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing in person in Washington, DC, and, by audio-visual telecommunication with Mr. Perry and PWR who were located in Ames, Iowa. Larry J. Thorson, Ackley, Kopecky & Kingery, LLP, Cedar Rapids, Iowa, represented Mr. Perry and PWR. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator.

On December 20, 2011, after the parties submitted post-hearing briefs, the ALJ filed a "Decision and Order (Craig Perry d/b/a Perry's Exotic Petting Zoo; Perry's Wilderness Ranch & Zoo, Inc.)" [hereinafter the ALJ's Perry Decision] in which the ALJ concluded that, on December 15, 2009, Mr. Perry and PWR failed to allow Animal and Plant Health Inspection Service officials access to Mr. Perry and PWR's

[1] Amended Compl. at 16-19 and 22 ¶¶ G 11-G 13, G 15-G 16, H 1.

place of business to conduct an inspection, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126. The ALJ concluded Mr. Perry and PWR's violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 was not willful and ordered Mr. Perry and PWR to cease and desist from further violations of the Animal Welfare Act and the Regulations. (ALJ's Perry Decision at 27.) The ALJ dismissed the remaining violations alleged against Mr. Perry and PWR (ALJ's Perry Decision at 26).

On January 27, 2012, the Administrator filed "Complainant's Petition for Appeal as to Respondents Craig Perry and Perry's Wilderness Ranch & Zoo, Inc." [hereinafter Appeal Petition]. On February 24, 2012, Mr. Perry and PWR filed "Response to Appeal Petition of Complainant" [hereinafter Response to Appeal Petition]. On March 2, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt the ALJ's conclusion that Mr. Perry and PWR violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126, except I conclude the violation was willful, and I assess Mr. Perry and PWR a civil penalty for their willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126.

DECISION

Discussion

The Administrator raises three issues on appeal. First, the Administrator contends, while the ALJ correctly concluded that Mr. Perry and PWR violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 on December 15, 2009, the ALJ erroneously concluded the violation was not willful (Appeal Pet. at 6-9). Mr. Perry and PWR agree they violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126, but contend the ALJ correctly concluded their violation was not willful (Response to Appeal Pet. at 2-5, 11).

The Animal Welfare Act authorizes the Secretary of Agriculture to conduct inspections and investigations to determine whether any exhibitor has violated or is violating the Animal Welfare Act or the

Regulations and requires exhibitors to allow access to their places of business, facilities, animals, and records, as follows:

> **§ 2146. Administration and enforcement by Secretary**
>
> **(a) Investigations and inspections**
>
> The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

7 U.S.C. § 2146(a).

The Regulations require that each exhibitor allow Animal and Plant Health Inspection Service officials access to the exhibitor's place of business, records, facilities, property, and animals, as follows:

> **§ 2.126 Access and inspection of records and property.**
>
> (a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:
> (1) To enter its place of business;
> (2) To examine records required to be kept by the Act and the regulations in this part;
> (3) To make copies of the records;

> (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
> (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.
> (b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals must be extended to APHIS officials by the dealer, exhibitor, intermediate handler, or carrier, and a responsible adult shall be made available to accompany APHIS officials during the inspection process.

9 C.F.R. § 2.126.

A willful act under the Administrative Procedure Act (5 U.S.C. § 558(c)) is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.[2] It is undisputed that Mr. Perry intentionally left his and PWR's place of business during business hours on December 15, 2009, without designating a person to allow Animal and Plant Health Inspection Service officials to enter that place of business, and that, during Mr. Perry's absence, an Animal and Plant Health Inspection Service official attempted to enter the place of business to conduct the activities listed in 9 C.F.R. § 2.126. I conclude Mr. Perry's intentional conduct is by definition "willful" under the Administrative Procedure Act; thus, I conclude Mr. Perry and PWR willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 on December 15, 2009.

Second, the Administrator contends the ALJ erroneously failed to assess Mr. Perry and PWR a civil penalty for their December 15, 2009,

---

[2] *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 860-61 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re D&H Pet Farms, Inc.*, 68 Agric. Dec. 798, 812-13 (2009); *In re Jewel Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc*., 37 Agric. Dec. 293, 306 (1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978).

violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 (Appeal Pet. at 9-11).

The Animal Welfare Act authorizes the Secretary of Agriculture to assess any exhibitor a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act or the Regulations. With respect to the civil penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. (7 U.S.C. § 2149(b).

Mr. Perry and PWR operate a large-sized business. An exhibitor's failure to provide Animal and Plant Health Inspection Service officials access to the exhibitor's place of business in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 is a serious violation because it thwarts the Secretary of Agriculture's ability to monitor the exhibitor's compliance with the Animal Welfare Act and the Regulations and severely undermines the Secretary of Agriculture's ability to enforce the Animal Welfare Act. However, Mr. Perry's December 15, 2009, absence from his and PWR's place of business was in response to a medical emergency suffered by Mr. Perry's long-time friend and volunteer, Michael Pacek, and, shortly after Mr. Perry returned to the place of business and determined an Animal and Plant Health Inspection Service official had attempted to enter the place of business to conduct an inspection, Mr. Perry contacted the Animal and Plant Health Inspection Service official and asked him to return to conduct the inspection or, in the alternative, to arrange another date for the inspection (Tr. 1776-82). Moreover, when Mr. Perry is absent from his and PWR's place of business during business hours, Mr. Perry designates a person to be available to provide Animal and Plant Health Inspection Service officials access to the place of business; however, due to the December 15, 2009, emergency, Mr. Perry did not have an opportunity to designate a person to be available to provide the Animal and Plant Health Inspection Service official access to the place of business (Tr. 1828-31). PWR has been an Animal Welfare Act licensee for approximately 20 years (Tr. 1699-1700), and the Administrator cites no previous violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 either by Mr. Perry or by PWR.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991):

> [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. The Administrator recommends that I assess Mr. Perry and PWR, jointly and severally, a civil penalty of not less than $1,000. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[3]

After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), and the remedial purposes of the Animal Welfare Act, I conclude assessment of a $500

---

[3] *In re Sam Mazzola*, 68 Agric. Dec. 822, 849 (2009), *dismissed*, 2011 WL 2988902 (6th Cir. Oct. 27, 2010); *In re Lorenza Pearson*, 68 Agric. Dec. 685, 731 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *In re Amarillo Wildlife Refuge, Inc.,* 68 Agric. Dec. 77, 89 (2009); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

civil penalty is appropriate and necessary to ensure Mr. Perry and PWR's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, the Administrator contends the ALJ erroneously failed to find that Mr. Perry and PWR committed the Iowa State Fair violations (Appeal Pet. at 11-21).

The alleged Iowa State Fair violations concern elephants exhibited by the Terranova Respondents. The ALJ concluded, although the Terranova Respondents exhibited elephants at the Iowa State Fair upon Mr. Perry's invitation, no principal-agency relationship existed between Mr. Perry and PWR and the Terranova Respondents as a result of the exhibition and, as to Mr. Perry and PWR, the ALJ dismissed the Iowa State Fair violations (ALJ's Perry Decision at 26 ¶¶ 5-6).

The Administrator correctly argues that a principal-agency relationship need not be established to hold Mr. Perry and PWR liable for the Iowa State Fair violations (Appeal Pet. at 14). I have long held, when two or more persons exhibit animals jointly, they all can be liable for violations of the Animal Welfare Act and the Regulations that arise out of that exhibition and there is no requirement that their relationship meet the requirements for a partnership or joint venture.[4] However, while the Administrator introduced some evidence that Mr. Perry and PWR jointly engaged in the exhibition of elephants with the Terranova

[4] *In re Gus White III*, 49 Agric. Dec. 123, 154 (1990) (stating, when two persons act together in the exhibition of animals, it is not necessary that their relationship meet all of the technical requirements of a partnership or joint venture in order to hold that both are exhibitors and jointly and severally liable for the violations); *In re Hank Post*, 47 Agric. Dec. 542, 547 (1988) (stating whether or not the shared duties of three persons constituted a joint venture is not the critical issue; the controlling consideration is that each person exercised control and authority over the way the animal was handled when exhibited and any one of them could have prevented the mishandling). *Cf. In re Micheal McCall*, 52 Agric. Dec. 986, 998 (1993) (stating the distinction between two kennels was so blurred as to make them, in reality, a single operation for which both individual kennel owners were jointly responsible).

Respondents at the Iowa State Fair, I do not find that the Administrator established joint exhibition by a preponderance of the evidence. Mr. Perry and PWR established that their employees and volunteers were prohibited from entering the elephant area and that Mr. Perry and PWR lacked control over the elephants (ALJ's Perry Decision at 20). Therefore, I agree with the ALJ's dismissal of the Iowa State Fair violations as to Mr. Perry and PWR.

Findings of Fact

1. Craig Perry is an individual whose business address is located in Center Point, Iowa 52213.

2. At all times material to this proceeding, Craig Perry was a corporate officer and director of Perry's Wilderness Ranch & Zoo, Inc.

3. Perry's Wilderness Ranch & Zoo, Inc., is an Iowa corporation.

4. At all times material to this proceeding, Perry's Wilderness Ranch & Zoo, Inc., was an Animal Welfare Act licensee and held Animal Welfare Act license number 42-C-0101.

5. On December 15, 2009, no one was at Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.'s place of business to allow an Animal and Plant Health Inspection Service official to enter the place of business to conduct an inspection of the facility, records, and animals.

Conclusions of Law

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

2. Pursuant to 7 U.S.C. § 2139, Craig Perry's acts, omissions, or failures in his capacity as corporate officer and director of Perry's Wilderness Ranch & Zoo, Inc., are deemed to be his own as well as those of Perry's Wilderness Ranch & Zoo, Inc.

3. On December 15, 2009, Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., failed to allow an Animal and Plant Health Inspection Service official access to Craig Perry and Perry's Wilderness Ranch & Zoo,

Inc.'s place of business to conduct an inspection, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126.

4. An order instructing Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., to cease and desist from failing to allow Animal and Plant Health Inspection Service officials access to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.'s place of business to conduct the activities listed in 9 C.F.R. § 2.126 is warranted in law and justified by the facts.

5. An order assessing Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., jointly and severally, a $500 civil penalty is warranted in law and justified by the facts.

For the foregoing reasons, the following Order is issued.

ORDER

1. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., 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 failing to allow Animal and Plant Health Inspection Service officials access to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.'s place of business to conduct the activities listed in 9 C.F.R. § 2.126.

Paragraph 1 of this Order shall become effective upon service of this Order on Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.

2. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., jointly and severally, are assessed a $500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Craig Perry and Perry's Wilderness Ranch & Zoo, Inc. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., shall state on the certified check or money order that payment is in reference to AWA Docket No. 09-0155.

RIGHT TO JUDICIAL REVIEW

Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., have the right to seek judicial review of the Order in this Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.[5] The date of entry of the Order in this Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., is July 19, 2012.

_____

[5] 7 U.S.C. § 2149(c).

In re: FOR THE BIRDS, INC., AN IDAHO CORPORATION; JERRY LEROY KORN, AN INDIVIDUAL; MICHAEL SCOTT KORN, AN INDIVIDUAL; AND RAYMOND WILLIS, AN INDIVIDUAL.
Docket No. 09-0196.
Decision and Order.
Filed August 7, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Raymond Willis, pro se.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO RAYMOND WILLIS

PROCEDURAL HISTORY

On September 14, 2009, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued pursuant to 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 of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, from June 11, 2008, through the filing of the Complaint, Raymond Willis: (1) operated as an exhibitor without an Animal Welfare Act license, in willful violation of 9 C.F.R. §§ 2.1(a) and 2.100(a); (2) failed to have an attending veterinarian who provided veterinary care to respondents' animals, in willful violation of 9 C.F.R. § 2.40(a); (3) failed to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of

animal care and use, in willful violation of 9 C.F.R. § 2.40(a)(1)-(2); (4) failed to establish and maintain programs of adequate veterinary care, in willful violation of 9 C.F.R. § 2.40(b); (5) failed to handle animals as expeditiously and carefully as possible in a manner that would not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of 9 C.F.R. § 2.131(b)(1); and (6) failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of 9 C.F.R. § 2.131(c)(1).[1] On October 6, 2009, Mr. Willis filed an answer denying the material allegations of the Complaint.

On March 13, 2012, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in Washington, DC. Mr. Willis, who represents himself in this proceeding, did not appear at the hearing. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. During the hearing, the Administrator moved for issuance of a decision based upon admissions deemed to have been made as a result of Mr. Willis's failure to appear at the hearing (Tr. 11-12).[2] In this regard, the Rules of Practice provide, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (e) *Failure to appear*. (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint. Complainant shall have an election whether to follow the procedure set forth in § 1.139 or whether to present evidence, in whole or in

[1] Compl. at 5-10 ¶¶ 14, 21, 25, 29, 33, and 37.

[2] References to the transcript of the March 13, 2012, hearing are designated as "Tr."

> part, in the form of affidavits or by oral testimony before the Judge. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

7 C.F.R. § 1.141(e)(1). The ALJ granted the Administrator's motion (Tr. 12-13), and the Administrator introduced the testimony of 11 witnesses[3] and moved the admission of exhibits, all of which the ALJ admitted in evidence.

On March 16, 2012, pursuant to 7 C.F.R. § 1.141(e)(1), the ALJ issued "Decision and Order as to Only Raymond Willis" [hereinafter the ALJ's Decision] in which the ALJ: (1) concluded that Mr. Willis violated the Regulations as alleged in the Complaint; (2) ordered Mr. Willis to cease and desist from violating the Animal Welfare Act and the Regulations; (3) permanently disqualified Mr. Willis from obtaining an Animal Welfare Act license; and (4) assessed Mr. Willis a $6,000 civil penalty (ALJ's Decision at 10-12).

On April 17, 2012, Mr. Willis filed "Appeal and Request for Oral Hearing Before the Judicial Officer" [hereinafter Appeal Petition]. On April 26, 2012, the Administrator filed a response to Mr. Willis's Appeal Petition. On May 2, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, except for minor non-substantive changes, the ALJ's Decision as the final agency decision as to Mr. Willis.

---

[3] Frank Lolli, Keith Schuller, Susan Dahnke, Craig Perry, Jeff Rosenthal, Joelene Janicek Gould, Kelly Kitchens, John Breidenbach, Dawn Talbott, and Toby Hauntz testified by telephone. Retired United States Department of Agriculture investigator Kirk B. Miller testified in person.

DECISION

Statement of the Case

After being notified of the time, place, and manner of the hearing, Mr. Willis, without good cause, failed to appear at the March 13, 2012, hearing. Pursuant to 7 C.F.R. § 1.141(e)(1), a respondent who, after being duly notified, fails to appear at a hearing, without good cause, is deemed to have waived the right to an oral hearing in the proceeding, to have admitted any facts presented at the hearing, and to have admitted the material allegations of fact contained in the complaint. Accordingly, the facts presented at the March 13, 2012, hearing and the material allegations of fact contained in the Complaint are adopted as findings of fact.

Findings of Fact

1. Raymond Willis is an individual whose mailing address is in West Virginia. From at least June 11, 2008, through the filing of the Complaint on September 14, 2009, Raymond Willis was an officer and a director of For the Birds, Inc., and was (1) operating as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations, and/or (2) acting for, or employed by, an exhibitor (For the Birds, Inc., and/or Jerry LeRoy Korn), and Raymond Willis's acts, omissions, or failures within the scope of his employment or office are, pursuant to 7 U.S.C. § 2139, deemed to be his own acts, omissions, or failures (Compl. at 3 ¶ 6).

2. Raymond Willis operated a moderate-sized business exhibiting farm, wild, and exotic animals. The gravity of Raymond Willis's violations of the Animal Welfare Act and the Regulations is great and include repeated instances in which Raymond Willis knowingly exhibited animals without a valid Animal Welfare Act license, failed to provide animals with adequate veterinary care, and failed to handle animals humanely. (Compl. at 4 ¶ 8.)

3. Raymond Willis does not have a history of violations of the Animal Welfare Act or the Regulations; however, Raymond Willis has not

shown good faith. Raymond Willis was made aware of the licensing, handling, and veterinary care requirements of the Animal Welfare Act and nevertheless repeatedly and knowingly demonstrated an unwillingness to comply with the prohibition against exhibiting animals without a valid Animal Welfare Act license and with the requirements for exhibiting animals safely (Compl. at 4 ¶ 9). The testimony and exhibits introduced at the March 13, 2012, hearing establish by more than a preponderance of the evidence that Raymond Willis, in his capacity as principal of For the Birds, Inc., operated as an exhibitor without being licensed to do so, as alleged in the Complaint. The evidence introduced at the March 13, 2012, hearing also establishes that Raymond Willis handled animals in a manner that exposed people and animals to harm and that Raymond Willis failed, on multiple occasions, to provide minimally adequate care to the animals and, specifically, failed to provide the animals with necessary veterinary care.

4. From June 11, 2008, through the filing of the Complaint, Raymond Willis operated as an exhibitor without having been licensed by the Secretary of Agriculture to do so, and specifically, operated a zoo (Compl. at 5-6 ¶ 14).

5. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to have an attending veterinarian who provided adequate veterinary care to respondents' animals (Compl. at 7 ¶ 21).

6. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use (Compl. at 8 ¶ 25).

7. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to establish and maintain programs of adequate veterinary care (Compl. at 8 ¶ 29).

8. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to handle animals as expeditiously and carefully as possible

in a manner that would not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm (Compl. at 9 ¶ 33).

9. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, allowed the public to handle tigers without any barrier or distance (Compl. at 10 ¶ 37).

Conclusions of Law

1. From June 11, 2008, through the filing of the Complaint, Raymond Willis operated as an exhibitor without having been licensed by the Secretary of Agriculture to do so, and specifically, operated a zoo, in willful violation of 9 C.F.R. § 2.1(a).[4]

2. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to have an attending veterinarian who provided adequate veterinary care to respondents' animals, in willful violation of 9 C.F.R. § 2.40(a).

3. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use, in willful violation of 9 C.F.R. § 2.40(a)(1)-(2).

4. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to establish and maintain programs of adequate veterinary care, in willful violation of 9 C.F.R. § 2.40(b).

---

[4] The Administrator alleged and the ALJ concluded that Mr. Willis's failure to obtain an Animal Welfare Act license also is a violation of 9 C.F.R. § 2.100(a) (Compl. at 5-6 ¶ 14; ALJ's Decision at 10). I conclude only that Mr. Willis willfully violated 9 C.F.R. § 2.1(a); however, my failure to conclude that Mr. Willis also violated 9 C.F.R. § 2.100(a) does not affect the disposition of this proceeding.

5. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to handle animals as expeditiously and carefully as possible in a manner that would not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of 9 C.F.R. § 2.131(b)(1).

6. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, allowed the public to handle tigers without any barrier or distance, in willful violation of 9 C.F.R. § 2.131(c)(1).

Mr. Willis's Appeal Petition

The Rules of Practice provide that a party may appeal an administrative law judge's decision to the Judicial Officer, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the 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 appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being

> relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

7 C.F.R. § 1.145(a). Mr. Willis's Appeal Petition contains numerous assertions that do not relate to: (1) the ALJ's Decision, (2) any ruling by the ALJ, or (3) the deprivation of Mr. Willis's rights. I do not address these assertions as they do not concern matters that may be raised in an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145(a). However, Mr. Willis's Appeal Petition does contain an allegation that the ALJ deprived him of due process.

First, Mr. Willis contends the ALJ deprived him of due process by changing the location of the hearing without providing him adequate notice of the change of the location of the hearing (Appeal Pet. at 8).

On July 28, 2011, the ALJ informed the parties that a hearing would be held in Boise, Idaho, commencing March 13, 2012, with an exact location in Boise, Idaho, to be determined 2 or 3 months before the commencement of the hearing (July 28, 2011, Hearing Notice at 1-2 ¶¶ 1, 4). The ALJ also informed the parties that she intended to change the location of the hearing from Boise, Idaho, to Washington, DC, if the respondents failed to comply with the ALJ's July 28, 2011, pre-hearing deadlines and instructions (July 28, 2011, Hearing Notice at 1 ¶ 2; July 28, 2011, Prehearing Deadlines and Instructions at 3 ¶ 11).

On March 2, 2012, the Administrator filed a motion requesting that the ALJ change the location of the hearing from Boise, Idaho, to Washington, DC, based upon the respondents' failure to comply with the ALJ's July 28, 2011, pre-hearing deadlines and instructions (Complainant's Motion to Change Hearing Location and to Take Testimony by Telephone at 1-3 ¶ I). On March 7, 2012, the ALJ granted the Administrator's motion (Order Granting Complainant's Motion to Change Hearing Location and to Take Testimony By Telephone), and Mr. Willis asserts he was informed of the ALJ's order changing the hearing location on March 9, 2012 (Appeal Pet. at 6).

The record before me establishes that the respondents failed to comply with the ALJ's July 28, 2011, pre-hearing deadlines and

instructions. The ALJ informed Mr. Willis in both the Hearing Notice and the Prehearing Deadlines and Instructions, filed 7 months 13 days before the date of the hearing, that the respondents' failure to comply with the pre-hearing deadlines and instructions would result in a change of the location of the hearing from Boise, Idaho, to Washington, DC. Under these circumstances, I find the ALJ's March 7, 2012, Order Granting Complainant's Motion to Change Hearing Location and to Take Testimony By Telephone provided Mr. Willis adequate notice of the change of the hearing location, and I conclude the ALJ did not deprive Mr. Willis of due process when she changed the location of the hearing.[5]

Second, Mr. Willis contends the ALJ deprived him of due process by taking testimony by telephone because "[a] telephone hearing is not an acceptable alternative to facing one's accusers in person." (Appeal Pet. at 8.)

On March 2, 2012, the Administrator requested that the ALJ permit the taking of testimony by telephone (Complainant's Motion to Change Hearing Location and to Take Testimony by Telephone at 3-5 ¶ II). The Administrator cited a number of reasons for the request, including the cost of having witnesses attend an in-person hearing in either Boise, Idaho, or Washington, DC, the inconvenience to witnesses of having to travel to the place of the hearing, and the fact that the testimony of each witness who would give testimony by telephone would be corroborated by other evidence. The Administrator asserted that permitting witnesses to testify by telephone would provide a full and fair evidentiary hearing, would not prejudice any party, and would cost less than conducting the hearing by personal attendance of the witnesses in Boise, Idaho, or Washington, DC. (Complainant's Motion to Change Hearing Location and to Take Testimony by Telephone at 3-5 ¶ II.) On March 7, 2012, the ALJ granted the Administrator's request to take testimony of witnesses by telephone rather than in-person appearance (Order Granting Complainant's Motion to Change Hearing Location and to Take

[5] Administrative law judges have the authority under the Rules of Practice to set the place of a hearing and change the place of a hearing with or without a motion requesting a particular hearing location (7 C.F.R. §§ 1.141(b), .144(c)(2)).

Testimony by Telephone), and, at the hearing, 10 witnesses testified by telephone.[6]

Due process is flexible and calls for such procedural protections as the particular situation demands.[7] Courts have applied a balancing test that examines: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[8] Therefore, I reject Mr. Willis's apparent contention that taking witness testimony by telephone is per se a violation of the due process clause of the Constitution of the United States. Moreover, after examining Mr. Willis's interests affected by this proceeding, the risk that Mr. Willis is erroneously deprived of those interests by taking testimony by telephone, the probable value of taking the in-person testimony of the 10 witnesses who testified by telephone, and the government's fiscal and administrative burdens that the in-person testimony would have entailed, I find the ALJ did not deprive Mr. Willis of due process by taking testimony by telephone.[9]

Mr. Willis's Petition to Reopen the Hearing

Mr. Willis requests that I reopen the hearing to take further evidence, that an administrative law judge other than Jill S. Clifton conduct the reopened hearing in Boise, Idaho, and that an attorney other than

---

[6] See note 3.

[7] *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Sandin v. Conner*, 515 U.S. 472, 503 (1995); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

[8] *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[9] The Rules of Practice provide that an administrative law judge may, in his or her sole discretion or in response to a motion by a party, conduct a proceeding by telephone if the administrative law judge finds a hearing conducted by telephone: (1) would provide a full and fair evidentiary hearing; (2) would not prejudice any party; and (3) would cost less than conducting the hearing by audio-visual telecommunication or by personal attendance of any individual who is expected to participate in the hearing (7 C.F.R. § 1.141(b)(4)).

Colleen A. Carroll represent the Administrator (Appeal Pet. at 10). The Rules of Practice provide that a petition to reopen a hearing must state the nature and purpose of the evidence to be adduced and set forth a good reason why such evidence was not adduced at the hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take 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). Mr. Willis does not set forth a good reason for his failure to appear at the March 13, 2012, hearing and adduce evidence at the hearing. Therefore, I deny Mr. Willis's request that I reopen the hearing to take further evidence.

Mr. Willis's Request for Oral Argument

Mr. Willis's request for oral argument (Appeal Pet. at 10), which the Judicial Officer may grant, refuse, or limit,[10] is refused because the issues are not complex and oral argument would serve no useful purpose.

For the foregoing reasons, the following Order is issued.

---

[10] 7 C.F.R. § 1.145(d).

ANIMAL WELFARE ACT

ORDER

1. Raymond Willis, 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, in particular, shall cease and desist from:

a. operating as an exhibitor without an Animal Welfare Act license;

b. failing to have an attending veterinarian to provide adequate veterinary care to animals;

c. failing to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use;

d. failing to establish and maintain programs of adequate veterinary care;

e. failing to handle animals as expeditiously and carefully as possible in a manner that does not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm; and

f. failing to handle animals during public exhibition so there is minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public.

Paragraph 1 of this Order shall become effective upon service of this Order on Raymond Willis.

2. Raymond Willis is permanently disqualified from obtaining an Animal Welfare Act license.

Paragraph 2 of this Order shall become effective upon service of this Order on Raymond Willis.

3. Raymond Willis is assessed a $6,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Raymond Willis. Raymond Willis shall state on the certified check or money order that payment is in reference to AWA Docket No. 09-0196.

RIGHT TO JUDICIAL REVIEW

Raymond Willis has the right to seek judicial review of the Order in this Decision and Order as to Raymond Willis in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Raymond Willis must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Raymond Willis.[11] The date of entry of the Order in this Decision and Order as to Raymond Willis is August 7, 2012.

___

[11] 7 U.S.C. § 2149(c).

In re: JEFFREY W. ASH, AN INDIVIDUAL, D/B/A ASHVILLE GAME FARM.
Docket No. 11-0380.
Decision and Order.
Filed September 14, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Robert M. Winn, Esq. for Respondent.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding on August 31, 2011, by filing an Order to Show Cause Why Animal Welfare Act License 21-C-0359 Should Not Be Terminated [hereinafter Order to Show Cause]. The Administrator 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].

The Administrator alleges: (1) at all times material to this proceeding, Jeffrey W. Ash was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations; (2) at all times material to this proceeding, Mr. Ash held Animal Welfare Act license number 21-C-0359; and (3) on April 29, 2011, Mr. Ash was convicted of reckless endangerment in the second degree in violation of New York Penal Law § 120.20, in connection with his exhibition of animals at the Ashville

Game Farm, in Greenwich, New York.[1] The Administrator seeks an order terminating Animal Welfare Act license number 21-C-0359[2] and disqualifying Mr. Ash from obtaining an Animal Welfare Act license for a period of not less than 2 years based upon Mr. Ash's violation of a state law pertaining to ownership and welfare of animals.[3]

On September 20, 2011, Mr. Ash filed a response to the Order to Show Cause: (1) admitting, at all times material to this proceeding, he was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations; (2) admitting, at all times material to this proceeding, he held Animal Welfare Act license number 21-C-0359; (3) admitting that, on April 29, 2011, he was convicted of reckless endangerment in the second degree in violation of New York Penal Law § 120.20; (4) stating New York Penal Law § 120.20 does not contain any element pertaining to the welfare and treatment of animals; and (5) denying his conviction of reckless endangerment in the second degree resulted in any finding that he abused, mistreated, or neglected any animals or that he was not fit to exhibit animals.[4]

On March 6, 2012, the Administrator filed Complainant's Motion for Summary Judgment in which the Administrator contends there is no factual dispute requiring a hearing. On March 27, 2012, Mr. Ash filed Respondent's Opposition to Motion for Summary Judgment asserting Complainant's Motion for Summary Judgment should be denied and the matter scheduled for hearing. On April 2, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] filed a Decision and Order Granting Summary Judgment in which she: (1) found that, on or about April 29, 2011, Mr. Ash was convicted of reckless endangerment in the second degree in violation of New York Penal Law § 120.20, in

---

[1] Order to Show Cause at 1 ¶ 1 and at 2 ¶¶ 3-4.

[2] The Administrator also states Animal Welfare Act license number 41-C-0122 should be terminated (Order to Show Cause at 1). I find the Administrator's reference to Animal Welfare Act license number 41-C-0122 puzzling as the record contains no evidence that Mr. Ash held Animal Welfare Act license number 41-C-0122, and I find no further reference to Animal Welfare Act license number 41-C-0122 in the record. Therefore, I decline to terminate Animal Welfare Act license number 41-C-0122.

[3] Order to Show Cause at 2 ¶ 5 and at 4.

[4] Answer and Request for Hearing ¶¶ 1-4.

connection with his August 10, 2010, exhibition of animals at the Ashville Game Farm, in Greenwich, New York; (2) concluded Mr. Ash's conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 involved the possession and exhibition of animals; (3) concluded Mr. Ash's conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 establishes that Mr. Ash's conduct was willful; (4) concluded Mr. Ash's conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 demonstrates he is unfit to hold an Animal Welfare Act license; (5) concluded the revocation of Mr. Ash's Animal Welfare Act license promotes the remedial purposes of the Animal Welfare Act; and (6) revoked Animal Welfare Act license number 21-C-0359.[5]

On April 27, 2012, the Administrator filed Complainant's Petition for Appeal; on May 3, 2012, Mr. Ash filed a Request for Oral Argument and an Appeal Petition; on May 23, 2012, the Administrator filed Complainant's Response to Request for Oral Argument and Petition for Appeal; and on May 29, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I affirm the ALJ's Decision and Order Granting Summary Judgment, except that I do not adopt the ALJ's Order revoking Animal Welfare Act license number 21-C-0359. Instead, I terminate Animal Welfare Act license number 21-C-0359.

DECISION

Discussion

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application for a license in such form and manner as the Secretary of Agriculture may prescribe (7 U.S.C. § 2133). The power to require and issue licenses under the Animal Welfare Act includes the power to terminate a license

[5] Decision and Order Granting Summary Judgment at 11 Findings of Fact ¶¶ 3, 8; at 12 Conclusions of Law ¶¶ 4-6, 8; and at 13.

and to disqualify a person whose license has been terminated from becoming licensed.[6] The Regulations specify certain bases for denying an initial application for an Animal Welfare Act license (9 C.F.R. § 2.11) and further provide that an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). The Regulations provide that an initial application for an Animal Welfare Act license will be denied if the applicant has been found to have violated any state law pertaining to ownership or welfare of animals or is otherwise unfit to be licensed and the Administrator determines that issuance of an Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act, as follows:

> **§ 2.11 Denial of initial license application.**
>
> (a) A license will not be issued to any applicant who:
> . . . .
> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. § 2.11(a)(6).

The purposes of the Animal Welfare Act are set forth in a congressional statement of policy, as follows:

---

[6] *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 856 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 94 (2009); *In re Amarillo Wildlife Refuge,* Inc., 68 Agric. Dec. 77, 81 (2009); *In re Loreon Vigne*, 67 Agric. Dec. 1060, 1062 (2008); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

ANIMAL WELFARE ACT

§ 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 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.

7 U.S.C. § 2131.

The Animal and Plant Health Inspection Service [hereinafter APHIS] has determined that Mr. Ash is unfit to be licensed under the Animal Welfare Act and that allowing Mr. Ash to hold an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act. APHIS's determinations are based upon Mr. Ash's conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 in connection with Mr. Ash's exhibition of wild and exotic animals.[7] Mr. Ash admits being convicted of reckless endangerment in

---

[7] Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 7.

the second degree in violation of New York Penal Law § 120.20.[8] I conclude Mr. Ash has been found to have violated a state law pertaining to ownership and welfare of animals. I affirm the determinations that Mr. Ash is unfit to hold Animal Welfare Act license number 21-C-0359 and that allowing Mr. Ash to hold Animal Welfare Act license number 21-C-0359 is contrary to the purposes of the Animal Welfare Act. Therefore, I terminate Animal Welfare Act license number 21-C-0359.

Findings of Fact

1. Mr. Ash is an individual who did business as Ashville Game Farm (Answer and Request for Hearing ¶ 1; Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 3).

2. Mr. Ash's mailing address is in Greenwich, New York (Answer and Request for Hearing ¶ 1; Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 3).

3. At all times material to this proceeding, Mr. Ash was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations (Answer and Request for Hearing ¶ 1).

4. At all times material to this proceeding, Mr. Ash held Animal Welfare Act license number 21-C-0359 (Answer and Request for Hearing ¶ 1).

5. On or about December 18, 2010, APHIS Regional Director, Animal Care, Eastern Region, Elizabeth Goldentyer, D.V.M., was notified by a member of her staff that Mr. Ash had been indicted on 29 counts of alleged criminal conduct related to his exhibition of animals at the Ashville Game Farm in Greenwich, New York (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 4).

6. Mr. Ash plead guilty to Count Twenty-Nine of the indictment referenced in Finding of Fact number 5, which Count reads as follows:

---

[8] Answer and Request for Hearing ¶ 4.

ANIMAL WELFARE ACT

COUNT TWENTY-NINE

The Grand Jury of the County of Washington, by this Indictment, accuses Defendant Jeffrey Ash, of the crime of Reckless Endangerment in the Second Degree, a class A misdemeanor, in violation of § 120.20 of the Penal Law of the State of New York, committed as follows:

> Defendant Jeffrey Ash, on or about August 10, 2010, in the Town of Greenwich, Washington County, New York, did recklessly engage in conduct which created the risk of serious physical injury to another person by running Ashville Game Farm and by not properly caging animals including lemurs, monkeys, bears, turtles, alligators, pigs[,] goats, deer and other animals, and by encouraging visitors to the game farm including children to feed the animals, and did allow visitors to the Game Farm to have contact with the animals, and did not have the animals vaccinated for rabies and did allow children to have contact with turtles known to carry salmonella, and did have reptiles such as snakes and lizards in unsecured cages, and did have a tarantula in a cage with an unsecured lid with a figurine of the cartoon character Sponge Bob in the cage with the poisonous spider making it likely a child would reach into the cage, and did have alligators in a cage with fencing which visitors could reach over and which visitors could reach through and which was not properly secured. Jeff Ash did fail to protect the public from attack, and disease.

Complainant's Mot. for Summary Judgment CX 2 at 10.

7. On or about April 29, 2011, Mr. Ash was convicted of reckless endangerment in the second degree in violation of New York Penal Law § 120.20, as alleged in Count Twenty-Nine of the indictment quoted in

Finding of Fact number 6 (Answer and Request for Hearing ¶ 4; Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 5 and CX 2 at 11-16).

8. APHIS determined Mr. Ash was unfit to hold a license under the Animal Welfare Act based upon Mr. Ash's April 29, 2011, conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 7).

9. APHIS determined that permitting Mr. Ash to continue to hold Animal Welfare Act license number 21-C-0359 would be contrary to the purposes of the Animal Welfare Act (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 7).

10. On or about June 8, 2011, Dr. Goldentyer requested that APHIS institute an administrative proceeding to terminate Mr. Ash's Animal Welfare Act license based upon Mr. Ash's April 29, 2011, conviction of reckless endangerment in the second degree in connection with his exhibition of wild and exotic animals (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 7).

11. In a letter dated June 29, 2011, the New York State Department of Environmental Conservation denied Mr. Ash's applications for renewal of his state licenses to possess and exhibit animals, in part, due to Mr. Ash's April 29, 2011, conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 6 and CX 3).

12. On July 27, 2011, the State of New York provided Dr. Goldentyer with a certificate of Mr. Ash's April 29, 2011, conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 5 and CX 2 at 11-16).

13. On or about August 10, 2011, APHIS received a copy of a letter dated June 29, 2011, from the New York State Department of Environmental Conservation directed to Mr. Ash, in which the New York State Department of Environmental Conservation denied the renewal of Mr. Ash's state licenses to possess and exhibit animals (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 6 and CX 3).

Conclusions of Law

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

2. The material facts involved in this matter are not in dispute and the ALJ's entry of summary judgment in favor of the Administrator was appropriate.

3. Mr. Ash's conviction of reckless endangerment in the second degree under New York Penal Law § 120.20 involved ownership and welfare of animals.

4. Mr. Ash's conviction of reckless endangerment in the second degree under New York Penal Law § 120.20 establishes that Mr. Ash's conduct was willful and implicated public health and safety; therefore, the Administrator was not required to provide Mr. Ash with written notice of the facts and conduct concerned with this proceeding and an opportunity to demonstrate or achieve compliance prior to instituting this proceeding, as provided in 5 U.S.C. § 558(c) and 7 C.F.R. § 1.133(b)(3).

5. Mr. Ash's conviction of reckless endangerment in the second degree under New York Penal Law § 120.20 demonstrates Mr. Ash is unfit to hold Animal Welfare Act license number 21-C-0359.

6. APHIS did not rely upon factors other than Mr. Ash's conviction of reckless endangerment in the second degree under New York Penal Law § 120.20 for its determination to seek termination of Mr. Ash's Animal Welfare Act license.

7. The termination of Mr. Ash's Animal Welfare Act license pursuant to 9 C.F.R. §§ 2.11(a)(6), .12, promotes the remedial purposes of the Animal Welfare Act.

Mr. Ash's Request for Oral Argument

Mr. Ash's request for oral argument, which the Judicial Officer may grant, refuse, or limit,[9] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Mr. Ash's Appeal Petition

Mr. Ash raises four issues in his Appeal Petition. First, Mr. Ash contends the ALJ erroneously held New York Penal Law § 120.20 is a state law pertaining to the transportation, ownership, neglect, or welfare of animals (Appeal Pet. Issue and Argument No. 1 at unnumbered pages 3-5).

New York Penal Law § 120.20 sets forth the elements of reckless endangerment in the second degree and defines the crime as a misdemeanor as follows:

> **§ 120.20 Reckless endangerment in the second degree**
>
> A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.
>
> Reckless endangerment in the second degree is a class A misdemeanor.

While transportation, ownership, neglect, and welfare of animals are not elements of the crime of reckless endangerment in the second degree, Mr. Ash's exhibition of animals was extrinsically related to Mr. Ash's

[9] 7 C.F.R. § 1.145(d).

execution of the crime so as to be an instrumentality of the crime as is evident in Count Twenty-Nine of the indictment charging Mr. Ash with a violation of New York Penal Law § 120.20.[10] Mr. Ash pled guilty to, and was convicted of, Count Twenty-Nine of the indictment.[11] Mr. Ash's indictment and conviction were based upon the manner in which Mr. Ash conducted the operation of Ashville Game Farm and specifically on his exhibition of animals regulated under the Animal Welfare Act.[12] Thus, I conclude New York Penal Law § 120.20 can pertain to ownership and welfare of animals and, under the circumstances in *People v. Ash*, Case No. I-192-2010 (Crim Ct, Washington County Apr. 29, 2011), New York Penal Law § 120.20 did pertain to ownership and welfare of animals.

Second, Mr. Ash asserts there are triable issues of fact relating to Mr. Ash's fitness to hold Animal Welfare Act license number 21-C-0359; therefore, the ALJ erroneously granted Complainant's Motion for Summary Judgment (Appeal Pet. Issue and Argument No. 2 at unnumbered pages 5-9).

The conclusion that Mr. Ash is unfit to hold Animal Welfare Act license number 21-C-0359 is based upon Mr. Ash's April 29, 2011, conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20.[13] The determination that a respondent is unfit to hold an Animal Welfare Act license may be based upon a conviction of any federal, state, or local law or regulation pertaining to transportation, ownership, neglect, or welfare of animals.[14] As discussed

---

[10] Complainant's Mot. for Summary Judgment CX 2 at 10.

[11] Answer and Request for Hearing ¶ 4; Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 5 and CX 2 at 11-16.

[12] The term "animal" is defined in 7 U.S.C. § 2132(g); 9 C.F.R. § 1.1.

[13] Decision and Order Granting Summary Judgment at 9-10 and at 12 Conclusion of Law ¶ 6.

[14] 9 C.F.R. §§ 2.11(a)(6), .12. See also *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 866-67 (2009) (concluding the respondent was unfit to be licensed under the Animal Welfare Act based upon her conviction of animal torture in violation of Minnesota Stat. § 343.21 subdiv. 1), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 96-102 (2009) (concluding the respondent was unfit to be licensed under the Animal Welfare Act based, in part, upon violations of the Lacy Act and the Endangered Species Act); *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 83-85 (2009) (concluding the respondent was unfit to be licensed under the Animal Welfare Act based upon violations of the Endangered Species Act); *In re Loreon Vigne*,

in this Decision and Order, *supra*, under the circumstances in *People v. Ash*, Case No. I-192-2010 (Crim Ct, Washington County Apr. 29, 2011), New York Penal Law § 120.20 did pertain to ownership and welfare of animals. Mr. Ash admits he was convicted of violating New York Penal Law § 120.20;[15] therefore, there is no genuine issue of material fact regarding Mr. Ash's fitness to hold Animal Welfare Act license number 21-C-0359 to be heard, and I reject Mr. Ash's assertion that the ALJ erroneously granted Complainant's Motion for Summary Judgment.

Third, Mr. Ash contends the ALJ erroneously gave preclusive effect to Mr. Ash's conviction of violating New York Penal Law § 120.20. Mr. Ash asserts the ALJ should not have given preclusive effect to his conviction because Count Twenty-Nine of the indictment charging him with violations of New York Penal Law § 120.20 is bombastic and contains misstatements of science. Further, Mr. Ash asserts he only plead guilty to violating New York Penal Law § 120.20 because a guilty plea was financially more prudent than incurring the expense of defending against the indictment. (Appeal Pet. Issue and Argument No. 3 at unnumbered pages 9-11.)

Mr. Ash's conviction of violating New York Penal Law § 120.20 is a material fact in this proceeding; the reason Mr. Ash plead guilty to violating New York Penal Law § 120.20 and the purported defects in the indictment filed in *People v. Ash*, Case No. I-192-2010 (Crim Ct, Washington County Apr. 29, 2011), are not material facts in this proceeding. Mr. Ash cannot relitigate his past criminal conviction in this Animal Welfare Act license termination proceeding. If Mr. Ash wishes to contest his conviction in *People v. Ash*, Case No. I-192-2010 (Crim Ct, Washington County Apr. 29, 2011), he must turn to the State Courts

---

67 Agric. Dec. 1060, 1067 (2008) (concluding the respondent was unfit to be licensed under the Animal Welfare Act based upon her conviction of violations of the Endangered Species Act); *In re Mark Levinson*, 65 Agric. Dec. 1026, 1038-39 (2005) (concluding the respondent was unfit to be licensed under the Animal Welfare Act based upon his conviction of violations of New York state laws pertaining to the transportation and ownership of animals).

[15] Answer and Request for Hearing ¶ 4.

of New York, as that is the proper forum in which to direct his arguments.

Fourth, Mr. Ash contends the ALJ erroneously determined that Mr. Ash's willfulness had been established as a matter of law (Appeal Pet. Issue and Argument No. 4 at unnumbered pages 11-13).

As an initial matter, an Animal Welfare Act license may be terminated under 9 C.F.R. § 2.12 based upon a violation of any state law described in 9 C.F.R. § 2.11(a)(6) and there is no requirement under 9 C.F.R. § 2.11(a)(6) that the violation of state law must be willful. However, under the Rules of Practice, except in a case of willfulness or in a case in which public health, interest, or safety otherwise requires, the Administrator must provide an Animal Welfare Act licensee with written notice of the facts or conduct concerned and an opportunity to demonstrate or achieve compliance, prior to instituting a proceeding that may affect the Animal Welfare Act license, as follows:

> **§ 1.133 Institution of proceedings.**
>
> . . . .
> (b) *Filing of complaint or petition for review*.
> . . . .
> (3) As provided in 5 U.S.C. 558, in any case, *except one of willfulness or one in which public health, interest, or safety otherwise requires*, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a "license" as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.

7 C.F.R. § 1.133(b)(3) (emphasis added). A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.[16] Generally, a criminal act involves at least a careless disregard of statutory requirements. In the instant proceeding, the Administrator seeks termination of Mr. Ash's Animal Welfare Act license as a result of Mr. Ash's conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20. Mr. Ash's conviction of recklessly engaging in conduct which creates a substantial risk of serious physical injury to another person establishes willfulness and implicates public health and safety; thus, the Administrator was not required to give Mr. Ash written notice of the facts or conduct concerned and an opportunity to demonstrate or achieve compliance prior to instituting this proceeding.

The Administrator's Appeal Petition

The Administrator raises one issue in Complainant's Petition for Appeal. The Administrator asserts the ALJ erroneously revoked Mr. Ash's Animal Welfare Act license (Complainant's Pet. for Appeal at 3-4).

Throughout this proceeding, the Administrator has consistently sought termination of Mr. Ash's Animal Welfare Act license pursuant to 7 U.S.C. § 2133 and 9 C.F.R. § 2.12 rather than revocation of Mr. Ash's Animal Welfare Act license pursuant to 7 U.S.C. § 2149. Nonetheless, the ALJ revoked rather than terminated Mr. Ash's Animal Welfare Act license.[17] Revocation of Animal Welfare Act license number 21-C-0359 would prohibit Mr. Ash from obtaining an Animal Welfare Act license in the future,[18] whereas termination of Mr. Ash's Animal Welfare Act

---

[16] *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 860-61 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re D&H Pet Farms, Inc.*, 68 Agric. Dec. 798, 812-13 (2009); *In re Jewel Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc*., 37 Agric. Dec. 293, 306 (1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978).

[17] Decision and Order Granting Summary Judgment at 13.

[18] See 9 C.F.R. §§ 2.10(b), .11(a)(3).

license would not prohibit Mr. Ash from obtaining an Animal Welfare Act license in the future. As this proceeding was instituted under the authority of the Secretary of Agriculture to terminate an Animal Welfare Act license and the Administrator consistently sought termination of Mr. Ash's Animal Welfare Act license, I do not adopt the ALJ's Order revoking Animal Welfare Act license number 21-C-0359. Instead, I terminate Animal Welfare Act license number 21-C-0359.[19]

For the foregoing reasons, the following Order is issued.

ORDER

Animal Welfare Act license number 21-C-0359 is terminated. This Order shall become effective on the 60th day after service of this Order on Jeffrey W. Ash.

———

[19] In addition to termination of Animal Welfare Act license number 21-C-0359, the Administrator originally sought Mr. Ash's disqualification from obtaining an Animal Welfare Act license for a period of not less than 2 years (Order to Show Cause at 4). The Administrator appears to have abandoned the request for a period of disqualification and now seeks only termination of Animal Welfare Act license number 21-C-0359 (Complainant's Mot. for Summary Judgment at 7; Complainant's Pet. for Appeal at 7; Complainant's Response to Request for Oral Argument and Pet. for Appeal at 9); therefore, I do not include a period of disqualification from obtaining an Animal Welfare Act license in the Order in this Decision and Order.

In re: TRI-STATE ZOOLOGICAL PARK OF WESTERN MARYLAND, INC., A MARYLAND CORPORATION; AND ROBERT L. CANDY, AN INDIVIDUAL.
Docket No. 11-0222.
Decision and Order.
Filed August 1, 2012.

AWA.

Buren W. Kidd, Esq., and Colleen A. Carroll, Esq., for Complainant.
Respondents, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

I. Introduction

The above captioned matter involves administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Tri-State Zoological Park of Western Maryland and Robert Candy ("Respondents"; "the Zoo"; "Tri-State"). Complainant alleges that Respondents violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; "the Act"), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; "Regulations and Standards").

In a complaint filed on May 11, 2011, ("the Complaint") Complainant alleged that Respondents willfully violated the Act and the Regulations on multiple occasions between 2006 and 2010. Generally, the Complaint alleged that Respondents failed to properly handle and care for a variety of animals; failed to maintain proper records; failed to maintain an adequate plan of veterinary care, or employ an attending veterinarian; failed to adequately maintain facilities in a variety of circumstances, including one leading to the death of a macaque.

Respondents timely filed an Answer on June 2, 2011, and thereafter filed supplementary narrative discussions. By Order issued August 17, 2011, a hearing was scheduled to commence on February 8, 2012 in Hagerstown, Maryland. At the hearing, Complainant was represented by Colleen A. Carroll, Esq. and Buren Kidd, Esq. of the Office of the General Counsel, Washington D.C. Respondents were represented by the Zoo's owner, Robert Candy, who appeared without assistance of counsel on his own behalf and on behalf of the corporate entity.

At the hearing, I admitted to the record Complainant's exhibits identified as CX-1 through CX-16, with the exception of CX-3 page 4 and CX-10, pages 9-12, which Complainant withdrew. Tr. at 21; 23. I also excluded portions of CX-16. Tr. at 434-435. I admitted to the record Respondents' exhibits RX-1 through RX-23, with the exception of RX-12 and RX-14, which Respondents withdrew, and RX-13, which I excluded. Tr. at 743-746. In addition, the parties entered into stipulations regarding the admissibility and authenticity of much of the documentary evidence, which I admitted to the record as ALJX-1. Tr. at 9.

I directed the parties to file written closing argument by not later than May 18, 2012[1]. By telephone on May 17, 2012, Respondents requested permission to file his argument by facsimile. I instructed my staff to advise Respondents that I would not accept filing by facsimile, but would allow a brief extension of time for mailed submissions. Respondents filed closing argument on May 21, 2012. Complainant filed partial written closing arguments on May 18, 2012, and requested a brief extension of time to file additions to its brief. Complainant filed its supplemental closing argument on May 22, 2012. Accordingly, the record is hereby closed.

The instant decision[2] is based upon consideration of the record evidence; the pleadings, arguments, and explanations of the parties; and controlling law.

---

[1] May 18, 2012 fell on a Friday.

[2] In this Decision & Order, the transcript of the hearing shall be referred to as "Tr. at [page number]. Complainant's evidence shall be denoted as "CX-[exhibit #]"and

II. Issues

Did Respondents violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?
Is Mr. Candy personally liable for acts of the corporate entity?

III. Findings of Fact and Conclusions of Law

A. Admissions

Respondents admit that Tri-State Zoological park of Western Maryland, Inc. ("Tri-State"; "the zoo") is a Maryland corporation whose registered agent for service of process is Respondent Robert L. Candy, whose mailing address is in Cumberland, Maryland.

Robert L. Candy is the Chief Executive Officer, principal and registered agent for Tri-State at all times pertinent to this proceeding.

Respondents further admit that Tri-State operates as an exhibitor within the meaning of the Act and prevailing regulations, and held Animal Welfare Act license Number 51-C-0064 at all times relevant to the instant adjudication.

B. Summary of Factual History

During the period encompassed by the instant cause of action, Respondents were in the business of exhibiting animals. Robert Candy started Tri-State in 2002 as a way to provide his children and other members of the community in Cumberland, Maryland with an entertaining and educational activity. Tr. at 694-697. Before starting the zoo, Mr. Candy spent thirty years as a management operations consultant, specializing in the fields of sanitation, housekeeping, building management, and environmental services. Tr. at 693. Mr. Candy wrote

---

Respondents' evidence shall be denoted as "RX-[exhibit number]". Exhibits admitted to the record sua sponte shall be denoted as "ALJX-[exhibit number]".

housekeeping and maintenance manuals and provided training in those disciplines, and is experienced in construction. Tr. at 694-695. He also has experience in operating businesses, and he managed a large horse farm in Pennsylvania at one time. Tr. at 761-762.

During his years working for corporations and as a consultant, Mr. Candy traveled extensively and visited zoos wherever he went. Tr. at 695. He started gathering information on owning and operating a zoo in the 1980s. *Id.* The Zoo is located on a defunct campsite, which Mr. Candy modified to house and exhibit Tri-State's animals. Tr. at 695-696. The site included a large building that was lost in a fire in March, 2006. Tr. at 763. Most of the Zoo's post-fire structures were constructed by volunteers from recycled materials. Tr. at 697. Tri-State has no employees, but approximately 20 volunteers perform specific duties at the Zoo commensurate with their experience and abilities. Tr. at 696.

The Zoo is still being developed, and approximately five acres of the sixteen acre site are used for zoo related purposes. Tr. at 698. Mr. Candy estimated that when construction is completed, the Zoo will occupy eight acres of the property. Id. Mr. Candy explained that the Zoo operates as an animal rescue facility as much as it does a zoo. Tr. at 699. He estimated that 3,000 visitors come to the Zoo each year to visit approximately 50 animals. Tr. at 721. Although Tri-State rescues animals, all of its big cats are hand-raised from infancy, and three were born at the facility. Tr. at 699-700. Tri-State does not solicit for animals, but is contacted by both large and small zoos when those facilities cannot accommodate a particular animal. Tr. at 700.

Dr. Gloria McFadden has been employed by the Animal Care Division of APHIS as a Veterinary Medical Officer for approximately eight (8) years. Tr. at 31. Her primary duties are to enforce the AWA and prevailing regulations at facilities that she is assigned to inspect. Tr. at 33. Among her assigned facilities is Respondents', with which Dr. McFadden first became familiar in 2004. Tr. at 34. During the period from May 17, 2006 through September 29, 2010, Dr. McFadden conducted eleven (11) inspections of Tri-State's facility and cited Respondents with violations of the Act and regulations. CX-3 through CX-14.

Mr. Candy testified that he does his best to comply with prevailing rules and regulations regarding the operation of his facility, but has been told by AWA personnel that they cannot give him specific guidance when he has asked for assistance. Tr. at 701. This has posed problems for him, as he has been found non-compliant with some of his fences and cages, despite his requests to consult with an AWA expert about standards for those structures. Tr. at 701-702. Although Tri-State solicits Dr. McFadden's advice before undertaking any project, Mr. Candy has been told that APHIS cannot give specific advice on how to achieve compliance. Tr. at 702.

Mr. Candy was frustration to be cited for violations of the AWA on occasions when weather or other unusual circumstances caused a temporary non-compliance. Tr. at 702. As an example, he was cited for muddy conditions after five consecutive days of rain. Id. Tri-State has been responsive to criticism from APHIS and has immediately corrected any problems pointed out by APHIS. Tr. at 702-703. Mr. Candy asserted that the Inspector General for the United States Department of Agriculture concluded that APHIS had no clear regulatory guidelines for many of the issues under its jurisdiction. Tr. at 748; RX-3. According to Dr. McFadden, inspectors were expected to be enforcement officers who had little authority to assist exhibitors on reaching compliance with the AWA and its regulations. Tr. at 749. Mr. Candy was not familiar with APHIS' website, which has reference materials on the Act and regulations. Tr. at 850.

Mr. Candy speculated that the biggest problem with his facility is "aesthetics". Tr. at 703-704. The Zoo doesn't always look "pretty", especially in winter. Tr. at 704. Mr. Candy opens at 10:00 a.m. in the morning and closes in the winter at dusk. Tr. at 705. Volunteers follow a written schedule of tasks throughout the day. Tr. at 704. He alone feeds and handles the large cats. Tr. at 705.

Mr. Candy admitted that he does not keep paperwork related to the zoo's operations on site, stating that he has no permanent structure to store records, save a small gift shop. Tr. at 706. He does not believe it is appropriate to keep records at the gift shop or in the kitchen area of the

reptile house, where he keeps staff daily check lists. Mr. Candy argued that he always provides the requested records and documents on the second day of inspection. Tr. at 836-837; 706-707. His records include an enrichment plan for primates, acquisition and disposition records, and information regarding the Zoo's attending veterinarian, as well as dietary instructions. Tr. at 707-713; 728-729.

Volunteers are required to complete a daily log on which they check off tasks and make observations about conditions of animals and facilities. Tr. at 724-725. The kitchen area where he stores these logs is small, and Mr. Candy did not believe it would be a good place to store official records, which he keeps at home. Tr. at 730-731.

Mr. Candy also keeps information regarding training sessions he or his volunteers attended, and the Zoo's rules and regulations. Tr. at 714-718. His rules include instructions on cleaning areas occupied by the animals and rules for feeding the animals. Tr. at 718-720. He provides ongoing instruction to his volunteers during their tours of duty. Tr. at 719. Some volunteers live on the premise, which provides added security. Tr. at 727. Other than a "Big Cat Symposium" that he and volunteers attended in 2004 (Tr. at 714-715; RX-5), Mr. Candy and the Zoo volunteers have had no formal training in the care and keeping of exotic animals. Tr. at 710-712.

Mr. Candy doubted that the facility would appear "perfect" at any time, but he asserted that he was conscientious about correcting problems that he and his volunteers find, or that are pointed out by APHIS. Tr. at 720. He believed that he made every effort to correct violations. Tr. at 834-835. He considered himself compliant with recordkeeping requirements because he always provided all requested records to APHIS inspectors before they concluded the inspection. Tr. at 835-845.

The Zoo gives educational tours to school and other groups, which Mr. Candy conducts on a daily basis. Tr. at 722. Mr. Candy encourages interaction with the animals, but does not allow direct contact with them. Tr. at 854-855. He explained that he conducts tours of the Zoo because the facility does not have a lot of signs, and he is aware that it looks "different" from traditional zoos. Tr. at 790. Many of the Zoo's animals

are rescued, and Mr. Candy wants visitors to understand the Zoo's mission and layout. Id.

C. Prevailing Law and Regulations

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 and transportation of animals by 7 U.S.C. §§ 2143(a), 2151. The Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer and transportation of regulated animals. 7 U.S.C. §§ 2133, 2134, 2140. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the Regulations and Standards are being followed. 7 U.S.C. §§ 2142, 2143, 2143 (a)(1) and (2), 2146 (a).

Violations of the Act by licensees may result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a $2,500 maximum, between April 14, 2004 and June 17, 2008 the maximum for each violation was $3,750. In addition, 7 U.S.C. § 2149(b), was itself amended and, effective June 18, 2008, the maximum civil penalty for each violation had been increased to $10,000.

The Act extends liability for violations to agents, pursuant to 7 U.S.C. §2139, which states, in pertinent part: "the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission or failure of such . . . exhibitor as well as of such person." 7 U.S.C. § 2139.

Implementing regulations provide requirements for licensing, recordkeeping and attending veterinary care, as well as specifications and

standards for the humane handling, care, treatment and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The regulations set forth specific instructions regarding the size of and environmental requirements of facilities where animals are housed or kept; the need for adequate barriers; the feeding and watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public, with sufficient distance or barriers between animals and people. *Id.*

D. Cited Violations

APHIS cited Respondents with violations of the Act and regulations that generally pertain to the state of the zoo's physical facilities; the existence of proper veterinary care; the proper retention and storage of records; and handling of animals, as follows:

1. Handling of Animals 9 C.F.R. § 2.131 (c)(1)

Respondents were cited with several violations of this regulation, which provides:

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

9 C.F.R. § 2.131(c)(1).

a. Cougar

During an inspection conducted on May 17, 2005, Dr. McFadden determined that the barrier fence separating the public from the cougar's enclosure was approximately 3 feet from the enclosure and too low, and would permit potential contact between the public and the animal in violation of 9 C.F.R. § 2.131 (c)(1). Tr. at 36; CX-3. Dr. McFadden acknowledged that the AWA regulations do not specify how high a

barrier fence must be to be considered "adequate". Tr. at 165; 163. However, since there were areas where she could reach over the fence and touch the enclosure containing the cougar, she concluded that the barrier fence was inadequate to prevent people from leaning over and reaching in to touch the cougar. Tr. at 166-168. Upon cross examination by Mr. Candy, Dr. McFadden acknowledged that the cougar is declawed. Tr. at 168.

Mr. Francis Keyser is an investigator for APHIS who investigated Respondents' facility in May, 2006. Tr. at 414-416. Mr. Keyser noted Dr. McFadden's concern that the cougar cage did not have an adequate perimeter fence, and he took photographs of the cougar cage area. Tr. at 418; CX-3. He also followed up on Dr. McFadden's concerns about the structural strength of the lion enclosure and took pictures of it. Tr. at 421-422;CX-3. Mr. Keyser met with Mr. Candy and prepared an affidavit which he asked Mr. Candy to sign. Tr. at 428-431; CX-16.

Respondents maintained that the fence around the cougar's enclosure was of sufficient distance within the regulations. Tr. at 752. The cougar is no longer housed in this enclosure. Tr. at 815. Although Respondents were cited for other violations involving the cougar's housing in subsequent investigations, this violation was not cited as a repeated violation. Dr. McFadden testified that repeated violations should be cited. Tr. at 225-226. She typically did not cite violations that had been corrected. Tr. at 62-63.

There is no evidence that the fence around the cougar enclosure was changed. Mr. Candy contended that the fence was adequate within the regulations, which suggests that it remained unchanged. Since the cougar no longer occupies that space, whether the fence was moved or height added is moot. Nevertheless, I accord substantial weight to Dr. McFadden's testimony and opinion and find that the barrier between the public and the cougar was not sufficient. It is not material that the cougar was declawed; the regulations are meant to protect the animal from the public, as well as the public from animals.

However, I am not persuaded that this lapse represents a violation of handling animals. Nothing of record demonstrates that the public had breached the perimeter barrier or that the cougar was near the public. Any non-compliance with the regulations involving the cougar enclosure would more aptly constitute a facilities violation. The height and distance of the perimeter fence from the cougar alone does not constitute a violation of 9 C.F.R. § 2.131 (c)(1), where there is no evidence that the public was seen near the cougar. This charge is dismissed.

b. Lion and Tigers

During an inspection conducted on June 2, 2008, Dr. McFadden was accompanied by another inspector, Robert Markham. Tr. at 75; CX-8. Volunteers for the Zoo were observed leading a group of people to see lions and tigers in a "behind the scenes tour". CX-8. Dr. McFadden noticed that the barrier between the public and the animals would have allowed people to reach in close to the animals, though she did not observe anyone doing so. Tr. at 76-77. She took pictures of two areas that showed people very close to the cats' enclosures. CX-8; Tr. at 79-80. No pictures show anyone touching the animals. CX-8; Tr. at 249. The lion was situated at a distance from the viewing public, with a wall-like structure between the animal and the tour participants. Tr. at 250.

Robert Markmann has been employed by APHIS since 1986, and has been an animal care inspector since 1988. Tr. at 359. He accompanied Dr. McFadden during her inspection of Tri-State's facility on June 2, 2008. Tr. at 361. He observed members of the public viewing tigers and saw children touching the tigers through their cage. Tr. at 362. Mr. Markmann advised a Zoo volunteer who appeared to be in charge that APHIS did not allow the sort of exhibition that was underway, and asked to speak to the owner. Tr. at 363. Dr. McFadden left to find Mr. Candy and bring him to the exhibition site; when Mr. Markmann told him that he could not allow the public to touch the tigers, Mr. Candy told him that he encouraged contact by the public with the tigers to keep them friendly. Tr. at 365.

Mr. Markmann related several incidents where tigers hurt APHIS inspectors and injured or killed exhibitors. Tr. at 365-369. He explained that APHIS has no pictures of the children touching the tigers because

people at the exhibit complained about the inspectors taking pictures of children. Tr. at 370. Mr. Markmann said that some people expressed their unhappiness about being stopped from touching and photographing the tigers while they waited for Mr. Candy to come to the scene. Tr. at 376.

Mark Deatelhauser works as a corrections officer, but has volunteered at the Zoo since 2004. Tr. at 509. He does a little of everything at the Zoo, helping with exhibitions and tours, and feeding and cleaning up after the animals. Id. Mr. Deatelhauser described how he and volunteers would bring groups to see the large cats in their housing behind the cages that are open to general public viewing. Tr. at 516-517. Usually at least two people from the Zoo are with the public during these special exhibitions. Tr. at 518. People are allowed to get close to the animals to take pictures, but they are instructed not to touch the animals. Tr. at 519.

Mr. Deatelhauser was taking a group on a tour of the back of the tiger area on June 2, 2008, when USDA inspectors were present. Tr. at 510. He did not allow anyone on the tour to touch the tigers or to put their hands in their cages. Tr. at 511. He was not involved with showing the lions to the group that day. *Id.* Mr. Deatelhauser was the only barrier between the public and the cats in their cages. Tr. at 517. He estimated that between fifteen and twenty people were in the group on June 2, 2008, but he could not recall the exact number. Tr. at 515.

Mr. Deatelhauser had worked at the Zoo for four years on the date the inspectors observed him. Tr. at 514. At that time, he worked at his regular job from 4:00 p.m. to 12:00 a.m., so he helped at the Zoo every morning from Monday through Friday. *Id.* Mr. Deatlehauser's training for his work at the Zoo was acquired "on the job" from Mr. Candy. Tr. at 514; 520. Mr. Candy taught him how to handle young animals, and he has worked with the tigers since they were born at the zoo. Tr. at 520-521; 524. Mr. Deatelhauser no longer handles the cats, but he does direct them to a "catch area" for feeding or cleaning their cages. Tr. at 521. Mr. Deatelhauser was instructed that if an animal escapes, he should do "whatever you can to keep the animal from getting away". Tr. at 522.

He no longer conducts many tours because he now works at his regular job during the day. Tr. at 523.

Kimberly Nicole Cramer has volunteered at the Zoo for ten years. Tr. at 527. Her primary duties include helping to keep internet records, helping with tours, and working in the gift shop and ticket office. Tr. at 528. She leads school groups on tours, including areas of the Zoo that are otherwise restricted to the public. Tr. at 429-530. She often works with another volunteer to lead the tours, depending on the size of the group. Tr. at 530. The school tours generally include chaperones or parents of the children. *Id.* Ms. Cramer received all her training about the Zoo's animals while working as a volunteer. Tr. at 538-539.

Ms. Cramer instructs all visitors to keep their hands away from the animals, but she believes that the area where she usually stands with groups is too far from the fence containing the lion to allow people to put their hands near the animal. Tr. at 532. She believes she is a sufficient barrier between the animals and the tour group. *Id.* She instructs people to keep their backs against the wall opposite to the lion's enclosure and their arms at their sides. Tr. at 544-545. She is particularly vigilant when children are present, having four of her own. Tr. at 542-543. When Ms. Cramer thinks that the lion would not be receptive to a crowd, she won't bring them to the area behind the lion enclosure. Tr. at 533.
Ms. Cramer was one of the volunteers leading a tour group on June 2, 2008 when USDA inspectors were at the Zoo. Tr. at 534. She testified that no one touched the lion or put their hands near the fence, which she estimated was twelve feet in distance from the lion. Tr. at 535-537.

Mr. Candy denied inviting the public to touch the tigers. Tr. at 854. He explained that Mr. Markmann misunderstood his concept of contact with the animals, by which Mr. Candy meant closer interaction with them. *Id.* Mr. Candy did not say a lot to Markmann that day[3]. Tr. at 855. He compared his "behind the scenes tour" to films he had seen of children smacking tigers at a preserve, and observed that "[t]here is actually no regulation that says you can't do that". Tr. at 787. He explained that the area where people entered to observe the tigers close

[3] I infer from discussions about the admission of evidence and Mr. Candy's concerns about Mr. Markmann's behavior that there was some unpleasant interaction between the individuals on June 2, 2008.

up was about twenty feet long, and that the number of people who could enter was controlled by the volunteer at the door, while another volunteer was inside the corridor with the tour. Tr. at 786-789. Mr. Candy likes to compensate for what he believed to be the aesthetic drawbacks of his facility by offering tours and personal tutoring to visitors. Tr. at 790.

Mr. Candy observed that at the time of the inspection at issue, the tigers were young teenagers and had occupied their space for about four months. Tr. at 790. They were housed in that area while their permanent enclosure was being prepared. Tr. at 790-791. Mr. Candy believed that his staff was familiar with the temperaments of his hand-reared tigers. Tr. at 788. No one at the Zoo moves a cat unless he is there, and he has trained his staff to handle an animal escape by using fire extinguishers that are scattered throughout the facility. Tr. at 791-792.

I accord substantial weight to the testimony of Ms. Cramer and Mr. Deatelhauser that they instructed the public not to touch from the animals. Bonnie Kellerhouse also conducted tours at times and her description of instruction to the public was very similar to Ms. Cramer's. See, Tr. at 585. I accord particular weight to this testimony, as it was elicited solely on my colloquy with the witness. I similarly credit Mr. Candy's explanation that he wanted to provide tour groups with some special closer viewing of the animals but did not invite them to touch the tigers.

I accord weight to the testimony of the volunteers, who both described giving strict instructions to visitors to keep their hands down. Mr. Markmann testified that he saw children reach into the spaces in the fencing to touch the tigers, but Dr. McFadden did not observe children touching the animals before she left the area to find Mr. Candy. Tr. at 84. The evidence regarding whether people touched the tigers is in equipoise.

Regardless, I find that Complainant has met its burden of proving that Respondents failed to provide a sufficient barrier between the tigers and the public, thereby mishandling animals. The photographs depict close quarters, with Mr. Deatelhauser in front of the group in a narrow corridor

and Ms. Cramer outside of the entrance to the corridor. CX-8. It is unlikely that Ms. Cramer could have seen what people did while they observed the tigers, and she was tasked with crowd control in the area next to the lion enclosure.

The volunteers assigned to conduct tours did not have sufficient control over the participants to prevent them from reaching into the tigers' cage. The quarters were too cramped and the volunteers too far apart to provide an adequate barrier between the crowd and the animals. Neither volunteer had a good view of everyone on the tour once the tour entered the area behind the tiger cages. People were too far from Ms. Cramer once they were behind the tiger cage, and Mr. Deatelhauser did not stand between all of the tour participants and the cage. Mr. Deatelhauser could scarcely have seen, never mind have stopped, an impulsive child from reaching between the fencing and touching the tigers. Mr. Markmann's credible testimony about injuries from tigers illustrates their unpredictability, and emphasizes the need for extra caution.

Further, although I fully credit the volunteers' testimony that their years at the Zoo have made them familiar with the tigers, the record does not establish that they were instructed on specific plans for capture or restraint of tigers, or were prepared to respond to an animal attack. Ms. Cramer has significant experience in educating and handling crowds, but there is little evidence that she would know how to restrain the lion if it decided to jump the wall that separated it from the viewing public on these special tours. Her reliance on her familiarity with the animals and their moods appears misplaced in these circumstances, given the inherently dangerous nature of lions and tigers.

The evidence demonstrates that the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. The regulations anticipate that individuals trained to handle and control animals would be involved in their exhibition to the public, but the presence of a handler does not eliminate the need for distance or a barrier between the animal and the public. *In re: ZooCats, Inc.*, 68 Agric. Dec. 737 (U.S.D.A. 2009).

Given the limited handling training for the volunteers, the number of people in attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come into contact with the animals, risking harm to them, I find that the Zoo's private, behind-the-scenes exhibitions, such as was observed on June 2, 2008, represent failure to adequately handle animals in violation of 9 C.F.R. § 2.131(c)(1).

c. Porcupine

On June 2, 2008, Dr. McFadden observed that the enclosure containing a porcupine did not have a barrier, although she had seen one in the past. Tr. at 90; CX-8. Dr. McFadden maintained that the lack of any barrier represented a violation even though no people were seen in the area. Tr. at 257. Dr. McFadden agreed that Respondents had corrected the problem by erecting a concrete wall. Tr. at 100; 278; CX-9.

Mr. Candy credibly testified that on the day of Dr. McFadden's inspection, he had removed a portion of a chain link fence that served as the exterior barrier so that he could exhibit the porcupine more closely to a school tour that was present. Tr. At 793-794. Nevertheless, Respondents built a stone wall as an additional barrier together with the chain link fence. Tr. at 783.

The record establishes that there was an inadequate barrier fence around the porcupine enclosure area, but there is nothing to suggest that a porcupine was being exhibited at the time of the inspection in such a way as to risk contact between it and the public. When Mr. Candy removed the barrier to exhibit the porcupine to the school group, he acted as a barrier within the meaning of the Act and regulations. The evidence fails to demonstrate a violation of a regulation concerning the handling of an animal pursuant to 9 § 2.131(c)(1).

d. Binturong

At the inspection conducted on August 3, 2009, Dr. McFadden observed a child stepping over a missing rung of the perimeter fence around the binturong enclosure[4]. Tr. at 102-103; CX-8. A post had fallen from the fencing and Mr. Candy fixed it as soon as Dr. McFadden pointed it out. Tr. at 806. That problem has not occurred again. Tr. at 807.

The evidence does not establish that this violation involved inadequate handling of an animal. Complainant admitted that the child did not enter the binturong enclosure, and the record fails to establish the location of the binturong when the child stepped over the perimeter fence. There is no evidence in previous or subsequent inspection reports that demonstrates that the fallen fence post was a persistent problem. Although the defective condition could represent a deficiency in facilities, I find the evidence insufficient to establish a violation of 9 C.F.R. § 2.131(c)(1).

e. Squirrel Monkey

Dr. McFadden conducted an inspection of Tri-State's facility on September 29, 2010, and found openings in the wire mesh entry door of a squirrel monkey's enclosure that permitted contact between the animal and public. Tr. at 132; 134; CX-14. The inspector was concerned that the gauge of the wire mesh was wide enough to allow people to put their fingers through it. Tr. at 136. On cross-examination, the doctor agreed that the squirrel monkey had occupied that enclosure for some time and she had never before issued a citation for the condition of the enclosure. Tr. at 311. Once she pointed it out to Mr. Candy, the door was replaced with a sold door. Tr. at 311-312. Mr. Candy observed that the monkey had been in the same location with the same conditions for five years, and the Zoo was not cited for a problem with the construction before this inspection. Tr. at 820.

I credit Dr. McFadden's testimony that the public could have reached through the door to touch the squirrel monkey. I find that the inspector's failure to cite this particular condition on previous inspections suggests

[4] USDA moved to correct the complaint to conform with the evidence that the child stepped over the perimeter fence, and did not enter the binturong enclosure, and I granted the motion. Tr. at 447-448.

that the violation was not significant. I note that the condition was corrected. Nevertheless, I find that the violation is supported by the record.

2. Facilities and Operating Standards

The majority of the cited violations involved in the instant adjudication fall within the general penumbra of "facilities", and shall be addressed categorically.

a. Structural Strength

The pertinent regulation states that

> [t]he facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

9 C.F.R. § 3.125(a).

i. *Lion Enclosure*

Respondents were repeatedly cited for failure to provide a structurally sound lion enclosure. CX-3; CX-7; CX-10; CX-11; CX-12; CX-13; CX-14. Dr. McFadden testified that at her inspection on May 17, 2006, she observed that ". . . the lion cage, the home panels at the bottom of the enclosure, they were not attached to the bottom in any way, and side posts weren't securely attached at that time and there were some gaps as well that the animal could reach under or dig under". Tr. at 40. Dr. McFadden pointed to photographs that she took, which depicted hog panels and different kinds of fencing held together by clips. In her opinion, the failure of one kind of fencing could cause a break in a section of fencing and the potential escape of the Zoo's lion. Tr. at 49. Dr. McFadden testified that the gauge of the fence would not have

prevented the lion from escaping if it attempted to get out. Tr. at 69.[5] She also believed that the use of railroad ties at the bottom of the hog panel fence created "the potential for it to detach over time or [be] bothered or tampered with, I guess". Tr. at 104; CX-11.

On September 26, 2007, the inspector found that the entrance door of the lion enclosure, constructed of treated wood and small gauge wire, would not contain the lion. CX-7; Tr. at 67. Dr. McFadden believed that the lion was kept in the enclosure depicted in her photograph at the time of the inspection, but she noted that the lions and tigers were moved around. Tr. at 67-68. The older lion has occupied the same enclosure for some time. Tr. at 68.

Dr. McFadden took pictures of the various kinds of fencing used to build the lion enclosure, and included them with her inspection report from September 30, 2009. CX-11. She shared with Mr. Candy her concerns that the fencing was not "traditional" and did not "necessarily meet the industry standards that [she] generally would see. So it was making an assessment of whether it was appropriate difficult". Tr. at 110.

Dr. McFadden referred to photographs showing corner metal poles connected to corner wooden poles with clamps, and other sections of fencing connected with wire clips. CX-11. She found the construction methods and materials "questionable", as she doubted their durability and strength. Tr. at 111-113. Dr. McFadden's inspection report of her September 30, 2009 inspection detailed her concerns about the use of multiple kinds of materials fixed together with clamps and plastic ties. CX-11; Tr. at 111-112.

At her inspections on November 20, 2009 and May 19, 2010, Dr. McFadden again cited Tri-State with violations related to the soundness of the lion's enclosure because nothing had changed and the materials were the same. Tr. at 121; 127; CX-12; CX-13. At her inspection on September 29, 2010, Dr. McFadden observed that an overhang made of

---

[5] The testimony is confusing at this juncture, because it has been acknowledged that the Zoo had only one lion, but the inspector refers to young lions. I believe she meant to discuss the young tigers' enclosure. See, Tr. at 233.

wood planks and high tensile wire had been added to the lion enclosure, but she still had concerns about the structure. Tr. at 138-141 ; CX-14.

In response to questioning by Mr. Candy, Dr. McFadden admitted that she could not specifically state the exact nature of the defects in the lion enclosure, other than that she believed it potentially would be unable to contain the lion. Tr. at 171-172. Dr. McFadden testified that industry standards are considered when determining whether an exhibitor is in compliance with the Animal Welfare Act. Tr. at 172. In addition, APHIS' big cat expert was unfamiliar with the hog wire panels used by Respondents. Tr. at 173. She acknowledged that the Zoo's lion has occupied the enclosure space for six years without an escape. 172.

Dr. McFadden testified that the lion enclosure was "not the most pleasing exhibit" and one of her reasons for citing non-compliance was to :"minimize complaints", presumably from the public[6]. Tr. at 175. She admitted that she had offered no alternative solution to Respondents, and further admitted that over the years, Respondents have added to the enclosure to increase its strength. Tr. at 172; 176. She had not observed breaks in the high tensile fence erected by Respondents. Tr. at 177. The fence is built with metal poles buried in the ground, and is attached to horizontal metal poles as well as vertical poles 11 feet high. Tr. at 178. The hog panels were added by Respondents after discussions with Dr. McFadden regarding how to improve the fence. *Id.*

Dr. McFadden reiterated her opinion that when a fence is constructed of different materials, the potential for a break in one kind of material could decrease the overall strength of the fence. Tr. at 179. She recalled being able to move one of the panels, which she concluded showed that the fence was not structurally sound. Tr. at 180. The inspector referred to pictures that showed that the fence was not consistently constructed. CX-11. Sometimes poles were erected between fencing; sometimes poles were inside the fence; and sometimes poles were outside the fence. The support posts appeared rusty and there were gaps in the fencing, as well as between the fencing and the ground. Tr. at 180.

---

[6] Mr. Candy made references to complaints about his facility made to various groups.

In Dr. McFadden's opinion, it was generally better to have poles outside the fence, because if an animal would push on the fence, the pole would stop the fence from moving further. Tr. at 185. She conceded that the strength of a fence and placement of poles depended on the type of materials and manner of construction. Tr. at 186. In some places, she agreed that changes made by Respondents increased the strength of the lion enclosure, but overall had doubts about the structural integrity of the fence. Tr. at 186-187.

Dr. McFadden acknowledged that Mr. Candy had requested an opinion about the fence from APHIS' big cat expert, who did not offer one. Tr. at 188. Dr. McFadden would have appreciated a second opinion from the specialist regarding whether the lion enclosure was in compliance with the AWA and regulations. Tr. 307. She had discussed with Mr. Candy that she wanted a resolution on the issue from another source. Id. Dr. McFadden further agreed that the basis for Respondents' non-compliance with respect to the lion's enclosure was that the fence may not be structurally sound rather than an affirmative opinion that is not structurally sound. Tr. at 190-191.

Dr. Ellen Magid has been a supervisory animal care specialist with APHIS since 1994. Tr. at 389-390. In September, 2009, Dr. Magid accompanied Dr. McFadden on an inspection of Tri-State's facilities. Tr. at 391-392. She recalled inspecting the lion enclosure and finding an area of fencing that she could move back and forth. Tr. at 392. Dr. Magid talked about the "wobbly" fence with Mr. Candy, who advised her that he wanted the loose fence as he believed it would be harder for the lion to get out. *Id.* She could not recall any specific reason for Mr. Candy's opinion, though she remembered discussing his rationale with him, as well as discussing the merits of different kinds of fencing. Tr. at 394.

Dr. Magid favors chain link fence over a hog panel fence because in her opinion, with hog panel fencing, "the animals can reach out with paws, sometimes up to their shoulders". Tr. at 395. Dr. Magid admitted that hog panel fencing met the regulatory minimum standards. Tr. at 408. She agreed that theories about fence construction varied and that the integrity of a fence sometimes depended on the animal. Tr. at 396.

Dr. Magid had observed a gap in the bottom of the lion enclosure of about two and one half feet in one section. Id. She also did not like the fence "waving", as the movement could cause metal fatigue. Tr. at 399-400. The doctor did not agree with Mr. Candy's theories about the flexibility of a fence adding to its safety, and found that the lion's enclosure was not structurally sound, which violated the Act and regulations. Tr. at 401. Although Dr. Magid was aware that the lion had lived for a long time in that enclosure without escape, she remembered an incident where he almost got out. Tr. at 403-404.

Dr. Magid did not recall a complaint from the public about the lion's enclosure, and she had no concerns about the health of the Zoo's animals. Tr. at 406. Her overall concern with the lion's enclosure was that it was constructed of many different materials that were joined together in different fashions in a manner that made it difficult to assess its structural integrity. Tr. at 409. The various kinds of materials required maintenance to prevent rusting, fatigue and breakage. Tr. at 410. Although APHIS' big cat specialist was not available to personally inspect Respondents' facility, she looked at pictures of the fencing and reached similar conclusions to Dr. Magid's. Tr. at 411. The big cat specialist did not give her opinion in written form. Id.; RX-11.

Timothy Squires is a police officer who regularly volunteers at the Zoo. Tr. at 590-593. Mr. Squires has also worked as a county code enforcement officer. Tr. at 592. He acquired construction experience by building his own home and other buildings. Tr. at 646. Mr. Squires does a little of everything at the Zoo, but is primarily involved in building and maintaining enclosures. Tr. at 593. When he first started volunteering at the Zoo, the two tigers were a few months old, and he has watched them grow. Tr. at 594-595. He has worked with the Zoo's large cats, and was particularly involved with the Zoo's cougar. Tr. at 596.

Mr. Squires took pictures of the facility and referred to them during his testimony. RX-15 through RX-22. He did not build the lion enclosure but was familiar with its construction, and described it from a photograph (RX-17) as consisting of eight foot by twenty foot panels

made of four inch square six gauge fencing on the outside of metal posts, with high tensile wire above the post and chain link fence below the post. Tr. at 663. The wires are attached with hog-rings and clamped to the horizontal poles, but Mr. Squires could not say from the picture how they are attached at corners. Tr. at 664-665. Railroad ties are at the base of the fencing and are attached to the fence. Tr. at 665. Another picture showed that at the corners, fencing is held to the posts by clamps. Tr. at 666. Tension straps further stabilize the fence. Tr. at 666.

Respondents have changed all perimeter or barrier fences and replaced three foot fences with eight foot fences. Tr. at 638-639. Mr. Squires confirmed that Respondents planned to confine all large cats to one area of the Zoo, located near the center of the premises and contained within a barrier fence. Tr. at 640. Mr. Squires described the lion enclosure that was then under construction at the Zoo, using photographs that he took to illustrate his explanations. Tr. at 634; RX-21. He testified that metal poles that hold the fencing are sunk into the ground several inches, and stand about twelve feet high. Tr. at 634-635. Mr. Squires stated that Mr. Candy was debating the relative merits of using chain link fence, compared to wire gauge fence, which he prefers. Tr. at 640-642. Mr. Squires thinks that chain link is flimsier and does not repair as well as panel fencing. Tr. at 641.

Mr. Squires described how he and Mr. Candy placed wire fencing over a wooden perimeter fence with a wooden platform when Dr. McFadden directed them to do so. Tr. at 643-644. Respondent has attempted to address every concern that Dr. McFadden shared by adding fencing and strengthening existing fencing even in areas that the public didn't generally go. Tr. at 647-651; RX-18; RX-22. Mr. Squires believes that the fences at the Zoo are structurally sound. Tr. at 647. Mr. Squires explained the integrity of the materials and the construction of the fencing by showing samples of the materials used. Tr. at 671-676.

Mr. Squires testified that the presence of rust does not present a threat to the strength of metal unless the rust corrodes the metal. Tr. at 675. He typically sands and paints rusted parts, and replaces parts that have deteriorated. Tr. at 676-677. Mr. Candy believed that rust would not harm an animal that licked it because it contains no lead. Tr. at 754. He

pointed out that the fencing was secured to the railroad ties, which were secured to poles. Tr. at 753.

Both Dr. McFadden and Dr. Magid did not like certain aspects of the lion enclosure fencing, and I credit their testimony, particularly regarding gaps in the fence and where the fence joined, and places where the fence appeared slack, which photographs corroborate. Although she did not provide a written opinion, APHIS' big cat specialist, Dr. Laurie Gage, agreed with the inspectors that the lion enclosure. Mr. Candy recalled discussing the fencing with both Dr. McFadden and Dr. Magid and he testified that he did not get an opinion about the fence's integrity from Dr. Gage. Tr. at 741. It appears as though Respondents expected a written opinion from Dr. Gage, but I do not find such corroboration necessary.

Although Dr. Magid conceded that hog wire panels met the regulatory standards, her major concerns were with the construction methods used in the fencing and not the materials. The photographs depict a structure that looks cobbled together. I accord substantial weight to Mr. Squires' testimony regarding the strength of the fencing, the security of the panels and the railroad ties, and the difference between a layer of rust and a corroded fitting. Although Mr. Squires is not a construction expert, he has experience in building and his testimony credibly explained why the structure had integrity. However, I equally credit the testimony of APHIS inspectors, who regularly assess the strength and utility of animal enclosures. The inspectors were concerned about gaps in area where fencing was joined, and at the bottom of the fence. They were concerned about the variety of materials used to join the fencing in corners. The fence was pliable at places, which represented an additional concern. There appeared to be no uniform plan in the construction, which cast suspicion on its fitness for purpose.

Dr. McFadden admitted that she cited Respondents with this violation out of her concerns that the fence "may" not be structurally sound. Although Dr. McFadden provided no specific instructions to Respondents on how to satisfy her concerns about the fence, she did repeatedly point out its flaws, and Dr. Magid shared her opinion. Dr.

McFadden testified that the fence did not meet industry standards. The record does not describe those standards, nor is reference made to a professional organization that issues such standards. Despite her allusion to "industry standards", Dr. McFadden's citations addressed specific conditions that Respondent could have remedied to meet her expectation of compliance.

Respondents argue that Dr. McFadden was uncertain about whether this enclosure met regulatory standards, and the record supports that conclusion to a point. Despite the somewhat speculative nature of Dr. McFadden's concerns about the fence, I find that the preponderance of the evidence establishes that the fence violated standards for structural integrity. Repeated inspections revealed different problems with the fencing that impinged upon its reliability. Although Respondents remedied problems identified by the inspectors, such ad hoc attention to the lion's fence falls short of coming into compliance. As I stated in my colloquy with Mr. Candy at the hearing, Dr. McFadden's uncertainty about the soundness of the fence is rooted in her inability to satisfy herself that it would withstand an escape attempt. Tr. at 867. It is clear that particular elements of the lion's fencing needed repair or bolstering, which supports Complainant's contention that the fencing was not adequate.

I further find that Mr. Candy's response to citations regarding the lion's fence demonstrate his unwillingness to accept APHIS' assessment about the fence. Although he questioned what more he could do to come into compliance and asserted that APHIS failed to give him guidance, I find that the inspection reports specifically identify deficits that should have been corrected. Since Mr. Candy fully believed his fence system was adequate, he ignored Dr. McFadden's repeated citations on this issue, resting upon his firm belief that she was uncertain about the integrity of the fence. I find that Dr. McFadden fully believed that the fence was unsound, but had no real and specific idea on how Respondents could come into compliance with the structure as it existed. I mark Dr. Goldentyer's suggestion that Respondents would know how to come into compliance by comparing the lion's enclosure to structures that were not cited for violations of this standard.

Considering the record as a whole, I find that Complainant has established that the lion's enclosure was not structurally sound within the meaning of the regulations. I note that this matter should soon be moot, since at the time of the hearing, Respondents were in the process of building new enclosures for all of the Zoo's large cats. Mr. Squires described a sound plan for building a solid enclosure that should address APHIS' concerns about gaps at the bottom of the fence, and the materials used to join fence posts at corners.

ii. *Tiger Enclosures*

Dr. McFadden had concerns about the enclosure that houses the Zoo's tigers. CX-14; Tr. at 140-145. She stood on the viewing platform looking into the white tiger area and took pictures that she used to illustrate her testimony. Tr. at 143-144; CX-14 at 8 and 12. She was concerned about the fencing dividing the white tiger area from an adjacent area housing other tigers:

> because, again, it was not traditional materials or industry standard, and they're using different types of materials to put this enclosure together. There was concern about the divider fence, particularly because up in this photo, he has added the wire hog panel fencing to that divider. Originally, it was just the board fencing and animals could potentially jump over. So the wire in this picture it has been added and I believe there's also electric wire you can see at the top of that. Additionally, there was some concern about the height of the enclosure at different points, because this was sort of an old swimming pool. So there was a sloping. So at the lowest end at one point didn't meet our 14 feet requirement. It was probably like 13 or something. So they did add some wire paneling, hog paneling. There has been high tensile wire added as well.

Tr. at 144-145.

Dr. McFadden had concerns that tigers could escape over a 12 foot high fence based upon experience at other facilities. Tr. at 146. However, she conceded that there was no height requirement for fences within enclosures that did not lead to public space. Tr. at 325. She described a wide ledge that she believed was less than 14 feet below the highest part of the fencing. Tr. at 147. She did not know the height of the concrete wall before it ended in a ledge to which Respondents had attached additional fencing, with electric fencing and a kick-in at the top. Tr. at 319. She admitted that height of the fence and the kick-in together was twelve feet. Tr. at 321.

Dr. McFadden pointed out that Respondents had added fencing, and the inspection report citing violations of this condition addressed general concerns about the security of the enclosure. Tr. at 326 She conceded that the regulations do not require a particular height of fence, but policy required a fence of at least twelve feet in height. She had not measured the exact height of the fences, and could not estimate the thickness of the concrete wall that formed part of enclosure. Tr. at 318.

Dr. McFadden did not like the concrete construction of the tiger enclosure because of the potential for crumbling. Tr. at 320. She cited Respondents with a violation of sanitary standards for that condition. CX-14. She did not know the thickness of the concrete, which Mr. Candy estimated at eight inches to two feet thick. Tr. at 323. She thought the animals could gain footing on the ledge, but could not say how high the fence above the ledge was. Tr. at 322. Dr. McFadden acknowledged that the board fencing that Respondents had erected to separate animals from each other was not in an area open to the public. Tr. at 148-149.

Lisa Ferguson is a Doctor of Zoology whose studies focused on the behavior of large cats. Tr. at 556-558. She has experience raising tigers and has worked at zoos and animal rescues for many years. Tr. at 556-559; 566-567. She has addressed animal rights conferences and has acted as a consultant on a variety of issues dealing with large cats. Tr. at 559. Dr. Ferguson is also a qualified veterinary technician and has worked with veterinarians. Tr. at 559; 567. She has worked at Tri-State as a volunteer since October 2011. Tr. at 560. In her opinion, the Zoo's cats are well-cared for and content. Tr. at 560-561. She has not observed

the signs and symptoms of anxiety or illness that are typical in large cats. Tr. at 561-563.

Dr. Ferguson was surprised at how well the tiger's containment area was adapted from a drained swimming pool. Tr. at 564. She observed, "[f]or a private owned zoo, out of the ones I've been to, I think that is like an amazing tiger cage, actually, to hold them, to see them, view them, they have plenty of room." Tr. at 564. She believed that the enclosure was secure and structurally sound. Id. Dr. Ferguson considered Respondent's enclosures to be superior to many she had seen at other facilities. Tr. at 574-575.

Mr. Squires helped build the tiger enclosure, and he described the construction methods and materials he used, illustrated by photographs that he took. Tr. at 595-600; RX-19; RX-20. Mr. Squires explained how the height of the enclosure varied because it was built around an emptied swimming pool, but the height of the fence was generally fourteen feet to sixteen feet from the lowest points of the enclosure, with kick-ins affixed to the top of the fencing. Tr. at 599-601. Additional fencing was added to concrete walls to heighten the fence. Tr. at 619. In addition, electric wiring runs along the top of the concrete, wood, and wire that comprised the enclosure. Tr. at 601-602. He explained that there was twelve feet of fencing above the ledge that concerned Dr. McFadden. Tr. at 622.

Mr. Squires testified that every structure or wall that abutted the tiger enclosure was at least twelve feet high. Tr. at 628. All cages were designed with catch areas, and no enclosure opens directly onto public areas. Tr. at 629-632. The doors to the tiger enclosure are reinforced with rebar and Mr. Squires believed them to be particularly impervious. Tr. at 630-633. High fences with electric wiring separate the Siberian and white tiger enclosures. Tr. at 635.

Mr. Squires explained that when the tiger enclosure is being cleaned, the tigers are moved to their inside area, and are kept in that area by two "guillotine" drop doors. Tr. at 652-653. The tigers are kept separate from the people who clean their areas. Tr. at 653.

Dr. McFadden's opinion regarding the fencing is speculative and conclusory. She believed that the fencing did not meet recent guidelines for height, but admitted that she was not good with dimensions, and conceded that the fence was at least twelve feet high. I accord substantial weight to Respondent's evidence regarding the height of the fencing that encloses the tiger display. With the help of Mr. Squires, Mr. Candy took extensive measurements of the fencing, documented by photographs. In addition, Dr. McFadden was unable to explain how Respondents could meet her expectations regarding the materials used to build the enclosure. Dr. McFadden and Dr. Magid were concerned that the re-purposed pool area created an unconventional enclosure, and their objections appear to be based primarily on the look of the containment area, since the preponderance of the evidence demonstrates that the enclosure was at least 12 feet high at all points, and constructed in a manner to discourage animals from escaping.

Dr. McFadden also did not provide a basis for concerns about the fencing that separated the tigers from each other. I credit the testimony that the fence that divided the enclosure did not open to the public in any way. Any animal that escaped its half of the enclosure would end up in another animal's enclosure. The enclosure was surrounded by fencing that was at least twelve feet high at every point, with tensile and electric wires and kick-ins at the top. Nothing of record demonstrates that an escape by tigers into each other's enclosures would pose a risk to the animals. The evidence fails to establish why the fence separating the different kinds of tigers violated the Act or regulations.

In contrast, Dr. Ferguson believed that the enclosure presented opportunity for environmental enrichment and variety for the tigers. Although Dr. Ferguson is not a veterinarian, she has a doctorate in zoology and has worked with big cats at many facilities. I accord weight to her opinion, and also credit Mr. Squires' testimony regarding the construction methods and materials, as his explanations are more concrete than the conclusory and speculative opinions of inspectors McFadden and Magid.

Complainant was unable to affirmatively explain how the tiger enclosure was fundamentally defective within the regulatory scheme. Although it is clear that inspectors found the enclosure unconventional,

the regulations measure the structural soundness of an enclosure and not its beauty. Complainant could not explain how Respondents could correct the fence to meet its standards. Dr. McFadden was unable or unwilling to advise Respondents on how to reach compliance regarding the tiger fence. In her opinion, Respondents are responsible for familiarizing themselves with regulatory requirements, presumably even those that could not be specifically explained.

I find that Complainant has failed to establish with any specificity how the Zoo's tiger enclosure fails to meet regulatory standards. I accord substantial weight to the photographic evidence that depicts the height of the fence and the methods and materials used for its construction, including an electrical fence and overhang at the top. I find that even considering the policy change regarding fence height, the evidence establishes that the tiger enclosure fences met that standard. These charges are dismissed.

iii. *Young Cat Enclosure*

On an inspection on or about September 26, 2007, Dr. McFadden cited the Zoo with failing to construct an enclosure for a large cat, referred to as a lion, in a manner sufficient to contain the animal. CX-7. On cross-examination, Dr. McFadden corrected the citation, acknowledging that the enclosure actually held Respondent's young tiger. Tr. at 233. Dr. McFadden explained that there were "two doors, sort of a space between a keeper area or a lock-out area." Tr. at 235. She believed that the small gauge of the wire door "would not withstand the strength of the animal." Id. She acknowledged that Respondents added hog-wire fence to the area. Tr. at 236. Dr. McFadden again found a problem with the young tiger enclosure upon inspection conducted on May 19, 2010. CX-13. At that time, she observed that a tree had grown inside the enclosure, which the tiger could potentially climb and escape. Tr. at 128.

Mr. Candy described how he had reinforced the door to this enclosure with another panel of six gauge wire. Tr. at 783. He further explained how trees had been growing out of an old pool back in 2008, two years

before he rebuilt the enclosure for the tiger. Tr. at 818-819. He stated that the tree that the inspectors had observed was small and was immediately removed. Tr. at 819; CX-13.

Complainant has established this violation, but Respondents have established that it was corrected.

iv. *Cougar Enclosure*

Complainant charged Respondents with a violation pertaining to damage and loose boards in the cougar's enclosure on September 26, 2007. CX-7. Mr. Candy explained that the loose boards were decorative trim that did not affect the structure. Tr. at 784. Upon reviewing photographs of the cougar area, Dr. McFadden acknowledged that the loose boards did not affect the structural integrity of the cage, and were decorative. Tr. at 240; CX-7, 7-9. The doctor admitted that the entire platform could be removed without impacting the integrity of the enclosure and agreed that the damaged platform did not give the cougar access to areas beyond its enclosure. Tr. at 9. She explained, "However, this is a citation for housekeeping and things have to be in good repair. If it's there, it needs to be in good repair." Tr. at 240.

On September 30, 2009, Dr. McFadden again cited Respondents with a violation of structural integrity standards with respect to the cougar enclosure. CX-11; Tr. at 114. She testified that the platform remained damaged. Id.

Despite Dr. McFadden's explanation that the condition of the cougar platform represented a housekeeping violation, Respondents were cited for structural failure. The record fails to establish that the loose boards on a decorative cover on the outside of a platform under the cougar enclosure violated the cited regulation pertaining to structural strength of a facility. See, 9 C.F.R. § 3.125(a). This charge is dismissed.

v. *Llama and Goat Enclosure*

On inspections conducted on November 29, 2006 and May 23, 2007, Dr. McFadden observed that wire fencing around the llama and goat enclosure was detached from the ground, causing sharp wire to protrude

into the enclosure. CX-5. Dr. McFadden was concerned that the protruding wire could injure an animal, or that an animal could escape. Tr. at 56. The inspector was aware that a miniature horse regularly damaged the fence, and she thought a citation could motivate a permanent solution to a recurring problem. Tr. at 57. Dr. McFadden had seen the horse damaging the fence, and Mr. Candy had told her that the horse damaged the fence on a regular basis. Tr. at 59; 222.

The inspector agreed that Respondents fixed the problem whenever she pointed it out, but she was not sure that the problem was ever permanently corrected. Tr. at 218; 222. She had no pictures of the damage because she typically does not retain pictures of inspections for more than three years. Tr. at 217-218. Mr. Candy testified that "that horse is no longer with us". Tr. at 765.

The evidence establishes this continuing violation. Respondents are credited with making repairs, but the record clearly demonstrates that the problem remained so long as the horse was housed in that location.

vi. *Reptile House*

A large crack in the back of the reptile house posed a potential structural problem, according to Dr. McFadden, who cited Respondents with this defect on her inspection report from May, 2006. Tr. at 40. Dr. McFadden agreed that the problem was repaired, and it was not the topic of any other citation mentioned in later inspections. Tr. at 192. Complainant has established this violation.

vii. *Bobcat Enclosure*

At her inspection on September 30, 2009, Dr. McFadden noticed that the bobcat's resting platform and ramp, which were made of wood, were damaged and need to be replaced. CX-11; Tr. at 114. She was concerned that the platform and ramp would not bear the weight of the bobcat. Id. Mr. Candy replaced the ramp that day with new wood, but he believed that the wood presented no structural problems that risked harm to the animal. Tr. at 815-816.

The evidence is in equipoise. Dr. McFadden observed an obvious defect in a ramp, but did not explain how the ramp would fail to bear the weight of the bobcat. Mr. Candy's explanation was reasonable and credible, and his willingness to make changes to accommodate Dr. McFadden's concerns merits consideration. This count is dismissed.

viii. *Arctic fox*

At her inspection on November 29, 2006, Dr. McFadden observed a hole in the roof of the structure housing an arctic fox. CX-5; Tr. at 57. Respondents corrected the defect on the date of the inspection. Tr. at 219. On September 29, 2010, the inspector saw detached planks on a wooden spool that the arctic fox used as a resting place. Tr. at 151; CX-14. Mr. Candy removed the resting platform that day. Tr. at 340. These charges are supported by the evidence.

b. Storage of Food and Bedding

"Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food". 9 C.F.R. § 3.125(c).

Dr. McFadden's inspection conducted on September 3, 2008, disclosed chemicals stored with feed hay storage building, and she concluded that this could potentially contaminate the hay. Tr. at 97. Respondents were cited with failing to store food supplies in facilities that would protect them from deterioration and contamination. CX-9.

Mr. Squires described a red building as the binturong house, which the Zoo had used for storage; at the time of the hearing, the building contained a separate enclosure that housed an alligator. Tr. at 655-656; RX-15. The items depicted at CX-8 had not been stored at this location for about two years. Tr. at 657. The barn is used to store hay, dog food, and feed for the field animals; a separate room inside the barn is used to store equipment and tools. Tr. at 658-660; RX-16. Within the barn is a platform where the Zoo stores garden tools and shovels. Tr. at 661.

Dr. McFadden's explanation for this citation is based upon conjecture. There is no evidence that chemicals were in open containers mixed among food stores. Her concerns about the potential of storing foodstuffs and other items in the same area represent a general apprehension about this practice, but not a clear indication of what risk the condition posed. It is clear that the inspector's advice about maintaining order was well placed and. Respondents have made significant strides to separate feed from supplies and tools. However, overall, the record fails to establish anything beyond the fact that Respondents' storage procedures were slovenly. This charge is dismissed.

c. Waste Disposal

Respondents were cited with a variety of violations of regulations pertaining to this obligation. The regulations require that:

> Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State and local laws and regulations relating to pollution control and the protection of the environment.

9 C.F.R. § 3.125(d).

i. *Accumulation of bedding and rodent feces in fennec fox and agouti enclosures*

On May 17, 2006, Dr. McFadden observed an excessive amount of waste and bedding in an enclosure housing an agouti and a fennec fox. CX-3; Tr. at 41. The doctor described a two-tiered enclosure occupied by the fox on the top and the agouti on the bottom. Tr. at 41-43. Mr. Candy testified that the agouti was not housed directly beneath the fox,

but rather that the area described by Dr. McFadden allows for air ventilation, heat distribution and drainage. Tr. at 756. He agreed that excess bedding could have been cleaned out, but disagreed that feces had accumulated in the area that actually was next to the agouti enclosure. Id.

This charge is sustained. Mr. Candy admitted that there was an excess of feces in areas near animal habitats. It is immaterial that the agouti was not directly in contact with the waste.

ii. *Excessive waste and excreta in pools*

On June 2, 2008, Dr. McFadden's inspection disclosed an excessive amount of excreta in a small pool where two adult tigers defecated and urinated. CX-8; Tr. at 91. The water was murky, and Dr. McFadden believed that the pool needed to be cleaned more often. Tr. at 90-91. Dr. McFadden cited Respondents with a repeated violation of this standard on August 3, 2009 (CX-10; Tr. at 105) and again on September 30, 2009 (CX-11; Tr. at 114-115); and November 20, 2009 (CX-12; Tr. at 122).

Mr. Candy explained that the pool referenced in the inspection reports served solely as the "tiger toilet". Tr. at 794. Dr. McFadden generally conducts inspections on Wednesdays, and is present when the enclosures are being cleaned. Tr. at 726. The pool was cleaned on Wednesdays and on Sundays. Tr. at 794-795. Mr. Candy speculated that Dr. McFadden observed what she considered excess waste in the "tiger toilet" because the pool had not yet been cleaned that day. Tr. at 794. Respondents' schedule was interrupted when Dr. McFadden arrived, and the area was cleaned after she concluded her inspection. Tr. at 795. The tigers no longer occupy that space, but are in a new exhibit. Tr. at 830. Mr. Candy believed that it was somewhat arbitrary to be cited for conditions that were temporary and were scheduled to be corrected. Tr. at 771.

Dr. McFadden criticized the condition of several pools, including the swimming pool in the area housing the large Siberian tiger and the area where the tiger cubs were housed. Tr. at 810. That pool is made of dark green concrete and Mr. Candy believed that it looked murkier to Dr. McFadden than it really was, because of the color of the paint on the pool. Tr. at 811. He observed that Dr. McFadden was 100 feet away from

the pool, and the distance was far enough to make the water appear dark. Tr. at 831. Respondents have resolved the problem with mulch in the tiger pool by removing it; the pool is now surrounded only by concrete. Tr. at 831-832.

Complainant cited Respondents for violations of how the pools that animals used for waste elimination and recreation were cleaned, but did not explain in other than vague terms how the condition of these pools represented a risk to the animals. There is no evidence that describes what constitutes an excess of excreta in the pools in violation of the regulatory standards Dr. McFadden's proximity to the pools was not close. If she measured or tested the pool water to determine the amount of excreta within, the results of such measurements are not of record.

I fully credit Mr. Candy's testimony that the areas in question were cleaned twice a week, on Wednesdays and Sundays. However, the fact that Dr. McFadden repeatedly cited Respondents with violations of this standard establishes is supported by Mr. Candy's cleaning schedule. Although Mr. Candy testified that he was aware of the aesthetic challenges that his facility presented to the public, my colloquy with him regarding his failure to adjust his practices to mollify Dr. McFadden's perceptions suggests that Mr. Candy did not consider Dr. McFadden's concerns as seriously as he may have. Despite the relative paucity of evidence demonstrating exactly how much excreta is too much[7], I conclude that Mr. Candy is mistakenly convinced that his methods are sound. He could have avoided Dr. McFadden's scrutiny by a simple adjustment in the cleaning schedule to accommodate her usual arrival for inspection on Wednesday. Respondents' adherence to the existing cleaning schedule, combined with the fact that Respondents have no paid employees to help lighten Mr. Candy's workload, supports a finding of this violation.

However, the evidence regarding the murky pool that is impinged by mulch and painted a color that enhances the murk is vague. I credit the

[7] I find it appropriate in this instance to apply to excessive excreta the observation made by Justice Potter regarding obscenity: "I know it when I see it". *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

testimony that the Zoo changed its sanitation methods regarding this water source in an effort to avoid future citations, but I also find that nothing of record establishes that this pool was excessively unclean or posed a risk to the health and welfare of the animals. I credit the testimony that the distance between the pool and observer would make it difficult to determine how clean the water was. I further credit the testimony that the water is filtered and sump pumped routinely. This violation is dismissed.

iii. *Failure to remove uneaten food and food waste*

On June 2, 2008, Dr. McFadden observed a carcass in the lion enclosure, and Mr. Candy told her it had been there for two days. CX-8; Tr. at 92-93. Dr. McFadden concluded that the carcass should have been taken away sooner to prevent potential contamination. Tr. at 92.

Mr. Candy denied that the carcass represented food, but maintained that it was for the enrichment of the lion, which would play with it. Tr. at 797-798. He did not believe it posed the risk of contamination, as it was dried skin. Tr. at 797. He found nothing in the regulations that addressed giving a large cat a deer carcass. Tr. at 796. Nevertheless, the carcass was removed before the inspectors left the Zoo that day. Tr. at 797.

Complainant did not fully establish how the lion was at risk because of the presence of a carcass. I find that the evidence on this issue is in equipoise and dismiss this allegation.

d. Outdoor Facilities

i. *Shelter from sunlight and inclement weather*

"When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals. . . to protect themselves from direct sunlight." 9 C.F.R. § 3.127(a). In addition, exhibitors are required to provide "for all animals kept outdoors [appropriate shelter] to afford them protection and to prevent discomfort to such animals. . ." 9 C.F.R. § 3.127(b).

On June 2, 2008, Respondents were charged with failing to provide adequate shelter to ferrets. CX-8. Dr. McFadden observed ferrets in an outdoor enclosure in direct sunlight, with no shade available. CX-8; Tr. at 92. Mr. Candy explained that the ferrets were outside for a short time, while their enclosures were being cleaned. Tr. at 795. He denied that they were in direct sunlight, noting shade from a structure and a tree in the area. Tr. at 795-796. The ferrets are not exhibit animals, and usually are kept in an area in the back of the reptile house. Tr. at 796. They were not in the exhibition area of the zoo when the inspector saw them. Tr. at 797.

Dr. McFadden could not recall the weather or temperature on the day of her inspection but pictures confirm that the sun was shining. CX-8; Tr. at 262. She acknowledged that there was a pavilion nearby and a tree that provided shade. Tr. at 263. Dr. McFadden was concerned that the ferrets were left in direct sunlight. Tr. at 264.

The evidence fails to establish how long the ferrets were outside. I credit Dr. McFadden's observations, but she did not observe the animals for an extended length of time. I credit Mr. Candy's representations that the animals were left outside temporarily while their enclosure was being cleaned. In addition, if the animals were uncomfortable, the pavilion and tree were close enough for them to obtain shelter from the elements. The record fails to show that they were restrained or otherwise confined to the exact area where they were observed by the inspector.

Complainant has failed to establish that Respondents' conduct involving the ferrets constitute a violation of the Act or regulations. This allegation is dismissed.

ii. *Drainage*

On an inspection conducted on May 17, 2006, Dr. McFadden observed a mixture of feces and mud in the pot-bellied pig enclosure, and she cited Respondents with failing to provide adequate drainage. CX-3. Respondents are required to provide "a suitable method. . . to rapidly eliminate excess water. 9 C.F.R. § 3.127(c). The doctor testified that the

Zoo had previous problems with drainage, and she therefore issued a citation at this inspection. Tr. at 43.

Respondents acknowledged that drainage was a problem at the facility, but maintained that the Zoo has worked regularly to improve drainage. Tr. at 756-757. Mr. Candy observed that despite five consecutive days of rain prior to the day he was cited with this violation, there was only one puddle. Tr. at 757.

I accord substantial weight to Respondents' efforts to find a permanent solution to this problem, as there is no evidence of repeated violations for this purported defect after 2006. I also credit Mr. Candy's explanation about the effects of continuous days of rain. The record is devoid of an explanation of how muddy conditions posed a sanitation or other health problem for the pigs in the area affected by the excess water. This violation is dismissed.

iii. *Perimeter fence*

The regulations mandate that "all outdoor facilities must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out." 9 C.F.R. § 3.127(d). The fence must be at least 8 feet high for potentially dangerous animals as identified by the regulations and must be constructed so as to protect the animals and "function as a secondary containment system." Id. The perimeter fence must be sufficiently distance from the primary enclosure "to prevent physical contact between animals inside the enclosure and those outside the perimeter fence" and fences less than 3 feet from the primary enclosure must be approved by APHIS. 9 C.F.R. § 3.127(d). The regulations do not mandate the height of such fencing. Tr. at 165.

On September 7, 2006, Dr. McFadden found that Respondents had failed to enclose facilities for servals with a perimeter fence. CX-4. The servals were in a temporary enclosure that did not have a perimeter fence three feet from the enclosure fence in the back. Tr. at 54. Dr. McFadden explained that although there was a perimeter fence generally around the facility, there was a break in the wall in this particular area, which represents a failure to create a secondary containment system that would keep an animal from escaping the premises. Tr. at 54-56; 216.

At her inspection on September 26, 2007, the serval was no longer in that enclosure, but the problem persisted. No complete perimeter fence had been erected, and a tiger and coatimundi were housed in the area. CX-7-A; Tr. at 68-69. Dr. McFadden cited Respondents because the back wall of the tiger enclosure was not within a perimeter fence. CX 7A; Tr. at 72-74.

Mr. Candy believed that a solid wall around the coatimundi and young tiger enclosure was sufficient to serve as a perimeter fence but nevertheless put up another fence when Dr. McFadden expressed reservations about the existing wall.. Tr. at 786. Dr. McFadden acknowledged that a solid wall could serve as a perimeter, since the regulations did not demand a particular material of fencing. Tr. at 217. However, there was a break in one area of the wall between two enclosures. Tr. at 216. Dr. McFadden conceded that there was a wall present in the area, but it did not meet the regulatory standard of being three feet from the enclosure. Tr. at 237.

Dr. McFadden acknowledged that the three foot requirement was a policy and not a specific regulatory requirement. Tr. at 238. She was not the original inspector assigned to Respondents' facility, and did not know whether her predecessor provided information to the Zoo. Tr. at 239-240. This violation has been substantiated.

On September 26, 2007 and on August 3, 2009, Dr. McFadden noted that the perimeter fence near the lion's enclosure was leaning inward, and therefore was not structurally providing an adequate barrier. CX-7; CX-10; Tr. at 105. The fence was "slightly, but noticeably" leaning inward. Tr. at 289. The fence was leaning at the top of its eight foot height, and Dr. McFadden could not recall whether it was braced on either side. Tr. at 289. Pictures that she took at both inspections show the fence leaning, and it appeared to be leaning more in 2009. CX-7; CX-10; Tr. at 292. She and Mr. Candy discussed the issue, and Mr. Candy understood that the fence needed to be made sturdier, and he straightened it out. Tr. at 812.

Complainant's concern about the structural integrity of the leaning perimeter fence is supported by the fact that later inspection revealed further leaning. This violation is established.

3. Animal Health and Husbandry Standards

The regulations require that animals be provided wholesome, palatable food, free from contamination, and appropriate in quantity and nutritive value for the age, species and condition of animals. 9 C.F.R. § 3.129(a). Potable water must be provided as often as necessary if not accessible at all times.

a. Feed

Respondents were cited with violations of this standard, with respect to a carcass that was observed in the lion enclosure on June 2, 2008. CX-8. At an inspection on September 3, 2008, Dr. McFadden was concerned about how meat and a carcass were stored in a refrigerator. Tr. at 97-99. She found that blood had pooled in the refrigerator, which she believed presented a risk of contaminating the other food. CX-9; Tr. at 99-100.

Respondents have adopted new policies regarding the storage of feed for animals. Tr. at 801. The Zoo no longer keeps large amounts of food on store. Mr. Candy buys meat on a daily basis and keeps enough of other foodstuffs for about a week. Tr. at 802. The Zoo freezes or refrigerates only donated meat, and donated foods are inspected closely before being fed to animals. Tr. at 802-803. Meat is no longer kept in the kitchen area inspected by Dr. McFadden, but fruits and vegetables are stored in the refrigerator. Tr. at 804.

The evidence demonstrates that Respondents' past practices were not the most tidy, but the record fails to establish how the conditions posed sanitation or health risks to animals. There is no record showing that animals were sickened by foodstuffs, and nothing to suggest that the conditions were not corrected. These violations are based upon appearances and not proof of actual and potential risk to animals or visitors. Complainant has failed to substantiate these violations by a preponderance of the evidence.

b. Watering

The Complaint charged Respondents failing to keep a water receptacle clean for a lion as a result of Dr. McFadden's inspection of November 20, 2009. CX-12. The testimony regarding the lion's water did not explain how the inspector reached her conclusions. She discussed the presence of a heating element in either a tub or a pool, and pointed to a photograph. Tr. at 124; 126. Dr. McFadden thought the water looked green. Tr. at 126.

Mr. Candy believed that this violation was prompted by a complaint made to PETA about his facility, because the inspection occurred shortly after he received a letter from that organization, and Dr. McFadden had completed an inspection thirty days or so previously. Tr. at 817. He believed that the water was clear.

No testing of the water was conducted, and although the water looked green in color to Dr. McFadden, the record fails to establish her distance from the container, or the color of the container that held the water. There is no evidence that the water contained algae. *Cf. In re: Hoctor,* 56 Agric. Dec. 416 (U.S.D.A. 1977). The preponderance of the reliable evidence fails to establish that Respondents' animals were not provided adequate and potable water. This charge is dismissed.

c. Sanitation

i. *Cleaning and Housekeeping*

"Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. . ." 9 C.F.R. § 3.131(a)(1). On November 29, 2006, Dr. McFadden observed an excessive amount of feces in several enclosures. CX-5; Tr. at 59. Mr. Candy advised that enclosures were cleaned once a week, which the inspector considered to be inadequate to prevent contamination and health hazards. Tr. at 59-60. On her inspection conducted on May 23,

2007, Dr. McFadden observed accumulated excreta, dirt and hair in the tiger enclosure. CX-6; Tr. at 60-61. She cited with a repeated violation for not cleaning enclosures frequently enough, Tr. at 61-62. These charges are upheld.

At her inspection on August 3, 2009, Dr. McFadden found an excessive amount of excreta in the enclosures for cougars, servals, bobcats, pigs and goats. CX-10; Tr. at 106. She believed the problem would be resolved with more frequent cleaning. Id.; CX-10. Mr. Candy had worked in the field of environmental services and has written policies regarding proper cleaning and building maintenance for companies such as Sodexho and Marriott. Tr. at 693-694. He is certified in cleaning and sanitation and feels qualified to determine how to maintain facilities so that they are properly cleaned and sanitized. Tr. at 694. He and his volunteers follow a schedule for cleaning the facility. Tr. at 705. He has developed checklists that volunteers must use to record that they accomplished assigned tasks. Tr. at 714-716. He trains volunteers in the best way to clean the facility, and uses industry-recognized cleaning agents. Tr. at 717. Vinegar is used inside, near the animals, and outside facilities are cleaned with a water and bleach mixture. Id.

Animals' areas are cleaned daily, and power-washed every two weeks. Tr. at 718. Mr. Candy asserted that Dr. McFadden is aware of the schedule and approved of his power-washing schedule. According to Mr. Candy, Dr. McFadden had never suggested a different schedule for removing feces, or doing other routine maintenance. Tr. at 719; 725. Since the Zoo operates on a 16 to 20 hour day, the fact that conditions appear unsanitary in the morning does not mean that they have been neglected, as the facility will be cleaned later in the day. Tr. at 771. He cleans large cat cages, and he cannot be cleaning on inspection days when he is required to tour the premises with the inspector. Id. The areas of fencing that tigers used to rub against and that accumulated hair have been changed, and are no longer attractive to the cats for that purpose. Tr. at 772.

As I have stated herein, *supra*, Mr. Candy's insistence on adhering to his pre-established cleaning schedule demonstrates that he fails to comprehend Complainant's concerns. He has been repeatedly and

frequently cited for deficiencies of cleanliness standards, yet maintains that Dr. McFadden has not suggested adjusting his cleaning practices. I find that Respondents have made little effort to accommodate Dr. McFadden's concerns. Although Mr. Candy deems himself an expert in sanitation, the businesses that he had worked in prior to his current enterprise hardly replicate conditions at a zoo. This violation is substantiated.

Dr. McFadden cited Respondents with violating basic housekeeping standards set forth at 9 C.F.R. § 3.131(c) on June 2, 2008. CX-8. She explained that half of the building that housed the binturong was used to store unused equipment, which was haphazardly place and presented a potential place to harbor pests. Tr. at 93. The inspector estimated that equipment and material, including propane tanks and possibly chemicals, had accumulated in three-quarters of the space, but did not impinge upon the binturong's living space. Tr. at 94-95.

Inspection of the premises on August 3, 2009 revealed an accumulation of trash and unused equipment in the bird area that could attract pests. Tr. at 107. Dr. McFadden cited Respondents with violating housekeeping standards. CX-10. She found a similar problem on her inspection of September 30, 2009. CX-11; Tr. at 117-118. The bird room is connected to the reptile house, which serves as part of the Zoo's perimeter fence. Tr. at 813. The area that Dr. McFadden described is outside of the Zoo's exhibition space, and part of the area used by another business that Mr. Candy owns. Tr. at 813-814. The area contains bathrooms and a miniature golf course. Tr. at 814.

The description of how housekeeping standards within this area of the Zoo violated the Act is too vague and subjective to fully credit. It does not appear from the record that any harm came to animals, or that the condition posed a risk other than potential increase in pests in an area not devoted to exhibiting animals covered by the Act. These problems have been resolved with permanent solutions, as described by Mr. Squires and Mr. Candy. The preponderance of the evidence fails to establish a violation of the Act and regulations with respect to this condition.

Respondents were cited for having cracks in concrete in the big cat enclosures that would have made it difficult to clean the area. Mr. Candy disagreed that the cracked concrete presented a sanitation problem. Tr. at 822. Mr. Candy uses Borateem or Borax, which is a powder that can sink into crevices that a power washer doesn't reach. Tr. at 822. He believed that although the cracks were not attractive, the effect was no different from having rocks or other irregularly shaped articles in an enclosure. Id. Mr. Candy pointed out that Dr. Gage believed that rough ground was better for cats. Tr. at 823; RX-10; RX-11.

I credit both opinions equally. The record is in equipoise on this issue and Complainant has failed to establish by a preponderance of the evidence that this condition as a violation of the Act.

ii. *Pest Control*

During the inspection on May 17, 2006, a mouse was seen in the binturong enclosure. CX-3. It was obvious to Dr. McFadden that the mouse was staying in the enclosure, and she opined that the presence of one rodent generally signified additional mice and an inadequate pest control system. Tr. at 46. Exhibitors are required to establish "a safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests. . ." 9 C.F.R. § 3.131(d).

On May 23, 2007, Dr. McFadden noted numerous flies in the reptile house, and concluded that Respondents had not taken effective measures to reduce their numbers. CX-6. Tr. at 62-63. She observed a number of fly strips, and knew of no other pest control measure used by Respondents. Tr. at 63. Dr. McFadden admitted that APHIS had not established standards for pest control. Tr. at 227. She further testified that she was not supposed to give guidance on how to come into compliance. *Id.*

On June 2, 2008, a dead mouse was seen in a trap near the young tiger's enclosure. CX-8; Tr. at 95. Although she could not say whether the picture she viewed depicted the mouse trap inside the enclosure, she nevertheless concluded that Respondents did not have effective pest

control measures that included frequent checking of traps to remove dead rodents. Tr. at 95- 96.

Mr. Candy has a written pest control program, but acknowledged that sometimes conditions require adjustments, such as in May, 2007, when an excessive number of flies were on site. Tr. at 773. An individual who used to have an animal exhibition now runs a pest control company and the Zoo uses his services. *Id.*

I find that the evidence supports that better pest control was necessary at the Zoo. These allegations are supported. However, Respondents have established a written program and instituted more effect pest control methods.

d. Employees

Exhibitors are required to use "a sufficient number of adequately trained employees. . . to maintain the professionally acceptable level of husbandry practices" required by the regulations. 9 C.F.R. § 3.132. "Such practices shall be under a supervisor who has a background in animal care." *Id.*

At her inspection on May 17, 2006, the inspector cited Respondents for failure to have adequate numbers of sufficiently trained employees on site. CX-3. It was evident to Dr. McFadden that Respondents did not have enough properly trained staff, due to the number of problems she had observed. Tr. at 46-47. She believed that the Zoo's volunteers needed guidance from someone with expertise in animal husbandry. Tr. at 47.

In 2004, Mr. Candy and two other Zoo volunteers attended a "Big Cat Symposium". Tr. at 714-715. He has not provided any other formal training to his volunteers, but he stated that he has established strict rules about maintenance and care of the animals, and closely supervises his volunteers. Tr. at 715. The Zoo's rules include health and safety policies, and volunteers are required to note and sign a list of tasks that they completed during their tours of duty. Tr. at 716. The checklist

requires observations about the condition of the animals and facility, and volunteers are expected to make entries when they arrive for their shifts, and again when they leave. Tr. at 717. Mr. Candy is always available to answer questions. *Id.* He expects volunteers to record weather conditions, any changes they notice in the animals, maintenance issues and anything else that they consider important. Tr. at 724-725.

Volunteers are trained on an on-going basis, and the Zoo uses the specific talents and expertise of its volunteers. Tr. at 719. The Zoo does not provide manuals to volunteers, other than the check list and rules. Tr. at 722. Mr. Candy is in charge of whatever goes on at the Zoo and he expects the volunteers to heed his instructions. Id. The checklists are kept in the reptile house. Tr. at 723-725; RX-23. One volunteer is designated as the "main volunteer" daily. Tr. at 726. The main volunteer works the same day each week and is generally responsible for feeding the animals. Tr. at 726-727. In addition, people live on the premises, and provide security on a consistent basis. Tr. at 727.

Mr. Candy testified that Dr. McFadden has told him that four people should be on duty at a time. Tr. at 759. Since the Zoo is not open long hours, and volunteers perform different jobs throughout the day and evening, Mr. Candy believed that he had sufficient workers. Tr. at 759-760. Mr. Candy asserted that he had adequate experience in animal care and expertise in facility maintenance and consequently has knowledge of animal husbandry. Tr. at 761. Mr. Candy had managed a large horse farm in Pennsylvania, and was responsible for cleaning and sanitizing universities, hospitals and veterinarian clinics. Tr. at 761-762. He developed procedures with the consultation of an individual with zoo experience. Tr. at 762. That individual is now working for another zoo, and another individual that Respondents hired as an animal consultant is no longer with Tri-State. Tr. at 762-763.

I credit Mr. Candy's years of experience working with animals and conferring with veterinarians and other animal experts, and conclude that he has adequate experience to operate the Zoo. However, the preponderance of the evidence demonstrates that the Zoo is not adequately staffed. Respondents have been repeatedly cited for violations that could have been avoided if people were tasked to make routine maintenance inspections to correct such problems as breaches in fencing,

pest control, and unsanitary conditions. Although Respondents' use of a check list for volunteers is laudatory, it is inadequate to prevent those types of infractions that were routinely observed by Dr. McFadden on her inspections. The Zoo fails to provide much formal training to volunteers. Despite Mr. Candy's contention that he demands certain skill sets from volunteers, he assumes sole responsibility for many tasks, without a trained individual to replace him in the event of an emergency.

I disagree with Mr. Candy's insinuation that four on-site people, reporting to an individual with experience in animal husbandry, is an arbitrary number. The size of the Zoo, both in area and animals, and the repeated problems observed by inspectors, support Complainant's contention that at least four people should be on site while the Zoo is open for operation. This is most clearly demonstrated by the fact that Mr. Candy must interrupt his scheduled work whenever an inspection takes place. Since he has sole responsibility for cleaning big cat cages, it is axiomatic that tasks are left undone or postponed when his attention is diverted.

Complainant has established this violation by the preponderance of the evidence.

4. Handling, Care and Treatment of Nonhuman Primates

On September 7, 2006, Dr. McFadden noticed that the roof of a dog house that was used as shelter for a Japanese macaque was cracked. CX-5; Tr. at 57. She believed this posed a problem as the crack could potentially injure the animal, and may not provide sufficient shelter from the elements. Respondents were cited with violating regulations pertaining to Structural soundness of housing and Shelter from elements. Housing facilities must be structurally sound and kept in good repair (9 C.F.R. § 3.75 (a)) and must provide protection from weather conditions (9 C.F.R. § 3.77 (d)).

Mr. Candy testified that the macaque in question was a rhesus macaque and not a Japanese macaque. Tr. at 770. He disagreed with this citation, because the dog house was meant as an environmental

enhancement for the animal; it was not where the macaque was sheltered, but was meant for the macaque to play in. Tr. at 770. Dr. McFadden admitted that the macaque was housed in a different enclosure. Tr. at 220. In any event, the roof was removed. Id.

Complainant has failed to establish that a cracked toy violated a housing standard for primates.

On her inspection conducted on September 29, 2010, Dr. McFadden noticed rodent holes in the lemur house charged Respondents with violating the standards set forth at 9 C.F.R. § 3.84 (d), Failure to maintain effective pest control program. CX-14; Tr. at 153.

Complainant has established that the Zoo's pest control plan is not consistently effective. This violation is supported.

On May 17, 2006, Dr. McFadden observed a young lemur housed by itself. CX-3; Tr. at 38-39. She charged Respondents with failure to provide enrichment for the psychological well-being of a primate, and with failure to provide environmental enhancement needs in violation of 9 C.F.R. § 3.81(b); (c)(4). Tr. at 39. Dr. McFadden issued a notice of non-compliance with this standard on August 3, 2009 with respect to a capuchin monkey, a squirrel monkey, and the lemur, who were each individually housed without companionship and without any program to enrich their psychological well-being. CX-10; Tr. at 103.

Dr. McFadden testified that the problem regarding the enrichment plan remained in effect at her inspection on September 30, 2009. CX-11; Tr. at 108-109. However, the inspector was uncertain where the primates were housed at this time, speculating that some may have been at a clinic or in foster homes. Tr. at 109.

Respondents denied that the Zoo failed to have an enrichment plan. Tr. at 707. Mr. Candy included every primate at the Zoo in the plan that was originally devised by an individual with experience with primates, and which was approved by the Zoo's veterinarian. Tr. at 708. The enrichment plans from the years 2006 to 2011 were admitted to the record as RX-6. The Zoo's original veterinarian was Dr. Ryan, who practices under the name of "Feathers, Tails and Scales". Tr. at 709.

Mr. Candy believed that Dr. Ryan was the only exotic pet expert in his part of the state, and the doctor's veterinarian technicians get some training at the Zoo. Tr. at 709-710.

The plans were again approved by Dr. Adams, who has been the Zoo's primary veterinarian from approximately 2007 or 2008, as he was located closer to the Zoo. Tr. at 710. When Dr. Adams decided to concentrate his practice on large hoofed animals, the Zoo engaged Dr. Fox from Cumberland County. Tr. at 710-711.

Mr. Candy acknowledged that the lemur was alone, but the environmental plan called for an increase in the variety of toys and other ways to stimulate solitary primates. Tr. at 807-808. The lemur is still alone, but his enclosure is near other primates so that they can interact. Tr. at 808. Respondents cannot buy a lemur legally, and must wait for a donation, so the Zoo's lemur is by necessity alone. Id.

The preponderance of the evidence establishes that Respondents had in place a plan for environmental enhancement, and practiced it. I dismiss this charge.

5. Attending veterinarian and adequate veterinary care

Exhibitors are required to employ "an attending veterinarian under formal arrangements. . . which include a written program of veterinarian care and regularly scheduled visits to the premises". 9 C.F.R. § 2.40(a). The program of care must demonstrate "the availability of appropriate facilities, personnel, equipment, and services. . .; the use of appropriate methods to prevent, control, diagnose and treat diseases and injuries and the availability of emergency, weekend, and holiday care; daily observation of all animals to assess their health and well-being . . .with a mechanism of direct and frequent communication [with] the attending veterinarian; adequate guidance to personnel involved in the care and use of animals regarding handling; and adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures". 9 C.F.R. § 2.40(b)(1)-(5).

Dr. Fox remains the Zoo's primary veterinarian. Tr. at 711. Mr. Candy volunteers at the doctor's office to learn as much as he can about animal care. Tr. at 712. Dr. Fox is very responsive to the needs at the Zoo, and his close physical proximity allows him to attend to emergencies. Tr. at 713. In addition to the plans for the care of the primates at the Zoo, the veterinarians that the Zoo has used over the years approved plans for the care of other animals, including the large cats. Tr. at 729; RX-7; RX-8; RX-14 and RX-15. The doctor's signatures are visible on the records. Tr. at 733. Veterinarians have visited the Zoo and signed a letter acknowledging their service. Tr. at 734; RX-9.

The record fully establishes that Respondents have a plan of veterinary care. This charge is dismissed.

a. Care of Goats

On September 7, 2006, Dr. McFadden noticed that one of Respondents' goats needed to have its hooves trimmed. Tr. at 53-54. The goat has a genetic deformity on its hooves, but they also were overgrown. CX-4; Tr. at 54. On August 3, 2009, Dr. McFadden noticed two limping goats, and documented their gait problem to make sure that they received veterinary attention. CX-10; Tr. at 102. On November 20, 2009, Dr. McFadden again cited Respondents with this violation. CX-12. She explained that Respondents had failed to provide a record from a veterinarian acknowledging the condition of the goats' hooves and establishing a schedule for trimming them. Tr. at 121. Respondents had no documentation from a veterinarian diagnosing the chronic condition. *Id.*

Mr. Candy explained that some of the goats at the Zoo had a genetic defect that creates a consistent problem with their hooves, which was known to their veterinarian. Tr. at 757. Mr. Candy does not consider the genetic malformation a medical condition that requires a schedule of care, but he is aware that the condition affects the goats and he tries to tend to their needs. Tr. at 757-758. Some of his goats have since been donated to other facilities. Tr. at 758; 804. Respondents have only six goats, none of which are related, because he was concerned that the goats

that limped due to the genetic hoof problem caused visitors to question their care and condition. Tr. at 804-805.

The evidence regarding veterinary care for goats with a genetic condition is substantiated. I accept that the existence of a genetic condition may not warrant a schedule of medical treatment for the condition. However, goats were observed limping due to overgrown hooves that needed medical attention. Respondents did not have a plan for routine hoof treating, and Mr. Candy admitted that the condition needed attention, as he called the Zoo's veterinarian, who treated the goats. Tr. at 281. This constitutes a failure to follow a plan of veterinary care, and a violation of the Act.

b. Pigtail Macaque

During her inspection of September 26, 2007, Dr. McFadden noted that Respondents' pigtail macaque was not in its usual enclosure. Tr. at 65. She had inquired into its whereabouts, having learned that Respondents did not always document the transfer, acquisition, death, or sale of their animals. Tr. at 64. Mr. Candy told her that the pigtail macaque had been found dead in its enclosure, and he speculated that it may have chewed on the cord of a heat lamp that was adjacent to its enclosure. Tr. at 65. Dr. McFadden concluded that the Zoo's personnel were not properly trained to care for animals, as a potential hazard had been left near the macaque in violation of 9 C.F.R. § 2.40(b)(1). Tr. at 66. In addition, it was alleged that appropriate methods to prevent, control, diagnose, and treat an injury were not used, in violation of 9 C.F.R. § 2.40(b)(2). Dr. McFadden concluded that these failures led to the macaque's electrocution. CX-7.

Mr. Candy found the animal dead, and discussed alternate theories of the cause of its death with Dr. McFadden, including the possibility that the animal had bitten through an electric cord. Tr. at 778. Mr. Candy rejected electrocution by the lamp as the cause of death because the extension cord was far from the enclosure, and the lamp remained in its place, suggesting that its cord had not been pulled. Tr. at 781. Although the plug on the cord was marked, the cord and plug were old and there

was no way to say that the marks were recent. Id. The cord and lamp were arranged so that they would be unplugged if pulled. Tr. at 781. There was no sign of damage to the cord, or signs of burns on the animal. Tr. at 779; 781. He and Dr. McFadden discussed many different causes of death, including old age and heart disease. Tr. at 781. No necropsy was performed, and the animal had been buried. Tr. at 780. Dr. McFadden did not examine the animal because her inspection was conducted the September following the animal's death in December. Tr. at 780-781.

There is insufficient evidence to determine that the animal died of electrocution. Even if Mr. Candy's speculations about the cause of the animal's death were limited to electrocution, Complainant has no corroborative evidence to charge Respondents with such a serious allegation. The violation is based on conjecture and is not supported by evidence of any sort. This allegation is dismissed.

6. Failure to retain records

Dr. McFadden charged Respondents with failure to maintain records relating to the acquisition and disposal of animals in violation of 9 C.F.R. § 2.75(b) during her September 26, 2007 inspection. CX-7; Tr. at 64. Mr. Candy testified that people often leave animals at their facility that they may not keep, and the Zoo did not at first record animals that were not covered by the AWA. Tr. at 775. He believed that he now kept records of animals, though were reconstructed after originals were destroyed in a fire. *Id.*

I find no evidence of record credibly disputes Complainant's contention that the Zoo fails to keep complete records relating to the acquisition and disposal of animals. This charge is sustained.

On June 2, 2008, Respondents failed to provide a copy of a written veterinarian plan. CX-8; Tr. at 75-76. As a result, Dr. McFadden was unable to determine whether Respondents had a veterinarian on call, or had developed a plan for care. Tr. at 75. Mr. Candy testified that he has no place to keep his records on site since the Zoo lost a building in a fire. Tr. at 706. He is reluctant to keep records in the gift shop or any other building that gives access to the public. Tr. at 707. However, he is aware

that Dr. McFadden generally spends two days inspecting his facility and he consistently provides her with all the records, including plans of veterinary care and enrichment for non-human primates, on the morning of the second day of her inspection. Tr. at 707.

When pressed to explain why he could not maintain the records in the place where he keeps check lists, Mr. Candy testified that he did not think it was appropriate to keep the records in that location, which is a kitchen that stores animal feed. Tr. 730. He distinguished those records from the daily logs, which are used daily. Tr. at 731. Despite being cited for repeated violations, he had never failed to provide the records. Tr. at 731-732. He maintains that so long as he "cures" defects, he should be considered compliant with the Act and regulations.

Mr. Candy's attitude with respect to keeping records on-site for inspection demonstrates that he does not understand the need to meet the inspector's expectations of compliance with the Act and regulations. I accept that the records are always made available to Dr. McFadden, but I reject the notion that duplicates cannot be maintained somewhere on the premises. Moreover, APHIS has the right to see records at an unannounced inspection to assure itself that the records have not been changed to conform with regulatory standards. *See In re: S.S. Farms Linn County, Inc*., 50 Agric. Dec. 476, 489 (U.S.D.A. 1991).

Mr. Candy's recalcitrant resistance to keeping the records on-site despite repeated violations for this failure demonstrates a lack of cooperation and commitment to full compliance with the Act and regulations. This violation is supported by the evidence.

E. Summary

The record establishes that Respondents are clearly in violation of regulatory operating standards regarding sanitation and record keeping. Although Respondents cooperate with USDA when Mr. Candy agrees with Dr. McFadden, where Mr. Candy is comfortable with how he does things, he disregards Dr. McFadden's concerns. For example, he is satisfied with being repeatedly cited for recordkeeping violations rather

than finding a place to keep records on site. He would rather be charged with repeated violations of unsanitary conditions than modify his cleaning routine. Although Respondents have resolved some of the government's concerns about food and equipment storage, I cannot conclude that Mr. Candy made those changes entirely to please APHIS. Mr. Candy has shown himself indisposed to alter his conduct when he disagrees with Dr. McFadden.

In addition, there is no doubt that Respondents lack adequately trained employees. Despite USDA's expressed concerns about manpower, and the obvious defects that inadequate staffing has caused, Mr. Candy has made no attempt to mollify the inspectors on this point. It is clear that more frequent patrols of the facility would eliminate problems with food storage, pest control, fence maintenance issues, and animal care. There is no trained back-up personnel, should Mr. Candy become unable to clean large cat enclosures or carry out other tasks. He failed to maintain and put into place a schedule for routine care of goats' hooves.

Although I have found certain allegations do not demonstrate failure to handle animals properly, Respondents' policy of taking groups within close proximity to large cats is a serious offense. The volunteers comprise the sole barrier between the cats in their cages and the public, who are within reaching distance to the cats. The volunteers are not positioned directly between the cats and the public, and their training is limited to using fire extinguishers in the event of an emergency. Even without direct evidence that spectators touched the cats, this practice represents a clear danger to both animals and spectators, and must be discontinued.

Respondents have corrected the concerns of APHIS about barrier and perimeter fences. I agree with Mr. Candy that certain of the allegations address concerns about appearances. Complainant has not been able to articulate exactly why the tiger enclosure fails to meet the regulatory standards. Respondents' facility appears to have been judged against "industry standards", which are not in evidence. The record establishes that the fencing meets height requirements and the use of kick ins, tensile wire and electric fencing demonstrates Respondents' concerns about containing the tigers.

In contrast, Complainant's concerns about the integrity of the lion enclosure have merit. Inspectors specifically pointed to questionable materials used to join fencing at corners. Specific deficits were observed in the fencing on different inspections, such as a gap at the bottom of fencing, and a leaning portion of the fence. In instances where inspectors found fault with aspects of the lion enclosure, Respondents addressed the concerns. However, Complainant clearly found the construction of the enclosure inadequate and a risk factor for an escape. I put little weight on an escape attempt in the past, since Respondents have done much to shore up the fencing since that time. However, I credit the inspectors' explanations that the use of several fencing types and different joining materials made the stability of the fence questionable. Since Respondents are in the process of building a new enclosure for the lion, the concerns that gave rise to these allegations shall soon be moot.

F. Personal Liability of Robert Candy

As sole corporate officer, and Director of the zoo, Mr. Candy is personally responsible for the acts of Tri-State. All acts of the corporate entity in these circumstances arose out of decisions made by Mr. Candy. It has been settled that individuals who direct licensee's activities are individually liable pursuant to 7 U.S.C. § 2139. *See In re Coastal Bend Zoological Ass'n*, 67 Agric. Dec. 154 (U.S.D.A. 2008). A corporation and the individual who exercised sole control over corporate activities may be jointly assessed penalties under 7 U.S.C. § 2149 pursuant to the operation of 7 U.S.C. § 2139. *Irvin Wilson & Pet Paradise Inc. v. U.S.D.A.*, 54 Agric. Dec. 111 (U.S.D.A. 1995). I find that Mr. Candy may be held personally liable for acts he performed on behalf of Tri-State.

G. Remedies

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (U.S.D.A. 1997). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the

person's good faith and history of previous violations. *In re Lee Roach and Pool Laboratories*, 51 Agric. Dec. 252 (U.S.D.A. 1992). The recommendations of administrative officials responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less or different from that recommended. *In re: Marilyn Shepherd*, 57 Agric. Dec. 242 (U.S.D.A. 1998).

As Eastern Regional Director of the Animal Care Program for APHIS, Dr. Goldentyer is familiar with the licensees within her jurisdiction. Tr. at 858-860. When considering whether sanctions are appropriate, she considers factors such as the size of the business of the licensee, the history of compliance, and the good faith of the enterprise with adhering to the Act and regulations. Tr. at 860-862. Respondents' operation is relatively small in size, and Respondents have consensually paid a previous fine to APHIS. Tr. at 860-861. Dr. Goldentyer could not say that Respondents acted entirely in good faith, because repeated and multiple violations were disclosed at each inspection. Tr. at 862.

Dr. Goldentyer agreed that some of the violations were not "egregious", but she pointed to the accumulation of violations, which she inferentially attributed to poor management. Tr. at 863. She believed that a period of suspension was appropriate to allow the facility to come into compliance. Tr. at 863-864. She also believed that a civil money penalty would send an appropriate deterrent message, though she was cognizant of Respondents' limited resources. Tr. at 870-871.

With respect to the soundness of the tiger and lion structures, Dr. Goldentyer suggested that the best model to judge structural soundness would be those enclosures that were not considered a violation of the regulations. Tr. at 865-866. Inspectors are expected to give guidance to licensees on how to achieve compliance, but are not tasked to dictate standards of construction. Tr. at 883. Inspectors generally rely upon their experience with facilities that have successfully built structures that are reliable when they measure the integrity of fencing. Tr. at 882. Dr. Goldentyer testified that she believed it would be possible for APHIS to work with Respondents during a period of suspension and confirm whether its newly constructed enclosures met regulatory standards. Tr. at

885. She observed that this would only work if both parties were in complete agreement about the outcome. Tr. at 886.

According to APHIS policy, if a deficient condition is corrected, it will not be cited on the following inspection. Tr. at 875-876. However, if a pattern of non-compliance establishes itself with repeated violations that reflect upon overall management of a facility, then inspectors will include all cited violations to show the pattern. Tr. at 877.

Respondents handled animals in a manner that posed risk to them and the public. Respondents do not employ an adequate number of trained personnel to ensure compliance with the Act and regulations, leading to repeated violations pertaining to the maintenance of the facility. Respondents failed to develop and follow a plan for veterinary care of its goats' hooves. Respondents' lion enclosure did not meet standards for structural soundness and at times had no full perimeter fence and no barriers. Respondents repeatedly violated regulations regarding recordkeeping requirements. Although Respondents have put forth good faith efforts to improve the appearance of the facility, and have implemented changes that corrected many of the conditions for which they were cited, conditions remained unaltered when Respondents disagreed with APHIS' findings. The Zoo's response to repeatedly being cited for certain conditions suggests lack of good faith and demonstrates willful violation of the Act and its implementing regulations.

APHIS has recommended that Respondents' license be suspended for a period of six months. I find that recommendation overly harsh, considering that many of the conditions on which violations were based occurred as long as six years ago, and many have been corrected by Respondents. As Dr. Goldentyer observed, the Zoo constitutes a small business; a suspension will pose a significant financial burden. Considering the remedial nature of the Act, and the fact that there were no violations involving harm to animals or the public, I find that a short suspension represents a sufficient deterrent from violating the Act, and see no need to impose an additional monetary penalty on Respondents as the result of their violations. In particular, I find that the deterrent purpose of sanctions would not be furthered by imposing a civil money

penalty for violations that were transitory and have been remedied, regardless of their historical accuracy.

I find it appropriate to suspend Respondents' license for a period of forty-five (45) days. I have found that Respondents' repeated violations are willful, thereby permitting the imposition of a suspension of the Zoo's license. See, In re: Big Bear Farm, Inc., et al., 55 Agric. Dec. 107 (1996).

H. Findings of Fact

1. The Secretary has jurisdiction in this matter.

2. Tri-State Zoological Park of Western Maryland, Inc. is a Maryland corporation whose registered agent for service of process is Robert L. Candy.

3. At all times relevant to this adjudication, Respondents operated a Zoo, and exhibited approximately 65 wild and exotic animals at a facility in Cumberland, Maryland under AWA license 51-C-0064.

4. APHIS conducted inspections of Respondents' facility, records and animals on May 17, September 7, and November 29, 2006; on May 23 and September 26, 2007; on June 2 and September 3, 2008; on August 3, September 30, and November 20, 2009; and on September 29, 2010.

5. At each of the inspections, APHIS inspectors cited Respondents with violations of the Act and regulations, including violations pertaining to handling animals; recordkeeping; housekeeping; animal husbandry; environmental enhancement for primates; inadequate drainage; structural inadequacy of enclosures; insufficient number of and inadequately trained employees; inadequate plan for pest control; poorly maintained fencing and shelter; inadequate shelter from inclement weather for primates and other animals; excessive feces and waste matter; failure to erect perimeter fencing; failure to provide wholesome and palatable food; failure to provide potable water; failure to store foodstuffs properly; and failure to follow plan of veterinary plan for trimming goat hooves.

6. Groups of people, including children, were led on tours to view the rear of lion and tiger enclosures with no additional barrier outside of the cages other than the presence of volunteers, and were allowed close proximity to the animals.

7. Records were not consistently maintained to record acquisition and disposition of animals, and no records regarding a plan for veterinary care, or other required records, were available on the days of inspections.

8. An accumulation of bedding and feces was observed in and near animals' housing on several occasions.

9. Deficits in construction and disrepair was noted in the enclosures of a porcupine, a binturong and a macaque.

10. Primates were housed singly and a plan for their environmental enhancement was not kept on the premises.

11. A veterinarian developed plans for environmental enhancement of primates.

12. Tri-State has an attending veterinarian who treats the Zoo's animals.

13. Puddles were observed after several days of rainfall, indicating problems with drainage.

14. The lion enclosure showed gaps between the ground and the fence, and the fencing was joined with a variety of materials.

15. Volunteers undertook tasks assigned by Mr. Candy, but had no special training in animal husbandry or animal escape and capture.

16. Rodent carcasses and an excess of flies were observed upon inspection.

17. Wire fencing at the llama and goat enclosures was detached and sharp wires protruded; a crack in a permanent shelter was observed; and the door of the lion enclosure needed reinforcement.

18. A cougar was displayed in an enclosure that was not surrounded by a barrier of sufficient height and distance to prevent contact between the animal and the public.

19. Ferrets were left in the sun; a structure used by a macaque was cracked; a spool in the enclosure for an arctic fox was cracked; and a ramp used by a bobcat appeared unstable.

20. Feces was observed repeatedly in the tiger pools and other areas of the facility.

21. Perimeter fencing was not evident in certain areas of the facility.

22. Foodstuffs were stored in locations where chemicals, tools and equipment were also stored.

23. A carcass was kept in a lion's enclosure for two days.

24. Water for a lion appeared greenish in color.

25. A macaque was found dead without obvious cause of death.

26. The hooves of goats needed to be trimmed, and there was no plan of veterinary care for maintenance of the condition.

I. Conclusions of Law

1. In his capacity as corporate officer and director of the Tri-State Zoological Park of Western Maryland, Robert Candy operated as an exhibitor as that term is defined by the Act and regulations.

2. Pursuant to 7 U.S.C. § 2139, Robert Candy's acts, omissions or failures in his capacity as corporate officer and director are deemed to be his own as well as those of the corporate entity.

3. The following violations brought against Respondents are dismissed for lack of proof by a preponderance of the evidence:

a. Allegations of violations of 9 C.F.R. § 2.131(c)[8], alleging failure to properly handle a cougar on May 17, 2005; a porcupine on June 2, 2008; and a binturong on August 3, 2009.

b. Allegations of violations of 9 C.F.R. § 3.125 (a), alleging insufficient structural strength of the tigers' enclosure, including the fencing that separates the different of tigers.

c. Allegations of violations of 9 C.F.R. § 3.125(a) alleging structural defects in the decorative board surrounding the platform in the cougar enclosure.

d. Allegations of violations of 9 C.F.R. § 3.125(a) alleging structural defects in the bobcat ramp.

e. Allegations of violation of 9 C.F.R. § 3.125(c) alleging improper storage of food on September 3, 2008.

f. Allegations of violations of 9 C.F.R. § 3.125(d) alleging sanitation violations with respect to the tiger pool occasionally compromised by mulch.

g. Allegations of violation of 9 C.F.R. § 3.125(d) alleging sanitation violations because of the failure to remove a carcass from the lion enclosure.

h. Allegations of violation of 9 C.F.R. § 3.127(a), alleging failure to provide shade to ferrets on June 2, 2008.

i. Allegations of violation of 9 C.F.R. § 3.127(c), alleging failure to provide adequate drainage on May 17, 2006.

---

[8] It is clear that Respondents failed to provide proper barrier fences in these instances, but Complainant did not charge them with that offense.

j. Allegations of violations of animal husbandry standards set forth at 9 C.F.R. § 3.129(a) regarding the refrigeration and storage of food on September 3, 2007 and the failure to remove a carcass from the lion enclosure on June 2, 2008.

k. Allegations of violations of animal husbandry standards set forth at 9 C.F.R. § 3.129(a) regarding potable water for a lion in November 20, 2009.

l. Allegations of violations of sanitation and housekeeping standards set forth at 9 C.F.R. § 3.131(c) pertaining to the storage of food stuffs mingled with equipment and non-food stuffs in a building on June 2, 2007; the failure to dispose of trash in a non-exhibition area of the facility on August 3, 2009; and the presence of cracked concrete in the tiger enclosure.

m. Allegations of violations of sanitation and housekeeping standards set forth at 9 C.F.R. § 3.131(c) with respect to trash found outside of the official Zoo on August 3, 2009 and September 30, 2009.

n. Allegations of violations of standards for structural integrity of housing for primates set forth at 9 C.F.R. § 3.75(a) for a macaque, cited on September 7, 2006.

o. Allegations of violations of standards for shelter from the elements for primates set forth at 9 C.F.R. § 3.77(d) for a macaque.

p. Allegations of violations of requirements to develop and provide environmental enhancement to primates set forth at 9 C.F.R. § 3.81(b) and (c)(4), pertaining to a macaque, lemur and capuchin monkey.

q. Allegations of violations of requirements to provide an attending veterinarian pursuant to 9 C.F.R. § 2.40 for a pigtail macaque that was discovered dead one morning.

r. Allegations of violations of requirements to engage an attending veterinarian pursuant to 9 C.F.R. § 2.40.

4. The following violations are established by a preponderance of the evidence:

a. On June 2, 2008, Respondents failed to handle animals (lion and tigers) in a manner to prevent risk of harm in violation of 9 C.F.R. § 2.131(c).

b. On September 29, 2010, Respondents failed to handle a squirrel monkey in a manner to prevent risk of harm in violation of 9 C.F.R. § 2.131(c).

c. Respondents failed to provide structural integrity for their lion enclosure in violation of 9 C.F.R. § 3.125(a).

d. On September 26, 2007 and again on May 19, 2008, Respondents failed to provide structural integrity of the enclosure housing their young cat in violation of 9 C.F.R. § 3.125(a) due to the gauge of the wire on the door to the enclosure.

e. On September 29, 2006 and May 23, 2007, the llama and goat enclosure was in disrepair in violation of 9 C.F.R. § 3.125(a).

f. A crack in the reptile house presented a structural defect that violated 9 C.F.R. § 3.125(a).

g. Structural problems with a spool in the arctic fox enclosure represented a defect that posed the risk of harm to the animal in violation of 9 C.F.R. § 3.125(a).

h. Respondents failed to dispose of waste in the agouti and fennec fox enclosure and in the tigers' pools in violation of 9 C.F.R. § 3.125(d).

i. Respondents failed to maintain a perimeter fence that was not disrupted by gaps, which affected the serval enclosure on

September 7, 2006 and the tiger and coatimundi enclosures on September 26, 2007, in violation of 9 C.F.R. § 3.127(d).

j. Respondents' perimeter fence was defective, in that its integrity was compromised, upon inspections conducted on September 26, 2007 and August 3, 2009, in violation of 9 C.F.R. § 3.127(d).

k. Respondents failed to remove excreta on numerous occasions in violation of 9 C.F.R. § 3.131(a)(1).

l. Respondents failed to establish an adequate plan for pest control, which impacted all of its animals, including primates, in violation of 9 C.F.R. § 3.131(d) and 9 C.F.R. § 3.84(d).

m. Respondents failed to provide for attending veterinary care for their goats in violation of 9 C.F.R. § 2.40(b).

n. Respondents failed to keep and provide records as required by 9 C.F.R. § 2.75(b).

o. Respondents failed to maintain an adequate number of sufficiently trained staff in violation of 9 C.F.R. § 3.132.

5. Respondents have repeatedly and willfully violated the Act and regulations.

6. A sanction of the suspension of Respondents' license for a period of forty-five (45) days is appropriate.

7. Further, an Order instructing Respondents to cease and desist conduct that violates the Act and regulations is appropriate.

ORDER

1. The Tri-State Zoological Park of Western Maryland, Inc., and its agents, employees, successors and assigns, directly or indirectly through any corporate or other device, including, but not limited to Robert L. Candy are hereby ORDERED to cease and desist from further violations of the Act and controlling regulations. In order to achieve compliance

with the Act and regulations, Respondents should develop alternate plans for tour groups that will not expose them or animals to the risk of contact; recruit and train volunteers or employees regarding basic sanitation and maintenance of the facility, with an emphasis on identifying conditions that could violate a regulation; consult with a specialist with animal husbandry experience to improve cleaning schedules and water sources; implement a plan for maintenance of goats' hooves; to identify a suitable location to store records on-site; and consult with APHIS specialists regarding the structural integrity of new enclosures and make suggested alterations.

2. AWA license number 51-C-0064 is hereby suspended for a period of forty-five (45) days.

3. This Decision and Order shall become effective and final 35 days from its service upon Respondent unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

———

In re: LEE MARVIN GREENLY, AN INDIVIDUAL; AND MINNESOTA WILDLIFE CONNECTION, INC., A MINNESOTA CORPORATION.
Docket No. 11-0072.
Decision and Order.
Filed August 22, 2012.

AWA.

Colleen A. Carroll, Esq., for Complainant.
Larry D. Perry, Esq., for Respondents.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

ANIMAL WELFARE ACT

Preliminary Statement

This Decision and Order involves the first of two actions filed the same day by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) alleging that the named Respondents violated the Animal Welfare Act (the Act or AWA). 7 U.S.C. § 2131, *et seq.*

In this action, the Complaint filed on November 29, 2010 originally named as Respondents Lee Marvin Greenly, Sandy Greenly, Crystal Greenly, and Minnesota Wildlife Connection, Inc., a Minnesota corporation. As the proceedings against two of individual Respondents have since been resolved by Consent Decisions, the action now involves only the two remaining Respondents named in the caption.[1]

On January 19, 2011, an Order was entered consolidating the two cases for the purpose of hearing, denying the Motions filed by the Respondents to dismiss three Respondents and to compel production of documents, establishing deadlines requiring the exchange of exhibits and lists of exhibits and witnesses, and setting both cases for hearing in Duluth, Minnesota on May 10, 2011.

On February 8, 2011, Complainant filed a Motion for Summary Judgment in Docket No. 11-0073 and on March 1, 2011 sought and was granted an Extension of Time in which to comply with the Order of January 19, 2011 concerning the exchange deadlines. By Order entered on March 8, 2011, the ruling on the Motion for Summary Judgment was deferred pending the hearing of the consolidated actions. On April 14, 2011, the Complainant amended its Complaint and on May 5, 2011, moved to continue the oral hearing.

By Notice of Hearing entered on April 25, 2012, the actions were rescheduled to be heard on May 1, 2012 in Minneapolis, Minnesota.[2] At the hearing conducted May 1 and 2, 2012, eleven witnesses testified for

---

[1] Consent Decisions were entered as to Sandy Greenly on April 9, 2012 and as to Crystal Greenly on May 4, 2012.

[2] The actions had previously been set for hearing on May 1, 2012 in Duluth, Minnesota; however, court space was not available and the location of the hearing was moved to Minneapolis.

the Complainant, seven witnesses testified for the Respondents, fifty-one exhibits were admitted for the Complainant and forty-eight exhibits admitted for the Respondents.[3]

Post hearing briefs were received from both parties and the matter is now ripe for disposition.

Discussion

The Animal Welfare Act enacted in 1970 (P.L. 91-579) draws its genesis from and is an amendment of the Laboratory Animal Welfare Act (P.L. 89-54) which had been enacted in 1966 to prevent pets from being stolen for sale to research laboratories, and to regulate the humane care and handling of dogs, cats, and other laboratory animals. The 1970 legislation amended the name of the prior provision to the Animal Welfare Act in order to more appropriately reflect its broader scope.[4] Since that time Congress periodically has acted to strengthen enforcement, expand coverage to more animals and activities, or conversely, curtail practices that are viewed as cruel or dangerous.[5]

The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals

---

[3] Includes sub exhibits introduced by Complainant (2-2c less 2a, 16-16a, and 24-24a).

[4] The Congressional statement of policy is set forth in 7 U.S.C. § 2131 which provides in pertinent part: "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 or eliminate burdens on 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 theft of their animals by preventing the sale or use of animals which have been stolen.

[5] A 1976 amendment added Section 26 of the Act making illegal a number of activities that contributed to animal fighting. Haley's Act (H.R. 1947) introduced in the 100th Congress made it unlawful for animal exhibitors and dealers (but not accredited zoos) to allow direct contact between the public and large felids such as lions and tigers.

by 7 U.S.C. §§ 2143(a), 2151. The Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer, and transportation of regulated animals. 7 U.S.C. §§ 2133, 2134, 2140. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the Regulations and Standards are being followed. 7 U.S.C. §§ 2142, 2143, 2143 (a)(1) and (2), 2146 (a).

Violations of the Act by licensees can result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. Over time, the maximum civil penalty that may be assessed for each violation has been increased under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. The Act originally specified a $2,500 maximum; however, between April 14, 2004 and June 17, 2008 the maximum for each violation was $3,750. More recently 7 U.S.C. § 2149(b) was again amended and effective June 18, 2008 the maximum civil penalty for each violation increased to $10,000.

The Respondent Lee Marvin Greenly is an individual who operates what he describes as a photographic educational game farm along the scenic Kettle River near Sandstone, Minnesota. CX-23, Tr. 382. He is a licensed exhibitor, holding Animal Welfare Act License Number 41-C-0122 and has worked in training animals for "close to over 28 years" with experience at a zoo in Hinckley prior to opening his own facility.[6] Tr. 416. The license renewal forms introduced during the hearing have listed as many as 190 animals that are maintained at his facility. CX-2.

The Respondent Minnesota Wildlife Connection, Inc. is a corporation organized and existing under the laws of Minnesota formed on February 19, 2008 and lists its address as the same as Respondent's Greenly's. CX-24. Although Greenly suggests that the corporation is a "marketing company," the record contains ample evidence that its activities and those of Mr. Greenly are essentially identical and the corporation checks

[6] During questioning concerning his experience with raccoons, Greenly testified that he had worked with raccoons for 31 or 32 years. Tr. 427.

have been used to renew Greenly's AWA license. CX-2, 5, 11, 23, 39, 40, 45, 46, 52, and 75.

The Complaint, as amended,[7] alleges that between March 14, 2006 and October 19, 2010 the Respondents committed some thirty-seven separate violations of the Act and its Regulations.[8] The alleged violations cover a wide range of provisions in the Regulations, including (a) failing to provide adequate veterinary care to their animals; (b) failing to establish a mechanism for communicating with the veterinarian; (c) failing to construct structurally sound housing facilities; (d) failing to timely remove and dispose of food waste; (e) failing to appropriately store food; (f) failing to adequately enclose outdoor facilities; (g) failing to make, keep and maintain adequate and appropriate records; (h) failing to provide environmental enrichment for the animals; (i) failing to allow access for unannounced inspections of the facility, the animals and records; (j) failing to handle animals so as to avoid trauma or physical harm; and (k) failing to handle animals so that there was minimal risk to the public and the animals by permitting direct contact between dangerous animals and members of the public, resulting in injuries to the public on three occasions, death to a neighbor's pet, and mandatory euthanization of one of the animals following one incident. The prayer for relief seeks findings that the violations alleged were committed, a cease and desist order, a civil penalty, and the suspension or revocation of the Respondents' Animal Welfare Act license.[9]

The Answer and Amended Answer filed by the Respondents dispute or deny the majority of the allegations, minimize the seriousness of the events underlying certain other alleged violations, and as to others indicate that any problem was corrected once it was brought to their attention. Limited staffing, the fact that the facility is open only by

---

[7] The Complaint was amended on April 14, 2011to add allegations of two additional violations. Docket Entry No. 16.

[8] One alleged violation (Paragraph 17 of the Amended Complaint) was withdrawn by the Government during the hearing. Tr. 408-409. The post hearing brief indicated that "the complainant calculates that the amended complaint alleges no fewer than 29 violations." Complainant's Post hearing Brief at p. 33.

[9] In her testimony, Dr. Goldentyer suggested that a cease and desist order, revocation of Respondent's license, and a $50,000.00 fine would be appropriate. Tr. 570-577.

appointment and conflicting business appointments were offered to explain the failure to provide inspection access. Still other violations were denied on the basis that the conditions observed were temporary and caused in part by being taken away from the performance of ongoing tasks to deal with USDA personnel who had interrupted normal routines.

Of the matters alleged in the Complaint, the allegations concerning Respondent's actions on the instances in which there was risk of injury to the animals or the public, if proven, by themselves would be sufficiently serious to warrant revocation of Respondent Greenly's Animal Welfare Act license.[10] While no useful purpose is served by speculation concerning the need for two separate actions and the large number of alleged violations, one of which was withdrawn during the hearing and a number of others which I will find to be unfounded, it will be observed that the decision to include allegations of numerous less serious and sometimes questionable violations significantly increased the Respondents' burden and expense of defending the actions brought against them.[11] While I will discuss all of the allegations, discussion of the less serious allegations will be given limited treatment in view of the remedial nature of the Act and the severity of the sanction which is being imposed. As noted in Complainant's post hearing brief and in the Departmental sanction policy, the Act is a remedial statute. *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (U.S.D.A. 1991); *See also In re Sam Mazzola*, 68 Agric. Dec. 822, 850 (U.S.D.A. 2009).

The handling violations:

---

[10] As will be discussed, only four of the five instances will be found to be supported.

[11] The pattern of including large numbers of alleged violations, many of which have since been corrected and/or are several years old has been observed in a number of recent cases. *See, In re Craig Perry, et al.,* Docket No. 05-0026, Initial Decision by Judge Bullard, *aff'd in part by the Judicial Officer, (Date)*; *In re Terranova Enterprises, Inc., et al.* Docket Nos. 09-0155 and 10-0418, 70 Agric. Dec. _____(December 20, 2011); and *In re Bodie Knapp*, Docket No. 09-0175, 70 Agric. Dec. ____ (September 27, 2011); *See also, In re Lorenza Pearson, et al*., 68 Agric. Dec. 685 (2009). Including allegations of numerous violations, but failing to establish them has the potential to expose the Department to the award of attorney fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504. *See, Fox v. Vice,* 131 S. Ct. 2205 (2011).

The Amended Complaint alleged that Respondents not only failed to handle animals so as to avoid trauma or physical harm on five occasions in violation of 9 C.F.R. §2.131(b)(1), and on the same occasions also failed to handle animals so that there was minimal risk to the public and the animals by permitting direct contact between dangerous animals and members of the public in violation of 9 C.F.R. §2.131(c)(1).

The evidence establishes that on February 12, 2009, Respondents allowed two wolves to run free during a photo shoot on acreage owned by Leo Gardner following which the wolves went onto residential property belonging to Linda and Carlyle Zeigler and attacked and killed the Zeigler's dachshund that had been let out "to go to the bathroom." Tr. 52, 439-440. As Mrs. Zeigler watched, one wolf scooped the dog up and the two wolves then proceeded to play tug of war with the pet, lancinating the animal in half. Tr. 55-56. Although Respondent Greenly indicated that he was moving his truck at the time of the incident, he accepted responsibility for the incident and attempted to make amends with the Zeiglers by purchasing a replacement animal which the Zeigler ultimately accepted. Tr. 439, 441-444.

On either August 6 or 9 of 2009,[12] the Amended Complainant alleged that Respondents permitted the public to have direct contact with adult bears during "Quarry Days" without having any distance or barriers between the animals and the public. No USDA employee was present on either of the dates alleged[13] and the evidence advanced in support of the allegation consisted only of a photocopy of a newspaper article photograph for which no foundation was provided other than it was obtained as part of the investigation. Tr. 189-190, CX-39. I find this evidence insufficient to establish a violation was committed on either August 6 or 9, 2009.

---

[12] Paragraph 26 of the Amended Complaint lists the August of 2009 violation as occurring on August 9, 2009; however, Paragraph 27 has the date as August 6, 2009. The newspaper article predates August 9, 2009 but does not indicate when the photograph was taken. CX-39.

[13] Neither IES Investigator Vissage nor VMO Sime were present. Tr. 195, 258.

On April 22, 2010, during a work study outing for students from East Range Academy of Technology and Science at Respondents' facility, Respondents exhibited Blue, a 19 or 20 year old bear. Tr. 488-491. During the exhibition, as apparently is Greenly's ill advised but frequent practice,[14] the students and faculty were allowed to feed the bear "Gummi Worms," with the students putting the candy in their mouth and letting the bear then take the candy from their mouths. Tr. 490. During the feeding session, Blue bit Denise Jenson, (Lee Greenly's cousin and then a school employee) who had accompanied the students.[15] Ms. Jenson attempted to minimize the incident during her testimony, indicating that the bite to her arm did not draw blood until later. Tr. 118. A couple of days after the bite, she began to experience pain. After being initially seen in the emergency room, she was admitted to the hospital the following day for a five day stay. Tr. 120-121. As she declined to have the bear euthanized and tested for rabies, she later underwent the prophylactic series of inoculations for rabies. Tr. 122.

On August 14, 2010, at the request of VMO Sime, Kimberly Miller, an Animal Care Inspector, was present at the Quarry Days celebration in Sandstone, Minnesota. Tr. 272, 274. While at the event, she attended Respondents' show and observed the public having direct contact with and handling raccoons, a possum, and some foxes during photography sessions without any distance or barriers between the animals and the public. Tr. 275-276, CX-41. Although the show was performed from an elevated stage, there was only a short distance between the public seating area and no barrier separated the two areas. Tr. 276, CX-41. Inspector Miller also observed Greenly standing in front of the area between the stage and the chairs with a mountain lion or cougar in his arms. Tr. 276-279, CX-41. An adult wolf was exhibited on the stage by two young adolescent girls and two or three baby wolves were brought through the audience allowing the public to take photographs and pet the animals. Tr. 277-278. The Inspection Report was prepared the following month. CX-20.

---

[14] Greenly testified that the stunt had been performed "hundreds of times" without incident. Tr. 490.

[15] Ms. Jenson's employment with East Range Academy of Technology and Science ceased at the end of the 2010 school year.

On October 19, 2010, the evidence amply established that Respondents were at or near Banning State Park for a photo shoot with a couple of photographers when an unleashed adult wolf came into contact with and injured five year old Johnna "Johnny" Mae Kenowski. Tr. 10-16, 478, 522, CX-45, 46. Although Respondent disputes that the wolf actually bit the child, the child's aunt, Maja Dockal testified that the wolf attacked her niece and the record contains photographs of bloodied areas on Johnny's face, scalp, and arm and what appeared to be puncture wounds on the child's face and scalp. Tr. 12, 14, 19, 24-25, 478-480, CX-45. As a result of the incident, it was necessary to euthanize the wolf to verify that it did not have rabies. Tr. 47.

Providing adequate veterinary care and communicating information to the attending veterinarian violations:

The Amended Complaint alleges that on two occasions, Respondents failed to provide adequate veterinary care and to establish a mechanism to communicate with the attending veterinarian. The first alleged violation was reported to be observed by VMO Sime during her inspection of Respondents' facility on March 14, 2006. VMO Sime testified that because the incident was so long ago, she could not recall exactly but thought that the cougar appeared thin and surmised that the Respondents could not demonstrate to her that they had transmitted any information concerning the animal to the attending veterinarian. Tr. 203-204. In his testimony, Mr. Greenly disputed her account and testified that he had discussed the cougar with Dr. Zimpel and that worming had been suggested. Tr. 384-386. Given the equivocal nature of VMO Sime's testimony and lack of any other supporting evidence refuting Mr. Greenly's testimony, I will give credence to his testimony and decline to find violations of sections 2.40(a) or 2.40(b)(3) of the Regulations on March 14, 2006.

On July 24, 2007, Respondent was again visited by VMO Sime who observed a raccoon with a thick mucous discharge. CX-30. Mr. Greenly testified that he had worked with raccoons for 31 or 32 years and that he had periodically observed similar conditions and that the condition usually cleared up in a day or two. Tr. 427. He also indicated that he had

consulted with Dr. Jill Armstrong about the animal and that she was in agreement with waiting a couple of days before determining the need for examination by her and medical intervention. Tr. 426-427. As the evidence is in conflict, I will again decline to find violations of sections 2.40(a) or 2.40(b)(3) of the Regulations on July 24, 2006.

Failing to construct structurally sound housing facilities:

The Amended Complaint lists six instances in which Respondent's failed to construct and maintain structurally sound housing facilities, to wit: March 14, 2006, August 23, 2006 (2 violations), July 24, 2007, November 10, 2008, and June 29, 2009.

On the first date, VMO Sime also testified that she observed a piece of wood in the fisher[16] enclosure "…where there was some exposed nails that must have fallen into that…."Tr. 205. Mr. Greenly testified that he remembered the situation well. He indicated that the enclosure had corner platforms designed so that the animals could climb into them for animal enrichment and to encourage exercise. By Mr. Greenly's account there were several boards on the platform which were screwed into another platform and one of the boards had split and exposed two or three screws allowing the heads to protrude maybe a half inch to an inch. When it was brought to his attention, he either screwed them back in or broke them off while VMO Sime was still there. Tr. 387-388. As the deficiency was corrected during the inspection, it would appear that any violation was abated and no further action is needed.

On August 24, 2006, VMO Sime reported two structural problems, faulting the enclosure housing five woodchucks and the bear enclosure. CX-43. Mr. Greenly testified that the boards were not broken, but rather were intentionally left in the woodchuck enclosure to provide something for the animals to gnaw on. Tr. 399. Although a photograph of the structure was admitted, it does not contain sufficient detail to dispute Mr. Greenly's account. CX-44. As to the second alleged violation involving

[16] When asked what a fisher was, VMO Sime responded "You know that's a good question. It's an animal native to Minnesota." Tr. 205. The Amended Complaint identifies a fisher or fisher cat as *Martes pennanti,* a medium sized mammal native to North America and a member of the *Mustelid* family, commonly referred to as the weasel family. Footnote 1, paragraph 8, Amended Complaint, Docket Entry No. 16.

the bear enclosure, Mr. Greenly testified that the bear had not escaped as the gate was still latched. He had taken the bear out of its cage on a leash prior to the inspector's arrival and was cleaning the cage. Tr. 402-404. Examination of the photograph reflects an apparently sound chain link structure with chain securing the gate. CX-44.

Greenly acknowledged that the two juvenile woodchucks had been able to escape their enclosures on July 24, 2007, but indicated that they had not breached the perimeter fencing. Tr. 428-429. Although a violation did occur, corrective action apparently was taken as subsequent inspections contain no further mention of the enclosure.

The alleged structural violations on November 10, 2008 and June 29, 2009 relate to a wolf enclosure. CX-7 and CX-13. Respondents' photographs of the enclosure refute the alleged violations reflecting a thick concrete slab with a sound chain link fence with a clearance of less three inches at the bottom. RX-47.

Perimeter fence violations:

The Amended Complaint includes allegations of five violations of failing to maintain an adequate perimeter fence on March 14, 2006, August 23, 2006 (2 violations), November 10, 2008 and June 29, 2009. The perimeter fencing violation was first noted on the March 14, 2006 Inspection Report and Mr. Greenly was given until September 14, 2006 in which to correct the deficiency. CX-25. It should be noted that the second citation was written within the period specified for corrective action to be taken; however, both Mr. Greenly's testimony and the absence of further such citations after the deadline indicate that any deficiency was corrected. Tr. 208, 394, CX-21.

It is noted that the Regulations contain no objective standard for perimeter fencing and APHIS officials when asked decline to advise license holders what is needed for compliance.[17] Fact finders are

[17] The Standards indicate that fences less than 8 feet for dangerous animals and less than six feet for other animals must be approved in writing by the Administrator. 9 C.F.R. § 3.127(d).

accordingly often faced the unfortunate situation of having to pass upon the appropriateness of the subjective opinion of an inspector as what is necessary when no objective standard exists.

Food storage and failure to remove food waste violations:

Two violations of food storage standards and one of failing to provide for the removal and disposal of food waste are alleged. VMO Sime's citation of the facility on March 14, 2006 for failing to store food supplies in a manner that adequately protects them from contamination arose out of the facility's acceptance of animal carcasses which were left on the upper hill of the facility. The VMO noted that the facility did have freezers available to store the food, but felt they "must not have been doing it in a timely fashion to get it into the freezers" and concluded that "it must have been getting excessive at that time." Tr. 205. Although she also cited the facility for leaving carcasses and carcass remnants in animal enclosures in her Inspection Report, at the hearing, she gave no testimony concerning that alleged violation so that alleged violation will be dismissed.

Mr. Greenly testified that the carcasses came from a variety of sources, including DNR, the state highway department, the city, and from local farmers needing to dispose of dead stock. He went on to say that the carcasses would be dropped off and left on the hill, but that he usually processed them by butchering them the day that they were brought in. If butchering was not done the same day, it would usually be done in less than 24 hours. Some of the meat would be used right away and the rest would be placed in the two walk-in freezers that the facility has. Tr. 389-392. I find Mr. Greenly's explanation reasonable and given that the inspection was conducted in mid March when temperatures in Minnesota are seldom above the freezing point, I see little risk of carcass contamination from spoiling from being left outside until processing could be done and take notice that carnivorous animals in the wild often devour their kill over a number of days. Accordingly, while the sight of carcasses on the property may give the impression of an aceldama and not be esthetically pleasing, I decline to find violations of section 2.100(a) for failure to meet the requirements of sections 3.125(c) or 3.125(d) of the Standards on March 14, 2006.

The remaining food storage violation was alleged to have been observed on January 11, 2007. Mr. Greenly testified that the three cans were prepared that morning for the afternoon feeding. Tr. 418-419. Greenly acknowledged that the bags of food were on the floor, but noted that he had never been written up for that before and he has since stored food on pallets. Tr. 421.

Record keeping violations:

Respondent was cited on August 23, 2006, July 24, 2007, and June 29, 2009 for failing to make, keep and maintain adequate and accurate records of the acquisition and disposition of the animals at the facility. CX-7, 30 and 43. While one instance might be understandable or explainable as an excusable lapse, it is difficult at best to understand Respondents' callous indifference and continued failure to avoid recurring violations. VMO Sime's testimony concerning the deficiencies clearly establishes the violations. Tr. 211, 218 and 221-224.

Environmental enrichment violation:

This alleged violation was withdrawn by the Complainant. Tr. 408-409.

Failure to provide access for the purpose of inspecting the facility, animals and records on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009 and May 13, 2009:

On December 19, 2006, APHIS VMO Debra M. Sime attempted to conduct an unannounced inspection at Respondent's Sandstone property. She met briefly with Mr. Greenly who informed them that he was ill and had to leave for a doctor's appointment. Tr. 413. According to the Interview Log prepared by IES Investigator Leslie Vissage who had accompanied the VMO to the site, VMO Sime "said that she would return to do the inspection another day." CX-37. As it appears that on this occasion both women agreed to return another time, I will decline to find a violation of failing to provide access for an inspection on December 19, 2006.

Although her testimony consisted of little more than identifying the inspection report made on each occasion, VMO Sime visited Respondent's facility on four other occasions but was unsuccessful in conducting an inspection. Those record establishes that unsuccessful attempts were made on June 12, 2007 (Tr. 200, CX-28), two different times on February 13, 2008 (Tr. 201, CX-10), February 23, 2009 (Tr. 201, CX-3), and May 13, 2009 (Tr. 202, CX-14).

Mr. Greenly testified that on the later occasions it never was a question of denying VMO Sime access, but rather was because he was likely not present at the facility. He went on to explain that he was a sole proprietor and had neither the staff nor the funds to have someone in the office from 9:00 to 5:00. He also indicated that he was frequently out of town, that he had given APHIS inspectors his cell phone number so they could get hold of him and that in the past some inspectors had called to make sure that someone would be present at the facility.[18] Tr. 413-416.

As the requirement to allow USDA access for the purpose of inspecting the facility, the animals and the records during normal business hours is unqualified and contains no exemptions or allowances for sole proprietors, the record supports violations of section 2.126 of the Regulations on June 12, 2007, February 13, 2008, February 23, 2009 and May 13, 2009.

The Sanction:

The United States Department of Agriculture's sanction policy provides that Administrative Law Judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, 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,

[18] VMO Sime made it clear that her inspections were unannounced. Tr. 226-227. Dr. Goldentyer affirmed that was consistent with Department policy. Tr. 569. Although Dr. Hovancsak was not available for cross examination, the record contains a memorandum from her indicating she did not call Mr. Greenly in advance of her inspections. CX-12.

> along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In re S.S. Farms Linn County, Inc., *supra.*

Like the Judicial Officer, I do not consider such recommendations controlling, and in appropriate circumstances, the sanction imposed may be considerably different, either less or more than that requested.[19] In the actions before me here, the Administrator has recommended that a civil penalty of $50,000.00 be imposed.

It is well established that correction of violations does not eliminate the fact that a violation may have occurred;[20] however, it is also clear that such corrective action may be taken into account in fashioning the sanction imposed. *In re Lorenza Pearson, d/b/a L & L Exotic Animal Farm,* 68 Agric. Dec. 685, 726-27 (2009). Aside from handling violations, record keeping, and inspection access violations, it appears that most, if not all of the other violations that I have found to have occurred were corrected.[21] As I find that Mr. Greenly's handling violations to be repeated and serious, I am revoking the Respondents'

---

[19] *In re* Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77,89 (U.S.D.A. 2009); *In re* Alliance Airlines, 64 Agric. Dec. 1595, 1608 (U.S.D.A. 2005); *In re* Mary Jean Williams, (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (U.S.D.A. 2005); *In re* George A. Heimos Produce Co., 62 Agric. Dec. 763, 787 (U.S.D.A. 2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug 31, 2004); *In re* Excel Corp., 62 Agric. Dec. 196, 234 (2003), enforced as modified, 397 F. 3d 1285 (10th Cir. 2005); *In re* Steven Bourk (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (U.S.D.A. 2002).

[20] *In re* Jewel Bond, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff'd per curiam* 275 F. App'x 547 (8th Cir. 2008); *In re* Eric Drogosch, 63 Agric. Dec. 623, 643 (U.S.D.A. 2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan* DeFrancesco, 59 Agric. Dec. 97, 112 n.12 (U.S.D.A. 2000); *In re* Michael A. Huchital, 58 Agric. Dec. 763, 805 n.6 (U.S.D.A. 1999); *In re* James E. Stephens, 58 Agric. Dec. 149, 184-85 (U.S.D.A. 1999).

[21] Dr. Goldentyer noted that the more recent inspections had noted improvement in the condition of the facility. Tr. 574.

Animal Welfare Act license, but decline to impose a civil penalty in light of the significant financial impact of the revocation.

On the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent Lee Marvin Greenly is an individual residing in the State of Minnesota who holds Animal Welfare Act license number 41-C-0122 as an exhibitor in his own name. CX-2. Greenly exhibits wild and exotic animals to the public both at traveling locations and operates what he refers to as a photographic educational game farm on property that he owns on the Kettle River near Sandstone, Minnesota. Tr. 382-383. On various occasions, he also provides animals for photographic opportunities at other locations on nearby private or public land that he does not own. Tr. 439-440.

2. Respondent Minnesota Wildlife Connection, Inc. is a corporation organized and existing under the laws of Minnesota having the same address for its registered office as that of Mr. Greenly. The affairs of the corporation and Greenly are sufficiently intertwined that they cannot be separated. CX-2, 5, 11, 23, 39, 40, 45, 46, 52 and 75.

3. On February 12, 2009, Respondents allowed two wolves to run free during a photo shoot on acreage owned by Leo Gardner following which the wolves went onto residential property belonging to Linda and Carlyle Zeigler and attacked and killed the Zeigler's dachshund that had been let out "to go to the bathroom." Tr. 52, 439-440. As Mrs. Zeigler watched, one wolf scooped the dog up and the two wolves then proceeded to play tug of war with the pet, tearing and ripping the animal in half. Tr. 55-56.

4. On August 14, 2009, Kimberly Miller, an Animal Care Inspector, was present at the Quarry Days celebration in Sandstone, Minnesota and observed the public having direct contact with and handling raccoons, a possum, and some foxes during photography sessions without any distance or barriers between the animals and the public. Tr. 272, 274-276, CX-41. The show was performed from an elevated stage with chairs for the public in front of the stage a short distance away, but without any

barrier between the stage and the chairs. Tr. 276. Inspector Miller later observed Greenly standing in front of the area between the stage and the chairs with a mountain lion or cougar in his arms. Tr. 276-279, CX-41. An adult wolf was exhibited on the stage by two young adolescent girls and there were two or three baby wolves that were brought through the audience allowing the public to take photographs or pet the animals. Tr. 277-278.

5. On April 22, 2010, during a work study outing for students from East Range Academy of Technology and Science at Respondents' facility, Respondents exhibited Blue, a 19 or 20 year old bear. Tr. 488-491. During the exhibition, the students and faculty were allowed to feed the bear "Gummi Worms," with the students putting the candy in their mouth and letting the bear then take the candy from their mouths. Tr. 490. During the feeding session, Blue bit Denise Jenson, (Lee Greenly's cousin and then a school employee) who had accompanied the students. A couple of days after the bite, she began to experience pain and after being initially seen in the emergency room was admitted to the hospital the following day for a five day stay. Tr. 120-121. As she declined to have the bear euthanized and tested for rabies, she later underwent the prophylactic series of inoculations for rabies. Tr. 122.

6. Twenty-two months after the previous unleashed wolf incident on October 19, 2010 Respondents were at or near Banning State Park for a photo shoot with a couple of photographers when an unleashed adult wolf came into contact with and injured five year old Johnna "Johnny" Mae Kenowski. Tr. 10-16, 478, 522, CX-45, 46. The child's aunt, Maja Dockal observed the wolf attacking her niece and photographs of bloodied areas on Johnny's face, scalp and arm reflect what appeared to be puncture wounds on the child's face and scalp. Tr. 12, 14, 19, 24-25, 478-480, CX-45. As a result of the incident, it was necessary to euthanize the wolf to verify that it did not have rabies. Tr. 47.

7. On March 14, 2006 and on July 24, 2007, Respondents were cited for failing to provide adequate veterinary care and failing to have a mechanism in place to communicate information to the facility's attending veterinarian; however on both occasions, Respondents had

communicated with the veterinarian and immediate intervention had not been considered necessary by the veterinarian.
8. On July 24, 2007 the two juvenile woodchucks escaped their enclosure, but were unable to breach the perimeter fencing. Tr. 428-429. Corrective action was taken and subsequent inspections contain no further mention of the enclosure.

9. On March 14, 2006 and August 23, 2006 (2 violations), November 10, 2008 and June 29, 2009, Respondents were cited for perimeter fencing violations. The violation was first noted on the March 14, 2006 Inspection Report and Mr. Greenly was given until September 14, 2006 in which to correct the deficiency. CX-25. The second citation was written within the period specified for corrective action to be taken; however, both Mr. Greenly's testimony and the absence of further such citations after the deadline indicate that any deficiency was corrected. Tr. 208, 394, CX-21.

10. On November 10, 2008 and June 29, 2009 Respondents were cited for perimeter fencing violations relating to a wolf enclosure (CX-7 and CX-13); however. Respondents' photographs of the enclosure refute the alleged violations reflecting a thick concrete slab with a sound chain link fence with a clearance of less than three inches at the bottom. RX-47.

11. On January 11, 2007, Respondents were cited for a food storage violation. Three open cans of food had been prepared that morning for the afternoon feeding (Tr. 418-419) and bags of food were observed on the floor. After receiving the citation, the facility has since stored food on pallets. Tr. 421.

12. On August 23, 2006, July 24, 2007, and June 29, 2009 Respondent failed to make, keep and maintain adequate and accurate records of the acquisition and disposition of the animals at the facility. CX-7, 30 and 43, Tr. 211, 218 and 221-224.

13. On December 19, 2006, APHIS VMO Debra M. Sime appeared at Respondents' facility to conduct an unannounced inspection at Respondent's Sandstone property. She met briefly with Mr. Greenly who informed them that he was ill and had to leave for a doctor's appointment. Tr. 413. The Interview Log prepared by IES Investigator

Leslie Vissage who had accompanied the VMO to the site, VMO Sime "said that she would return to do the inspection another day." CX-37.

14. Unsuccessful attempts to inspect Respondents' facility were made on June 12, 2007 (Tr. 200, CX-28), two different times on February 13, 2008 (Tr. 201, CX-10), February 23, 2009 (Tr. 201, CX-3), and May 13, 2009 (Tr. 202, CX-14).

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. On February 12, 2009, August 14, 2009, October 19, 2010, and October 22, 2010, Respondents willfully violated 9 C.F.R. § 2.131(b)(1) of the Regulations by failing to handle animals as carefully as possible in a manner that does not cause trauma or physical harm.

3. On February 12, 2009, August 14, 2009, April 22, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(c)(1) of the Regulations by failing to handle animals during public exhibition so that there was minimal risk of harm to the animals and the public, with sufficient distance or barriers between the animals and the public so as to assure the safety of the animals and the public.

4. The evidence is insufficient to establish violations of 9 C.F.R. § 2.40(a) or 2.40(b)(3) of the Regulations on either March 14, 2006 or July 24, 2007.

5. The evidence is insufficient to establish violations of 9 C.F.R. §2.131(b)(1) and § 2.131(c)(1) of the Regulations on August 6, 2009.

6. The structural deficiencies cited on March 14, 2006 and July 24, 2007 have since been corrected and no further action is required.

7. The evidence was insufficient to establish a structurally sound housing facilities violations on August 23, 2006, November 10, 2008 and June 29, 2009.

8. The perimeter fence violations cited on March 14, 2006, August 23, 2006 (2 alleged violations), November 10, 2008 and June 29, 2009 have since been corrected and no further action is required.

9. The evidence is insufficient to establish violations of 9 C.F.R. § 2.100(a), 3.125(c), or 3.125(d) of the Regulations and Standards on March 14, 2006.

10. Respondents willfully violated 9 C.F.R. § 2.100(a) and 3.125(c) of the Regulations and Standards by having three bags of uncovered canine food stored on the floor.

11. The evidence is insufficient to establish a violation of 9 C.F.R. §2.100(a) and 3.125(c) of the Regulations and Standards for having uncovered buckets or cans of food prepared for and intended for use that day.

12. Respondents willfully violated 9 C.F.R. § 2.75(b)(1) of the Regulations on August 23, 2006, July 24, 2007, and June 29, 2009 by failing to make, keep and maintain adequate records of the acquisition and disposition of animals at the facility.

13. The evidence is insufficient to establish a violation of 9 C.F.R. § 2.126(a) of the Regulations on December 19, 2006.

14. Respondents willfully violated 9 C.F.R. § 2.126(a) of the Regulations on June 12, 2007, February 13, 2008, February 23, 2009 and May 13, 2009.

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 or the Regulations and Standards issued thereunder.

2. AWA License Number 41-C-0122 is revoked.

3. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless 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 of this Decision and Order will be served upon the parties by the Hearing Clerk.

_____

In re: LEE MARVIN GREENLY.
Docket No. 11-0073.
Decision and Order.
Filed August 22, 2012.

AWA.

Colleen A. Carroll, Esq., for Complainant.
Larry D. Perry, Esq., for Respondents.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This Decision and Order involves the second of two actions initiated by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) against Lee Marvin Greenly (Greenly) seeking termination of his Animal Welfare Act license.[1]

This action, also filed on November 29, 2010, was initiated by the filing of an Order to Show Cause Why Animal Welfare Act License 41-C-0122 Should Not Be Terminated and named Greenly as the Respondent. The Order to Show Cause alleges that Respondent is no

[1] The other action is In re Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., Docket No. 11-0072

longer fit for licensure under the Animal Welfare Act, 7 U.S.C. §2131, *et seq*. (the Act or AWA) as a result of a conviction under the Lacey Act (16 U.S.C. §§3371-3378) and other specified grounds and seeks termination of Respondent's license and disqualification of the Respondent, any agent, assigns, or business entity in which the Respondent might hold a position as an officer, agent or representative, or otherwise holds a significant business interest from obtaining an AWA license for a period of two years.

After requesting and being granted an extension of time in which to respond, Respondent filed his Answer on January 14, 2011. The Answer was accompanied by a Motion to Consolidate the two proceedings brought against him and during a teleconference held on January 19, 2011, the Motion was granted with a written Order entered into the record of the same date.[2]

On February 8, 2011, Complainant filed a Motion for Summary Judgment and on March 1, 2011 sought and was granted an Extension of Time in which to comply with the Order of January 19, 2011 concerning the exchange deadlines established for the consolidated hearing. By Order entered on March 8, 2011, the ruling on the Motion for Summary Judgment was deferred pending the hearing of the consolidated actions. On April 14, 2011, the Complainant amended its Complaint in Docket No. 11-0072 and on May 5, 2011, moved to continue the oral hearing of the consolidated cases. By Notice of Hearing entered on April 25, 2012, the actions were rescheduled to be heard on May 1, 2012 in Minneapolis, Minnesota.[3]

At the hearing conducted May 1 and 2, 2012, eleven witnesses testified for the Complainant, seven witnesses testified for the Respondents, fifty-one exhibits were admitted for the Complainant and forty-eight exhibits admitted for the Respondents.[4]

---

[2] From the onset, Counsel for Mr. Greenly placed both docket numbers on his pleadings.

[3] The actions had previously been set for hearing on May 1, 2012 in Duluth, Minnesota; however, court space was not available and the location of the hearing was moved to Minneapolis.

[4] Includes sub exhibits introduced by Complainant (2-2c less 2a, 16-16a, and 24-24a).

Discussion

In addition to setting forth allegations concerning the Lacy Act plea and conviction, the Show Cause Order indicates that the Respondent is unfit for licensure and that maintenance of a license by him would be contrary to the purposes of the Act. The Show Cause Order also mirrors certain of the allegations contained in Docket No. 11-0072, containing the handling violations alleged on February 12, 2009, August 14, 2010, and October 19, 2010 and inspection access violations alleged to have occurred on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009.

In responding to the Show Cause Order, Respondent suggests: (a) that the plea agreement "that does not bind any federal or state agency;" (b) that there was a genuine dispute related to the land boundaries where the offense was alleged to have occurred; (c) that Minnesota allows baiting of bears in bear season and no laws were broken in that regard; (d) that the Respondent was licensed as a hunting guide; and (e) that the State of Minnesota requires all land where hunting is prohibited to be posted and that the land in question was not posted.

In Respondent's post hearing brief, Respondent argues that the Lacey Act is not part of the AWA and that USDA has no oversight over wildlife "unless exhibited to the public or used in research or teaching" and raises the defenses of Double Jeopardy and a bar to the action by reason of the Statute of Limitations.

The Animal Welfare Act (the Act) provides that the Secretary shall issue licenses to dealers and exhibitors upon application in such form and manner as the Secretary may prescribe (7 U.S.C. § 2133).[5] The power to require and to issue licenses under the Act includes the power to terminate a license and to disqualify a person from being licensed. *In re: Amarillo Wildlife Refuge, Inc.* 68 Agric. Dec. ____ (U.S.D.A. 2009); *In*

[5] ". . . Provided that no license shall be issued until the dealer or exhibitor shall have demonstrated that his facility complies . . "

re: Loreon Vigne, 67 Agric. Dec. _____ (U.S.D.A. 2008); *In re: Mary Bradshaw*, 50 Agric. Dec. 499, 507 (U.S.D.A. 1991).

The primary basis of the Administrator's determination that the Respondent is no longer fit to be licensed as an exhibitor under the Animal Welfare Act is based upon evidence that the Respondent was convicted of conspiracy to violate the Lacey Act. In his Answer, the Respondent admits entering into the plea agreement and acknowledges that the plea agreement is a matter of record.

The Lacey Act, introduced by Iowa Congressman John Lacey, was signed into law by President William McKinley on May 25, 1900, and was the first federal law protecting wildlife. The original Act was directed primarily at the preservation of game and wild birds by making it a crime to poach game in one state with the purpose of selling the bounty in another. Following a number of amendments, the Act now protects both plants and wildlife by providing both civil and criminal penalties for a wide array of violations prohibiting trade in wildlife, fish and plants that have been illegally taken, possessed, transported or sold.[6]

Section 2.11 of the Regulations (9 C.F.R. § 2.11) authorizes denial of a license for a variety of reasons, including:

> (a) A license will not be issued to any applicant who:
>
> (4) Has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to animal cruelty, within one year of application, or after one year if the Administrator determines that the circumstances render the applicant unfit to be licensed.
> ….
>
> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled

[6] Significant amendments were added in 1969, 1981 and 1988. The 1988 amendment was added to cover threats to big game species under the ambit of a "sale."

> *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that issuance of a license would be contrary to the purposes of the Act.

Section 2.12 (9 C.F.R. § 2.12) provides:

> A license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice.

The evidence establishes that on November 27, 2006, the United States and Respondent entered into a Plea Agreement and Sentencing Stipulations whereby Respondent pleaded guilty to the Information charging him with a misdemeanor conspiracy violation of the Lacey Act, by making or submitting a false record or account for wildlife under 16 U.S.C. §3372(d), 3372(d)(3)(B)(ii), all in violation of 18 U.S.C. § 371. *United States v. Lee Marvin Greenly*, Crim. No. 060235 (PAM) (D. Minn); CX-120. In the Plea Agreement, Respondent admitted committing the offenses and agreed to and did plead guilty to conspiring to violate the Lacey Act. *Id.* at 2-3. In addition to the admissions contained in the Plea Agreement, the record contains supporting evidence reflecting that Respondent had given statements and submitted records to the Minnesota Department of Natural Resources (DNR) concerning the incident, falsely representing that he had guided a country singer named Troy Gentry on a commercial hunt "in a no-quota zone" where Gentry had killed the bear. CX-32, 33, and 35.

At the hearing, Respondent testified that on Dr. Cathy Hovancsak's last inspection of his facility, she informed him that under a new policy a bear named "Cubbie" that he was keeping in a seven acre "hot wire" enclosure would need a second barrier installed. Tr. 501-502. At the time, "Cubbie" was experiencing serious dental problems would require

expensive dental work if the bear were to be kept.[7] As the cost of either the fence or dental care would be an expense Respondent was reluctant to "bear," after unsuccessful efforts to find the animal another home and discussing the matter with Dr. Hovancsak, Greenly agreed to euthanize the bear. Tr. 503-504. Rather than complying with the facility's Program of Veterinary Care which required euthanization by injection; however, Respondent searched for an individual who would purchase the animal for slaughter. Tr. 505, CX-75. After receiving one offer for $1,500 which never reached fruition, he was contacted by a hunting client, Troy Gentry, who expressed interest in purchasing the animal and being filmed killing the bear with a bow and arrow. Tr. 505-507. After the bear was killed on Greenly's property, it was tagged with a Minnesota Department of Natural Resources hunting license tag and submitted as a lawfully taken bear from the wild population. CX-121. Cubbie's hide and teeth were then transported to Kentucky to a taxidermist for mounting and tanning. Tr. 506-507.

As the handling and inspection access violations were addressed in the companion case, Docket No. 11-0072, no need exists to discuss them further in this action.

Based upon the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent Lee Marvin Greenly is an individual residing in the State of Minnesota who holds Animal Welfare Act license number 41-C-0122 as an exhibitor in his own name. CX-2. Greenly exhibits wild and exotic animals to the public both at traveling locations and operates what he refers to as a photographic educational game farm on property that he owns on the Kettle River near Sandstone, Minnesota. Tr. 382-383. On various occasions, he also provides animals for photographic opportunities at other locations on nearby private or public land that he does not own. Tr. 439-440.

---

[7] The causation of the dental problems was not established; however, Respondent frequently feeds his bears a sweet called "Gummi Worms." Tr.

2. On November 27, 2006, the United States and Respondent entered into a Plea Agreement and Sentencing Stipulations whereby Respondent agreed to plead guilty to the Information charging him with a misdemeanor conspiracy violation of the Lacey Act, by making or submitting a false record or account for wildlife under 16 U.S.C. §3372(d), 3372(d)(3)(B)(ii), all in violation of 18 U.S.C. §371. *United States v. Lee Marvin Greenly,* Crim. No. 060235 (PAM) (D. Minn); CX-120, 121.

3. Pursuant to the Plea Agreement, Respondent admitted the offense, agreed to and did plead guilty in the United States District Court to conspiring to violate the Lacey Act and to violating the Lacey Act. *Id at* 2-3.

4. On February 26, 2007, Respondent was sentenced by Senior United States District Judge Paul A. Magnuson in the United States District Court for the District of Minnesota to probation for three months, a fine of $15,000.00, a special assessment of $25.00 and other terms and conditions contained in the sentencing documents. CX-120-121.

5. Respondent submitted false statements and records to the Minnesota Department of Natural Resources (DNR) concerning the incident, falsely representing that he had guided a country singer named Troy Gentry on a commercial hunt "in a no-quota zone" where Gentry had killed the bear when in fact the bear was killed on Greenly's property in a fenced enclosure. CX-32, 33, 35, 120 and 121.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The Respondent, having been found guilty on February 26, 2007 of a criminal misdemeanor conspiracy violation of the Lacey Act, by making or submitting a false record or account for wildlife under 16 U.S.C. §3372(d), 3372(d)(3)(B)(ii), in violation of 18 U.S.C. §371 by the United States District Court for the District of Minnesota, is found to be unfit to

hold an Animal Welfare Act license. 9 C.F.R. §2.11(a)(4) and (6); and §2.12.

3. License revocation proceedings do not constitute Double Jeopardy.

4. As Respondent's conviction and sentence were not entered until February 26, 2007, the termination proceedings are not barred by the Statute of Limitations.

ORDER

1. Should the revocation of Respondent's Animal Welfare Act License No. 41-C-0122 in Docket No. 11-0072 be vacated for any reason, said license is terminated by this action.

2. The Respondent is disqualified for a period of 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.

3. This Decision and Order shall become final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

———

Mitchel Kalmanson
71 Agric. Dec. 1007

In re: JENNIFER CAUDILL, AN INDIVIDUAL KNOWN AS JENNIFER WALKER AND JENNIFER HERRIOTT WALKER; AND MITCHEL KALMANSON, AN INDIVIDUAL. [1]
Docket No. 10-0416.
Decision and Order.
Filed September 24, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondents.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER AS TO MITCHEL KALMANSON

Preliminary Statement

This license termination proceeding was initiated on September 7, 2010 by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) pursuant to Animal Welfare Act (the Act or AWA), 7 U.S.C. § 2131, *et seq.*, by the filing of an Order to Show Cause Why Animal Welfare Act Licenses 58-C-0947, 55-C-0146 and 58-C-0505 Should Not Be Terminated. The action as brought originally named Jennifer Caudill (also known as Jennifer Walker and Jennifer Herriott Walker) (Caudill), Brent Taylor (Taylor) and William Bedford (Bedford), individuals doing business as Allen Brothers Circus, and Mitchel Kalmanson (Kalmanson) as Respondents. When AWA license 55-C-0146 was voluntarily terminated on May 12, 2012, the issues concerning Taylor and Bedford were resolved. APHIS moved to withdraw the Order to Show Cause concerning Bedford and Taylor and an Order of Dismissal was entered as to them on June 15, 2012.[2]

Answers, and as to some of the Respondents, Amended Answers were ultimately filed and multiple pleadings, including several Motions

---

[1] The Show Cause Order Caption and contents spell Kalmanson's first name as Mitchell. Correspondence from him however indicates that the proper spelling is Mitchel. Letter, dated September 13, 2010, Docket Entry No. 5.

[2] Order of Dismissal, June 15, 2012, Docket Entry No. 73

to Dismiss, two Motions for Summary Judgment, a Motion to have Complainant's Counsel disqualified from further involvement in the case, and another to recuse "Administrator" L. Eugene Whitfield (in actuality the Department's Hearing Clerk) were filed by Respondents, all of which were denied.[3] The matter was originally set for oral hearing in Tampa, Florida to commence on March 22, 2011, but was continued and later rescheduled for June 11, 2012.[4]

At the hearing, thirteen witnesses testified.[5] Thirty-five exhibits were introduced by the government and eighteen by the Respondents.[6] Post hearing briefs have been received from all parties and the matter is now ripe for disposition.

Discussion

The Animal Welfare Act enacted in 1970 (P.L. 91-579) draws its genesis from and is an amendment of the Laboratory Animal Welfare Act (P.L. 89-54) which had been enacted in 1966 to prevent pets from being stolen for sale to research laboratories, and to regulate the humane care and handling of dogs, cats and other laboratory animals. The 1970 legislation amended the name of the prior provision to the Animal Welfare Act in order to more appropriately reflect its broader scope.[7] Since that time Congress periodically has acted to strengthen

---

[3] Docket Entry Nos. 6, 7, 10, 15, 17, 19, 20, 21, 56, and 60.

[4] Docket Entry Nos. 44, 51, 65, and 67.

[5] References to the Transcript will be indicated as Tr. and the page number.

[6] Complainant's exhibits are referred to as CX and the exhibit number. Respondent Caudill's exhibits are referred to as RCX and the exhibit number. Respondent Kalmanson's exhibits are referred to as RKX and the exhibit number. Joint Respondent exhibits are referred to as RCKX and the exhibit number.

[7] The Congressional statement of policy is set forth in 7 U.S.C. § 2131 which provides in pertinent part: "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 or eliminate burdens on 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 theft of their animals by preventing the sale or use of animals which have been stolen.

enforcement, expand coverage to more animals and activities, or conversely, curtail practices that are viewed as cruel or dangerous.[8]

The Act provides that the Secretary shall issue licenses to dealers and exhibitors upon application in such form and manner as the Secretary may prescribe, 7 U.S.C. § 2133.[9] As part of his enforcement authority, the Secretary may suspend or revoke the license of any dealer or exhibitor who violates the Act or its Regulations. 7 U.S.C. § 2149(a). The power to require and to issue licenses under the Act includes the power to terminate a license and to disqualify a person from being licensed. *In re: Amarillo Wildlife Refuge, Inc.* 68 Agric. Dec. 77 (U.S.D.A. 2009); *In re: Loreon Vigne,* 67 Agric. Dec. 9620 (2008), *aff'd with modifications*, 67 Agric. Dec. 1060 (U.S.D.A. 2008); *In re: Mary Bradshaw,* 50 Agric. Dec. 499, 507 (U.S.D.A. 1991). Violations of the Act by licensees can result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149.

The license termination proceedings brought against Kalmanson and the other Respondents appears to have arisen from concerns, suspicions and unverified conclusions on the part of Dr. Elizabeth Goldentyer, the Eastern Regional Director for the USDA Animal and Plant Health Inspection Service, Animal Care Program, that the Respondents were engaged in activities designed to circumvent an Order of the Secretary of Agriculture revoking the AWA exhibitor's license previously held by Lancelot Kollman Ramos (Ramos), conduct specifically proscribed by Section 2.11(d) of the Regulations, 9 C.F.R. § 2.11(d).[10] APHIS personnel involved in preparing inspection reports were specifically instructed by Goldentyer and her staff to include language in their reports to the effect that "This licensee appears to be circumventing the

---

[8] A 1976 amendment added Section 26 of the Act making illegal a number of activities that contributed to animal fighting. Haley's Act (H.R. 1947) introduced in the 100th Congress made it unlawful for animal exhibitors and dealers (but not accredited zoos) to allow direct contact between the public and large felids such as lions and tigers.

[9] ". . . Provided that no license shall be issued until the dealer or exhibitor shall have demonstrated that his facility complies. . "

[10] "No license will be issued under circumstances that the Administrator determines would circumvent any order suspending, revoking, terminating, or denying a license under the Act." 9 C.F.R. § 2.11(d).

revocation of Lancelot Kollman Ramos-2.10(b), 2.11(d), 2.12."[11] Tr. 386-387, CX-20 (McFadden), 23 (Geib), 24 (Baltrush), 25 (Baltrush),[12] 28 (Howard).[13]

Dr. McFadden in her testimony indicated that the direction to include that language had come from her supervisor, Dr. Elder Magrid, who reports to Dr. Goldentyer but indicated it was not a conclusion that she, (McFadden), had reached. Tr. 159-160. Dr. Mary Geib testified that she believed her instructions to include the language came from Dr. Goldentyer. Tr. 177-179. Her testimony makes it clear that that there was no factual basis for the conclusory language from what she had observed. *Id.* Jan Baltrush, an experienced USDA Animal Care Inspector since 1988, testified that the directed language was placed in the report only because she was told to and admitted that she had no factual basis for its inclusion. Tr. 198. While possibly not rising to the level of "fraud upon the Court" as suggested by Kalmanson's post hearing brief, such egregiously improper and inappropriate actions can only be condemned in the strongest terms possible and casts significant doubt upon the ability of the officials involved to properly execute their responsibilities to the public that they serve as part of the "People's Department."[14]

Ramos's license No. 58-C-0816 had been revoked effective October 19, 2009 following his unsuccessful appeal of administrative

---

[11] Dr. Goldentyer admitted directing both inspectors and supervisors to include the language. Tr. 386. Later, she answered "Yeah. They definitely were given that language." Tr. 437. Excerpts from the APHIS Exhibitor Inspection Guide introduced during the hearing provide that reports should have a clear, detailed description of the non-compliance and include **observations** by the inspecting official and avoid personal comments or administrative messages to the regional office. Tr. 302-303. RCKX-1.

[12] "Should a Contracted Licensee act in a manner that is circumventing the AWA the Cole Brothers Circus may be held responsible." CX-25.

[13] "This licensee appears to be assisting in the direct circumvention of a USDA revocation order." CX-28.

[14] Two and a half years after the Department of Agriculture was established in 1862, in what would be his final annual message to Congress, then President Abraham Lincoln called USDA the "People's Department. As for the obligations of public officials, attention is invited to the oft quoted admonition to prosecutors that while "he may strike hard blows, he is not at liberty to strike foul ones." *United States v. Berger*, 295 U.S. 78, 88 (1935).

proceedings.[15] At the time of the revocation of his license, Ramos either owned or had in his possession approximately 37 exotic felids being exhibited at circus venues.[16] CX-9. Subsequent to his license being revoked, Ramos sold a number of his animals that were being exhibited in traveling circuses to Jennifer Caudill who assumed the obligations under the agreements that Ramos had made and in return was entitled to the revenue generated from the use of the animals.

Kalmanson's name appears a total of eight times in the Complaint. It first appears two times in paragraph 4 where he is identified as an individual whose business address is in Maitland, Florida and the holder of AWA License No. 58-C-0505. It next appears in paragraph 5d where it is alleged that seven or eight tigers owned by Ramos were exhibited by Ramos, Soul Circus, Inc., and Respondents Caudill and Kalmanson since February of 2010. Kalmanson's name again appears two times in paragraph 20 which relates to Caudill's preparation of an APHIS Form 7006 conveying seven tigers to Kalmanson[17] and a second form prepared by Kalmanson stating that the animals had been "abandoned" in Atlanta, Georgia. The next mention is in paragraph 22 which relates to a letter from Dr. Goldentyer to Kalmanson expressing her concerns that Lance Kollman (Ramos) intended to use Kalmanson's license. In her letter of March 10, 2010, Dr. Goldentyer wrote that she was "concerned that Mr. Lance Kollman [Ramos] has or intends to use your license, or that of Jennifer Caudill, to engage in activities governed under the Animal Welfare Act….without holding a valid license. CX-16. Paragraph 31 describes a letter that Kalmanson wrote to APHIS and the final mention

---

[15] *In re* Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1093 (2007), *aff'd sub nom. Kollman Ramos v. Dep't of Agriculture*, 68 Agric. Dec. 60 (2009); 322 Fed App'x 814 (11th Cir. 2009) (not selected for publication.) CX-32, 33.

[16] Ten tigers had been travelling with Feld Entertainment, Inc. (d/b/a Ringling Brothers, Barnum & Bailey); eight tigers and one liger were with the Cole Brothers Circus (Cole Bros); eight tigers were with Soul Circus, Inc. (UniverSoul or Soul); and 10 were being kept at property owned by Ramos's mother in Balm, Florida. Tr. 673-674, CX-5, 6.

[17] The APHIS Form from Caudill to Kalmanson appears to have be prepared "after the fact" at the request of Todd Nimms of the Georgia Fish and Game so that he had something for his records indicating that she no longer had the cats. Tr. 581, 666-667, CX-14.

in Paragraph 34 contains the conclusion that Kalmanson (and Caudill) were operating as Ramos's surrogates.

Complainant's post hearing brief's discussion of Kalmanson's involvement is equally scant and not particularly helpful, containing a proposed finding on page 11 and 12 identifying him as an exhibitor and some discussion of the two APHIS Forms 7006 prepared concerning the seven tigers travelling with Soul. On pages 12 and 13, a proposed finding references Dr. Goldentyer's concerns set forth in her March 10, 2010 letter to Kalmanson.[18] On page 15, another finding relates to Kalmanson's July 13, 2010 letter to APHIS. On page 16, two proposed adverse Conclusion of Law are set forth. Page 19 sets forth the assertion that Kalmanson is unfit for licensure based upon a conclusion that he "engaged in activities to facilitate the circumvention of the Secretary's order revoking Ramos's license…Additional unsupported conclusions are contained on page 21 and 22. Complainant's Post Hearing Brief, Docket Entry No. 81.

In its brief, Complainant asserts that Kalmanson knowingly "acquired" animals from unlicensed entities. Complainant's Brief, p. 21, Docket Entry No. 81. Not only was there no corresponding allegation of such conduct in the Complaint, the evidence of record indicates Kalmanson's acquisition of the animals was prompted by USDA's informing both of the Soul and Cole Bros. circuses that although Caudill had an exhibitor's license she was not considered qualified to exhibit the animals.[19] Tr. 39, 585-586, 658-659. The evidence further strongly suggests that Kalmanson's acquisition was acquiesced in, if not suggested by USDA officials. Tr. 575, 577-579, 584-589, 614. Moreover, although it is clear that USDA was informed by Kalmanson that he had acquired the animals, the record contains no indication that USDA ever corresponded with Kalmanson objecting to his acquisition of

[18] Kalmanson responded to the Goldentyer letter by certified letter dated March 25, 2010. RKX-6.

[19] AWA Exhibitor's Licenses do not contain any restrictions on the face of the license. Dr. Goldentyer testified that a Class C License authorizes the exhibition of any number of animals including tigers. Tr. 312.

the animals or advising him that the acquisition itself was in any way improper.[20]Tr. 454, CX-26, RKX-8.

The evidence adduced at trial falls short of establishing the allegations contained in the Complaint. Aside from establishing that Kalmanson had known Ramos for as much as 40 years and that the animals that Kalmanson took custody, control and possession of previously belonged to Ramos, the record is completely devoid of any evidence of Ramos's involvement in Kalmanson's exhibition of the animals once Kalmanson took custody of them.[21] After being advised by USDA that Caudill was not qualified to exhibit the animals at their circus (Tr. 56, 658-659), Sedrick "Ricky" Walker, one of the owners of Soul, contacted Kalmanson (who at the time was in the United Kingdom on business) on February 25, 2010 and asked him to take custody, control

[20] It is well established that the Animal Welfare Act is considered remedial legislation. *In re* Animals of Montana, 68 Agric. Dec. 92, 106 (U.S.D.A. 2009); *In re* Martine Collette, 68 Agric. Dec. 768, 786 (U.S.D.A. 2009); *In re* Sam Mazzola, 68 Agric. Dec. 822, 848 (U.S.D.A. 2009); *In re* Loreon Vigne, 67 Agric. Dec. 1060, 1068 (U.S.D.a. 2008); *In re* Tracey Harrington, 66 Agric. Dec. 1061, 1071 (U.S.D.A. 2007); *In re* Mary Jean Williams, (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (U.S.D.A. 2005); *In re* Richard Miehke, 64 Agric. Dec. 1295, 1313 (U.S.D.A. 2005); *In re* Eric John Drogosch, 63 Agric. Dec. 623, 645-46 (U.S.D.A. 2004); *In re* Wanda McQuarry, 62 Agric. Dec. 452, 479 (U.S.D.A. 2003); *In re* J. Wayne Shaffer, 60 Agric Dec. 444, 479 (U.S.D.A. 2001*); In re* Reginald Dwight Parr, 59 Agric. Dec. 601, 626 (U.S.D.A. 2000); *In re* Marilyn Shepherd, 57 Agric. Dec. 242, 270 (U.S.D.A. 1998); *In re* Richard Lawson*,* 57 Agric. Dec. 980, 1012 (U.S.D.A. 1998); *In re* David Zimmerman, 57 Agric. Dec. 1038, 1063 (U.S.D.A. 1998); *In re* Volpe Vito, Inc., 56 Agric. Dec. 269, 272 (1997); *In re Patrick Hoctor*, 56 Agric. Dec. 416, 426 (U.S.D.A. 1997); *In re* S.S. Farms Linn Cnty., Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (U.S.D.A. 1991); and *In re* Lloyd A. Good, Jr., 49 Agric. Dec. 156, 163 (U.S.D.A. 1990). Despite the remedial nature of the legislation, Dr. Goldentyer expressed unwillingness to give guidance to licensees, particularly if there was an ongoing investigation, as she did not want to "talk people around what the requirements are." Tr. 331-332, 343. While clearly some balancing judgment is necessary, communication of compliance guidance to licensees concerning the standards requirements might well limit if not avoid litigation.

[21] Although Kalmanson indicated that he had written insurance for Kollman (Ramos), his testimony that he had never had any business enterprise with Ramos was not rebutted. Tr. 604, 624.

and possession of the felids that were on exhibition with the circus.[22] Tr. 569-575, 659. Kalmanson's relationship with Soul was both of long standing and in a variety of capacities. In addition to writing their insurance, he had provided risk management services and in the past provided animals to the corporation. Tr. 568. Jennifer Caudill confirmed that it was Sedrick Walker who had decided to contact Kalmanson. Tr. 659. Given USDA's strong warnings to the circus concerning Jennifer Caudill's lack of qualification to exhibit the animals, despite the financial impact it would have on Caudill, Soul's approaching Kalmanson was entirely reasonable given their established relationship with him. Tr. 658-659. *See,* CX-15.

The second occasion occurred on July 13, 2010 when Kalmanson was approached with a virtually identical request and asked to assume responsibility for the felids travelling with the Cole Bros. Circus. Tr. 595-598, RKX-7. In neither instance was Kalmanson required to pay for the animals. The record makes it abundantly clear that while Kalmanson was willing to assume responsibility for the animals, he had no intention of paying anyone to acquire them.[23] Tr. 580, 587-588, 600, 625-626. The record fails to establish any agreement between Jennifer Caudill and Kalmanson. Tr. 605, 665, 667. Although Ms. Caudill may have entertained hopes that she would eventually get the animals back (Tr. 666, 668), Kalmanson's testimony makes it obvious that he took advantage of a business opportunity which was making money exhibiting the animals and that he had no intention of returning the animals to her. Tr. 599-600, 628-629, 636.

On the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

---

[22] Caudill had sought to overcome USDA's objection to her lack of experience by calling on an old family friend, William Bedford, to assist her and be responsible for the animals. Tr. 40. Bedford had agreed and Caudill had transferred the animals to him. CX-12. By contacting Kalmanson, Walker declined to allow William Bedford, a licensed exhibitor, to continue to assist Caudill and Bedford was told to leave which he did. Tr. 48.

[23] The record does indicate that upon acquiring the animals, he took the animals and spent the money "to bring them up to my standards" by having them micro-chipped and examined by a veterinarian." Tr. 580, 605-613, 635

Findings of Fact

1. Respondent Mitchell Kalmanson is an individual residing in and operating his business ventures from the State of Florida. In addition to being a wholesale or retail insurance broker specializing in animal entertainment insurance, load master, and risk management consultant, he owns a number of animals and is licensed as an exhibitor under the Act, holding AWA License No. 58-C-0505. Tr. 561-565. He also owns and maintains a 200 acre facility located north of Orlando which is not open to the public at which he keeps some of his animals. Tr. 566.

2. Although the record reflects conflicting evidence as to actual title of the animals, at the request of Soul Circus, Kalmanson took custody, control and possession of seven tigers (Egor, Jellie, Natasha, Savannah, Diva, Gondie, and Chad) on February 25, 2010. An APHIS form 7006 was completed by Kalmanson on that date indicating that the tigers had been abandoned and were delivered by Soul Circus to Kalmanson.[24] CX-14, RKX-3.

3. On or about July 13, 2010, at the request of Cole Bros Circus, Kalmanson took custody, control and possession of eight tigers and one liger (Aztec, Tahar, Appollo, Mohan, Chercon, Rambo, Mariha, Shakira and Zeus) that had been traveling with the Cole Bros. circus. On July 13, 2010, Kalmanson wrote to APHIS concerning the circumstances of his acquiring the animals. CX-26, RKX-8.

4. All of the animals acquired by Kalmanson had previously belonged to Lancelot Kollman Ramos.

5. Kalmanson acknowledged knowing Ramos for "probably 40 years;" however, the record is completely devoid of any contact between the two

[24] Jennifer Caudill had previously prepared an APHIS Form 7006 conveying the animals to Brent Taylor and William Bedford; however, Bedford later disclaimed ownership. Tr. 60, CX-12, 22. A second form prepared by Caudill purporting to convey the same animals to Kalmanson was completed at the behest of and to satisfy Todd Nimms, a Georgia Fish and Wildlife officer. fn. 17.

individuals in connection with Kalmanson's acquisition of the animals or with Kalmanson's subsequent use of them.

6. The instructions given by Dr. Elizabeth Goldentyer, the Eastern Regional Director for the USDA Animal and Plant Health Inspection Service, Animal Care Program and her staff to APHIS personnel involved in preparing inspection reports to include language in their reports to the effect that "This licensee appears to be circumventing the revocation of Lancelot Kollman Ramos-2.10(b), 2.11(d), 2.12" impermissively and inappropriately tainted the investigation of Kalmanson's conduct.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The evidence is insufficient to find that Respondent Kalmanson is unfit to hold an AWA license or that maintenance of a license by him would in any way be contrary to the purposes of the Act.

3. Assuming he otherwise meets the eligibility requirements of 7 C.F.R. §1.184, the award of Equal Access to Justice Act (EAJA) fees to Respondent Kalmanson is appropriate.

ORDER

1. The determination by the Administrator that Respondent Mitchell Kalmanson is unfit to be licensed as an exhibitor under the Act is **REVERSED** and the license termination proceedings against AWA License No. 58-C-0505 are **DISMISSED**.

2. Any application for EAJA fees shall be submitted not later than 30 days after this Decision and Order becomes final. In the event of appeal by the Complainant within that period, action on the application will be deferred until a final Decision is entered.

3. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless 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 of this Decision and Order will be served upon the parties by the Hearing Clerk.

———

In re: ERIC JOHN DROGOSCH, AN INDIVIDUAL.
Docket No. 11-0024.
Decision and Order.
Filed November 28, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER BY REASON OF DEFAULT (FAILURE TO APPEAR)

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131, *et seq*.) (the "Act"), by a complaint filed on October 21, 2010, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the Act and the regulations promulgated thereunder.

Respondent Eric John Drogosch was duly notified in writing of the time and place of the oral hearing in this matter (November 27-30, 2012, at 300 West Belknap, Trial Room D, Fort Worth, Texas). Said respondent has failed to appear at the hearing, without good cause. Therefore, pursuant to section 1.141(e) of the applicable Rules of Practice, said respondent is "deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing." 7 C.F.R. § 1.141(e). Complainant has elected to follow the procedure set forth in section 1.139 of the Rules of Practice (7 C.F.R. §1.139). The material facts alleged in the complaint are all

admitted by the respondent Drogosch's failure to appear at the hearing without good cause, and they are adopted and set forth herein as Findings of Fact and Conclusions of Law. This decision and order is issued pursuant to sections 1.139 and 1.141(e) of the Rules of Practice.

Findings of Fact

1. Respondent Eric John Drogosch is an individual who did or does business as Great Cat Adventures, and whose last known business mailing address is P.O. Box 161095, Ft. Worth, TX 76161. At all times mentioned herein, said respondent was (1) operating as an exhibitor, as that term is defined in the Act and the Regulations; or (2) acting for or employed by an exhibitor (respondent Palazzo), and his acts, omissions, or failures within the scope of his employment or office are, pursuant to section 2139 of the Act (7 U.S.C. § 2139), deemed to be his own acts, omissions, or failures, as well as the acts, omissions, or failures of respondent Palazzo. Respondent Drogosch previously held AWA license number 74-C-0536, which license was revoked in 2004, by order of the Secretary.[1]

2. Respondent Drogosch has previously been found to have violated the Act and the Regulations. Respondent Drogosch has knowingly failed to obey a cease and desist order issued by the Secretary.[2] Respondent Drogosch has not shown good faith. Respondent Drogosch, after having specifically been advised that the failure to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, is a violation, has knowingly continued to violate the handling Regulations, and to do so in a manner that presents a serious risk of harm to both people and animals.

3. From approximately February 26, 2010, through September 1, 2010, respondent Drogosch operated as an exhibitor and/or a dealer, without having a valid license to do so.

---

1 *In re* Eric John Drogosch, 63 Agric. Dec. 623 (U.S.D.A. 2004) (Decision and Order).
2 *See* Note 1.

4. On or about the following dates, respondent Drogosch failed to handle tigers as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort:

a. September 29, 2008 (Tulsa Fair Grounds, Tulsa, Oklahoma)

b. February 27, 2009 (Brownwood Intermediate School, Brownwood, Texas)

c. April 11, 2009 (Great Cat Adventures, Atoka, Oklahoma)

d. March 3, 2009 (Dublin Elementary School, Dublin, Texas)

e. August 7, 2008 (Washington Town and Country Fair, Washington, Missouri)

5. On or about the following dates, Respondent Drogosch failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public:

a. September 29, 2008 (Tulsa Fair Grounds, Tulsa, Oklahoma)

b. February 27, 2009 (Brownwood Intermediate School, Brownwood, Texas)

c. April 11, 2009 (Great Cat Adventures, Atoka, Oklahoma)

d. March 3, 2009 (Dublin Elementary School, Dublin, Texas)

e. August 7, 2008 (Washington Town and Country Fair, Washington, Missouri)

ANIMAL WELFARE ACT

Conclusions of Law

1. From approximately February 26, 2010, through September 1, 2010 (a total of 157 days), respondent Drogosch operated as an exhibitor and/or a dealer, without having a valid license to do so, in willful violation of section 2134 of the Act, and sections 2.1 and 2.10 of the Regulations.

2. On or about the following five dates, respondent Drogosch failed to handle tigers as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort, in willful violation of section 2.131(b)(1) of the Regulations. 9 C.F.R. § 2.131(b)(1):

a. September 29, 2008 (Tulsa Fair Grounds, Tulsa, Oklahoma)

b. February 27, 2009 (Brownwood Intermediate School, Brownwood, Texas)

c. April 11, 2009 (Great Cat Adventures, Atoka, Oklahoma)

d. March 3, 2009 (Dublin Elementary School, Dublin, Texas)

e. August 7, 2008 (Washington Town and Country Fair, Washington, Missouri)

3. On or about the following five dates, respondent Drogosch failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of section 2.131(c)(1) of the Regulations. 9 C.F.R. § 2.131(c)(1).

a. September 29, 2008 (Tulsa Fair Grounds, Tulsa, Oklahoma)

b. February 27, 2009 (Brownwood Intermediate School, Brownwood, Texas)

c. April 11, 2009 (Great Cat Adventures, Atoka, Oklahoma)

d. March 3, 2009 (Dublin Elementary School, Dublin, Texas)

e. August 7, 2008 (Washington Town and Country Fair, Washington, Missouri)

4. Respondent Drogosch (a) violated section 2134 of the Act (7 U.S.C. § 2134) and sections 2.1 and 2.10 of the Regulations (9 C.F.R. §§ 2.1, 2.10) on 157 occasions; (b) violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), on five occasions; and (c) violated section 2.131(c)(1) of the Regulations (9 C.F.R. § 2.131(c)(1)), on five occasions.

5. In 167 instances, respondent Drogosch knowingly failed to obey a cease and desist order issued by the Secretary of Agriculture in *In re Eric John Drogosch*, 63 Agric. Dec. 623 (U.S.D.A. 2004) (Decision and Order).

ORDER

1. Respondent Eric John Drogosch, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act, Regulations and Standards.

2. Respondent Eric John Drogosch is assessed a civil penalty of $108,857 for his 167 violations herein.

3. Respondent Eric John Drogosch is assessed a civil penalty of $27,550 for his knowing failures to obey the cease and desist order issued by the Secretary of Agriculture.

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 of 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

———

EQUAL ACCESS TO JUSTICE ACT

DEPARTMENTAL DECISION

In re: APPLICATION FOR ATTORNEY'S FEES AND COSTS OF LARRY THORSON, ESQ., COUNSEL FOR RESPONDENTS CRAIG PERRY, AN INDIVIDUAL DOING BUSINESS AS PERRY'S EXOTIC PETTING ZOO; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION.
Docket No. 12-0645.
Decision and Order.
Filed September 27, 2012.

EAJA.

Colleen A. Carroll, Esq. for Complainant.
Larry J. Thorson, Esq. for Resondents.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

MISCELLANEOUS DECISION AND ORDER AMENDING THE CAPTION AND GRANTING ATTORNEY FEES AND COSTS TO LARRY THORSON, ESQ., COUNSEL FOR PERRY RESPONDENTS

The above captioned matter[1] involves an application for attorney's fees and costs filed by counsel for one group of Respondents in an administrative disciplinary proceeding initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"). APHIS filed a complaint against Craig Perry, an individual d/b/a Perry's Exotic Petting Zoo and Perry's Wilderness Ranch & Zoo, Inc. ("Respondents"). The complaint against Respondents was consolidated

[1] At the suggestion of the Judicial Officer for USDA ("Judicial Officer") in his Order of May 22, 2012, the caption has been amended to limit the instant matter to an application for attorney's fees and costs related to certain Respondents in docket No. 09-0155. In addition, pleadings related to the application were filed in a separate file and a new docket number was assigned by the Hearing Clerk for USDA's Office of Administrative Law Judges (Docket No. 12-0645).

with other tenuously related matters under docket No. 09-0155. A hearing commenced on February 17, 2011 and continued through February 25, 2011, in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri.

Procedural History

On December 20, 2011, I issued Findings of Facts and Conclusions of Law in docket No. 09-0155, in a Decision and Order ("D&O") that segregated the Perry Respondents from other Respondents in the matter. I found that the majority of the Complainant's allegations linking the Perry Respondents to actions of other Respondents were not substantiated. I further found that Complainant had established that Respondents' failure to allow an inspection of Respondents' premises violated the Act, but concluded that the circumstances underlying the violation did not merit the imposition of a sanction.

On January 17, 2012, counsel for the Perry Respondents, Larry Thorson, Esq., filed an application for an award of attorney fees. On January 23, 2012, APHIS filed a petition to appeal my D&O to the Judicial Officer. On February 3, 2012 Complainant filed objections to an award of fees, alleging that the application was not ripe. Counsel for Respondents did not file a response.

By Order issued February 6, 2012, I deferred ruling on the petition and referred the matter to the Judicial Officer. By Order issued May 22, 2012, the Judicial Officer concluded that he lacked jurisdiction over the application for fees and remanded the matter to me. On July 19, 2012, the Judicial Officer issued a Decision and Order on appeal, in which he upheld my findings, except that he concluded that the Perry Respondents' failure to allow access to APHIS officials for inspection represented a willful violation of 7 U.S.C. § 2146(2) and 9 C.F.R. § 2.126 and warranted a sanction of $500.00.

Neither party requested reconsideration of the Judicial Officer's Decision and Order and the Perry Respondents did not appeal his

decision. Therefore, the matter of the pending application for attorney's fees and costs is ripe.[2]

Discussion

An award of attorney fees for the successful prosecution of claims is governed by the Equal Access to Justice Act ("EAJA") section of the Administrative Procedures Act ("APA"). 5 U.S.C. § 504. A prevailing party must file an application for fees within thirty (30) days after the final disposition of a proceeding. 5 U.S.C. § (a)(2); 7 C.F.R. § 1.193. The date of a final disposition is "the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding…becomes final and unappealable, both within the Department and to the courts." 7 C.F.R. § 1.193(b). In addition, "days" is defined by prevailing regulations as "calendar days", and therefore intervening weekends or holidays are not excluded from the computation of time. 7 C.F.R. § 1.180(a).

USDA objected to an award of fees because Mr. Thorson filed his application **before** my Decision and Order became final. Mr. Thorson's application was not untimely filed in the classic sense of failing to meet a deadline. Instead, having concluded all of his services with respect to the case before me, he protectively filed an application for fees. There is no prejudice to USDA in having notice of an application for fees and costs before the time expires within which one must file such application. USDA cites to no precedent for striking an early-filed application. There is nothing of record to suggest that the substance of Mr. Thorson's application would have changed had he waited to file his fee petition until after the final disposition of the case.

Although USDA characterizes Mr. Thorson's application as "premature", I have declined to rule upon it until it had "matured" following the expiration of the time to appeal the Judicial Officer's

[2] I would have welcomed a renewed application for attorneys' fees and costs, particularly considering USDA's objections on the ground that Mr. Thorson's application was pre-maturely filed. I note that in light of the assessment of a civil penalty, Mr. Thorson may have concluded that his application would be denied. However, as I discuss infra., the failure to prevail on one allegation does not totally preclude an award of fees and costs.

Decision and Order of July 19, 2012. Accordingly, USDA's objection to Mr. Thorson's application on the grounds that it was premature is over-ruled, and the Motion to Strike the application is DENIED.

An award of attorney's fees against the Government is appropriate if (1) the applicant is a prevailing party; (2) the Government's position was not "substantially justified; and (3) an award would not be rendered unjust due to special circumstances. *See Davidson v. USDA*, 62 Agric. Dec. 49 (U.S.D.A. 2003), citing *Sims v. Apfel*, 238 F.3d 597, 699-700 (5th Cir. 2000). An applicant for attorney fees may be said to be a prevailing party if the applicant succeeded on any significant issue. *Id.*

In order to be deemed a "prevailing party", a party must "receive at least some relief on the merits of his claim . . ." *Buckhannon B. & Care Home, Inc. v. W. Va. Dep'T of Health & Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). No award of fees may be granted if the position of the United States was substantially justified. *See* 28 U.S.C. § 2412(d)(1)(A).

The Judicial Officer substantially upheld my findings that dismissed the majority of the government's allegations against the Perry Respondents. USDA charged the Perry Respondents with liability for violations involving the care and exhibition of animals owned by other licensed exhibitors. I rejected that argument, and so did the Judicial Officer. Accordingly, I find that the position of the government was not substantially justified, and that the Perry Respondents were prevailing parties.

I find no circumstances that would make an award of fees "unjust". I credit the affidavits accompanying the application that attest that Respondent Craig Perry's net worth did not exceed two million dollars at the time of the adjudication and that the business Respondents did not have a net worth in excess of seven million dollars.

Considering all of the evidence, an award of attorneys' fees and costs is warranted. I find that the number of hours charged by Mr. Thorson are reasonable. I note that Mr. Thorson's total charges would likely have

been more modest but for the government's unsuccessful attempt to impute the actions of other Respondents to his client. Mr. Thorson's documented expenses of $603.83 appear to be reasonable.

It is generally appropriate to exclude from an award for fees and costs those that can be attributed to services rendered on issues that were unsuccessful. Since my finding that the Perry Respondents had violated the Act by not having a responsible individual on site to allow inspection by APHIS officials was upheld by the Judicial Officer, it is appropriate to calculate and exclude the costs of Mr. Thorson's services for that defense. At the hearing, a witness testified about the circumstances that led to Mr. Perry's absence from his establishment. Mr. Thorson consulted the witness before the hearing, as evidenced by his itemized time records. Mr. Thorson made argument on that issue in his written closing argument. I estimate a total of four hours of Mr. Thorson's services were devoted exclusively to the defense of this charge, and I therefore adjust his claimed total of 110.30 hours to 106.30 hours.

In addition, I must reduce Mr. Thorson's hourly rate for services. Although Mr. Thorson's rate of $160.00 per hour is objectively reasonable, an award of fees under EAJA is limited to an hourly rate of $150.00, pursuant to 7 C.F.R. § 1.186 (March 3, 2011). Accordingly, a total of $16,548.83 ($150.00 X 106.30 hours + 603.83 costs) is hereby awarded to Larry Thorson, Esq.

ORDER

For the reasons set forth herein, *supra*, the application for attorney fees by Larry Thorson, Esq., counsel for the Perry Respondents is GRANTED.

Attorney fees and costs in the amount of $16,548.83 are hereby awarded to Larry Thorson, Esq.

This Decision and Order shall become effective and final 35 days from its service upon Respondents' counsel unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

The Hearing Clerk shall serve copies of this Miscellaneous Order upon the parties.

———

FOREST RESORUCES CONSERVATION AND SHORTAGE RELIEF ACT

FOREST RESOURCES CONSERVATION AND SHORTAGE RELIEFT ACT

DEPARTMENTAL DECISION

In re: STIMSON LUMBER COMPANY.
Docket No. 12-0338.
Decision and Order.
Filed July 3, 2012.

FRC-SRA.

James K. Hein, Esq., for Petitioner.
Lori Polin Jones, Esq., for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding under the Forest Resources Conservation and Shortage Relief Act of 1990, as amended, 16 U.S.C. §620, *et seq.* (Act) in which the Stimson Lumber Company (Stimson) is applying for approval of a sourcing area under section 490(c) of the Act. A Sourcing Area Application dated December 30, 2011 was originally submitted by the Stimson to the Hearing Clerk's Office. As the Application failed to disclose whether there had been an informal review by the Forest Service, no action was taken on it at that time. By letter dated April 4, 2012 received by the Hearing Clerk on April 5, 2012, the Department's Office of General Counsel subsequently requested that the matter be docketed as a request for formal review.

On May 9, 2012, an Order was entered directing the Regional Forester to provide additional information concerning the Application, including whether there had been an informal review; dates of any meetings with the Stimson's representatives; whether any "submissions had been received; a statement of any issues, both resolved and unresolved; and a description of all actions taken by the Regional Forester since the case had been docketed. The Regional Forester's Response to the Order was filed on May 18, 2012 along with a copy of

the Notice of the Sourcing Area Application with a list of the newspapers of general circulation in which the Notice was published and an indication that additional information concerning the Application was available to the public on Region 1's website.

On June 15, 2012, The Regional Forester filed her Comments and Analysis of the Stimson's Sourcing Area Application. Additional comments on the application were received from the public during the comment period from Stolze Land & Lumber Company, The Lands Council, Idaho Forest Group LLC, and Friends of the Clearwater, each of which have been filed as part of the record.

By letter dated June 28, 2012, the Regional Forester filed her review of the Comments received during the Comment period and recommended approval of the Sourcing Application as filed, subject to the requirement that the Stimson amend their application to include the certification language as published in the Interim Rule at 36 C.F.R. §223.190(c)(4)(1995).

On July 2, 2012, the Hearing Clerk's Office received a letter from the Stimson dated June 29, 2012 supplementing its application. In the letter, Stimson, while questioning the technical deficiency in the Application's certification language, advised that it was "ready, willing and able" to provide any certification required by law. Additionally, Stimson expressed their willingness to address the concern raised in several of the comments that land in eastern Washington had not been included as part of its proposed sourcing area by agreeing to include additional relevant lands identified on a revised description and map.

Discussion

The Forest Resources Conservation and Shortage Relief Act was enacted because of the recognized need to conserve timber resources in short supply, including the need to limit the export of unprocessed timber. To this end, 16 U.S.C. §620(a)(2), (6)-(8) provides:

> (2) Forests, forest resources, and the forest environment are exhaustible natural resources that require efficient and effective conservation efforts.
> ….
> (6) There is evidence of a shortfall in the supply of unprocessed timber in the western United States.
> (7) There is reason to believe that any shortfall which may already exist may worsen unless action is taken.
> (8) In conjunction with the broad conservation actions expected in the next few months and years, conservation action is necessary with respect to exports of unprocessed timber.

The objectives of the Act are to preserve work for domestic sawmills and to preclude the export of federal timber and the substitution of federal timber for exported private timber. These objectives are accomplished when a person's approved sourcing area is economically and geographically separate from any geographic area from which that person harvests for export timber originating from private lands. These objectives are not advanced by restricting sourcing areas to only those who exported lumber in 1990. *In re Springdale Lumber,* 53 Agric. Dec. 1185, 1193 (1994).

In its current Application, Stimson's President and CEO certified that Stimson had "not exported unprocessed timber originating from private lands within the boundaries of the sourcing area which is the subject of this application in the previous 24 months."[1] The Application seeks to acquire federal timber to source Stimson's St. Maries, Priest River, and Plummer Idaho sawmills. In attempting to determine whether the proposed sourcing area was geographically and economically separate from any geographic areas from which Stimson harvests for export any unprocessed timber originating from private lands, the Regional Forester reviewed historical timber sale records, log transfer agreements from Forest Service timber sales, and obtained personal knowledge from local Contracting Officers in Regions 1, 4 and 6 to determine Stimson's

[1] Administrative decisions concerning two prior applications by Stimson for approval of sourcing areas appear of record. *In re Stimson Lumber Company,* 54 Agric. Dec. 155 (1955) and *In re Stimson Lumber Company,* 56 Agric. Dec. 480 (1997).

purchasing patterns on both federal and private lands over an extended period of time.[2] Based upon the available information, it was also concluded that the size and location of the sourcing area proposed by Stimson does not differ significantly from other mills located in the same general vicinity.

The Regional Forester also carefully evaluated the comments received during the comment period and concluded that nothing within the comments altered her recommendation that the application be approved.

Based upon the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. The Applicant is a corporate entity with Executive Offices in Portland, Oregon.

2. A map of the proposed sourcing area was included with the Application which is of sufficient scale and detail to show the following items:

a. The Applicant's desired sourcing area boundary.

b. The location of the three timber manufacturing facilities owned or operated by Stimson within the proposed sourcing area where Stimson intends to process timber originating from federal land.

c. Private lands within and outside the desired sourcing area.

3. The boundaries of the proposed sourcing area follow appropriate features such as the Continental Divide; Interstate 15, 84, and 90; U.S. Highways 20 and 26; the Snake River; and State and International borders, including the borders between Idaho and Oregon, Idaho and

[2] The period of time indicated was since the early 1990s although most of the information related to the past decade.

Washington; and the border between the United States and Canada. The specific Area Description is as follows:

> Beginning at a point on the Continental Divide that adjoins the border between the United States of America and Canada, proceeding south on the crest of the Continental Divide to the point where it is crossed by Interstate 90 east of Butte, Montana. From this point, south and west on Interstate 90 to its junction with Interstate 15, west of Butte, Montana. From this point, south on Interstate 15 to its juncture with State highway 26 near Blackfoot, Idaho. From this point, west on State highway 26 to Arco, Idaho where State highway 26 joins with State highway 20. From this point, west on State highway 20 to its intersection with Interstate 84 at Mountain Home, Idaho. From this point, west and north on Interstate 84 to where this roadway hits the border between the states of Idaho and Oregon. From this point, north on the border between Idaho and Oregon to where Idaho, Oregon and Washington meet. From this point, continuing north on the border between Idaho and Washington to the border between the United States of America and Canada. From this point, east to the point of beginning.

4. The boundaries of the proposed sourcing area include both private and federal lands from which Stimson intends to acquire unprocessed timber for its mills.

5. The Application identified 13 other lumber manufacturing facilities in Idaho and 6 facilities in Montana that are in the same general vicinity of its mills and proposed sourcing area.

6. The Application contains a signed certification statement.

7. The Application is on Stimson Lumber Company letterhead, is signed by Andrew W. Miller, President and CEO, and was notarized on February 6, 2012 by a commissioned Notary Public for Oregon.

8. Appropriate notice to the public has been given by publication of notice of Stimson's Sourcing Area application in newspapers of general circulation in the proposed sourcing area and further notice has been given on Region I's website.

9. The Regional Forester has provided comment and an analysis of the Application and the comments received during the prescribed comment period.

10. No request for a hearing was received from any interested party.

Conclusions of Law

1. The Secretary has jurisdiction of this matter.

2. Stimson has satisfied all of the procedural and with one remediable minor deficiency all technical requirements of the Act.

3. The sourcing area that is the subject of the Application is geographically and economically separate from any geographic area from which Stimson harvests for export any unprocessed timber originating from private lands.

3. The Application's certification is technically deficient in that it fails to repeat the language of the Interim Rule published at 36 C.F.R. §223.190(c)(4)(1995); however, such deficiency may be remedied by amendment of the certification by Stimson.

4. The Regional Forester's recommendation that the Sourcing Application be approved only as originally submitted subject to the amendment of the certification is supported by the record before me.[3]

[3] As Stimson's willingness to include land in eastern Washington as reflected on the proposed revised description and map would appear to require republication and additional opportunity to comment by any affected parties, only the original proposed boundaries will be considered in this Decision.

FOREST RESORUCES CONSERVATION AND SHORTAGE RELIEF ACT

ORDER

1. Subject to Stimson's amendment of the certification of its Application, its Sourcing Area Application is **APPROVED**, and the sourcing area is established pursuant to the Act and its regulations.

2. Amendment of the certification shall be effected no later than 10 days after service of the Decision and Order upon the Applicant.

3. This Decision and Order shall become final, unless appealed to the Department's Judicial Officer as provide in the Rules of Practice.

Copies of this Order will be served upon the parties by the Hearing Clerk.

_____

Wesley Collatz
71 Agric. Dec. 1035

SALARY OFFSET ACT

DEPARTMENTAL DECISIONS

In re: WESLEY COLLATZ.
Docket No. 12-0464.
Decision and Order.
Filed September 6, 2012.

SOA.

Petitioner, pro se.
Sheonna Gibson for ARS.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Wesley Collatz ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Agricultural Research Service ("Respondent"; "USDA-ARS"); and if established, the ability of Petitioner to pay.

On June 7, 2012, Petitioner timely requested a hearing before the Office of Administrative Law Judges ("OALJ"). A telephone conference was held with Petitioner and Respondent's representative, Linnette Williams, and a hearing was scheduled to commence on August 30, 2012. The parties were directed to provide information and documentation to the Hearing Clerk for the Office of Administrative Law Judges for the United States Department of Agriculture ("Hearing Clerk"). On August 10, 2012, Respondent filed a Narrative, together with supporting documentation. On August 13, 27, and 30, 2012, Petitioner filed documents and argument.

The hearing commenced as scheduled and I admitted the parties' documents to the record. Petitioner represented himself and testified. Ms. Williams and Lynn Pearson testified on behalf of the USDA-ARS.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order shall be entered:

Findings of Fact

1. Petitioner worked part-time for USDA-ARS when he was a student earning an hourly rate for variable hours.

2. Petitioner recorded his hours of work on a web-based computer time-keeping system that often reflected error codes that Petitioner was instructed to overlook.

3. Towards the end of his tenure, Petitioner requested leave under the Family Medical Leave Act (FMLA).

4. During his tenure with USDA-ARS, Petitioner was provided no training regarding time-keeping and he worked with administrative assistant Lynn Pearson to correct time-keeping entries.

5. Petitioner's leave balances varied due to his varying hours of work, and his status of being on FMLA leave.

6. Petitioner's immediate supervisor was out on leave during much of the period that he worked for USDA-ARS, and he did not know who else to ask for explanations of confusing leave information recorded on his time sheets.

7. Upon the termination of Petitioner's employment with USDA-ARS, the agency discovered that during his employment he had been paid for 38.75 hours of annual leave and 1 hour of sick leave that he had not earned.

8. Petitioner believed that errors in processing timesheets through the on-line system caused him to be mistakenly paid for leave.

9. By letter dated August 16, 2011, Petitioner was presented with a demand for payment of a debt to Respondent in the amount of $429.94.

10. Petitioner was notified that late fees and penalties would be assessed on any balance delinquent for more than 90 days.

11. On September 14, 2011, Petitioner wrote to USDA's National Finance Center, disputing the debt and asking for a review of the circumstances.

12. Petitioner spoke with a representative of ABCO, who advised that the matter would be investigated by USDA-ARS.

13. Petitioner received an additional demand for payment on March 16, 2012.

14. On March 16, 2012, Petitioner again wrote to ask that collection be suspended pending review of the debt, noting his original letter and his expectation that USDA-ARS was reviewing his claim and request for waiver.

15. The matter was referred to Ms. Linnette Williams on April 17, 2011, and she reviewed all of the information pertinent to the payment of unearned leave.

16. In a letter that she drafted for her supervisor's signature dated May 4, 2012, Ms. Williams concluded that waiver was not appropriate despite administrative errors, because Petitioner should have known that he had been paid for leave that he had not earned.

17. In support of her conclusions, Ms. Williams cited to determinations by the Department of Defense Board of Claims and the Comptroller General, which held that individuals who had been paid unearned amounts of leave were liable to repay the amount regardless of administrative error.

18. Ms. Williams corroborated her findings in her credible testimony.

19. Ms. Pearson credibly testified that the computer-based time and attendance program was error-ridden; that Petitioner had asked for help; and that part-time employees such as Petitioner were not trained in leave processes or in keeping time and attendance.

20. There is no evidence that Petitioner intentionally or negligently entered information that allowed for the erroneous accrual of leave.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Petitioner's request for a hearing was timely filed.

3. Unpaid debts that are delinquent are subject to the assessment of penalties and fines.

4. USDA assessed penalties and fines in the amount of $46.15 (difference between original demand for payment of $429.94 on August 16, 2011 and most recent demand for payment of $476.09 on March 14, 2012).

5. The penalties and fines were improperly assessed on Petitioner's account because he immediately requested a waiver on the debt, which should have suspended collection action.

6. Petitioner's request for review and waiver was not forwarded to USDA-ARS until months later, in mid-April, 2012, through no fault of Petitioner, who diligently pursued resolution of this matter.

7. Once Linnette Williams was assigned the review of Petitioner's account and request for waiver, she acted with all alacrity, reaching a determination by May 4, 2012.

8. Although Ms. Williams' determination is not unreasonable, based as it was upon other rulings involving erroneous accrual of leave, the facts of the instant matter are different from those set forth in the cases she relied upon.

9. In the matter of Board of Claims Case No. WL 5775295, the Board noted that the employee should have realized that he had received an unexplained increase of pay, considering that the employee was aware that he had run out of annual and sick leave. In contrast, Petitioner's leave balances varied; he did not have a complete understanding of his electronic time sheet which recorded information about earned and projected leave; the timekeeping program was error-prone, and he relied upon Ms. Pearson's help to correct errors; he received no training in keeping leave; and his supervisor was not available to assist him.

10. In the matter of Comptroller General Decision Case No. B-250228, it was determined that an employee had erroneously been credited with an accrual of annual leave greater than the amount to which he was entitled, and therefore, an adjustment to the accrued leave was warranted despite the administrative error that created the problem. In contrast, Petitioner had limited experience working for the government in any capacity and had no training or instruction about the accrual and use of leave; his time and attendance records were fraught with computer errors and he had no training on how to correct errors; his supervisor was absent frequently; and he worked erratic hours, making it difficult for him to determine his accrued leave from the balances noted on his time and attendance records.

11. The preponderance of the evidence establishes that Petitioner acted in good faith in recording his hours of work, and was not at fault or responsible for inaccurate records of time and attendance.

12. It would be unreasonable to conclude that Petitioner should have known that an administrative error existed, where time keeping errors occurred frequently; where his hours of work and pay fluctuated; where his supervisor was not available to assist him; where he had no training or resources other than another employee to help correct errors; and where he was on Family Medical Leave Act leave for a period of time, which imputes absence from the office and erratic statements concerning leave balances.

13. Waiver is appropriate in these circumstances, as Petitioner reasonably did not know whether he was entitled to leave when it was paid during his tenure with USDA-ARS.

14. Petitioner's debt account should be cancelled.

15. The debt should NOT be collected from Petitioner by income tax offset, administrative wage garnishment, or any other manner.

ORDER

Neither Treasury nor USDA-ARS may collect any amount on Petitioner's account as waiver of this debt is appropriate.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

———

In re: ROMINA A. HENNIG, D.V.M.
Docket No. 12-0083.
Decision and Order.
Filed October 4, 2012.

SOA.

Petitioner, pro se.
Evelyn McGovern for FSIS.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

Issue

1. The issue is whether Dr. Hennig shall reimburse USDA- Food Safety and Inspection Service **$10,305.74**, for the unearned portion of her second year's recruitment incentive pay. USDA-FSIS seeks repayment, through ***salary offset***.

Procedural History

2. The hearing by telephone was held on June 15, 2012. Romina A. Hennig, D.V.M., the Petitioner (Dr. Hennig) participated. The Respondent also participated, represented by Evelyn McGovern and Susan Bowen. The Respondent is the Food Safety and Inspection Service, an agency of the United States Department of Agriculture (USDA). Frequently herein, the Respondent is called "USDA- Food Safety and Inspection Service" or "USDA-FSIS".

Summary of the Facts Presented

3. Dr. Hennig is a veterinarian who works for USDA- Food Safety and Inspection Service.

4. Dr. Hennig's Hearing Request dated September 27, 2011 with attached "Service Agreement for Receipt of Payment for a Recruitment/Relocation Incentive" is admitted into evidence, together with the testimony of Dr. Hennig, and Dr. Hennig's exhibits PX 1 through PX 4, and Dr. Hennig's email dated August 24, 2012.

5. The Salary Offset Hearing Request Transmittal Form dated November 22, 2011 with all attachments [1] is admitted into evidence, together with the testimony of Evelyn McGovern and Susan Bowen, and USDA- Food Safety and Inspection Service's Exhibits RX-1 through RX-16.

6. As a veterinarian, Dr. Hennig was recruited to work in poultry inspection at Sumter, South Carolina. Dr. Hennig was paid a sign-on bonus ("recruitment incentive"), worth $14,102.75 per year for up to 4

[1] The attachments include not only Dr. Hennig's Hearing Request dated September 27, 2011, with attached "Service Agreement for Receipt of Payment for a Recruitment/Relocation Incentive"; but also Notification of Personnel Action showing Effective Date of 12/05/10; Notification of Personnel Action showing Effective Date of 03/13/11; the email from Dr. Hennig dated April 18, 2011 that includes the email from Brian Fleming dated March 30, 2011; the Notice of Intent to Offset Salary; Dr. Hennig's letter to USDA, FSIS, HRD dated June 2, 2011; and Susan L. Bowen's (undated) letter to Dr. Hennig.

years. This was her first job with USDA-FSIS; she was hired as a Public Health Veterinarian.

7. The recruitment incentive would be paid for only the time that the recruit continued to work in poultry inspection at Sumter, South Carolina. Dr. Hennig did complete her first year in poultry inspection at Sumter, South Carolina, thereby earning the entire $14,102.75 for the first year (paid in advance). The $14,102.75 for the second year was also paid in advance. *See* Notification of Personnel Action showing Effective Date of 12/05/10, with Box 20 showing $14,102.75. Remarks include: Payment 2 of 4. USDA-FSIS is asking for the unearned portion of that second payment to be repaid.

8. Dr. Hennig's first year working in poultry inspection at Sumter, South Carolina was December 6, 2009 through December 5, 2010. During her second year in the job, Dr. Hennig transferred (within USDA-FSIS, but no longer doing poultry inspection and no longer working at Sumter, South Carolina). USDA-FSIS is not asking for the entire $14,102.75 for the second year to be repaid, but only a proportional amount.

9. Dr. Hennig's partial second year was December 6, 2010 through March 12, 2011. *See* Notification of Personnel Action showing Effective Date of 03/13/11, for transfer <u>from</u> District #16 - Raleigh, NC, Position Title Supervisory Veterinary Medical Officer (Public Health); <u>to</u> District #15 - Beltsville, MD, Position Title Consumer Safety Officer. Remarks include: Training is a condition of employment for retention in this position. RX-7, p. 1.

10. From December 6, 2010 through March 12, 2011, there were 7 pay periods:

12/05/2010 - 12/18/2010;
12/19/2010 - 01/01/2011;
01/02/2011 - 01/15/2011;
01/16/2011 - 01/29/2011;
01/30/2011 - 02/12/2011;
02/13/2011 - 02/26/2011; and
02/27/2011 - 03/12/2011.

I have reviewed carefully RX 16 and agree with the mathematical calculation and conclude that the unearned portion of Dr. Hennig's second year recruitment incentive is **$10,305.74**. Also I have considered carefully Dr. Hennig's email dated August 24, 2012, a copy of which I am filing with the Hearing Clerk. Dr. Hennig believes her transfer date was June 6, 2011, after the required training. I disagree with Dr. Hennig, based on the Notification of Personnel Action showing Effective Date of 03/13/11. *See* paragraph 9. [There is a Notification of Personnel Action showing Effective Date of 06/05/11 (*see* RX-7, p. 2), which when compared to RX-7 p. 1, shows higher locality pay and a change of duty station from West Columbia Lexington SC to Beltsville Prince Georges MD, but nevertheless I find that the new job began on March 13, 2011, even though the job began with training.]

11. The recruitment incentive ("bonus") that was part of Dr. Hennig's pay package when she worked in poultry inspection at Sumter, South Carolina (RX- 4) would not carry over to her new job that began March 13, 2011. RX 7, p. 1. If the facts discussed thus far were all that needed to be considered, I would conclude that Dr. Hennig owes USDA-FSIS **$10,305.74**, and the next step would be to consider whether she can withstand ***salary offset*** in the amount of 15% of her disposable pay without that causing her financial hardship. Before going to that step, however, there are 2 other considerations.

12. Dr. Hennig testified credibly that she was told by someone at USDA-FSIS Human Resources that so long as she stayed within the Agency (USDA-FSIS), she would <u>not</u> have to repay any portion of the second year recruitment incentive. Dr. Hennig's letter to USDA, FSIS, HRD dated June 2, 2011, includes:

> The disagreement over indebtedness arose because of the information I was given by FSIS Human Resources before I accepted the new position. I was offered the EIAO position on February 23 and was given 24 hours to decide if I wanted to accept it. During that time, I gathered as much information as I could to made an educated decision. The language in the paperwork I was

given regarding the PHV incentives when I initially joined the agency is not clear as to what will have to be repaid and under what circumstances repayment will be required. I did my due diligence and inquired at the FSIS Human Resources office by phone about whether I would lose the incentives given as a PHV if I took the EIAO position. I was informed that in such a case, I would *not* get the remaining installments of my bonus, but that I also would *not* have to pay back any of the bonus already paid to me because my new position would still be within FSIS. The same statement was made regarding the loan repayment incentive. Either this information was incorrect or I was erroneously billed.

I made the decision to accept the position as an EIAO on February 24 based on this information provided by HR. If I had known that I would go into such serious debt by taking the EIAO position, I would not have accepted it. By the time I was informed that I would have to repay the bonus, I had already attended four weeks of EIAO training and my PHV position had been offered to someone else. I had also already made the commitment to the Beltsville District Office to take the position as an EIAO, so I could not go back to my former position as a PHV. I truly believe that my knowledge as a veterinarian and my scientific skills would be an asset and not a detriment to the Agency as I perform the duties of an EIAO. I am committed to the Agency's mission and my decision to accept the EIAO position was made in good faith. I made every effort possible to determine if my transfer would lead to indebtedness and I was ultimately either given the wrong information by FSIS Human Resources or I was erroneously billed. Therefore, I must request a hearing to have the question of indebtedness reviewed further.

13. Dr. Hennig wanted EIAO training, which would probably enhance her promotion potential. EIAO stands for Enforcement Investigations and Analysis Officer. [2]

14. Dr. Hennig inquired about getting the EIAO training while working at her Sumter, South Carolina duty station. Dr. Hennig's email dated June 17, 2010 inquired; the response the same day showed no current opportunity for her where she was, but encouraged her "to take the opportunity to speak with EIAOs about their job to determine if you might be interested in applying for an EIAO position. Good luck in your career!" PX 1.

15. Dr. Hennig knew that obtaining the EIAO training would be valuable; nevertheless I accept her statement as true, that if she had known that she would go into such serious debt by taking the EIAO position, she would not have accepted the reassignment. When Dr. Hennig was told that she would not have to repay any portion of the bonus she had already been paid because she was staying within FSIS, that was wrong. Having been given the wrong information and having relied on it, Dr. Hennig is nevertheless not entitled to debt forgiveness. The wrong information Dr. Hennig was given does not negate the obligation USDA-FSIS has to recover the unearned portion of Dr. Hennig's second year recruitment incentive of **$10,305.74**. Dr. Hennig was misled, but that does not justify forgiving the repayment due.

16. Now, to the last consideration. When Dr. Hennig reported to her new job within USDA-FSIS, Dr. Hennig was leaving a job in pay band 4 (AP-4) [comparable to GS 12/13], Supervisory Veterinary Medical Officer; she was taking a reassignment to a job also in pay band 4 (AP-4), Consumer Safety Officer. Her pay band did not change, and the new job had no "built-in" "career ladder" to a promotion with higher pay. Consequently, USDA-FSIS Human Resources determined that Dr. Hennig's new job was <u>without higher promotion potential</u>. *See* Brian Fleming's email dated March 30, 2011, which states in part: "The EIAO position does not have a recruitment incentive like the PHV position.

---

[2] *See* http://www.fsis.usda.gov/FSIS_Employees/EIAO_Training_Modules/index.asp.

Your movement to the EIAO also is considered a reassignment to a position without higher promotion potential. For these reasons you will be billed, on a pro rated basis (approximately eight and a half months), for the recruitment incentive that you received this past December only." RX-8.

17. Dr. Hennig stayed within USDA-FSIS when she took the reassignment, and she does not have to repay the recruitment incentive on a pro rata basis, **IF** she was "promoted or **reassigned to a position with greater promotion potential in FSIS**." USDA-FSIS Directive 4300.8 regarding Recruitment, Relocation, and Retention Incentives (*see* RX-15, p. 12).

18. Dr. Hennig has persuaded me that she does have greater promotion potential in FSIS in her new job, even though the new job has no "built-in" "career ladder" to a promotion with higher pay. This was no easy thing to prove. First, Dr. Hennig proved that she tried to get EIAO training while working at her Sumter, South Carolina duty station and could not. *See* paragraph 14. *See* PX 1. Next, Dr. Hennig proved that she could get EIAO training if she accepted the reassignment; in fact, the EIAO training was a condition of employment for retention. Dr. Hennig then proved that "out of seven (7) Front Line Supervisors in the Beltsville District, six (6) have completed EIAO training." PX 2. [Dr. Hennig testified that the other one (the 7th of 7), had more than 20 years' experience in food safety and inspection service.] Dr. Hennig proved next that, "There are approximately 140 FLS at FSIS. Of these, approximately 111 FLS have completed EIAO training." PX 3. That, Dr. Hennig pointed out, is 79.3%.

19. Dr. Hennig showed the importance of the EIAO course, including its importance to becoming a Front Line Supervisor. A Front Line Supervisor is in pay band 5, comparable to GS-14. Dr. Hennig had reason to expect that the EIAO course would be available to her. *See*, for example, FSIS Directive 4300.10 regarding Ensuring that Inspection Program Personnel Have Proper Training to Cover Work Assignments, PX 4, p. 14.

20. Dr. Hennig accepted reassignment within USDA-FSIS to a job that would include EIAO training, which for that reason **was a position with**

greater promotion potential in FSIS, because promotion to Front Line Supervisor would be more likely if she had EIAO training.

Findings, Analysis and Conclusions

21. The Secretary of Agriculture has jurisdiction over the parties, Dr. Hennig and USDA- FSIS, and over the subject matter, which is ***salary offset***.

22. Dr. Hennig's evidence persuades me that, by being reassigned to a job within USDA-FSIS that would include EIAO training, which she had tried to get but couldn't while working in poultry inspection at Sumter, South Carolina, Dr. Hennig was "**reassigned to a position with greater promotion potential in FSIS**" and that consequently she does not have to repay the recruitment incentive on a pro rata basis.

23. Dr. Hennig does **not** have to repay the unearned portion of her second year recruitment incentive of **$10,305.74**.

ORDER

24. USDA-FSIS shall record that Dr. Hennig took a **reassignment to a position with greater promotion potential in FSIS**, and that consequently she does **not** have to repay the recruitment incentive on a pro rata basis. [Dr. Hennig is more likely to advance because she has the EIAO training.]

25. USDA-FSIS shall **not** ***offset*** Dr. Hennig's pay or other **Federal monies** payable to the order of Dr. Hennig to recover the **$10,305.74** or any portion of it.

26. Dr. Hennig owes no repayment to USDA-FSIS as a result of her reassignment on March 13, 2011.

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

MISCELLANEOUS ORDERS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

ADMINISTRATIVE WAGE GARNISHMENT ACT

CATHERINE BROWN.
Docket No. 12-0709.
Miscellaneous Order.
Filed July 9, 2012.

PAULA A. PEACE.
Docket No. 12-0330.
Miscellaneous Order.
Filed July 17, 2012.

LUCAS JONES.
Docket No. 12-0320.
Miscellaneous Order.
Filed July 18, 2012.

JEFF LATTIMER.
Docket No. 12-0418.
Miscellaneous Order.
Filed July 18, 2012.

MARGARITA GONZALES.
Docket No. 12-0435.
Miscellaneous Order.
Filed July 19, 2012.

CLAYTON CALLAHAN.
Docket No. 12-0434.
Miscellaneous Order.
Filed July 20, 2012.

BARBARA ANDERSON, F/K/A BARBARA BROCK.
Docket No. 12-0459.
Miscellaneous Order.
Filed July 23, 2012.

JANIELLE CORRALES.
Docket No. 12-0364.
Miscellaneous Order.
Filed July 24, 2012.

CINDY MCGUIRE.
Docket No. 12-0449.
Miscellaneous Order.
Filed July 26, 2012.

ABEL SERRATA, JR.
Docket No. 12-0451.
Miscellaneous Order.
Filed July 26, 2012.

PAUL LAROCHE.
Docket No. 10-0129.
Miscellaneous Order.
Filed July 30, 2012.

CHRISTOPHER INGRAM.
Docket No. 12-0385.
Miscellaneous Order.
Filed July 31, 2012.

MISCELLANEOUS ORDERS

ROBERT JURJEVICH.
Docket No. 12-0432.
Miscellaneous Order.
Filed July 31, 2012.

ERIC TRUMAN.
Docket No. 12-0448.
Miscellaneous Order.
Filed August 1, 2012.

JOHNNY BARDWELL.
Docket No. 12-0527.
Miscellaneous Order.
Filed August 1, 2012.

MARDY B. GABUYA.
Docket No. 12-0481.
Miscellaneous Order.
Filed August 9, 2012.

RUDOLPH GABUYA.
Docket No. 12-0482.
Miscellaneous Order.
Filed August 9, 2012.

BENJAMIN KELSEY.
Docket No. 12-0411.
Miscellaneous Order.
Filed August 13, 2012.

ADAM MASON.
Docket No. 12-0483.
Miscellaneous Order.
Filed August 13, 2012.

TIFFANY MUMFORD, F/K/A TIFFANY HOLT.
Docket No. 12-0479.
Miscellaneous Order.
Filed August 13, 2012.

JOSHUA BARTLEY.
Docket No. 12-0484.
Miscellaneous Order.
Filed August 15, 2012.

TERRY SMITH.
Docket No. 12-0501.
Miscellaneous Order.
Filed September 7, 2012.

ERIC CANTRELL.
Docket No. 12-0609.
Miscellaneous Order.
Filed September 13, 2012.

JOSE G. SALDANA.
Docket No. 12-0591.
Miscellaneous Order.
Filed September 25, 2012.

JENNIFER SNYDER.
Docket No. 12-0590.
Miscellaneous Order.
Filed September 26, 2012.

ROCKY COPELAND.
Docket No. 12-0568.
Miscellaneous Order.
Filed September 27, 2012.

LARRY THORSON.
Docket No. 12-0645.
Miscellaneous Order.
Filed September 27, 2012.

MISCELLANEOUS ORDERS

THERESA M. SKINNER, N/K/A THERESA M. HEIDECKER.
Docket No. 12-0592.
Miscellaneous Order.
Filed September 28, 2012.

TRAVIS THANGVIJIT.
Docket No. 12-0532.
Miscellaneous Order.
Filed October 16, 2012.

DENISE CHRISTOPHER.
Docket No. 12-0486.
Miscellaneous Order.
Filed October 22, 2012.

RICKY B. MAXWELL.
Docket No. 12-0509.
Miscellaneous Order.
Filed October 24, 2012.

BRENNA BYRD.
Docket No. 12-0505.
Miscellaneous Order.
Filed October 25, 2012.

DENNIS DAVIS.
Docket No. 12-0607.
Miscellaneous Order.
Filed November 13, 2012.

MELANIE GONZALEZ.
Docket No. 13-0018.
Miscellaneous Order.
Filed December 6, 2012.

KARA MARTIN, F/K/A KARA DOOLITTLE.
Docket No. 13-0005.
Miscellaneous Order.
Filed December 10, 2012.

ELIDA O. SALAZAR, N/K/A ELIDA ESPINOZA.
Docket No. 13-0001.
Miscellaneous Order.
Filed December 11, 2012.

CRYSTAL DAWN COMBS.
Docket No. 13-0098.
Miscellaneous Order.
Filed December 14, 2012.

BRIDGET WYNKOOP.
Docket No. 13-0101.
Miscellaneous Order.
Filed December 20, 2012.

SETH WYNKOOP.
Docket No. 13-0102.
Miscellaneous Order.
Filed December 20, 2012.

BRIDGET WYNKOOP.
Docket No. 13-0101.
Miscellaneous Order.
Filed December 20, 2012.

AGRICULTURE MARKETING AGREEMENT ACT

GREINER'S GREENACRES, INC., A/K/A GREINER'S GREEN ACRES, INC.
Docket No. 12-0617.
Miscellaneous Order.
Filed December 5, 2012.

MISCELLANEOUS ORDERS

ANIMAL WELFARE ACT

In re: CRAIG A. PERRY, AN INDIVIDUAL; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION; AND LE ANNE SMITH, AN INDIVIDUAL.
Docket No. 05-0026.
Miscellaneous Order.
Filed July 2, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Larry J. Thorson, Esq. for Respondents.
Initial Decision by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING ADMINISTRATOR'S APPEAL PETITIONS

On June 29, 2012, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], by telephone, requested that I extend to July 5, 2012, the time for appealing two initial decisions issued by Administrative Law Judge Jill S. Clifton in the instant proceeding, *In re Le Anne Smith*, __ Agric. Dec. ___ (Mar. 30, 2012), and *In re Craig A. Perry*, __ Agric. Dec. ___ (Mar. 29, 2012). For good reason stated, the Administrator's motion to extend the time for filing appeal petitions is granted. The time for filing the Administrator's appeal petitions is extended to, and includes, July 5, 2012.[1]

___

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the appeal petitions are received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, July 5, 2012.

Miscellaneous Orders
71 Agric. Dec. 1048-1061

In re: TRI-STATE ZOOLOGICAL PARK OF WESTERN MARYLAND, INC., A MARYLAND CORPORATION; AND ROBERT L. CANDY, AN INDIVIDUAL.
Docket No. 11-0222.
Miscellaneous Order.
Filed September 25, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Respondents, pro se.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME TO FILE A RESPONSE TO RESPONDENTS' APPEAL PETITION

On September 24, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], requested that I extend the time for filing a response to Respondents' appeal petition to October 25, 2012. For good reason stated, the Administrator's motion to extend the time for responding to Respondents' appeal petition is granted. The time for filing the Administrator's response to Respondents' appeal petition is extended to, and includes, October 25, 2012.[1]

———

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 25, 2012.

MISCELLANEOUS ORDERS

In re: JENNIFER CAUDILL, A/K/A JENNIFER WALKER, A/K/A JANNIFER HERRIOTT WALKER, AN INDIVIDUAL; BRENT TAYLOR AND WILLIAM BEDOFRD, INDIVIDUALS, D/B/A ALLEN BROTEHRS CIRCUS; AND MITCHELL KALMANSON.
Docket No. 10-0416.
Miscellaneous Order.
Filed October 10, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Mitchell Kalmanson.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING APPEAL PETITION

On October 4, 2012, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], requested an extension of time within which to appeal the initial Decision and Order as to Mitchell Kalmanson issued on September 24, 2012, by Chief Administrative Law Judge Peter M. Davenport. The Administrator requests that I extend the time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson to 30 days after service of an initial decision and order as to Jennifer Caudill on the Administrator's counsel. For good reason shown, the Administrator's time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson is extended to 30 days after the Administrator's counsel is served with an initial decision and order as to Jennifer Caudill. Should this extended time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson expire on a Saturday, Sunday, or Federal holiday, the time for filing an appeal petition pursuant to this Order Extending Time for Filing Appeal Petition shall be extended to include the following business day.[1]

———

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, any appeal petition filed pursuant to this Order Extending Time for Filing Appeal Petition must be received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, on the date due.

Miscellaneous Orders
71 Agric. Dec. 1048-1061

In re: LEE MARVIN GREENLY, AN INDIVIDUAL; SANDY GREENLY, AN INDIVIDUAL; AND MINNESOTA WILDLIFE CONNECTION, INC., A MINNESOTA CORPORATION.
Docket No. 11-0072.
Miscellaneous Order.
Filed October 18, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Larry Perry, Esq. for Respondents.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME TO FILE A RESPONSE TO RESPONDENTS' APPEAL PETITION

On October 17, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], requested that I extend the time for filing a response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition to October 29, 2012. For good reason stated, the Administrator's motion to extend the time for responding to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is granted. The time for filing the Administrator's response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is extended to, and includes, October 29, 2012.[1]

---

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 29, 2012.

MISCELLANEOUS ORDERS

In re: TRI-STATE ZOOLOGICAL PARK OF WESTERN MARYLAND, INC., A MARYLAND CORPORATION; AND ROBERT L. CANDY, AN INDIVIDUAL.
Docket No. 11-0222.
Miscellaneous Order.
Filed October 25, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Respondents, pro se.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

SECOND ORDER EXTENDING TIME TO FILE A RESPONSE TO RESPONDENTS' APPEAL PETITION

On October 25, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], by telephone, requested that I extend the time for filing a response to Respondents' appeal petition to October 26, 2012. For good reason stated, the Administrator's motion to extend the time for responding to Respondents' appeal petition is granted. The time for filing the Administrator's response to Respondents' appeal petition is extended to, and includes, October 26, 2012.[1]

---

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 26, 2012.

Miscellaneous Orders
71 Agric. Dec. 1048-1061

In re: LEE MARVIN GREENLY, AN INDIVIDUAL; SANDY GREENLY, AN INDIVIDUAL; AND MINNESOTA WILDLIFE CONNECTION, INC., A MINNESOTA CORPORATION.
Docket No. 11-0072.
Miscellaneous Order.
Filed October 31, 2012.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Larry Perry, Esq. for Respondents.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME TO FILE A RESPONSE TO RESPONDENTS' APPEAL PETITION

On October 31, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], by telephone, requested that I extend the time for filing a response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition to November 2, 2012. For good reason stated, the Administrator's motion to extend the time for responding to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is granted. The time for filing the Administrator's response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is extended to, and includes, November 2, 2012.[1]

___

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 2, 2012.

MISCELLANEOUS ORDERS

LAWRENCE C. WALLACH.
Docket No. 12-0233.
Miscellaneous Order.
Filed November 9, 2012.

EQUAL ACCESS TO JUSTICE ACT

In re: CRAIG A. PERRY, AN INDIVIDUAL; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION; AND LE ANNE SMITH, AN INDIVIDUAL.
Docket No. 05-0026.
Miscellaneous Order.
Filed October 31, 2012.

EAJA—AWA.

Colleen A. Carroll, Esq. for Complainant.
Larry J. Thorson, Esq. for Respondents.
Initial Decision by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME TO FILE AN APPEAL PETITION

On October 31, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], by telephone, requested that I extend the time for filing an appeal petition in this proceeding to November 2, 2012. For good reason stated, the Administrator's motion to extend the time for filing an appeal petition is granted. The time for filing the Administrator's appeal petition is extended to, and includes, November 2, 2012.[1]

———

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 2, 2012.

Miscellaneous Orders
71 Agric. Dec. 1048-1061

In re: CRAIG A. PERRY, AN INDIVIDUAL; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION; AND LE ANNE SMITH, AN INDIVIDUAL.
Docket No. 05-0026.
Miscellaneous Order.
Filed November 2, 2012.

EAJA—AWA.

Colleen A. Carroll, Esq. for Complainant.
Larry J. Thorson, Esq. for Respondents.
Initial Decision by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

SECOND ORDER EXTENDING TIME TO FILE AN APPEAL PETITION

On November 2, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], by telephone, requested that I extend the time for filing an appeal petition in this proceeding to November 5, 2012. For good reason stated, the Administrator's motion to extend the time for filing an appeal petition is granted. The time for filing the Administrator's appeal petition is extended to, and includes, November 5, 2012.[1]

———

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 5, 2012.

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

ANIMAL QUARANTINE ACT

JAMES P. MAREK.
Docket No. 12-0491.
Default Decision.
Filed September 24, 2012.

ANIMAL WELFARE ACT

ABRAM KHAIMOV.
Docket No. 12-0325.
Default Decision.
Filed August 16, 2012.

GLORIA WIPPLER.
Docket No. 12-0429.
Default Decision.
Filed September 24, 2012.

SCOTT WIPPLER.
Docket No. 12-0430.
Default Decision.
Filed September 24, 2012.

HORSE PROTECTION ACT

TERRY WAYNE SIMS, A/K/A TERRY SIMS.
Docket No. 12-0192.
Default Decision.
Filed July 20, 2012.

CONSENT DECISIONS

ANIMAL HEALTH PROTECTION ACT

DHL Express (USA), Inc., d/b/a DHL, d/b/a DHL Express, d/b/a DHL Worldwide Express, Inc., AQ-12-0522.

ANIMAL WELFARE ACT

G. Frederick Keating, AWA-11-0224, 08/08/12.
Loki Clan Wolf Refuge, Inc. & Myrtle Clapp, AWA-11-0224, 10/11/12.
Terri Wilson, d/b/a Whistlin W. Kennel, AWA-11-0422, 10/11/12.
Cynthia McConnell, AWA-12-0163, 11/15/12.
Brenda Walter, AWA-12-0392, 12/31/12.

FEDERAL CROP INSURANCE ACT

Reza Kalantari, FICA-09-0169, 10/12/12.
Ficus Farm, Inc., FICA-09-0170, 10/12/12.

FEDERAL MEAT INSPECTION ACT

R-Ventures, d/b/a Fasta & Ravioli Company, & Robert J. Ricketts, FMIA-12-0540, 07/27/12.
Bowman's Butcher Shop, LLC and Nicholas A. Johnson, FMIA-D-12-0610, 08/29/12.

FOOD AND NUTRITION ACT

Maryland Department of Human Resources, FNS-12-0521, 10/09/12.
Arizona Department of Economic Security, FNS-12-0523, 12/21/12.

HORSE PROTECTION ACT

Derrick S. Butner, HPA-11-0307, 07/24/12.
Gerale Martin & Derrick Brown, HPA-D-12-0291, 08/17/12.
Jackie McConnell, HPA-D-12-0466, 08/23/12.

CONSENT DECISIONS

Lloyd W. Sebastian & B-Sha Sebastian, HPA-11-0307, 10/03/12.
Gerale Martin, HPA-12-0291, 10/17/12.
Regina Fritsch, HPA-11-0305, 11/02/12.
Thomas Vest, HPA-11-0305, 11/02/12.
Jeanette Baucom, HPA-11-0311, HPA-12-0619, 12/31/12.

PLANT PROTECTION ACT

DHL Express (USA), Inc., d/b/a DHL, d/b/a DHL Express, d/b/a DHL Worldwide Express, Inc., PQ-12-0522.

POULTRY PRODUCTS INSPECTION ACT

R-Ventures, d/b/a Fasta & Ravioli Company, & Robert J. Ricketts, PPIA-12-0540, 07/27/12.

AGRICULTURE DECISIONS

Volume 71

July – December 2012
Part Two (P & S)
Pages 1065 - 1184

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

LIST OF DECISIONS REPORTED

JULY – DECEMBER 2012

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

MISCELLANEOUS ORDERS

DEFAULT DECISIONS

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

In re: SAMMY SIMMONS AND WENDY SIMMONS, D/B/A PEOPLE'S LIVESTOCK OF CARTERSVILLE.
Docket No. D-12-0131.
Decision and Order.
Filed September 20, 2012.

PS-D—Sanctions.

Jonathan D. Gordy, Esq. for Complainant.
Respondents, pro se.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 21, 2011. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [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].

The Deputy Administrator alleges: (1) Sammy Simmons and Wendy Simmons violated the cease and desist order issued in *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007); (2) during the period December 1, 2008, to January 31, 2009, Sammy Simmons and Wendy Simmons sold livestock on commission and, in purported

payment of the net proceeds of those sales, issued at least 50 checks to consignors for livestock consigned to Sammy Simmons and Wendy Simmons' market for sale which checks were returned unpaid by the bank upon which the checks were drawn because Sammy Simmons and Wendy Simmons did not have and maintain sufficient funds on deposit and available, in the accounts upon which those checks were drawn, to pay the checks when presented, in willful violation of 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. § 201.43; (3) during the period December 1, 2008, to January 31, 2009, Sammy Simmons and Wendy Simmons sold livestock on commission and failed to remit, when due, the net proceeds from the sale price of those livestock, in willful violation of 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. § 201.43; and (4) as of January 31, 2009, Sammy Simmons and Wendy Simmons had a deficiency in their custodial account of $104,710.11, in willful violation of 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. § 201.42.[1]

The Hearing Clerk served Sammy Simmons and Wendy Simmons with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on January 25, 2012.[2] Neither Sammy Simmons nor Wendy Simmons filed an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint, as required by 7 C.F.R. § 1.136(a). The Hearing Clerk sent a letter, dated February 27, 2012, to Sammy Simmons and Wendy Simmons informing them that an answer to the Complaint had not been filed within the time prescribed by the Rules of Practice. Neither Sammy Simmons nor Wendy Simmons responded to the Hearing Clerk's February 27, 2012, letter.

On March 27, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Show Cause Order in which he provided the parties 15 days within which to show cause why a default decision should not be entered. On April 12, 2012, the Deputy Administrator filed a response to the Chief ALJ's Show Cause Order in the form of a Motion for Decision Without Hearing by Reason of Default and a proposed Decision Without Hearing by Reason of Default. On May 8, 2012, Sammy Simmons and Wendy Simmons filed a response to

---

[1] Compl. ¶¶ II-V.

[2] Hearing Clerk's Memorandum To The File, dated January 25, 2012, regarding service on Wendy Simmons; Hearing Clerk's Memorandum To The File, dated January 25, 2012, regarding service on Sammy Simmons.

the Deputy Administrator's Motion for Decision Without Hearing by Reason of Default stating they were no longer in the business of selling livestock on commission and they were unable to pay the $58,000 civil penalty requested in the Deputy Administrator's Motion for Decision Without Hearing by Reason of Default.

On May 30, 2012, the Chief ALJ, in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order: (1) concluding Sammy Simmons and Wendy Simmons willfully violated 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. §§ 201.42-.43, as alleged in the Complaint; (2) ordering Sammy Simmons and Wendy Simmons to cease and desist from violations of the Packers and Stockyards Act and the Regulations; (3) suspending Sammy Simmons and Wendy Simmons as registrants under the Packers and Stockyards Act for 5 years; and (4) assessing Sammy Simmons and Wendy Simmons a $58,000 civil penalty.[3]

On August 8, 2012, Sammy Simmons and Wendy Simmons appealed the Chief ALJ's Default Decision and Order to the Judicial Officer. On September 7, 2012, the Deputy Administrator filed Complainant's Response to Respondent's [sic] Appeal Petition. On September 14, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt, with minor changes, the Chief ALJ's Default Decision and Order as the final agency decision.

DECISION

Statement of the Case

Neither Sammy Simmons nor Wendy Simmons filed a timely answer to the Complaint. Pursuant to 7 C.F.R. § 1.136(c), the failure to file a timely answer is deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139,

[3] Chief ALJ's Default Decision and Order at 4-5.

the failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact, and I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Sammy Simmons is an individual residing in Cartersville, Georgia.

2. At all times material to this proceeding, Sammy Simmons:

   (a) was a 51% owner and operator in the general partnership of People's Livestock of Cartersville;

   (b) was registered, with Wendy Simmons, with the United States Department of Agriculture as a market agency selling livestock on commission;

   (c) was responsible, with Wendy Simmons, for the day-to-day management, operation, and control of People's Livestock of Cartersville;

   (d) purchased and sold livestock;

   (e) sold livestock on commission; and

   (f) was a market agency and dealer within the meaning of the Packers and Stockyards Act and the Regulations.

3. Wendy Simmons is an individual residing in Cartersville, Georgia.

4. At all times material to this proceeding, Wendy Simmons:

   (a) was a 49% owner and office manager in the general partnership of People's Livestock of Cartersville;

(b) was registered, with Sammy Simmons, with the United States Department of Agriculture as a market agency selling livestock on commission;

(c) was responsible, with Sammy Simmons, for the day-to-day management, operation, and control of People's Livestock of Cartersville; and

(d) was a market agency within the meaning of the Packers and Stockyards Act and the Regulations.

5. In *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007), Sammy Simmons and Wendy Simmons were ordered to cease and desist from:

(a) issuing checks to consignors or shippers of livestock that are returned unpaid by the bank upon which the checks are drawn because Sammy Simmons and Wendy Simmons do not have or maintain sufficient funds on deposit and available, in the account upon which the checks are drawn, to pay the checks when presented; and

(b) failing to remit the full amount of the net proceeds due from the sale price of livestock sold on commission within the time period required by 9 C.F.R. § 201.43.

6. During the period December 1, 2008, to January 31, 2009, Sammy Simmons and Wendy Simmons sold livestock on commission and, in purported payment of the net proceeds of those sales, issued at least 50 checks to consignors for livestock consigned to Sammy Simmons and Wendy Simmons' market for sale which checks were returned unpaid by the bank upon which the checks were drawn because Sammy Simmons and Wendy Simmons did not have and maintain sufficient funds on deposit and available, in the accounts upon which those checks were drawn, to pay the checks when presented.

7. Sammy Simmons and Wendy Simmons, in the transactions described in Finding of Fact number 6, failed to remit, when due, the net proceeds due from the sale price of livestock sold on commission.

8. As of January 31, 2009, Sammy Simmons and Wendy Simmons had outstanding checks drawn on their custodial account in the amount of $125,019.33, and had to offset those checks, a balance in their custodial account of negative $3,205.13, proceeds receivable of $8,485.75, and deposits in transit in the amount of $15,028.60, resulting in a deficiency of $104,710.11.

Conclusions of Law

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

2. Sammy Simmons and Wendy Simmons willfully violated 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. §§ 201.42-.43.

3. Sammy Simmons and Wendy Simmons willfully violated the cease and desist order issued in *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007).

Sammy Simmons and Wendy Simmons' Appeal Petition

Sammy Simmons and Wendy Simmons raise one issue in their appeal petition. Sammy Simmons and Wendy Simmons request that I reduce or eliminate the $58,000 civil penalty assessed by the Chief ALJ because they are not able to pay a civil penalty of $58,000.

The Secretary of Agriculture's sanction policy is 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.

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993). Pursuant to 7 U.S.C. § 213(b), the Secretary of Agriculture must also 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."

Sammy Simmons and Wendy Simmons assert they no longer own or manage People's Livestock of Cartersville, and they no longer sell livestock on commission;[4] therefore, when reviewing the $58,000 civil penalty assessed by the Chief ALJ, I do not consider the size of Sammy Simmons and Wendy Simmons' business or the effect of the civil penalty on Sammy Simmons and Wendy Simmons' ability to continue in business.

As for the gravity of Sammy Simmons and Wendy Simmons' violations of the Packers and Stockyards Act and the Regulations, I find their violations were serious. Sammy Simmons and Wendy Simmons were market agencies who had a duty to remit to livestock consignors the net proceeds due from the sales price of livestock sold on commission. Sammy Simmons and Wendy Simmons were in a position of trust and the funds they held were trust funds.[5] In addition, Sammy Simmons and Wendy Simmons' failure, as market agencies, to maintain their custodial account in accordance with 9 C.F.R. § 201.42 is an unfair and deceptive practice in violation of the Packers and Stockyards Act.[6] Sammy Simmons and Wendy Simmons violated the trust of livestock sellers by (1) issuing at least 50 insufficient funds checks, (2) failing to remit, when due, the net proceeds due from the sale price of livestock sold on commission, and (3) allowing a $104,710.11 deficiency in their custodial account.

---

[4] Sammy Simmons and Wendy Simmons' Appeal Pet.; Sammy Simmons and Wendy Simmons' response to the Deputy Administrator's Motion for Decision Without Hearing by Reason of Default.

[5] 9 C.F.R. § 201.42.

[6] *In re Finger Lakes Livestock Exchange, Inc.*, 48 Agric. Dec. 390, 398 (1989); *In re Harry C. Hardy*, 33 Agric. Dec. 1383, 1400 (1974).

Moreover, Sammy Simmons violated two previously issued cease and desist orders and Wendy Simmons violated one previously issued cease and desist order. In *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007), Sammy Simmons and Wendy Simmons were ordered to cease and desist from: (1) issuing checks to consignors or shippers of livestock that are returned unpaid by the bank upon which the checks are drawn because Sammy Simmons and Wendy Simmons do not have or maintain sufficient funds on deposit and available, in the account upon which the checks are drawn, to pay the checks when presented; and (2) failing to remit the full amount of the net proceeds due from the sale price of livestock sold on commission within the time period required by 9 C.F.R. § 201.43. In that 2007 proceeding, Sammy Simmons and Wendy Simmons were assessed a $6,000 civil penalty for their issuance of nine non-sufficient funds checks. In *In re Samuel Gail Simmons*, 54 Agric. Dec. 1209 (1995), Sammy Simmons was ordered to cease and desist from paying for livestock with checks returned for non-sufficient funds.[7]

In light of the number and gravity of Sammy Simmons and Wendy Simmons' violations of the Packers and Stockyards Act and the Regulations, Sammy Simmons and Wendy Simmons' violations of previously issued cease and desist orders, and the Deputy Administrator's recommendation that the Chief ALJ assess Sammy Simmons and Wendy Simmons a $58,000 civil penalty,[8] I conclude the $58,000 civil penalty assessed by the Chief ALJ is justified by the facts. Moreover, the civil penalty is warranted in law. The maximum civil penalty that the Secretary of Agriculture may assess for each of Sammy Simmons and Wendy Simmons' violations of the Packers and Stockyards Act is $11,000.[9] Therefore, I reject Sammy Simmons and

---

[7] See *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731, 734 (2007) (discussing the cease and desist order issued in *In re Samuel Gail Simmons*, P&S Docket No. D-94-15 (Aug. 31, 1995)).

[8] Deputy Administrator's Motion for Decision Without Hearing by Reason of Default at second unnumbered page.

[9] The Packers and Stockyards Act provides that the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) is $10,000 (7 U.S.C. § 213(b)). However, the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) has been modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), and various implementing regulations issued by the Secretary of

Wendy Simmons' request that I reduce or eliminate the $58,000 civil penalty assessed by the Chief ALJ.

For the foregoing reasons, the following Order is issued.

ORDER

1. Sammy Simmons and Wendy Simmons, their agents and employees, directly or indirectly through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

a. failing to pay the full amount of the net proceeds due from the sale price of livestock sold on commission, within the time period required by 9 C.F.R. § 201.43;

b. issuing checks to consignors or shippers of livestock which are returned unpaid by the bank upon which the checks are drawn because Sammy Simmons and Wendy Simmons do not have and maintain sufficient funds on deposit and available, in the accounts upon which the checks are drawn, to pay the checks when presented; and

c. failing to maintain a Custodial Account for Shippers' Proceeds in conformity with 9 C.F.R. § 201.42.

Paragraph 1 of this Order shall become effective 5 days after service of this Order on Sammy Simmons and Wendy Simmons.

2. Sammy Simmons and Wendy Simmons are suspended as registrants under the Packers and Stockyards Act for a period of 5 years.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on Sammy Simmons and Wendy Simmons.

Agriculture. During the period December 1, 2008, to January 31, 2009, when Sammy Simmons and Wendy Simmons violated the Packers and Stockyards Act and the Regulations, the maximum civil penalty for each violation of 7 U.S.C. § 213(a) was $11,000 (7 C.F.R. § 3.91(b)(6)(iv) (2010)).

3. Sammy Simmons and Wendy Simmons are assessed a $58,000 civil penalty. Payment of the civil penalty shall be made by certified check or money order, made payable to the "Treasurer of the United States," and sent to:

USDA-GIPSA
PO Box 790335
St. Louis, Missouri 63179-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Order on Sammy Simmons and Wendy Simmons who shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0131.

RIGHT TO JUDICIAL REVIEW

Sammy Simmons and Wendy Simmons have the right to seek judicial review of this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial review must be sought within 60 days after entry of the Order in this Decision and Order.[10] The date of entry of the Order in this Decision and Order is September 20, 2012.

———

[10] 28 U.S.C. § 2344.

In re: GOLDEN WEST CATTLE CO., LLC AND MICHAEL KASTNER.
Docket No. D-12-0206.
Decision and Order.
Filed December 18, 2012.

PS-D.

Ciarra Toomey, Esq. for Complainant.
Michael Newman, Esq. for Respondents.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 26, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges: (1) on or about June 28, 2010, Golden West Cattle Co., LLC [hereinafter Golden West], under the direction, management, and control of Michael Kastner, in connection with its operations subject to the Packers and Stockyards Act, issued checks in payment for livestock purchases that were returned unpaid by the bank upon which the checks were drawn because Golden West did not have and maintain sufficient funds on deposit and available in the

account upon which the checks were drawn to pay the checks when presented, in willful violation of 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43; and (2) on or about June 21, 2010, and June 28, 2010, Golden West, under the direction, management, and control of Mr. Kastner, in connection with its operations subject to the Packers and Stockyards Act, purchased livestock and failed to pay the full amount of the purchase price for the livestock within the period required by the Packers and Stockyards Act, in willful violation of 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43.[1]

The Hearing Clerk served Golden West and Mr. Kastner with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on March 30, 2012.[2] Neither Golden West nor Mr. Kastner filed an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint, as required by 7 C.F.R. § 1.136(a). The Hearing Clerk sent a letter, dated May 16, 2012, to Golden West and Mr. Kastner informing them that an answer to the Complaint had not been filed within the time prescribed by the Rules of Practice. Neither Golden West nor Mr. Kastner responded to the Hearing Clerk's May 16, 2012, letter.

On May 18, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Show Cause Order in which he provided the parties 15 days within which to show cause why a default decision should not be entered. On June 4, 2012, the Deputy Administrator filed a response to the Chief ALJ's Show Cause Order in the form of a Motion for Decision Without Hearing By Reason of Default [hereinafter Motion for Default Decision] and a Proposed Decision Without Hearing By Reason of Default [hereinafter Proposed Default Decision]. Neither Golden West nor Mr. Kastner filed a response to the Chief ALJ's Show Cause Order.

The Hearing Clerk served Golden West and Mr. Kastner with the Deputy Administrator's Motion for Default Decision, the Deputy Administrator's Proposed Default Decision, and the Hearing Clerk's

---

[1] Compl. ¶¶ II-III.

[2] United States Postal Service Track & Confirm for label number 7005 1160 0002 7836 3755.

service letter on July 10, 2012.[3] Neither Golden West nor Mr. Kastner filed objections to the Motion for Default Decision and Proposed Default Decision within 20 days after the Hearing Clerk served them with the Motion for Default Decision and Proposed Default Decision, as required by 7 C.F.R. § 1.139.

On September 25, 2012, the Chief ALJ, in accordane with 7 C.F.R. § 1.139, issued a Default Decision and Order: (1) concluding Golden West and Mr. Kastner willfully violated 7 U.S.C. §§ 192(a) and 228b, as alleged in the Complaint; (2) ordering Golden West and Mr. Kastner to cease and desist from violations of the Packers and Stockyards Act; and (3) assessing Golden West and Mr. Kastner a $10,500 civil penalty.[4]

On November 1, 2012, Golden West and Mr. Kastner filed Petition To Vacate Or In The Alternative Appeal With A Request For Pardon Or Lesser Sanction [hereinafter Appeal Petition]. On November 26, 2012, the Deputy Administrator filed Complainant's Opposition To Respondents' Petition to Vacate or in the Alternative Appeal with a Request for Pardon or Lesser Sanction. On November 30, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt, with minor changes, the Chief ALJ's Default Decision and Order as the final Decision and Order.

DECISION

Statement of the Case

Neither Golden West nor Mr. Kastner filed a timely answer to the Complaint. Puruant to 7 C.F.R. § 1.136(c), the failure to file a timely answer is deemed, for purposes of the proceeding, an admission of the allegations in the Complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer, or the admission by the answer of all the

[3] Memorandum To The File, dated July 12, 2012, signed by L. Eugene Whitfield, Hearing Clerk.
[4] Chief ALJ's Default Decision and Order at 3-4.

material allegations of fact contained in the Complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact, and I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Golden West is a Colorado corporation actively registered to do business within the State of New Jersey.

2. Golden West has a mailing address in Teaneck, New Jersey.

3. Golden West was, at all times material to this proceeding:

(a) Engaged in the business of buying livestock in commerce for the purpose of slaughter; and

(b) A packer within the meaning of, and subject to the provisions of, the Packers and Stockyards Act.

4. Mr. Kastner is an individual whose home address is in the State of New Jersey.

5. Mr. Kastner was, at all times material to this proceeding:

(a) One hundred percent owner of Golden West;

(b) President of Golden West;

(c) Responsible for the direction, management, and control of Golden West; and

(d) A packer within the meaning of, and subject to the provisions of, the Packers and Stockyards Act.

6. Golden West, under the direction, management, and control of Mr. Kastner, in connection with its operations subject to the Packers and Stockyards Act, on or about the date and in the transaction described in this Finding of Fact, issued a check in payment for livestock purchases,

which check was returned unpaid by the bank upon which the check was drawn because Golden West did not have and maintain sufficient funds on deposit and available in the account upon which the check was drawn to pay the check when presented.

Purchase Date	Seller's Name	No. of Head	Livestock Amount	Due Date	Check Date	Check No.	Check Amount
6/28/10	Greg Kroupa	48	$14,673	6/29/10	7/9/10	2114	$14,673

7. Golden West, under the direction, management, and control of Mr. Kastner, in connection with its operations subject to the Packers and Stockyards Act, in the transactions described in this Finding of Fact, purchased livestock and failed to pay the full amount of the purchase price for the livestock within the time period required by the Packers and Stockyards Act.

Seller's Name	Purchase Date	No. of Head	Livestock Amount	Due Date	Payment Instrument No.	Date Paid	Days Late
Jim Bamford	6/21/10	40	$16,562.75	6/22/10	1105	8/24/10	63
Greg Kroupa	6/28/10	48	$14,673	6/29/10	2114	8/23/10	55

Conclusions of Law

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

2. Golden West and Mr. Kastner willfully violated 7 U.S.C. §§ 192(a) and 228b.

Golden West and Mr. Kastner's Appeal Petition

Golden West and Mr. Kastner raise seven issues on appeal. First, Golden West and Mr. Kastner contend their Appeal Petition was timely filed (Appeal Pet. ¶¶ 3-10).

The Hearing Clerk served Golden West and Mr. Kastner with the Chief ALJ's Default Decision and Order on October 3, 2012.[5] The Rules of Practice provide that a party must file an appeal from an administrative law judges's written decision with the Hearing Clerk within 30 days after the Hearing Clerk serves that party with the administrative law judge's decision.[6] Thus, Golden West and Mr. Kastner were required to file their Appeal Petition with the Hearing Clerk no later than November 2, 2012. Golden West and Mr. Kastner filed their Appeal Petition with the Hearing Clerk on November 1, 2012; therefore, I agree with Golden West and Mr. Kastner that their Appeal Petition was timely filed.

Second, Golden West and Mr. Kastner contend they were not served with the Complaint on March 30, 2012 (Appeal Pet. ¶¶ 2(a)(i); 11-17).

United States Postal Service Track & Confirm for label number 7005 1160 0002 7836 3755 establishes that the Hearing Clerk served Golden West and Mr. Kastner with the Complaint on March 30, 2012. Golden West and Mr. Kastner offer nothing to show this United States Postal Service record, placed in the docket file by the Hearing Clerk, inaccurately states the date of delivery of the Complaint to Golden West and Mr. Kastner. Therefore, I reject Golden West and Mr. Kastner's contention that they were not served with the Complaint on March 30, 2012.

Third, Golden West and Mr. Kastner contend they were never notified of their default (Appeal Pet. ¶ 2(a)(ii)).

The record establishes that the Chief ALJ filed a Default Decision and Order on September 25, 2012, and, contrary to Golden West and Mr. Kastner's contention that they were never notified of their default, Golden West and Mr. Kastner assert they were served with the Chief ALJ's Default Decision and Order on October 3, 2012 (Appeal Pet. ¶ 3). Moreover, Golden West and Mr. Kastner appealed the Chief ALJ's Default Decision and Order by filing their Appeal Petition with the Hearing Clerk on November 1, 2012. In light of Golden West and

[5] Appeal Pet. ¶ 3.
[6] 7 C.F.R. § 1.145(a).

Mr. Kastner's assertion that the Hearing Clerk served them with the Chief ALJ's Default Decision and Order on October 3, 2012, and Golden West and Mr. Kastner's November 1, 2012, Appeal Petition, I reject Golden West and Mr. Kastner's contention that they were never notified of their default.

Fourth, Golden West and Mr. Kastner contend the Chief ALJ's findings of fact are error (Appeal Pet. ¶¶ 2(a)(iii)-(vii), (b)(i), (iv); 21-24).

The Hearing Clerk served Golden West and Mr. Kastner with the Complaint on March 30, 2012.[7] Golden West and Mr. Kastner failed to file an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint, as required by 7 C.F.R. § 1.136(a). The Rules of Practice provide that the failure to file a timely answer to the Complaint is deemed, for purposes of the proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing.[8] The Chief ALJ adopted the material allegations of fact alleged in the Complaint as the findings of fact in his Default Decision and Order based upon Golden West and Mr. Kastner's deemed admission of the allegations in the Complaint. Therefore, I reject Golden West and Mr. Kastner's contention that the Chief ALJ's findings of fact are error.

Fifth, Golden West and Mr. Kastner contend their violations of the Packers and Stockyards Act were not "unfair practices" because the livestock sellers, Mr. Kroupa and Mr. Bamford, expressly agreed to payment for the livestock in question in a manner other than required by 7 U.S.C. § 228b(a) (Appeal Pet. ¶¶ 2(a)(viii)-(ix), (b)(ii)-(iii); 25-31).

Golden West and Mr. Kastner correctly point out that the prompt payment provisions in 7 U.S.C. § 228b(a) may be modified by the parties to the purchase and sale of livestock, as follows:

---

[7] See note 2.
[8] 7 C.F.R. §§ 1.136(c), .139, .141(a).

§ 228b. Prompt payment for purchase of livestock

. . . .

(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.

7 U.S.C. § 228b(b). However, Golden West and Mr. Kastner have not offered any evidence of their express written agreements with Messrs. Kroupa and Bamford. Instead, Golden West and Mr. Kastner failed to file a timely response to the Complaint and are deemed to have admitted that they failed to make prompt payment for the purchase of livestock. As a matter of law, a packer's delay in payment for livestock is an unfair practice:

§ 228b. Prompt payment for purchase of livestock

. . . .

(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. § 228b(c). Therefore, I reject Golden West and Mr. Kastner's contention that their failure to make full payment promptly for livestock, in willful violation of 7 U.S.C. § 228b(a), is not an "unfair practice," as that term is used in the Packers and Stockyards Act.

Sixth, Golden West and Mr. Kastner contend the civil penalty assessed by the Chief ALJ is not warranted in law and is without justification in fact (Appeal Pet. ¶¶ 2(c)(i)-(vi); 41-51).

The Chief ALJ assessed Golden West and Mr. Kastner, jointly and severally, a $10,500 civil penalty.[9] The maximum civil penalty that the Secretary of Agriculture may assess for each of Golden West and Mr. Kastner's violations of the Packers and Stockyards Act is $11,000.[10] The Chief ALJ could have assessed Golden West and Mr. Kastner a civil penalty of $33,000 each. Therefore, I reject Golden West and Mr. Kastner's contention that the $10,500 civil penalty assessed by the Chief ALJ is not warranted in law.

Moreover, the civil penalty assessed by the Chief ALJ is justified in fact. When determining the amount of the civil penalty, the Secretary of Agriculture must consider three factors: (1) the gravity of the offense; (2) the size of the business involved; and (3) the effect of the civil penalty on the person's ability to continue in business (7 U.S.C. § 193(b)).

---

[9] Chief ALJ's Default Decision and Order at 4.

[10] The Packers and Stockyards Act provides that the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 192(a) is $10,000 (7 U.S.C. § 193(b)). However, the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 192(a) has been modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), and various implementing regulations issued by the Secretary of Agriculture. When Golden West and Mr. Kastner violated the Packers and Stockyards Act, the maximum civil penalty for each violation of 7 U.S.C. § 192(a) was $11,000 (7 C.F.R. § 3.91(b)(6)(i)).

Golden West and Mr. Kastner, in two transactions, purchased 88 head of livestock for $31,235.75 from two livestock sellers and failed to pay, when due, the full purchase price of the livestock. These two transactions occurred within a week of each other; namely, on June 21, 2010, and June 28, 2010. Golden West and Mr. Kastner's payment to Mr. Bamford was 63 days late and their payment to Mr. Kroupa was 55 days late. After considering the number of violative transactions, the number of livestock sellers involved, the number of livestock involved, the total amount of the transactions, the period of time during which the violative transactions commenced, and the length of time that Golden West and Mr. Kastner delayed payment, I find Golden West and Mr. Kastner's violations of the Packers and Stockyards Act sufficiently grave to support the Chief ALJ's assessment of a $10,500 civil penalty against Golden West and Mr. Kastner.

The only indication of the size of Golden West and Mr. Kastner's business and the effect of assessment of a $10,500 civil penalty on Golden West and Mr. Kastner's ability to continue in business are assertions contained in Golden West and Mr. Kastner's Appeal Petition. Golden West and Mr. Kastner assert Golden West is a small business and Mr. Kastner is now unemployed (Appeal Pet. ¶ 50). Golden West and Mr. Kastner further assert they have exited the industry and will not be returning to the industry in the future (Appeal Pet. ¶ 2(c)(v)). Therefore, for the purpose of determining the amount of the civil penalty in this proceeding, I find the size of Golden West and Mr. Kastner's business is small and the amount of the civil penalty has no effect on Golden West and Mr. Kastner's ability to continue in business as Golden West and Mr. Kastner are no longer packers and will not become packers in the future.

After consideration of the gravity of Golden West and Mr. Kastner's violations of the Packers and Stockyards Act, the size of Golden West and Mr. Kastner's business, and the effect of assessment of a $10,500 civil penalty on Golden West and Mr. Kastner's ability to continue in business, I find the Chief ALJ's assessment of a $10,500 civil penalty against Golden West and Mr. Kastner, jointly and severally, justified in fact.

Seventh, Golden West and Mr. Kastner contend a finding of actual or likely harm to competition is a necessary prerequisite to the conclusion that a violation of the Packers and Stockyards Act has occurred, and the Chief ALJ failed to find that actual or likely harm to competition resulted from Golden West and Mr. Kastner's actions or inaction (Appeal Pet. ¶¶ 35-40).

The purposes of the Packers and Stockyards Act are varied; however, one of the primary purposes of the Packers and Stockyards Act is to assure proper handling and transmission of a livestock seller's funds, including prompt payment.[11] The requirement that a livestock purchaser make timely payment effectively prevents sellers from being forced to finance transactions.[12] Golden West and Mr. Kastner contravened the timely payment requirement and their violations directly thwart one of the primary purposes of the Packers and Stockyards Act.[13] I do not find that the Chief ALJ's failure to find actual or likely harm to competition resulting from Golden West and Mr. Kastner's actions or inaction, error.

Golden West and Mr. Kastner's Request for Oral Argument

Golden West and Mr. Kastner's request for oral argument, which the Judicial Officer may grant, refuse, or limit,[14] is refused because the issues are not complex and oral argument would serve no useful purpose.

For the foregoing reasons, the following Order is issued.

---

[11] *Bowman v. U.S. Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966).

[12] *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating timely payment in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction); *In re Robert Morales Cattle Co.*, __ Agric. Dec. ___, slip op. at 19 (Mar. 6, 2012) (same); *In re Richard L. Reece* (Order Denying Pet. to Reconsider), __ Agric. Dec. ___, slip op. at 7 (Nov. 4, 2011) (same); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1429 (1998) (same).

[13] *See Mahon v. Stowers*, 416 U.S. 100, 111 (1974) (per curiam) (dictum) (stating regulations requiring prompt payment support the policy to ensure that packers do not take unnecessary advantage of cattle sellers by holding funds for the packers' own purposes); *Bowman v. U.S. Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating one of the purposes of the Packers and Stockyards Act is to ensure prompt payment).

[14] 7 C.F.R. § 1.145(d).

ORDER

1. Golden West and Mr. Kastner, their agents and employees, directly or indirectly through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

a. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which the checks are drawn to pay the checks when presented; and

b. Failing to pay, when due, the full purchase price of livestock.

2. Golden West and Mr. Kastner are assessed, jointly and severally, a $10,500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

USDA—GIPSA
P.O. Box 790335
St. Louis, MO 63197-9000

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Order on Golden West and Mr. Kastner. Golden West and Mr. Kastner shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0206.

RIGHT TO JUDICIAL REVIEW

Golden West and Mr. Kastner have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Golden West and Mr. Kastner must seek judicial review within 60 days after entry of the Order in this Decision and Order.[15] The date of entry of the Order in this Decision and Order is December 18, 2012.

———

[15] 28 U.S.C. § 2344.

In re: VERNON BLACK.
Docket No. D-11-0139.
Decision and Order.
Filed December 31, 2012.

PS-D.

Charles Spicknall, Esq. for Complainant.
Respondent, pro se.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on February 18, 2011. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges, during the period May 26, 2009, through August 11, 2009, Vernon Black engaged in the business of a market agency buying cattle on a commission basis without maintaining an adequate bond or bond equivalent, in willful violation of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29.[1] On March 21, 2011, Mr. Black filed a letter in which he denied the material allegations of the Complaint.

---

[1] Compl. ¶¶ II-IV.

On June 25, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted a hearing in Riverton, Wyoming. Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Deputy Administrator. Mr. Black appeared pro se. The Deputy Administrator called two witnesses and Mr. Black testified on his own behalf.[2] The Deputy Administrator introduced 24 exhibits identified as CX 1-CX 24.

On August 23, 2012, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order: (1) concluding Mr. Black engaged in operations subject to the Packers and Stockyards Act without obtaining and maintaining an adequate bond or bond equivalent, in willful violation of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29; (2) ordering Mr. Black to cease and desist from violations of the Packers and Stockyards Act and the Regulations; and (3) assessing Mr. Black a $4,000 civil penalty.[3]

On October 3, 2012, Mr. Black filed Respondent's Appeal Petition to the Judicial Officer Against Decision and Order [hereinafter Appeal Petition]. On October 22, 2012, the Deputy Administrator filed Appeal Response. On October 26, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt, with minor changes, the Chief ALJ's Decision and Order as the final Decision and Order.

DECISION

Discussion

The term "market agency" is defined in the Packers and Stockyards Act, as follows:

---

[2] References to the transcript of the June 25, 2012, hearing are indicated as "Tr." with the page reference.

[3] Chief ALJ's Decision and Order at 5-6.

> **§ 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[.]

7 U.S.C. § 201(c). The Packers and Stockyards Act authorizes the Secretary of Agriculture to require market agencies to obtain bonds to secure their obligations under the Packers and Stockyards Act:

> **§ 204. Bonds and suspension of registrants**
>
> On and after July 12, 1943, the Secretary may require reasonable bonds from every market agency (as defined in this subchapter) . . . under such rules and regulations as he may prescribe, to secure the performance of their obligations[.]

7 U.S.C. § 204. Pursuant to this statutory authority, the Secretary of Agriculture has issued bonding regulations (9 C.F.R. §§ 201.10, .27-.34), which require market agencies to file and maintain bonds:

> **§ 201.29 Market agencies, packers and dealers required to file and maintain bonds.**
>
> (a) Every market agency . . . shall execute and maintain a reasonable bond on forms approved by the Administrator containing the appropriate condition clauses, as set forth in § 201.31 of the regulations, applicable to the activity or activities in which the person or persons propose to engage, to secure the performance of obligations incurred by such market agency . . . . No market agency . . . required to maintain a bond shall conduct his operations unless there is on file

> and in effect a bond complying with the regulations in this part.
> (b) Every market agency buying on a commission basis . . . shall file and maintain a bond. If a registrant operates as both a market agency buying on a commission basis and as a dealer, only one bond to cover both buying operations need be filed. Any person operating as a market agency selling on a commission basis and as a market agency buying on a commission basis or as a dealer shall file and maintain separate bonds to cover his selling and buying operations.

9 C.F.R. § 201.29(a)-(b).

The failure to obtain and maintain the required bond or bond equivalent is an unfair and deceptive practice that constitutes a violation of 7 U.S.C. § 213(a).[4] The evidence establishes that, at least during the period May 26, 2009, through August 11, 2009, Mr. Black bought cattle for a Nebraska-based feedlot operator, Meyers & Sons, and other individuals on a commission basis without obtaining and maintaining the required bond or bond equivalent (CX 2-CX 24). In addition, Mr. Black acknowledged during the hearing that he continues to buy cattle for Meyers & Sons (Tr. 38).

Findings of Fact

1. Mr. Black is an individual residing in the State of Wyoming.

2. Mr. Black was, at all times material to this proceeding:

   (a) Engaged in the business of buying cattle in commerce on a commission basis; and

---

[4] *United States v. Hulings*, 484 F. Supp. 562, 566-67 (D. Kan. 1980); *In re Mark V. Porter*, 47 Agric. Dec. 656, 667 (1988); *In re Robert F. Johnson*, 47 Agric. Dec. 436, 441-44 (1988); *In re Mart (Bill) White*, 23 Agric. Dec. 1104, 1106 (1964); *In re Floyd Bryan Moore*, 23 Agric. Dec. 312, 314 (1964); *In re Caesar Bros., Inc.*, 22 Agric. Dec. 1248, 1250 (1963); *In re Arden Vietmeier*, 22 Agric. Dec. 529, 531 (1963); *In re C.D. Goff*, 21 Agric. Dec. 1323, 1325 (1962); *In re Ray York*, 20 Agric. Dec. 1112, 1113-14 (1961); *In re Olion Ray Brown*, 20 Agric. Dec. 842, 843-44 (1961); *In re W.O. Steen*, 16 Agric. Dec. 125, 127 (1957); *In re Isom Martin*, 8 Agric. Dec. 1247, 1249 (1949).

(b) Not registered with the Secretary of Agriculture.

3. On July 10, 2006, Mr. Black was notified by certified mail that the Packers and Stockyards Program had information indicating he was operating as a market agency without being registered with the Secretary of Agriculture and operating as a market agency without having a bond or bond equivalent. The notice also informed Mr. Black that he was required to register with the Secretary of Agriculture and to secure a bond or bond equivalent. (CX 1.)

4. Notwithstanding the notice described in Finding of Fact number 3, Mr. Black continued to engage in the business of buying cattle in commerce on a commission basis without registering with the Secretary of Agriculture and without obtaining and maintaining an adequate bond. During the period May 26, 2009, through August 11, 2009, Mr. Black bought approximately 358 head of cattle from Riverton Livestock Auction in Riverton, Wyoming, for Meyers & Sons and other individuals and was paid commissions totaling $1,221.11 (CX 2-CX 22; Tr. 16-18).

5. After the Hearing Clerk served Mr. Black with the Complaint, Mr. Black continued to buy cattle in commerce on a commission basis without registering with the Secretary of Agriculture and without obtaining and maintaining an adequate bond (CX 23-CX 24; Tr. 19-24, 38).

Conclusions of Law

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

2. Mr. Black, at all times material to this proceeding, bought cattle in commerce on a commission basis and was a "market agency" as that term is defined in the Packers and Stockyards Act.

3. Mr. Black willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29 by engaging in operations subject to the Packers and Stockyards Act without obtaining and maintaining an adequate bond or bond equivalent.

Mr. Black's Appeal Petition

Mr. Black raises six issues on appeal. First, Mr. Black asserts the Deputy Administrator violated the Privacy Act of 1974, as amended (5 U.S.C. § 552a) [hereinafter the Privacy Act], when he disclosed records introduced as exhibits in this proceeding without a prior written request by, or the prior written consent of, Mr. Black (Appeal Pet. ¶¶ 1, 9(2)[5]).

This proceeding is a disciplinary administrative proceeding to determine whether Mr. Black has violated the Packers and Stockyards Act and the Regulations; it is not a proceeding to determine whether the Deputy Administrator violated the Privacy Act. Moreover, I do not have jurisdiction to entertain Mr. Black's Privacy Act claims.[6] Therefore, I decline to address Mr. Black's assertion that the Deputy Administrator violated the Privacy Act.

Second, Mr. Black contends the Chief ALJ's finding that the Packers and Stockyards Program notified Mr. Black of his obligations to register with the Secretary of Agriculture and to secure a bond or bond equivalent, is error (Appeal Pet. ¶ 2).

The Chief ALJ found that, on July 10, 2006, Mr. Black was notified by certified mail that he must register with the Secretary of Agriculture and secure a bond or bond equivalent (Chief ALJ's Decision and Order at 4). The record establishes that the Packers and Stockyards Program sent the letter in question to Mr. Black's proper address and Mr. Black's brother, Jim Black, received the letter on July 10, 2006 (CX 1; Tr. 13-14, 31-32). I infer Mr. Black was notified of the registration and bonding requirements based upon the Packers and Stockyards Program's having directed the letter to the proper address and the receipt of the letter at Mr. Black's address by Mr. Black's brother. Therefore, I reject Mr. Black's contention that the Chief ALJ's finding that Mr. Black was notified of the requirement that he register with the Secretary of

---

[5] Two paragraphs in Mr. Black's Appeal Petition are identified as "9." I identify the first paragraph "9" as "9(1)" and the second paragraph "9" as "9(2)."

[6] See 7 U.S.C. §§ 450c-450g which authorizes the Secretary of Agriculture to delegate regulatory functions to the Judicial Officer and 7 C.F.R. § 2.35 which lists the regulatory functions which the Secretary of Agriculture has delegated to the Judicial Officer.

Agriculture and the requirement that he secure a bond or bond equivalent, is error.

Moreover, even if I were to find that Mr. Black was not provided actual notice of the Packers and Stockyards Act bonding requirements, that finding would not change the disposition of this proceeding. Neither the Packers and Stockyards Act nor the Regulations require the Packers and Stockyards Program to provide a market agency with actual notice of the bonding requirements prior to the institution of a disciplinary administrative proceeding against that market agency for a violation of the bonding requirements in 9 C.F.R. pt. 201.

Third, Mr. Black contends the Chief ALJ's finding that Mr. Black operated as a market agency in the transactions at issue, is error (Appeal Pet. ¶¶ 3-5, 9(2)).

A market agency acts as an agent for another person, the principal, for the purpose of buying or selling livestock.[7] Mr. Black testified he received orders to buy cattle for Meyers & Sons and other individuals, by telephone. When he found cattle of the type and at the price requested by his principals, Mr. Black bought the cattle for his principals. After these transactions, Riverton Livestock Auction issued checks to Mr. Black. (Tr. 35-38; CX 2-CX 22.) Mr. Black referred to the checks issued to him by Riverton Livestock Auction as "gratuity check[s]" (Tr. 37); however, the record establishes that the checks payable to Mr. Black were issued in payment for Mr. Black's services in connection with the purchase of cattle for Mr. Black's principals. Thus, I conclude Mr. Black was paid commissions and Mr. Black bought the cattle in question on a commission basis.[8] As Mr. Black was acting as a

---

[7] *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 216 (1980) (stating a person who buys cattle for others is the agent of the purchasers), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980).

[8] *Keszenheimer v. Reliance Standard Life Ins. Co.*, 402 F.3d 504, 509 (5th Cir. 2005) (stating the word "commission" means a fee paid to an agent or employee for transacting a piece of business or performing a service); *Estes v. Meridian One Corporation*, 77 F. Supp.2d 722, 726 n.7 (E.D. Va. 1999) (stating the common definition of the word "commission" is a fee or percentage allowed to a salesman or agent for his services), aff'd, 6 F. App'x 142 (4th Cir. 2001); In re Sterling Colorado Beef Co., 39 Agric. Dec. 184, 216 (1980) (stating the word "commission" means a fee paid to an agent or

commission buyer, he was a "market agency" as that term is defined in 7 U.S.C. § 201(c).[9] Therefore, I reject Mr. Black's contention that the Chief ALJ's finding that Mr. Black operated as a market agency in the transactions at issue, is error.

Fourth, Mr. Black contends he has no obligation to obtain and maintain a bond because the auction market at which he bought cattle, Riverton Livestock Auction, is bonded and Mr. Black's principal, Myers & Sons, pays Riverton Livestock Auction directly (Appeal Pet. ¶ 6).

The Regulations require every market agency to execute and maintain a reasonable bond and prohibit market agencies from conducting operations subject to the Packers and Stockyards Act unless there is on file and in effect a bond complying with 9 C.F.R. pt. 201.[10] I find no exception from the bonding requirements for a market agency that buys cattle at a livestock auction company that is bonded and no exception for a market agency whose principal pays the livestock auction company directly. Therefore, I reject Mr. Black's contention that he has no obligation to obtain and maintain a bond because Riverton Livestock Auction is bonded and Myers & Sons pays Riverton Livestock Auction directly.

Fifth, Mr. Black contends he has no obligation to obtain and maintain a bond because he does not take title to or possession of the cattle he buys for Meyers & Sons and others at Riverton Livestock Auction (Appeal Pet. ¶¶ 7-9(1)).

Mr. Black's failure to take title to or possession of the cattle which he buys for others at Riverton Livestock Auction is not relevant to Mr. Black's obligation to obtain and maintain a bond. Mr. Black is required to obtain and maintain a bond because he operates as a "market agency" which term is defined as any person engaged in the business of

---

employee for transacting a piece of business or performing a service), appeal dismissed, No. 80-1293 (10th Cir. Aug. 11, 1980).

[9] *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 216 (1980) (stating, under the Packers and Stockyards Act, a person who is engaged in buying or selling livestock for others is either a market agency or a dealer - a market agency if he charges a commission; a dealer if he does not), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980).

[10] 9 C.F.R. § 201.29(a).

(1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services.[11] Nothing in the definition of the term "market agency" indicates that a person must take title to or possession of the livestock bought or sold on a commission basis in order to meet the definition of market agency.[12] Therefore, I reject Mr. Black's contention that he has no obligation to obtain and maintain a bond because he does not take title to or possession of the cattle he buys for Meyers & Sons and others at Riverton Livestock Auction.

Sixth, Mr. Black contends the Chief ALJ's order that Mr. Black cease and desist from violations of the Packers and Stockyards Act and the Regulations was premature (Appeal Pet. ¶ 10).

The Secretary of Agriculture is authorized to order any market agency to cease and desist from violations of 7 U.S.C. § 213(a), as follows:

> **§ 213. Prevention of unfair, discriminatory, or deceptive practices**
>
> . . . .
> (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.

7 U.S.C. § 213(b). The Hearing Clerk served Mr. Black with notice of his alleged violations of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29 on

---

[11] 7 U.S.C. § 201(c).

[12] I note that, generally, a market agency does not take title to livestock, but merely facilitates transactions between buyer and seller. *See Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 801-02 (8th Cir. 2010) (discussing the issue of title in the context of market agency transactions).

March 2, 2011,[13] and the Chief ALJ conducted a hearing on June 25, 2012.[14] After the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order on August 23, 2012, which included the cease and desist order which Mr. Black contends was premature.[15] As the Chief ALJ issued the cease and desist order subsequent to notice and hearing in this proceeding, I reject Mr. Black's contention that the Chief ALJ prematurely issued the cease and desist order.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Black, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required without obtaining, filing, and maintaining an adequate bond as required by the Packers and Stockyards Act and the Regulations.

Paragraph 1 of this Order shall become effective on the day after service of this Decision and Order on Mr. Black.

2. Mr. Black is prohibited from and shall cease and desist from engaging in any capacity for which bonding is required under the Packers and Stockyards Act without first becoming properly registered with the Secretary of Agriculture.

Paragraph 2 of this Order shall become effective on the day after service of this Decision and Order on Mr. Black.

3. Mr. Black is assessed a $4,000 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:

---

[13] United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9851 5888.
[14] Tr. 1-68.
[15] Chief ALJ's Decision and Order at 5-6.

USDA-GIPSA
P.O. Box 790335
St. Louis, MO 63179-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Order on Mr. Black. Mr. Black shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-11-0139.

RIGHT TO JUDICIAL REVIEW

Mr. Black has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. Black must seek judicial review within 60 days after entry of the Order in this Decision and Order.[16] The date of entry of the Order in this Decision and Order is December 31, 2012.

———

In re: GEOFFREY S. MARTIN.
Docket No. 12-0146.
Decision and Order.
Filed August 7, 2012.

PS-D.

Charles E. Spicknall, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

I. Introduction

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture ("USDA";

[16] 28 U.S.C. § 2344.

"Complainant") against Geoffrey S. Martin ("Respondent"), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. ("the Act").

II. Issues

1. Whether Respondent failed to obtain a bond in willful violation of the Act; and

2. If Respondent willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

III. Findings of Fact and Conclusions of Law

A. Procedural History

On December 22, 2011, Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk"). On January 17, 2012, Respondent filed an Answer with the Hearing Clerk, acting pro se. References to the Answer in this Decision and Order shall be denoted as "RX-1". Attempts to arrange a pre-hearing telephone conference with Complainant's counsel and Respondent were unsuccessful and by Order issued March 8, 2012, I directed Respondent to provide a valid telephone number and other valid means of contact to my staff. When Respondent had not complied with my Order, on April 2, 2012, I issued an Order setting deadlines for the parties' submissions in advance of setting a hearing date.

On April 26, 2012, Complainant timely filed pre-hearing submissions in accordance with my Order. Respondent did not file any pre-hearing submissions, and on July 5, 2012, I issued an Order to Respondent to show cause why a Decision and Order on the Record should not be entered. Respondent did not respond.

In response to my Order, on July 24, 2012, Complainant filed Proposed Findings of Fact, Conclusions of Law, Order and Brief ("Proposed Findings"), as well as evidence hereby identified as CX-1 through CX-23. On that date Complainant also filed Declarations by

Susan S. McBryde and Timothy Hansen, which are hereby identified respectively as CX-24 and CX-25. All of Complainant's evidence is hereby admitted to the record. The matter is ripe for adjudication and the record is closed.

1. Statutory and Regulatory Authority

7 C.F.R. § 1.1.39 provides, in pertinent part:

> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day 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. § 1.1.39.

Livestock dealers, market agencies and packers operating subject to the Act are required to obtain reasonable bonds to secure their obligations to livestock sellers. 7 U.S.C. § 704. The Secretary has issued regulations requiring parties subject to the bond requirements to file bonds or bond equivalents with the Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration ("GIPSA"), in an amount set forth by 9 C.F.R. § 201.30. See, 9 C.F.R. § 201.29. The Act allows for the assessment of civil money penalties in an amount of up to $11,000 per violation for violations of the Act. 7 U.S.C. § 213(b).

B. Summary of the Facts

In his Answer filed on January 17, 2012, Respondent admitted that he has co-owned and operated a licensed and bonded livestock auction company in Louisiana since the year 2000. He asserted that he has conducted business in various states and has paid his bills and accounts

in full at all times. Respondent asserted that of the nineteen (19) violations charged in Complainant's complaint, eleven (11) represent purchases made for his family farm. He noted that he periodically purchases cattle for his uncle Stacey Martin and his close friend Tom Lindsey. Respondent denied purchasing cattle for R&W Farms, LLC at Miller Livestock Inc., located in Dequincy, Louisiana. Respondent attributed that allegation to a mistake that should have noted his work hauling for R& W, LLC. Respondent purchased cattle for San Angelo Packing Co. under two invoices. He stopped purchasing cattle for that entity when he learned that his bond did not cover such purchases. RX-1.

Respondent did not register with GIPSA regarding his business buying livestock on commission, and did not obtain a bond or bond equivalent related to that business. CX-24. By notice of default dated October 4, 2010, delivered on November 5, 2010, GIPSA advised Respondent that he could not continue to buy or sell cattle subject to the Act without registering with GIPSA and obtaining an appropriate bond. CX-1.

Resident Agent for GIPSA Susan McBryde completed an investigation into Respondent's business practices involving the Act in May, 2011. CX-24. Her investigation included a December 10, 2010 interview with Peggy Perkins, co-owner and office manager at the Kinder Livestock Auction in Kinder, Louisiana. CX-24. According to Ms. Perkins, Respondent continued to purchase livestock on a commission basis at the Kinder Livestock Auction after November 4, 2010, the date he received GIPSA's notice of default. CX-2. Agent McBryde also interviewed Jim Miller, an owner of Miller Livestock Markets, Inc. in DeQuincy, Louisiana, who confirmed that Respondent continued to purchase livestock on a commission basis at his auction after November 5, 2010. CX-3. Records reflecting livestock purchases made by Respondent during the period from November 10, 2010 through December 18, 2010, are in evidence at CX-5 through CX-23, summarized at CX-4.

As of the date of Ms. McBryde's declaration made on July 10, 2012, Respondent had not notified GIPSA the he had obtained an appropriate bond or bond equivalent. CX-24.

Timothy Hansen is a program analyst for GIPSA who is familiar with investigations conducted by the agency into violations of the Act. CX-25. As part of his duties, Mr. Hansen makes recommendations regarding sanctions in circumstances where violations are disclosed. CX-25, ¶ 1. He explained that civil penalties are intended to further the remedial purposes of the Act by deterring Respondent and others from acting in violation of the Act, against the interests of livestock sellers. CX-25, ¶ 6.

Mr. Hansen reviewed the investigation into Respondent's alleged violations and concluded that Mr. Martin willfully violated the Act and regulations by operating as an unregistered and unbonded market agent who bought livestock on commission in Louisiana. CX-25, ¶¶ 2, 3. Mr. Hansen recommended that Respondent be ordered to cease and desist from operating without a bond or bond equivalent and be assessed a civil penalty of $4,000.00. CX-25, ¶ 3. Civil penalty is warranted because Respondent did not cooperate wih GIPSA's investigation and did not obtain a bond or bond equivalent despite being notified of the Act's requirements. CX-25, ¶ 4.

C. Discussion

Respondent failed to respond to any attempt to ascertain his availability for a hearing. Agent McBryde also noted that Mr. Martin did not cooperate with her during her investigation, as he failed to return her many attempts to contact him. See, CX-24, ¶ 9. Respondent's answer did not specifically deny all of the allegations of the complaint, and indeed, Mr. Martin admitted to purchasing livestock without requisite bonds. See, RX-1. Respondent failed to cooperate with the investigation. Other than filing a letter in response to Complainant's complaint, Mr. Martin also failed to file any defensive evidence or argument. Accordingly, I find it appropriate to issue this Decision and Order on the record, pursuant to 7 C.F.R. § 1.139.

Respondent did not specifically address all of the allegations in the Complaint, but rather asserted that he bought cattle for his uncle and a friend. Such purchases do not exempt Respondent from complying with the requirements of the Act and regulations to purchase appropriate

bonds or bond equivalents. The requirement to obtain a bond or equivalent surety is to protect livestock sellers, not buyers. *In re: Edward Tiemann*, 47 Agric. Dec. 1573, 1585 (U.S.D.A. 1988). As of the date of the notice of default issued by GIPSA in October, 2010, and received by Mr. Martin on November 5, 2010, Respondent had actual notice that he needed to register with the agency and obtain required surety to continue operating in the livestock business. Respondent's failure to come into compliance has been corroborated by owners of auction markets where Respondent bought livestock on commission without a bond after receiving the notice of non-compliance.

Although Respondent alleged that certain accounting entries documented work he did as a hauler, he has provided no independent records to corroborate that charge, such as invoices or payments. I accord substantial weight to the findings of Agent McBryde, who regularly conducts investigations involving compliance with the Act. I conclude that the information she reviewed showed nothing to distinguish the challenged transactions from livestock purchases. Her opinion is corroborated by Analyst Hansen, who reviewed the file and similarly found nothing to suggest that the transactions involving R& W represented anything other than livestock sales.

Respondent's failure to obtain a bond or other financial instrument to act as surety while continuing to buy livestock on commission constitutes an unfair and deceptive practice that violates 7 U.S.C. § 312(a). *See In re: Robert F. John*, 47 Agric. Dec. 436, 441 (U.S.D.A. 1998). Further, Respondent has failed to register with the agency. GIPSA's recommended sanctions are appropriate for Respondent's willful violations of the Act. *See In re: Wilkes County Stock Yard, Inc.,* 48 Agric. Dec. 1015, 1025 (U.S.DA. 1989). There is little indication that Respondent has sought to achieve compliance with the Act and regulations, despite a letter from GIPSA advising him of his transgressions.

D. Findings of Fact

1. Respondent Geoffrey Martin is an individual whose business address is his home address in the State of Louisiana.

2. At all times material herein, Respondent was engaged in the business of buying livestock in commerce on a commission basis, and was not registered with GIPSA.

3. On November 4, 2010, Respondent received written notification from GIPSA advising him that the agency had concluded that he was operating under the Act without being registered and without having a bond.

4. In the notice letter received on November 4, 2010, GIPSA advised Respondent of his obligation to register with the agency and to secure a bond or bond equivalent.

5. Respondent continued to engage in the business of buying livestock in commerce on a commission basis without registering with GIPSA and without obtaining an adequate bond or equivalent, during the period from November 13, 2010 through December 8, 2012, as enumerated in Appendix 1, attached hereto.

E. Conclusions of Law

1. Respondent Geoffrey Martin willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.29, 201.30, by engaging in operations subject to the Act without maintaining an adequate bond or bond equivalent.

2. Respondent Geoffrey Martin operated in violation of the Act and its implementing regulations by failing to register with the Secretary of Agriculture, pursuant to 9 C.F.R. § 201.10.

3. Sanctions are appropriate to deter Respondent and others from willfully failing to register.

ORDER

Respondent Geoffrey S. Martin, 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 engaging in business in any capacity for which bonding is required

without filing and maintaining an adequate bond or its equivalent as required by the Act and prevailing regulations.

Further Respondent is prohibited from registering to engage in business subject to the Act for a period of thirty (30) days from the date of this Order. Pursuant to 7 U.S.C. § 203, Respondent is prohibited from engaging in business subject to the Act without being registered with GIPSA.

After expiration of this thirty (30) day period, Respondent may submit an application for registration to GIPSA along with the required bond or bond equivalent.

Pursuant to 7 U.S.C. § 213(b), Respondent is assessed a civil penalty in the amount of four thousand dollars ($4,000.00). Respondent's payment shall be made out to the "U.S. Department of Agriculture" and sent to USDA-GIPSA, P.O. Box 790335, St. Louis, Missouri 63179-0335. Respondent shall include on the payment instrument a reference to this case, Docket No. 12-0146.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

———

In re: CLAUSEN MEAT PACKING, INC., MICHELLE TSAO, AND KENNETH KHOO.
Docket No. 12-0213.[1]
Decision and Order.
Filed August 9, 2012.

PS-D.

Ciarra Toomey, Esq. for Complainant.
Respondents, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

I. Introduction

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture ("USDA"; "Complainant") against Clausen Meat Packing Inc., Michelle Tsao, and Kenneth Khoo ("Respondents"), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. ("the Act"). The Complaint alleges that Respondents failed to comply with the Act and its implementing regulations, administered by the Packers and Stockyards Program, Grain Inspection Service, Packers and Stockyards Administration ("GIPSA").

II. Issues

1. Whether a hearing is necessary in this matter;

2. Whether Respondents failed to timely pay sellers for the purchase of livestock in willful violation of the Act; and

3. If Respondents willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

---

[1] Associated cases assigned docket numbers for accounting purposes, 12-0214 and 12-0215, are included in this disposition.

III. Findings of Fact and Conclusions of Law

A. Procedural History

On January 27, 2012 Complainant filed a complaint against Respondents with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk"). On February 23, 2012, Respondents filed an Answer with the Hearing Clerk, acting *pro se*. References to the Answer in this Decision and Order shall be denoted as "RX-1". By Order issued March 22, 2012, I set deadlines for the parties' submissions in advance of setting a hearing date.

On May 9, 2012, Complainant timely filed pre-hearing submissions in accordance with my Order. Respondents did not file pre-hearing submissions, and on July 5, 2012, I issued an Order to Respondents to show cause why a Decision and Order on the Record should not be entered. On July 23, 2012, Respondents filed a response to my Order, hereby identified as RX-2. On July 24, 2012, Complainant filed Proposed Findings of Fact, Conclusions of Law, Order and Brief ("Proposed Findings"), as well as evidence hereby identified as CX-1 through CX-16. On that date Complainant also filed Declarations by Amy Blechinger and James Morcaldi, which are hereby identified respectively as CX-17 and CX-18. All of Complainant's and Respondents' evidence is hereby admitted to the record. The matter is ripe for adjudication and the record is closed.

1. *Statutory and Regulatory Authority*

7 C.F.R. § 1.1.39 provides, in pertinent part:

> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day 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. § 1.1.39.

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of possession of livestock by paying by check to the seller or authorized representative at the point where the livestock is transferred or by paying through a wire transfer. *Id.* The deadline for making payment in full by the next business day can only be circumvented by express written agreement between the buyer and the seller. *Id.* Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a).

The Act allows for the assessment of civil money penalties in an amount of up to $11,000.00 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. *See S.S. Farms Linn County*, 50 Agric. Dec. 476 (U.S.D.A. 1991).

B. Summary of the Facts

On or about July 29, 2010, GIPSA sent written notice to Respondents that it had come to GIPSA's attention that Respondents had failed to timely mail checks that were meant as payment for livestock purchases in violation of the Act. CX-5. The letter was acknowledged as received by Respondents on August 5, 2010. Thereafter, GIPSA's Resident Agent in California, James Morcaldi, conducted a follow up investigation and determined that Respondents had failed to timely pay for transactions made during the period from September 15, 2010 through October 19, 2010. CX-17, ¶ 2.

Agent Morcaldi documented his findings with copies of invoices, checks, and mailing envelopes involving nine separate transactions during this period. CX-18, ¶ 7; CX-7 through CX-16. Agent Morcaldi concluded that Respondents had dated checks for purchases on the dates of the transactions, affixed postage through a postal meter machine that marked the envelopes with the dates that payments were due, and deposited the envelopes in the mail for delivery as many as eighteen days late. CX-18, ¶8. This information formed the underpinnings for USDA's complaint against Respondents.

In the Answer that they filed, Respondents admitted that they had made late payments in violation of the Act. CX-1. This admission was reiterated in their response to my Order to show cause. CX-2. In justification for their actions, Respondents asserted that their suppliers did not complain, and they were not the only company making late payments. Further, Respondents noted that their customers have never been faced with non-payment due to non-sufficient funds. They observed that economic circumstances have produced an unfavorable situation, in which they receive untimely payments from creditors, or have accounts that result in uncollectible judgments because of business bankruptcies or dissolutions. Respondents further assert that they have agreements with suppliers to deduct from the amount due specific amounts for animals that have died or were damaged. CX-1. Respondents repeated these assertions in their response to my Order to show cause. CX-2.

Amy Blechinger is a Program Analyst for GIPSA whose duties include reviewing investigations and making recommendations regarding the propriety of sanctions. CX-17, ¶¶ 1. Ms. Blechinger reviewed Respondents' file and concluded that they had willfully violated the Act by purchasing livestock and failing to pay the full amount within the time period required by the Act. CX-17, ¶ 3. In her opinion, Respondents acted willfully by failing to make payments after being given notice by GIPSA that such failure represented violation of the Act. CX-17, ¶ 4.

Analyst Blechinger concluded that a civil penalty of $4,000.00 should be assessed against the Respondents, jointly and severally. CX-17, ¶¶ 3, 4. Ms. Blechinger noted that the Act allowed a greater amount of penalty, but she considered Respondents' reports that their liabilities

exceeded assets for the period from July 1, 2010 through June 30, 2011, and recommended a reduction in the penalty. CX-17, ¶ 5.

C. Discussion

The record is undisputed that Respondents failed to make timely payments within the mandates of the Act. Respondents have essentially admitted that they failed to make timely payments. Respondents allude to agreements with suppliers to make other kind of payment arrangements. However, despite at least three opportunities to produce such evidence, none is of record. Respondents did not provide any specific information about that defense in their Answer to the Complaint; Respondents failed to file a list of evidence or witnesses in their defense; and Respondents failed to provide specific information or evidence in response to the Order to show cause that I issued.

Further, Respondents did not comply with the payment provisions of the Act despite being given notice of their violations by GIPSA. The Secretary has found that "…once a licensee has been adequately warned, if he subsequently violated the Act the agency may proceed to suspend his license without any further warning, notice or opportunity to demonstrate informally that he did not violate the Act". *In re: Jeff Palmer*, 50 Agric. Dec. 1762, 1782 (U.S.D.A. 1991). Accordingly, I find it appropriate to issue this Decision and Order on the record, pursuant to 7 C.F.R. § 1.139.

I find that Respondents have willfully violated the Act by failing to make payments when due. The Secretary has concluded that the failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. *In re: Great American Veal, Inc.*, 48 Agric. Dec. 183, 202-03 (U.S.D.A. 1989). Respondents withheld payments in nine transactions conducted after receiving a notice from GIPSA advising them that their payment practices violated the Act. I conclude that their continued practice of making late payments despite notice constitutes substantial evidence of willfulness.

I credit Respondents' explanation that their cash flow has suffered during the current economy, and I even sympathize with their position. Nevertheless, Respondents' financial problems are not a meritorious defense to their failure to make payments. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. *Id.* at 211. Moreover, the Secretary has concluded that Respondents who admit to the allegations in a complaint are in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondents. *In re: Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654, 656 (U.S.D.A. 1994). I note that Complainant considered Respondents' liabilities and assets when Ms. Blechinger recommended a reduced monetary sanction. Complainant has not proposed suspending or otherwise hampering Respondents' ability to engage in the business of buying and selling livestock, despite its authority to do so. *See In re: Jeff Palmer*, 50 Agric. Dec. at 1582.

Respondents' actions also support the imposition of an Order directing them to cease and desist their practice of late payment. GIPSA's notice to Respondents failed to Act as a suitable deterrence from their practice of making late payments. I agree with GIPSA's assessment of penalties, and find that both a cease and desist Order and monetary penalties should persuade Respondents to comply with the prompt payment requirements of the Act in the future.

D. Findings of Fact

1. Respondent Clausen Meat Packing, Inc. ("Clausen") is a corporation organized and existing under the laws of the State of California, and its registered agent for service of process is Michelle Tsao.

2. At all times material herein, Clausen was engaged in the business of buying livestock in commerce for the purpose of slaughter, and was a packer within the meaning of the Act.

3. Michelle Tsao and Kenneth Khoo are individuals whose current mailing address is in the State of California. At all times material herein, Michelle Tsao was the president, treasurer, registered agent, and owner of 50% of the stock of Clausen Meat Packing Inc., and was, together

with Kenneth Khoo, responsible for the direction, management and control of Clausen.

4. At all times material herein, Kenneth Khoo was the vice-president, secretary, and owner of 50% of the stock of Clausen Meat Packing Inc., and was, together with Michelle Tsao, responsible for the direction, management and control of Clausen.

5. On July 29, 2010, GIPSA sent Respondents written notification advising them that the agency had concluded that they were not mailing checks for livestock purchases in a timely manner, which correspondence was received by Respondents on August 5, 2010.

6. Respondents purchased livestock and failed to pay the full amount of the purchase price within the time period required by the Act on nine occasions between September 15, 2010 and October 19, 2010, as documented at Attachment "A" hereto.

7. Respondents failed to make timely payments in nine transactions after being notified by GIPSA that this practice constituted a violation of the Act.

E. Conclusions of Law

Respondents willfully violated 7 U.S.C. § 192(a) and § 228b of the Act by failing to pay the full amount of the purchase price for livestock within the time period required by the Act.

Sanctions are appropriate to deter Respondents and others from willfully failing to make prompt payments, pursuant to 7 U.S.C. §193(b).

ORDER

Respondents Clausen Meat Packing, Inc., Michelle Tsao and Kenneth Khoo, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

Pursuant to 7 U.S.C. § 193(b), Respondents are assessed, jointly and severally, a civil penalty in the amount of four thousand dollars ($4,000.00). Respondents' payment shall be made out to the "U.S. Department of Agriculture" and sent to USDA-GIPSA, P.O. Box 790335, St. Louis, Missouri 63179-0335. Respondents shall include on the payment instrument a reference to this case, Docket No. 12-0213.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

———

In re: VERNON LEROY BLACK.
Docket No. 11-0139.
Decision and Order.
Filed August 23, 2012.

PS-D.

Charles E. Spicknall, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*) (Act), instituted by a Complaint filed on February 18, 2011 by Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture. The Complaint alleges that

Vernon Leroy Black (Respondent) willfully violated section 312(a) of the Act, 7 U.S.C. § 213(a) and sections 201.29 of the Regulations, 9 C.F.R. § 201.29 by engaging in operations subject to the Act without maintaining a bond or bond equivalent for the protection of livestock sellers.

Copies of the Complaint were served upon the Respondents by certified mail on March 2, 2011. On March 21, 2011, a copy of a letter from Respondent to Charles E. Spicknall was filed as the Respondent's Answer. In the letter, Respondent denied violating the Act, denied receiving prior correspondence from GIPSA, and denied that he was operating as a market agency subject to the Act.

An Exchange Order was entered on May 23, 2011 and following a teleconference with the parties on February 29, 2012, the matter was initially set for hearing in Riverton, Wyoming on May 14, 2011. Due to a conflict in my schedule and the availability of court space in Riverton, Wyoming, the matter was postponed and rescheduled for June 25, 2012.

At the hearing on June 25, 2012, the Government called two witnesses and introduced twenty-four exhibits (CX-1 through 24).[1] The Respondent, appearing without counsel, also testified. Both parties were invited to and have submitted post hearing briefs and the matter is now ready for disposition.[2]

Discussion

Nearly 90 years ago, Congress inserted a provision into Act through the 1924 annual appropriation bill for USDA which authorized the Secretary to require livestock dealers, market agencies, and packers to obtain reasonable bonds to secure their obligations under the Act. The bonding provision was made permanent in 1943 and codified at 7 U.S.C. §204 and the implementing regulations are contained in Part 201 of 9 C.F.R.

---

[1] References to the transcript of the proceedings will be indicated as Tr. and the page number.

[2] Respondent filed a pleading titled Respondent's Reply as to Complainant's Proposed Findings of Fact, Conclusions of Law and Order and Brief.

9 C.F.R. § 201.29 provides in pertinent part:

§ 201.29 Market agencies, packers and dealers required to file and maintain bonds.

> (a) Every market agency, packer, and dealer…..shall execute and maintain a reasonable bond on forms approved by the Administrator….applicable to the activity or activities in which the person or persons propose to engage, to secure the performance of obligations incurred by such market agency, packer, or dealer. No market agency, packer, or dealer required to maintain a bond shall conduct his operations unless there is on file and in effect a bond complying with the regulations in this part.
>
> (b) Every market agency buying on a commission basis and every dealer buying for his own account or for the accounts of others shall file and maintain a bond. If a registrant operates both as a market agency buying on a commission basis and as a dealer, only one bond to cover both buying operations need be filed…..
>
> The term "market agency" is defined at 7 U.S.C. §201(c) as:
>
> (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…..

While the appearance of the word "commission" on an invoice does not conclusively establish that a cattle dealer was selling on a commission basis so as to render him a market agency, *Ferguson v. U.S. Dep't of Agric*., 911 F. 2d 1273 (8th Cir. 1990), the provision defining "marketing agency includes individuals who buy and sell livestock for customers for which service they charge commission. *Kelley v. United States*, 202 F. 2d 838 (10th Cir. 1953).

Failing to obtain a bond or other acceptable financial instrument is an unfair and deceptive practice that violates section 312(a) of the Act, 7 U.S.C. § 312(a). *See In re Robert F. Johnson*, 47 Agric. Dec. 436, 441 (U.S.D.A. 1988); *In re Mark V. Porter,* 47 Agric. Dec. 656, 667 (1988); *In re Klemme Cattle Co., Inc.*, 45 Agric. Dec. 1108, 1110 (U.S.D.A. 1986).

In addition to the evidence introduced at the hearing reflecting that at least since May 26, 2009 Respondent has been purchasing cattle on commission for a Nebraska based feedlot operator, Myers & Sons, and other individuals without being registered with the Secretary or having the required bond or bond equivalent (CX-2 through 24), Respondent acknowledged that he continues to buy cattle for Myers & Sons. Tr. 38.

In Respondent's Reply as to Complainant's Proposed Findings of Fact, Conclusions of Law and Order and Brief, despite his admissions at the hearing (Tr. 38), he denies being a market agency as the term is defined in the Act, repeats his earlier belief that he has not violated the Act and asserts that the exhibits introduced at the hearing should not be allowed as evidence as he was not provided a copy of the transcript. His objection to the exhibits while novel, is untimely and without merit as the transcript could have been obtained by him by paying for the copy.

On the basis of the entire record, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent Vernon Leroy Black is an individual residing in the State of Wyoming.

2. Respondent is, and at all times material herein, was:

   a. Engaged in the business of buying livestock in commerce on a commission basis; and

   b. Not registered with the Secretary of Agriculture.

3. On July 10, 2006, Respondent was notified by certified mail that GIPSA had information indicating that he was operating as a market agency without being registered with the Secretary or having a bond or bond equivalent and notified him of his obligation to register and to secure a bond or bond equivalent. CX-1.

4. Notwithstanding the above notice, Respondent continued to engage in the business of buying livestock in commerce on a commission basis without registering or maintaining an adequate bond as required by the Act. Between May 26, 2009 and August 11, 2009, Respondent purchased some 358 head of cattle from Riverton Livestock in Riverton, Wyoming and was paid commissions totaling $1,221.11. CX-2 through CX-22. Tr. 16-18.

5. After being served with the Complaint, Respondent continued to purchase cattle on commission. CX-23-24; Tr. 19-22, 38.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent at all times material herein has bought livestock in commerce on a commission basis and is a market agency within the definition of the Act.

3. Respondent Vernon Leroy willfully violated section 312(a) of the Act, 7 U.S.C. § 213(a) and sections 201.29 of the Regulations, 9 C.F.R. § 201.29 by engaging in operations subject to the Act without obtaining and maintaining an adequate bond or bond equivalent.

ORDER

1. Respondent Vernon Leroy Black, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from engaging in business in any capacity for which bonding is required without obtaining, filing or maintaining an adequate bond as required by the Act and its Regulations.

2. Respondent is prohibited from and shall cease and desist from engaging in any capacity for which bonding is required under the Act without first becoming properly registered with the Secretary.

3. Respondent is assessed a civil penalty in the amount of Four Thousand Dollars ($4,000.00).

Payment shall be made to: US Department of Agriculture
USDA-GIPSA
P.O. Box 790335
St. Louis, Missouri 63179-0335

Respondent is further directed to note the Docket Number of this action on the payment instrument.

4. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Respondent, unless 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 of this Decision and Order will be served upon the parties by the Hearing Clerk.

———

In re: MICHAEL T. GODBERSON.
Docket No. 12-0034.
Decision and Order.
Filed August 30, 2012.

PS-D—Operation as dealer—Sanctions.

Brian Sylvester, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

I. Introduction

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture ("USDA"; "Complainant") against Michael T. Godberson ("Respondent"), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. ("the Act"). The Complaint alleges that Respondent failed to comply with the Act and its implementing regulations, administered by the Packers and Stockyards Program, Grain Inspection Service, Packers and Stockyards Administration ("GIPSA").

II. Issues

1. Whether a hearing is necessary in this matter;

2. Whether Respondent failed to timely pay sellers for the purchase of livestock in willful violation of the Act;

3. Whether Respondent failed to register with GIPSA;

4. Whether Respondent operated as a "dealer" subject to the Act without a bond; and

5. If Respondent willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

III. Findings of Fact and Conclusions of Law

D. Procedural History

On October 19, 2011, Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk"). On November 8, 2011, Respondent filed an Answer with the Hearing Clerk, acting *pro se*. References to the Answer in this Decision and Order shall be denoted as "RX-1". On April 2, 2012, I issued an Order setting deadlines for the parties' submissions in advance of setting a hearing date.

On May 7, 2012, Complainant timely filed pre-hearing submissions in accordance with my Order. Respondent did not file any pre-hearing

submissions, and on July 5, 2012, I issued an Order to Respondent to show cause why a Decision and Order on the Record should not be entered. Respondent did not respond in writing as directed. On July 25, 2012, Complainant filed Proposed Findings of Fact, Conclusions of Law, Order and Brief ("Proposed Findings"), as well as evidence hereby identified as CX-1 through CX-7. On that date Complainant also filed Declarations by Justin K. Ham and Peter Jackson, which are hereby identified respectively as CX-8 and CX-9.

On August 21, 2012, Respondent filed correspondence, hereby identified as RX-2. Respondent asked for "additional time", asserting that he did not know that he was expected "to respond unless [he] had a dispute to [Complainant's] evidence" and expressing concern about Complainant's request for a cease and desist Order and the imposition of penalties. Respondent also asked for help in understanding this matter.

I find that no good cause has been established to allow additional time to Respondent to file any evidence. Respondent did not deny any aspect of the allegations charged against him in the complaint. Respondent's initial answer stated in the entirety, verbatim:

> I Mike Godberson am writing this response in regards to docket #12-0034. I have been inactive in my position as a livestock dealer since Dec. 2010. Cattle purchased in 2010 for grazing purposes. I am auctioneer at two auction barns currently and I graze cattle and pre-condition cattle with a partner. Thank you, Mike Godberson (signature).

RX-1. Respondent failed to file submissions in response to two Orders that I issued. Although it is regrettable that Respondent does not completely understand the instant proceeding, he has had since the date he was served notice of the Complaint, in October 2011, to consult counsel or another knowledgeable individual to help him. Respondent took no action to get help and he did not comply with two Orders that I issued that directed him to take actions. According, his motion for an extension is hereby DENIED.

All of the evidence is hereby admitted to the record. The matter is ripe for adjudication and the record is closed.

E. Statutory and Regulatory Authority

7 C.F.R. § 1.1.39 provides, in pertinent part:

> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day 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. § 1.1.39.

Livestock dealers, market agencies and packers operating subject to the Act are required to obtain reasonable bonds to secure their obligations to livestock sellers. 7 U.S.C. § 704. The Secretary has issued regulations requiring parties subject to the bond requirements to file bonds or bond equivalents with GIPSA, in an amount set forth by 9 C.F.R. § 201.30. *See* 9 C.F.R. § 201.29.

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of possession of livestock by paying by check to the seller or authorized representative at the point where the livestock is transferred or by paying through a wire transfer. *Id.* The deadline for making payment in full by the next business day can only be circumvented by express written

agreement between the buyer and the seller. *Id.* Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a).

The Act allows for the assessment of civil money penalties in an amount of up to $11,000.00 per violation for violations of the Act. 7 U.S.C. § 193(b). Cease and desist orders are routinely issued in cases under the Act even where the violator is no longer engaged in business regulated by the Act and regulations. *In re: Wilkes County Stock Yard, Inc.*, 48 Agric. Dec. 1015, 1025 (U.S.D.A. 1989).

F. Summary of the Facts

On August 23, 2007, GIPSA notified Respondent by certified mail that the agency had placed his registration in inactive status, effective August 22, 2007, based upon information provided by Respondent in the annual report he had filed with GIPSA on December 21, 2006. CX-1. Respondent was advised that he was no longer required to maintain Trust Agreement No. OK-183 in the amount of $10,000.00; however, if he decided to operate under the Act in the future, he would need to apply for a registration and a bond or its equivalent. CX-1.

An investigation conducted by GIPSA Resident Agent Justin Ham ("Agent Ham") in September, 2010 revealed that Respondent had been dealing in livestock without a bond and had outstanding debts to livestock sellers. CX-8. Agent Ham's investigation concluded that Respondent consistently failed to pay for livestock purchases when payment was due. CX 6 through CX-8. The owner of Ouachita Livestock Market, Mark Wedel, confirmed that Respondent regularly bought livestock on commission at that market. CX-2. Sales invoices and other documents from the period from February 2010 through September 2010 reflect that Respondent had purchased livestock on commission at Ouachita Livestock Market and sold livestock at other auction markets. CX-4 through CX-7. The chart at CX-6 shows seventeen (17) instances of Respondent's failure to timely pay for purchases during this period. See, Attachment "A", hereto.

In a statement given to Agent Ham on September 10, 2010, Respondent Godberson admitted that he had been operating without a dealers' license or a bonding instrument when he purchased cattle at Ouachita Livestock in Louisiana and Covington Sale Barn in Oklahoma. CX-3. Respondent admitted that he owed Darrel Clark of Welch Stockyard approximately $7,000.00. *Id.* In his Answer, Respondent advised that he has not actively engaged in livestock dealing since December, 2010, but has purchased cattle for his own use. RX-1. Respondent's answer did not address the issues of registration with GIPSA or failing to secure a bond or equivalent.

Peter Jackson is an auditor for GIPSA, who gave a declaration dated July 25, 2012, in which he described his duties reviewing investigative files. CX-9, ¶1. Mr. Jackson reviews between 40 and 60 investigative files annually and makes recommendations regarding the type and amount, if any, of sanctions that GIPSA should impose in those cases. Id. Mr. Jackson reviewed the circumstances involved in the instant cause of action and concluded that Respondent willfully violated the Act by failing to pay within the time period required for livestock purchases. In addition, it was found that Respondent operated under the Act without a bond or equivalent financial security. Mr. Jackson recommended that a civil penalty of $42,250.00 be assessed against Respondent and that Respondent be Ordered to cease and desist violations of the Act. He further recommended the imposition of a thirty (30) day period of prohibition from registering to engage in business subject to the Act.

D. Discussion

Respondent has failed to file affirmative defenses denying the allegations raised by the Complaint served against him. Respondent did not respond to my Order to show cause why a Decision on the record should not be entered. He filed a letter in response to Complainant's Proposed Findings, in which he stated that he was uncertain what to do about the case, but was concerned about the recommended sanction. In a statement given to APHIS' investigator, Respondent admitted that he did not timely pay people or have proper bonds. I find that Respondent Michael Godberson has admitted the allegations underlying this cause of action, and therefore good cause lies to issue this Decision and Order on the record, pursuant to 7 C.F.R. § 1.139.

The record is undisputed that Respondent engaged in activities regulated under the Act without the requisite bond or equivalent required by 9 C.F.R. § 201.29. The requirement to obtain a bond or equivalent surety is to protect livestock sellers, not buyers. *In re: Edward Tiemann*, 47 Agric. Dec. 1573, 1585 (U.S.D.A. 1988). Respondent had specific notice from GIPSA by certified mail on August 23, 2007 that he would need to file an application for registration with GIPSA and secure a bond or equivalent if he once again engaged in transactions covered by the Act. Respondent admitted to GIPSA Investigator Ham that he had operated under the Act without a dealers' license or a bonding instrument when he purchased cattle at Ouachita Livestock. His activities were corroborated by owners of auction markets where Respondent bought livestock on commission without a bond after receiving the notice explaining terms of compliance with the Act.

Respondent's failure to obtain a bond or other financial instrument to act as surety while continuing to buy livestock on commission constitutes an unfair and deceptive practice that violates 7 U.S.C. § 312(a). *See In re: Robert F. John*, 47 Agric. Dec. 436, 441 (U.S.D.A. 1998). Further, Respondent has failed to register with the agency. These actions constitute willful violations of the Act. GIPSA's recommended sanctions are appropriate for Respondent's willful violations of the Act. *See In re: Wilkes County Stock Yard, Inc.*, 48 Agric. Dec. 1015, 1025 (U.S.D.A. 1989).

In addition, the record establishes that Respondent failed to make timely payments for livestock purchases as required by the Act and prevailing regulations. Mr. Godberson admitted to Agent Ham that he owed people money, and records of transactions at various livestock auctions corroborate that admission. I accord substantial weight to the findings of Agent Ham, who regularly conducts investigations involving compliance with the Act. I conclude that the information he reviewed established that Respondent acted in violations of the Act.

The Secretary has concluded that the failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. *In re:*

Great American Veal, Inc., 48 Agric. Dec. 183, 202-03 (U.S.D.A. 1989). The Secretary further has concluded that a Respondent who admits to the allegations in a complaint is in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondents. *In re: Hardin County Stockyards, Inc*., 53 Agric. Dec. 654, 656 (U.S.D.A. 1994). Although Respondent did not make any overt admission in his filings regarding the instant adjudication, he admitted to an official representing GIPSA that he had failed to fully pay for purchases that were subject to the Act.

I find that Respondent willfully violated the Act by failing to make payments when due. Respondent withheld payments in a number of actions, and I find that his practice of making partial and late payments constitutes substantial evidence of willfulness. I note that in his filed correspondence, Respondent has made statements that are not entirely supported by the evidence. Respondent maintained that he has not operated as a dealer subject to the Act since 2010, and moreover asserted that livestock purchases he made in 2010 were for his use. However, the evidence disclosed by Agent Ham's investigation demonstrates that Respondent acted as a dealer from February 2010 through September 2010.

I credit Mr. Jackson's recommendations for sanctions, but note that Mr. Jackson's statements supporting his proposal for a civil money penalty in the amount of $42,450.00 are conclusory. Although similar penalties have been assessed in other cases, the imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. *See In re: S.S. Farms Linn County*, 50 Agric. Dec. 476 (U.S.D.A. 1991). The recommendations of administrative officials responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less or different from that recommended. *In re: Marilyn Shepherd*, 57 Agric. Dec. 242 (U.S.D.A. 1998).

Mr. Jackson's rationale for recommending such a severe penalty is that it will serve as a deterrent. I find that it is not necessary to impose such a burdensome penalty to effectuate that goal. Although Respondent has made seemingly contradictory statements about his business activities in 2010, I accord Respondent the benefit of the doubt and

conclude that he stopped operated as a dealer after September 2010, and purchases made thereafter were for his own use. Therefore, I find it appropriate to suspend imposition of the recommended penalty of $42,250.00 until such time as Respondent may once again engage in conduct that violates the Act.

Since Respondent engaged in activities that violated the Act despite having notice of requirements for compliance, it is appropriate to Order him to cease and desist violating the Act and regulations. His conduct also supports the imposition of a specific period prohibiting him from engaging in covered activity. Respondent shall be suspended from registering as a dealer under the Act for a period of thirty (30) days from the date this Decision and Order becomes final.

Further, should Respondent wish to engage in conduct covered by the Act at any time in the future, he must complete the terms of registration with GIPSA. He shall also need to substantiate that he has secured a bond or equivalent financial instrument at that time. In addition, he must establish that he has made full payment to the sellers of livestock who received only partial payments from Respondent in the transactions documented herein.

E. Findings of Fact

1. Respondent Michael Godberson is an individual whose business address is his home address in the State of Oklahoma.

2. At times material herein, Respondent was engaged in the business of buying livestock in commerce on a commission basis, and was not registered with GIPSA.

3. On or about August 23, 2007, Respondent was notified by certified mail that GIPSA had placed his registration in inactive status as of August 22, 2007, pursuant to information gleaned from Respondent's annual report filed with GIPSA on December 21, 2006.

4. Respondent was also advised that since he was no longer active, he did not need to maintain Trust Agreement No. OK-183 in the amount of $10,000.00.

5. Respondent was further advised that if he decided to engage in activities subject to the Act in the future, he would be required to file an application for registration and a bond or its equivalent with GIPSA.

6. An investigation conducted by GIPSA disclosed that Respondent had engaged in the business of a dealer without a bond or equivalent during the period from February 2010 through September 2010. See, Attachment "A".

7. In addition, with respect to the transactions that he undertook in that period, Respondent failed to pay when due the full purchase price of livestock. See, Attachment "A".

F. Conclusions of Law

1. Respondent Michael Godberson willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.29, 201.30, by engaging in operations subject to the Act without maintaining an adequate bond or bond equivalent.

2. Respondent Michael Godberson operated in willful violation of the Act and its implementing regulations by failing to register with the Secretary of Agriculture, pursuant to 9 C.F.R. § 201.10.

3. Respondent Michael Godberson operated in willful violation of the Act and its implementing regulations by failing to register with the Secretary of Agriculture.

4. Respondents willfully violated 7 U.S.C. § 213(a) and 228b(a) by failing to pay the full amount of the purchase price for livestock within the time period required by the Act.

5. Sanctions are appropriate to deter Respondent and others from willfully failing to register; from willfully failing to secure a bond or equivalent; and from willfully failing to make prompt payments as required by the Act and regulations.

ORDER

Respondent Michael Godberson, 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 engaging in business in any capacity for which bonding is required without filing and maintaining an adequate bond or its equivalent as required by the Act and prevailing regulations.

Further, Respondent is prohibited from registering to engage in business subject to the Act for a period of thirty (30) days from the date this Order becomes final. Pursuant to 7 U.S.C. § 203, Respondent is prohibited from engaging in business subject to the Act without being registered with GIPSA and acquiring proper bond or equivalent.

After expiration of this thirty (30) day period, Respondent may engage in business subject to the Act after submitting an application for registration to GIPSA along with the required bond or bond equivalent; EXCEPT that Respondent shall not be registered unless he provides proof of payment in full to any seller of livestock who did not receive full payment in the transactions that are the subject of this adjudication. Pursuant to 7 U.S.C. § 213(b), Respondent is assessed a civil penalty in the amount of $42,250.00, EXCEPT that payment of that penalty is suspended for so long as Respondent remains in compliance with the Act and prevailing regulations. Should Respondent engage in activities covered by the Act without fulfilling the obligations set forth by this Order, the penalty shall become immediately due.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

___

PACKERS AND STOCKYARDS ACT

In re: DOUGLAS BUTLER.
Docket No. 12-0033.
Decision and Order.
Filed August 31, 2012.

PS-D.

Jonathan Gordy, Esq. for Complainant.
Peter F. Langrock, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint filed on October 19, 2011 by Alan R. Christian, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that Douglas Butler, herein referred to as Respondent, willfully violated the Act.

The Complaint alleges that between May 16, 2009 and the end of the summer of 2009, on six occasions Respondent, a dealer registered with the Secretary, purchased a total of 116 head of cattle from M.R. Pollock & Sons (Pollock) and failed to pay the purchase price of $105,800.00 for the livestock when due.[1] The Complaint also alleges that Respondent failed to maintain records of the transactions that took place between Pollock and himself in that there are no invoices or records or inventory of the cattle purchased.

The Respondent filed his Answer on November 18, 2011, admitting the jurisdictional allegations, but denying the remaining allegations, asserting that he had not purchased the cattle, but rather had instead entered into a joint venture with Pollock, agreeing to care for the

[1] Complainant since conceded that 9 head of cattle were returned to Pollock and that the total amount due for the remaining cattle was $92,750.00. n.1, page 2, Complainant's Post-Hearing Brief, Docket Entry No. 24; RX-2.

livestock for the milk that they produced and splitting half of the profits from their intended sale to third parties.

The matter was heard in Burlington, Vermont on June 5 and 6, 2012. Four witnesses testified for the Complainant and the Respondent and his son testified for the Respondent.[2] Fifteen exhibits were admitted into evidence, twelve from the Complainant (CX-1-12) and three from the Respondent (RX-1-3).

Discussion

The Packers and Stockyards Act, enacted on August 15, 1921,[3] is a product of the same era that produced § 3 of the Interstate Commerce Act of 1887[4] (prohibiting undue preferences), the Sherman Anti-Trust Act in 1890,[5] § 2 of the Clayton Act in 1914[6] (prohibiting specified discriminatory pricing), and § 5 of the Federal Trade Act in 1914[7] (prohibiting unfair methods of competition in commerce). In 1917, President Wilson had directed the Federal Trade Commission (FTC) to investigate the food industry to determine the truth or falsity of allegations made earlier that year in Congressional hearings 'that the course of trade in important food products is not free, but is restricted and controlled by artificial and illegal means."[8] The strongly worded FTC Report concluded there was "conclusive evidence" that "monopolies, controls, trusts, combinations, conspiracies, or restraints of trade out of harmony with the law and the public interest" existed.[9] When enacted, the House Report described it as "a most comprehensive measure and extends further than any previous law in the regulation of

---

[2] References to the transcript of the proceeds will be indicated as Tr. and the page number.
[3] Aug. 15, 1921, c.64, Title I, § 1, 42 Stat. 159.
[4] Interstate Commerce Act, ch. 104, 24 Stat. 380 (1887), 49 U.S.C. § 10701(c)(1), 10741, 10742.
[5] 15 U.S.C. §§ 1-7.
[6] 15 U.S.C. §13
[7] 15 U.S.C. §45
[8] FED. TRADE COMM'N, REP. OF FED. TRADE COMM'N ON MEAT PACKING INDUSTRY, 392 (1919).
[9] *Id.*

private business, in time of peace, except possibly the interstate commerce act.[10]

The purpose of the Act was expressed in connection with a 1958 amendment as being:

> [T]o assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.[11]

Included in the Act's major provisions are prohibitions against unfair, unjustly discriminatory, or deceptive practices,[12] record keeping requirements,[13] and stringent requirements for the payment of livestock purchased by a packer, market agency or dealing purchasing livestock.[14]

The evidence of record establishes that in late August of 2010, Ronald Pollock contacted the Packers and Stockyard Program officials and complained that Respondent had not paid him for cattle purchases that had been negotiated on Pollock's behalf by Mike Lane, an individual who worked with Pollock. Tr. 20-21. Jamie Ziem, a Packers and Stockyards Program Resident Agent proceeded to investigate the matter, collecting copies of the sales invoices from Pollock; taking statements from Mike Lane (CX-3), Ronald Pollock (CX-4), Milton Pollock (CX-5) and Respondent (CX-6); and reviewing Respondent's records. Tr. 21-37. At the hearing, Ziem identified the records produced during the course of the investigation, as well as the statements that had been given to her. Tr. 13-50.

---

10 H.R. REP. NO. 77, 67th Cong, 1st Sess. 2 (1921).
11 H.R. REP. NO. 1048, 85th Cong, 1st Sess. 1(1957).
12 7 U.S.C. § 201.
13 7 U.S.C. § 213.
14 7 U.S.C. § 228b.

The characterization of the transactions by the parties as reflected in the testimony adduced at trial is in sharp conflict, with Complainant's witnesses testifying that the transactions were all sales and the Respondent testifying that in each case a form of joint venture was established whereby he would take care of the cattle, retain any milk that was produced, and that when the cattle were sold to third parties that he would get half of the proceeds.

Mike Lane, the individual who negotiated dairy cattle transactions on Pollock's behalf,[15] testified that on May 6, 2009, he, Ronald Pollock, Milton Pollock (Ron's brother), and Respondent took 39 Holstein cows, also described in the testimony as the Cooper herd from Maine to Butler's farm in Vermont.[16] Tr. 55-56, 126. The herd was considered to be in excellent shape and Respondent was on hand at the time of the transfer to inspect the animals before they were delivered to his farm.[17] Tr. 56-57, 125. Lane testified that the negotiated sale price was $1,450.00 per head and an invoice reflecting the sale was prepared and given to Respondent. Tr. 56-57, 126, 127, 139, CX-3, 7. At the time of the sale, Respondent told both Lane and Pollock that he had a buyer for the cattle and that he would pay for them when they were sold. Tr. 56, 135. On May 17, 2009, Lane delivered another 33 head of cattle from the Lovewell farm to Butler. Tr. 58-60. Butler again told Lane that he had a buyer for the cattle and that payment would be forthcoming once they were resold. *Id.* An invoice was again prepared reflecting a purchase amount of $22,300.00 and given to Respondent. Tr. 59-60, 113, CX-8.

The third transaction occurred on or about May 28, 2009 when Lane delivered six cattle (5 bred Holsteins and a bull) to Respondent's farm. Tr. 60-61. The invoice prepared and delivered to Respondent reflected the six animals and a purchase price of $6,950.00. CX-9. On July 12,

---

[15] Lane indicated that he "trucks" cattle for a living and that he also works with Ron Pollock in buying cows to sell to other people. Tr. 52. Pollock confirmed that he and Lane started "dealing" in [dairy] cows together. Tr. 123.

[16] Respondent subsequently returned nine of the cattle to Lane. Tr. 66-67. At $1,450 per head, the cost of the remaining cattle would be $43,500.00.

[17] Butler took only a portion of the cattle in the herd as there were a number that he did not take. Those animals were sold to another farmer in Maine. Tr. 56.

2009, Lane met Butler at Santa Claus Village in New Hampshire where eight cattle were unloaded from Lane's trailer onto Respondent's. Tr. 62-63. Respondent had told Lane that he needed some cheaper animals for a neighbor who was going to buy them. Tr. 62-63. An invoice reflecting a sales price of $5,600.00 was prepared and given to Respondent. CX-10. On or about July 22, 2009, Lane delivered a breeding age bull to Respondent. Tr. 64. An invoice reflecting a purchase price of $750.00 was given to Respondent. CX-11.

The final transaction negotiated by Lane occurred in July or August of 2009. Tr. 66. Those cattle were delivered to Respondent by Milton Pollock. Tr. 132. An invoice reflecting the purchase price of $13,650 was prepared. CX-12.

Although the evidence very clearly reflected that Respondent had disposed of a number of the cattle that had been sold to him without remitting any portion of their purchase price to Pollock (Tr. 69, 133, 146, 155), Respondent maintained in his testimony that he and Pollock had made a deal as partners.[18] Tr. 210. As part of the deal, Respondent indicated that Pollock provided the cattle and Respondent furnished the feed and labor. Tr. 210. He also testified that rather than just the nine animals being taken back from the Cooper herd that Lane had indicated, all but two or three had been retrieved and resold by Pollock. Tr. 203.

Respondent's testimony was strongly disputed by Pollock. Throughout his testimony, he indicated that all of the transactions were sales and that he still expected to be paid. Tr. 121-168.

Having heard the testimony from both parties, I find Respondent's testimony that the transactions were part of a partnership arrangement or joint venture incredible and unworthy of belief. Not only is there no evidence of a written agreement between the parties, the evidence is clear that many of the animals purchased were subsequently either resold or otherwise disposed of without there being any remittance to Pollock. Tr. 69, 133, 146, 155. Even had there been such an agreement as Respondent has suggested, Respondent has in essence admitted flagitious conduct on his part in that he has not settled up with Pollock. Tr. 210.

---

[18] Respondent admitted that he had not been able to settle up with them (Pollock and Lane). Tr. 210.

In this action Complainant has sought a cease and desist order, a five year suspension and a civil penalty of $66,000.00. The United States Department of Agriculture's sanction policy provides that Administrative Law Judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, 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.

In re S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 497 (U.S.D.A. 1991).

Like the Judicial Officer, I do not consider such recommendations controlling, and in appropriate circumstances, the sanction imposed may be considerably different, either less or more than that requested.[19] In the action before me here, the Agency has recommended that a civil penalty of $66,000.00 be imposed. While I will impose a civil penalty in that amount, given the purpose of the Act that sellers of livestock be paid for the animals that were sold, rather than diminish the potential for payment to made to the seller, I will suspend a significant portion of the penalty provided the Respondent can provide evidence that his debt to Pollock has been satisfied within six months of the date of this Decision and Order.

---

[19] *In re* Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 89 (U.S.D.A. 2009); *In re* Alliance Airlines, 64 Agric. Dec. 1595, 1608 (U.S.D.A. 2005); *In re* Mary Jean Williams, (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (U.S.D.A. 2005); *In re* George A. Heimos Produce Co., 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug 31, 2004); *In re* Excel Corp., 62 Agric. Dec. 196, 234 (U.S.D.A. 2003), enforced as modified, 397 F. 3d 1285 (10th Cir. 2005); *In re* Steven Bourk (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (U.S.D.A. 2002).

On the basis of the entire record, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent Douglas Butler is an individual who resides in the Middlebury, Vermont who operates a dairy and cattle farm and is also a cattle dealer. Tr. 196.

2. Respondent, at all times material herein, was:

(a) Engaged in business as 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 for his own account and as a market agency buying livestock on commission.

3. Between May 16, 2009 and the end of July of 2009, on six occasions Respondent purchased 107 head of cattle from M.R. Pollock & Sons and failed to pay the purchase price of $92,750.00 for the livestock, when due. CX-7 through 12, RX-2.

4. Respondent also failed to maintain adequate records of the transactions that took place between M.R. Pollock & Sons and himself in that there are no invoices or records or inventory of the cattle purchased.

5. As of the date of the issuance of this Decision, Respondent still continues to owe Pollock for the cattle purchased from him.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully violated Sections 312(a), 401 and 409 of the Act, 7 U.S.C. §213(a), 221, and 228(b).

ORDER

1. Respondent, his agents and employees, directly or through any corporate or other device, in connection with activities subject to the Act, shall cease and desist from:

a. Failing to pay the full purchase of livestock as required by section 409 of the Act, 7 U.S.C. § 228b;

b. Failing to maintain records that fully and correctly disclose all transactions in his business, as required by section 401 of the Act, 7 U.S.C. § 221.

2. Respondent is suspended as a registrant under the Act for a period of five years, and thereafter for such time until he:

a. Provides evidence that the debt for the livestock purchases in this action has been satisfied.

b. Acquires, files and maintains an adequate bond as required by the Act and the Regulations thereunder.

3. Respondent is assessed a civil penalty of $66,000.00; however, $36,000.00 of that amount will be suspended on condition that Respondent provides satisfactory evidence that his debt to Pollock has been satisfied within six months of the date of this Decision and Order. Failing production of such evidence within the allotted time, the full amount of the penalty shall then be due and owing.

Payment shall be made to: US Department of Agriculture
USDA-GIPSA
P.O. Box 790335
St. Louis, Missouri 63179-0335

Respondent is further directed to note the Docket Number of this action on the payment instrument.

4. This Decision shall become final and effective without further

proceedings 35 days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R § 1.145).

Copies of this Decision shall be served upon the parties.

———

In re: RONNIE LEWIS, D/B/A LAZY L ORDER BUYERS.
Docket No. 12-0011.
Decision and Order.
Filed October 11, 2012.

PS-D—Surety—Sanctions.

Brian Sylvester, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before me pursuant to a complaint filed by the United States Department of Agriculture, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administrations ("GIPSA"; "Complainant") against Ronnie Lewis, d/b/a Lazy L Order Buyers ("Respondent"), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. ("the Act").

I. Issues

1. Whether Respondent failed to timely pay sellers for the purchase of livestock in willful violation of the section 312(a) of Act (7 U.S.C. § 213(a));

2. Whether Respondent operated under the Act without adequate surety; and

3. If Respondent willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

II. Findings of Fact and Conclusions of Law

A. Procedural History

On October 5, 2011 Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk"). On November 1, 2011, Respondent filed an Answer with the Hearing Clerk, acting *pro se.* References to the Answer in this Decision and Order shall be denoted as "RX-1". By Order issued February 2, 2012, I set deadlines for the parties' submissions in advance of setting a hearing date.

Complainant timely filed pre-hearing submissions in accordance with my Order, but Respondent did not file any pre-hearing submissions. On February 15, 2012, Complainant filed a motion for Decision by reason of Default. I deferred ruling on that motion and instead held a hearing on June 21, 2012. At the hearing, I admitted to the record Complainant's documentary evidence identified as CX-1 through CX-21 and heard testimony from Complainant's witnesses and from Respondent Ronnie Lewis, who represented himself. The transcript of the hearing was filed. Complainant filed written closing argument post-hearing, and Respondent filed documents pursuant to my oral Order at the hearing. Those documents are identified as "RX-2" and hereby admitted to the record.

The record is closed and this matter is ripe for adjudication.

B. Summary of the Facts

In his Answer and at the hearing Respondent Ronnie Lewis admitted that he had made late payments in violation of the Act. RX-1; Tr. At 85-86. Mr. Lewis has been in the livestock business all of his life. Tr. At 87. He began working with his father when Mr. Lewis was in high school. Id. The family business has been in operation since 1969. Tr. At 87-88.

Respondent explained that on September 13, 2010, he learned that funds from his checking account had been stolen when his bank cashed

two forged checks written against the account. Tr. At 84; 94; CX-8. When checks Mr. Lewis had written to pay for livestock (identified at CX-11) were presented to his bank, his account had been diminished by the forged checks in the aggregate total of $87,500.00. Tr. At 85. Mr. Lewis learned about the problem from his bank, and not from sellers who were unable to cash Mr. Lewis' checks. Tr. At 96-97.

The bank returned the amount of one of the forged checks, $41,000.00, because the bank was familiar with the name used by the forger on that check. Tr. At 100. A similar theft by forgery under the same name had been perpetrated at a livestock auction in the state of Georgia. Tr. At 100-101. However, the bank refused to return to Mr. Lewis the amount of the other forged check in the amount of $46,500.00 and he engaged counsel to try to resolve the matter. See, RX-2, letter of November 29, 2010.

During the period between August 23 and October 12, 2010 checks were presented for payment to Mr. Lewis' bank, and were denied. Tr. At 95; CX-11. Some of the checks were rejected because Mr. Lewis' bank advised him to close the compromised account and open a new account for his business needs. Tr. At 85. Mr. Lewis did as he was advised on September 14, 2010, and he was assured by his bank that checks presented on the closed account would be cashed. Tr. At 99. He called people who were holding his checks to warn them of his problem; at the time of the transfer of accounts, sufficient funds were available to cover the checks he had written. Tr. At 99-100. However, an $80,000.00 check written to Cattleman's drained the account, and could only be partially paid.

Mr. Lewis testified that the matter was further complicated because his original bank, Wachovia, had been taken over by Wells Fargo. Tr. At 85. Another obstacle for Mr. Lewis has been his inability to secure a bond. As a result of non-payment due to the theft, a seller filed a claim against his bond, which was not renewed and has not been replaced, despite Mr. Lewis' efforts. Tr. At 86. Mr. Lewis would like to pay back the outstanding balance of $38,205.19 owed to livestock sellers, but he cannot operate his business without a bond, and without resolving the matter of the stolen money. Tr. At 86. He believes that the thief has been identified by investigators looking into the Georgia theft. Tr. At 102-104.

Mr. Lewis was attempting to take over his family business from his mother, and GIPSA notified him that he needed to secure an adequate bond to operate as a dealer. CX-4; Tr. At 109-111. Mr. Lewis was unable to secure the bond and by letter dated December 15, 2010, GIPSA advised the business that it must discontinue all livestock operations for which bonding are required under the Act. CX-9; Tr. At 109.

Nilsa Ramos Taylor works for GIPSA as a resident agent whose duties include conducting regulatory and investigative activities in the livestock and poultry industry in Florida, South Georgia and Alabama. Tr. At 14. In mid-September 2010, she received a telephone call from Tony Yeomans, the president of the Ocala Livestock Market who asked for bonding documents and claim forms relating to Respondent's business. TR. At 15-16. Ms. Taylor conducted an investigation into Mr. Yeoman's allegations that some checks written by Respondent were not cashed because the account had been closed. Tr. At 17; 27. She spoke with Respondent shortly after the phone call from Mr. Yeomans and interviewed Respondent on November 29, 2010. Tr. At 19. Respondent explained that forged checks had been cashed against his account by his bank and that the bank was looking into the problem. Tr. At 20.

Ms. Taylor explained that the failure to make good on the payments by the close of the next business day resulted in Respondent's violation of the Act and regulations. Tr. At 29. Six sellers were not paid timely for transactions that took place from August 23, 2010 to October 12, 2010, although $80,649.25 of a check written to Cattleman's Auction in the amount of $85,949.96 cleared the bank. Tr. At 30-36; CX-11; CX-13. In addition, Ocala Livestock Market Inc. filed a claim on Respondent's bond and received $30,000.00 of the $39,741.95 owed by Mr. Lewis. Tr. At 29. Ms. Taylor testified that Mr. Lewis provided her with documentation supporting that funds from his bank account had been stolen, but she considered him to be in violation of the Act because he had not paid sellers.

Mr. David Tomkow operates a livestock market and has sold cattle to Mr. Lewis' business, Lazy L Order Buyers, for years. Tr. At 50-51. Mr. Tomkow corroborated the testimony that Mr. Lewis bought livestock in

August and September 2010 and did not fully pay for the orders. Tr. At 50-56. Mr. Tomkow testified that Mr. Lewis has not bought cattle at his market after September, 2010. Tr. At 55.

Ms. Taylor testified that records showed that Respondent continued to buy livestock on order for an individual, Terry Bomhak, and received a commission for the purchases. Tr. At 124. Ms. Taylor explained that individuals who buy on order for other registered dealers are required to be bonded and registered. Tr. At 126. Mr. Lewis is not currently registered as a livestock dealer. Tr. At 91. His registration was terminated in December, 2010 because he did not have a bond. Tr. At 109; CX-9.

Respondent made efforts to secure a bond after his bank account was compromised, but was unsuccessful. Tr. At 110. Mr. Lewis testified that he was not aware that he needed to be registered for commission sales of cattle he made on behalf of Mr. Bomhak, who paid for the cattle. Tr. At 111-112; 128. Mr. Lewis contended that he was advised by a GIPSA employee, Ms. Ramos-Taylor, that so long as he was included in Mr. Bomhak's bond, he was covered. Tr. At 112; 131-132. He believed that Mr. Bomhak included him on the bond. Tr. At 132. A copy of a revocable letter of credit and Trust Agreement issued to Terry Bomhak on May 18, 2011 includes Mr. Lewis and extends to May 18, 2013. See, RX-2.

Mr. Lewis believed that he has worked for Mr. Bomhak since August or September, 2011. Tr. At 113. During the period from November, 2010 until he began working with Mr. Bomhak, Mr. Lewis had done very little work and earned no income. Tr. At 113-114. Income tax returns reflect that Mr. Lewis' income plunged between 2010 and 2011. RX-2.[1]

C. Statutory and Regulatory Authority

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of

[1] These tax returns have been redacted to protect private information.

possession of livestock by paying by check to the seller of authorized representative at the point where the livestock is transferred or by paying through a wire transfer. *Id.* The deadline for making payment in full by the next business day can only be circumvented by express written agreement between the buyer and the seller. *Id.*

Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a). The Act allows for the assessment of civil money penalties in an amount of up to $11,000 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. *See S.S. Farms Linn County*, 50 Agric. Dec. 476 (U.S.D.A. 1991).

D. Discussion

1. *Motion for judgment by default*

Pursuant to 7 C.F.R. § 1.136(c), the failure to file an answer within the time frame set forth by to 7 C.F.R. § 1.136(a) constitutes an admission of the allegations in the Complaint, and the failure to deny or otherwise respond to an allegation of the Complaint shall be deemed an admission of the allegation. In such instances, the entry of default against a Respondent is appropriate. In addition, pursuant to 7 C.F.R. § 1.139, the failure to file an answer constitutes a waiver of a hearing on the Complaint. If no objection to a motion for entry of proposed decision is filed by Respondent, "the Judge shall issue a decision without further procedure or hearing." 7 C.F.R. § 1.139.

Having considered all the evidence, I find grounds to deny Complainant's motion for judgment by default. Respondent filed an answer that Complainant apparently deemed to be timely because Complainant moved for a hearing in the matter on November 9, 2011. Since the motion placed Respondent on notice that a hearing was anticipated in the matter, the grant of a subsequent motion for a default judgment filed months later would impinge upon Respondent's due process rights. In addition, the Hearing Clerk sent a corrected notice of the Complaint, which was delivered to Respondent on October 11, 2011.

Respondent's answer was docketed by the Hearing Clerk on November 1, 2011. I deem the Answer timely filed as it was received on the 20th day after receipt of the Complaint.

2. *Non-payment to livestock sellers*

Respondent admits that livestock sellers were not paid, but maintains that his failure to pay was not willful. I find that GIPSA has established that Respondent failed to make timely payments to six sellers during the period from August 23, 2010 to October 12, 2010, as described at CX-11.

3. *Operating as a dealer without registration or bonding*

I credit Mr. Lewis' testimony that he did not do any business on his own behalf after October 2010. Mr. Lewis' income tax returns show a wide disparity of income between 2010 and 2011, which supports his contention. See, RX-1.

The evidence reflects that Mr. Lewis bought livestock on commission through Mr. Bomhak's business and made purchases in May and June, 2012. CX-21. In compliance with my instructions at the hearing, Respondent submitted post-hearing a copy of a letter of credit from the Bank of Union El Reno, OK, in the names of Terry Bomhak/Ronnie Lewis, which is dated May 18, 2011 and which was renewed for one year on May 18, 2012. See, RX-1. The letter of credit has a notation that Mr. Lewis was added on May 18, 2012. I cannot deduce from this document alone whether Mr. Bomhak covered Mr. Lewis for transactions that took place before May 18, 2012 or May 18, 2011, as the information is somewhat contradictory. However, it is apparent that Mr. Lewis was included in Mr. Bomhak's surety as of May 18, 2012 at the latest, and accordingly, transactions conducted by Respondent after that date do not represent violations of the Act. I infer from Complainant's closing argument and recommended findings of fact that it has accepted that Mr. Lewis did not violate the Act in 2012.

The evidence reflects that Mr. Lewis bought livestock on commission for Bomhak on March 8, 2011, April 6, 2011, and April 12, 2011. CX-18-CX-20. The only evidence regarding whether he had surety at this

time is Mr. Lewis' credible testimony that he believed that Mr. Bomhak included him on Bomhak's letter of credit from the time he began to work with Bomhak. No other documentary evidence regarding Mr. Bomhak's surety is of record. A copy of Mr. Bomhak's letter of credit or other surety for the period before May, 2011 would have resolved any doubt regarding whether Mr. Lewis was covered in March and April, 2011. It is disappointing that Complainant did not submit such evidence, particularly since GIPSA requires the documentation and presumably has it on file, and since I suggested at the hearing that the documentation would be helpful and held the record open for its receipt.

Mr. Lewis' loss of income, as demonstrated by tax returns that he freely provided, shows that Respondent did not act as a dealer on his behalf without securing a bond. I decline to infer from Mr. Lewis' filings that he was not covered under Mr. Bomhak's letter of credit when he made purchases on commission in March and April, 2011, absent some affirmative evidence supporting that conclusion. I impose no affirmative duty on Mr. Lewis to provide all documentation from Mr. Bomhak, given the uncertainty of Respondent's access to Bomhak's records and the government's certain access to them. I further decline to shift the burden of proof to Respondent.

However, Mr. Lewis testified that he believed he began to work for Mr. Bomhak in August or September, 2011. Despite finding Mr. Lewis' testimony very credible and according it weight due to his many years as a dealer, his understanding from a GIPSA agent that he needed to be covered by Mr. Bomhak, and his business practice of being similarly covered on his mother's bond in his family business, I must discount his testimony regarding when he began to work for Bomhak. The record clearly establishes that Respondent bought livestock on commission in March and April, 2011, and I conclude from the preponderance of the evidence that Respondent engaged in those transactions without being covered by a financial instrument as surety in violation of 7 U.S.C. § 312(a).

4. *Sanctions*

Elkin Parker is a Regional Director at GIPSA, whose office is located in Atlanta, Georgia. Tr. at 61-62. Mr. Parker's duties include enforcing the Act in the eastern region of the United States and in Puerto Rico. Tr. at 62. He has worked for GIPSA for over thirty-five years. Tr. at 63. Mr. Parker is familiar with livestock dealers' compliance with the Act, and with the results of GIPSA's enforcement efforts in the territory for which he is responsible. TR. at 65.

Mr. Parker was aware of the circumstances underlying GIPSA's investigation of Respondent's failure to make prompt payment and failure to be bonded. Tr. at 67. He considered these violations serious non-compliance with the Act and believed sanctions were appropriate to promote a deterrent effect by facilitating compliance with the Act. Tr. at 69. Mr. Parker was aware that Mr. Lewis had alleged that forged checks wiped out his bank account, but he nevertheless believed that Mr. Lewis was responsible for failing to pay in accordance with the law and regulations. Tr. at 80.

Peter Jackson is an auditor with GIPSA's Policy and Litigation Division. Tr. at 136. He reviews investigation files and recommends discipline. Tr. at 138. Mr. Jackson reviewed Respondent's case and concluded that his failure to pay sellers as required was willful. Tr. at 138-139. He recommended that Mr. Lewis be ordered to cease and desist from violating the Act, as well as be ordered to obtain a bond and to be assessed a civil penalty of $58,000.00. Tr. at 139.

Mr. Jackson explained that the recommended penalty was substantially reduced from the $11,000.00 per violation that is authorized at law. Tr. at 142. The penalty would not reimburse the outstanding balance Mr. Lewis still owes to sellers, but Mr. Jackson would reconsider his recommendation of the penalty amount if Mr. Lewis could prove that he paid the balances, since the starting point for the penalty was the unpaid amount. Tr. at 142-144.

Mr. Jackson was aware of the forgeries which depleted Mr. Lewis' account, and he considered that when making a penalty assessment. Tr.

at 147. However, he continued to assert that the failure to pay when due was a willful violation of the Act. *Id.*

Willfulness is defined by the Administrative Procedures Act (5 U.S.C. §558(c)) as an act where "the actor intentionally does a prohibited act irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements." A violation is considered willful "if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts." *In re: Hines & Thurn Feedlot*, 57 Agric. Dec. at 1414.

It is undisputed that Respondent failed to pay for livestock purchases in violation of the Act. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. *In re: Great American Veal Inc.*, 48 Agric. Dec. 183, 211 (U.S.D.A. 1989). Moreover, the Secretary has concluded that Respondents who admit to the allegations in a complaint are in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondents. *In re: Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654, 656 (U.S.D.A. 1994).

I have found no precedent involving the theft of funds being the reason for non-payment of amounts due to sellers of livestock. Despite the language in the seminal cases cited herein, *supra*, I find it difficult apply those conclusions in circumstances where unknown agents interfered with a dealer's ability to pay sellers by stealing the dealer's funds. I fully credit the evidence and find that Respondent's bank account held the funds to pay for his purchases until a third party or parties forged checks that his bank, rather foolishly, paid over.

There is no evidence that Respondent was aware of the theft of his funds when he wrote checks to pay for livestock purchases. He closed his account on the advice of his bank, and his remaining funds were disbursed when valid checks were presented for payment. Mr. Lewis informed the sellers of the problem. He used the funds that the bank agreed to return to him to pay the sellers what he could. It is likely that all sellers would have been paid had the bank not refused to reimburse

him for one of the forgeries, an issue that he continues to pursue to this date[2]. A claim was made on his bond, and he could not secure a replacement bond, thereby disqualifying him from working in the business that he had worked in all of his life. Respondent did not continue to purchase livestock after the thefts caused him to shortchange sellers. He believed that he met all requirements to buy livestock on commission for a dealer.

Respondent suffered severe loss of income and has been unable to pay all of the sellers, though he has made some reimbursements. Respondent could have avoided falling into violation of the Act in these circumstances if he could have foreseen the future and taken measures to stop payment on the forgeries. He also could have kept a reserve of cash large enough to pay creditors, although that should have been covered by the bond that Respondent acquired in the amount set by regulation. Respondent's bond was not large enough to pay all claims, although it met GIPSA requirements. Respondent's livelihood was extinguished when he was unable to find an agency willing to give him a bond after a claim was made. I find that these circumstances do not represent a willful violation of the Act.

In addition, this situation can hardly set standards for deterring other dealers from failing to comply with the Act and regulations. What cautionary tale would sanctions in this case tell: Do not allow thieves to forge checks that your bank is careless enough to cash? The sanctions recommended against Respondent are harsh where the failure to pay was caused by a crime perpetrated against Respondent; where Respondent could not secure a bond to continue to operate his business and generate cash to make sellers whole; and where Respondent did his best to recover the money. In addition, a civil penalty will do nothing to make the sellers whole, and Respondent's debt to the sellers remains unsatisfied.

---

[2] I note the government's argument that Mr. Lewis did not produce proof that he is suing his bank for restitution, and find it has no relevance to burdens of proof or my credibility assessments. Mr. Lewis has suffered severe economic loss as the result of the theft, the ensuing failure to pay, and ultimate inability to conduct his business. His efforts were complicated by a change in bank ownership as well. Mr. Lewis' evidence on this issue, while not complete, is sufficient to verify his testimony that he consulted legal counsel about this issue—the only material reason for its admission.

I note, however, that Mr. Lewis was not the only victim of the theft of his bank account. The sellers who still have not been paid for the sales made to Mr. Lewis were also victims of the crime. Although I accord full credit to Mr. Lewis' efforts to make restitution, there is no evidence that the livestock sales were canceled or that attempts to return the livestock were made. I acknowledge that Mr. Lewis has experienced a financial crisis in the loss of his business, and encourage his efforts to find employment. However, more than $38,000.00 remains unpaid to sellers. Since the purpose of the Act and regulations is to protect sellers from the failure of buyers to pay, and since Respondent has not yet made full payment to sellers for transactions that took place two years ago, I find it appropriate to impose a conditional civil penalty. A penalty is also warranted because Mr. Lewis bought livestock in transactions covered by the Act without apparent adequate surety.

Accordingly, I hereby impose a civil penalty of $38,000.00, which shall be suspended on condition that Respondent provides proof that he has paid in full, within one year of the date this Decision becomes final, all outstanding balances due to sellers who were not fully and promptly paid for the transactions underlying the instant cause of action[3]. I also adopt the agency's recommendation of issuing a cease and desist Order, as well as ordering Respondent to obtain an adequate bond or bond equivalent in order to operate subject to the Act.

E. Findings of Fact

1. At all times material herein, Respondent was engaged in the business of buying livestock in commerce on a commission basis.

2. Respondent bought livestock at auction on six occasions between the period from August 23, 2010 and October 12, 2010 and failed to make full payment to the buyers by the end of the next business day.

3. On November 16, 2010, GIPSA notified Respondent that Lazy L Order Buyers could not engage in transactions covered by the Act because its bond had been terminated.

[3] I am optimistic that Respondent's employment as a livestock buyer on commission shall improve his financial condition and allow him to make restitution.

4. Respondent was unaware that his bank had paid out two forged checks in the total amount of $87,500.00 on September 13, 2010.

5. On the advice of his bank, Respondent closed his account, and subsequent sellers' demands for payment were refused.

6. One seller made a claim against Respondent's bond and was partially paid the amount due from the sale.

7. Respondent's bank restored the sum of one of the forged checks, $41,000.00, from which Respondent made payments and partial payments to the sellers.

8. Respondent continues to pursue restitution from his bank for the other check, which has been complicated by a law enforcement investigation and the sale of the bank to another entity.

9. Sellers remain unpaid for the transactions in the aggregate of slightly more than $38,000.00.

10. Respondent ceased operating as a dealer under his own business name when he could not get a bond or other financial surety.

11. Sometime in 2011, Respondent began to buy livestock on commission on behalf of dealer Terry Bomhak.

12. Respondent was included in Bomhak's letter of credit as of not later than May 18, 2012.

13. Respondent bought livestock for Bomhak on three occasions in March and April 2012 without apparent surety.

14. Respondent bought livestock for Bomhak later in 2012, after he had been added to the letter of credit covering Bomhak's actions covered by the Act.

F. Conclusions of Law

1. Respondent Ronnie Lewis willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.29, 201.30, by engaging in operations subject to the Act without maintaining an adequate bond or bond equivalent.

2. Respondent Ronnie Lewis, doing business as Lazy L Order Buyers operated in violation of the Act and its implementing regulations by failing to pay the full amount of the purchase price for livestock within the time period required by the Act during the period from August 23, 2010 to October 12, 2010 in violation of 7 U.S.C. § 213(a).

3. Respondent's failure to pay was caused by the theft of his funds through forged checks cashed against his bank account, and his failure to pay was not willful.

4. Although Respondent did not willfully fail to pay sellers, balances remain on the account of some of the sellers, and therefore sanctions are appropriate to encourage others to make restitution and to operate with proper surety.

ORDER

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) engaging in business in any capacity for which bonding is required without filing and maintaining an adequate bond or its equivalent as required by the Act and prevailing regulations; and (2) failing to pay the full amount of the purchase price for livestock within the time period required by the Act and regulations.

Further, Respondent is ordered to obtain an adequate bond or bond equivalent if Respondent wishes to operate subject to the provisions of the Act.

Pursuant to 7 U.S.C. § 213(b), Respondent is assessed a civil penalty in the amount of thirty-eight thousand dollars ($38,000.00), except that

the penalty shall be suspended on condition that Respondent has satisfied the outstanding debts owed to sellers by not later than one year from the date this Decision becomes final.

Respondent's payment, if due, shall be made out to the "U.S. Department of Agriculture" and sent to USDA-GIPSA, P.O. Box 790335, St. Louis, Missouri 63179-0335. Respondent shall include on the payment instrument a reference to this case, Docket No. 12-0033.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

———

In re: CHARLES HELMICK.
Docket No. 12-0563.
Decision and Order.
Filed December 19, 2012.

PS-D.

Brian Sylvester, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

I. Introduction

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture ("USDA"; "Complainant") against Charles Helmick ("Respondent") alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. ("the Act"). The Complaint alleges that Respondent

failed to comply with the Act and its implementing regulations, administered by the Packers and Stockyards Program, Grain Inspection Service, Packers and Stockyards Administration ("GIPSA").

II. Issues

1. Whether a hearing is necessary in this matter;

2. Whether Respondent failed to timely pay sellers for the purchase of livestock in willful violation of the Act; and

3. If Respondent willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

III. Findings of Fact and Conclusions of Law

A. Procedural History

On August 1, 2012 Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk"). On August 29, 2012, Respondent filed correspondence, acting *pro se*, which I construe to be a timely filed Answer. References to the Answer in this Decision and Order shall be denoted as "RX-1". By Order issued March 22, 2012, I set deadlines for the parties' submissions in advance of setting a hearing date.

On October 10, 2012, Complainant filed a motion for a Decision and Order on the Record. On November 14, 2012, Respondent filed correspondence in which he did not deny the complaint allegations, and asserted that he was attempting to make restitution for unpaid sales of livestock. This document is hereby designated "RX-2". On November 20, 2012, I deferred ruling on Complainant's motion, and allowed additional time for Respondent and Complainant to file evidence. On December 13, 2012, Complainant filed documentary evidence identified as CX-1 through CX-8, and also filed sworn declarations by two individuals, hereby identified as CX-9 and CX-10. Complainant's evidence is hereby admitted to the record. Respondent has not filed any

evidence other than his two letters, which are hereby admitted to the record.

The matter is ripe for adjudication and the record is closed.

1. *Statutory and Regulatory Authority*

7 C.F.R. § 1.1.39 provides, in pertinent part:

> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day 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. § 1.1.39.

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of possession of livestock by paying by check to the seller or authorized representative at the point where the livestock is transferred or by paying through a wire transfer. *Id.* The deadline for making payment in full by the next business day can only be circumvented by express written agreement between the buyer and the seller. *Id.* Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a).

The Act allows for the assessment of civil money penalties in an amount of up to $11,000.00 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. *See, S.S. Farms Linn County*, 50 Agric. Dec. 476 (U.S.D.A. 1991). One of the primary purposes of the Act is to assure fair trade practices and safeguard farmers and ranchers from being paid less than the fair market value of their livestock. *Bruhn's Freezer Meats v. U.S. Dep't of Agric.*, 438 F. 2d 1332, 1337 (8th Circ. 1971).

B. Summary of the Facts

Respondent is registered with USDA as a livestock dealer. On September 19, 2009, Complainant GIPSA sent to Respondent a Notice of Violation regarding Respondent's insolvency as of December 31, 2008. During the period from June 23, 2009 through May 26, 2011, Respondent failed to make timely payment for 100 head of livestock purchased from Virginia Cattle Company, South Branch Valley Livestock Exchange and Harry "Buck" Hamborsky for the aggregate amount of $52,147.88. CX-5 through CX-8. To the knowledge of GIPSA Resident Agent James Cannon, an amount of $29,504.20 remains due to those livestock sellers. CX-10. Agent Cannon documented the failure to pay the full amounts due to sellers. CX-5 through CX-8; CX-10.

In his written correspondence, Respondent admitted that he had failed to fully pay sellers for livestock that he purchased. Respondent explained that his accountant had passed away, and review of the accountant's books revealed that Respondent had not made proper tax payments. The additional financial burden of resolving his tax deficits led to problems with making prompt payment. Respondent freely admitted that he had violated the Act, but he believed that he had made payments to one seller for which he has not received credit.

Jeanna Harbison is an Investigative/Enforcement Attorney for GIPSA whose duties include reviewing investigations and making recommendations regarding the propriety of sanctions. CX-9. Ms. Harbison reviewed Respondent's file and concluded that he had willfully

violated the Act by purchasing livestock and failing to pay the full amount within the time period required by the Act. She concluded that a civil penalty of $29,504.26 should be assessed against the Respondent, with set-offs for proof of payment to sellers. In addition, Ms. Harbison believed that a five year suspension of Respondent's registration to act as a dealer under the Act should be imposed, with the proviso that the suspension could be reduced to one year upon proof of full payment to the sellers, particularly in consideration of Respondent's assertion that he had paid one seller an additional $10,000.00. In the alternative, Ms. Harbison believed that Respondent could be employed by another dealer, after one year suspension of his own registration.

C. Discussion

The record is undisputed that Respondent failed to make timely payments within the mandates of the Act. Respondent has admitted that he failed to make timely payments. Although Respondent asserted that he made more payments than GIPSA credits him, he did not provide any specific information about the payments. Further, Respondent did not comply with the payment provisions of the Act despite being given notice by GIPSA that he was in violation of the Act. The Secretary has found that "…once a licensee has been adequately warned, if he subsequently violated the Act the agency may proceed to suspend his license without any further warning, notice or opportunity to demonstrate informally that he did not violate the Act". *In re: Jeff Palmer*, 50 Agric. Dec. 1762, 1782 (U.S.D.A. 1991). Accordingly, I find that a hearing in this matter is not necessary, and further find it appropriate to issue this Decision and Order on the record, pursuant to 7 C.F.R. § 1.139.

I find that Respondent has willfully violated the Act by failing to make payments when due. The Secretary has concluded that the failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. *In re: Great American Veal, Inc.*, 48 Agric. Dec. 183, 202-03 (U.S.D.A. 1989). Respondent failed to make timely payments despite receiving a notice from GIPSA advising him of the need to comply with the Act. I conclude that Mr. Helmick's continued practice of making late or incomplete payments despite notice constitutes substantial evidence of willfulness.

I credit Respondent's explanation that his cash flow suffered due to tax deficiencies that needed to be addressed, and I sympathize with his position. Nevertheless, Respondent's financial problems are not a meritorious defense to his failure to make payments. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. *In re: Great American Veal Inc.*, 48 Agric. Dec. at 211. Moreover, the Secretary has concluded that a Respondent who admits to the allegations in a complaint is in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondent. *In re: Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654, 656 (U.S.D.A. 1994).

I accord substantial weight to Ms. Harbison's recommendations, considering the number of years and transactions that disclose Respondent's failure to comply with the Act. GIPSA's notice to Respondent failed to serve as a suitable deterrent to his practice of making late payments. I agree with GIPSA's assessment of penalties, and find that a cease and desist Order, a suspension, and monetary penalties should persuade Respondent to comply with the prompt payment requirements of the Act in the future. However, I decline to adopt wholesale the recommendations proposed by Complainant regarding the timeframe for making full payment, considering that the proposed date has passed. I also find that the period of suspension should be reduced to correlate with the number of years that Respondent failed to comply with the Act.

D. Findings of Fact

1. Respondent is an individual whose current address is in the State of West Virginia.

2. At all times material herein, Respondent was engaged in the business of buying livestock in commerce and acted as a dealer within the meaning of the Act.

3. On September 19, 2009, GIPSA sent Respondent written notification advising him that he had violated the Act.

4. During the period from June 23, 2009 through May 26, 2011, Respondent was involved in five transactions to purchase a total of 100 head of livestock from Virginia Cattle Company, South Branch Valley Livestock Exchange, and Harry "Buck" Hamborsky for a total price of $52,147.88 and failed to pay the full amount of the purchase prices within the time period required by the Act.

5. During the period from April 1, 2011 through May 27, 2011, Respondent was involved in fourteen transactions to purchase a total of 144 head of livestock from five different livestock sellers for a total purchase price of $91,583.29, which Respondent failed to fully pay when due.

6. Respondent failed to make timely payments after being notified by GIPSA that he had violated the Act.

E. Conclusions of Law

Respondent willfully violated 7 U.S.C. § 192(a) and § 228b of the Act by failing to pay the full amount of the purchase price for livestock within the time period required by the Act.

Sanctions are appropriate to deter Respondent and others from willfully failing to make prompt payments, pursuant to 7 U.S.C. § 193(b).

ORDER

Respondent Charles R. Helmick, shall cease and desist from failing to pay when due the full purchase price of livestock in transactions subject to the Act and regulations monitored by GIPSA.

Pursuant to 7 U.S.C. § 193(b), Respondent is assessed a civil penalty of not more than $29,504.26, with full credit for all payments that Respondent can establish by written proof provided to counsel for Complainant not later than December 31, 2012. In addition, the penalty

shall be suspended if Complainant makes all payments due on the outstanding balances owed to sellers as the result of transactions involved in this adjudication so long as those payments are made by not later than December 31, 2012. If Respondent fails to fully satisfy the outstanding balances, the amount of the final penalty shall be made by check to "U.S. Department of Agriculture" and sent to USDA-GIPSA, P.O. Box 790335, St. Louis Missouri, 63179-0335. Respondent shall include on the payment instrument a reference to this matter, Docket No. 12-0563.

Respondent is hereby suspended from registering under the Act for a period of not to exceed **three years,** which is the time period equivalent to the period during which violations arose. If Respondent can demonstrate through written proof that he has satisfied the outstanding balance by December 31, 2012, the suspension shall be reduced to six months. If Respondent fails to meet the deadline imposed herein, but makes restitution in full within six months, he may be employed by another dealer within the meaning of the Act.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

———

MISCELLANEOUS ORDERS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

PACKERS AND STOCKYARDS ACT

In re: TYSON FARMS, INC.
Docket No. D-12-0123.
Miscellaneous Order.
Filed July 5, 2012.

PS-D.

Jonathan D. Gordy, Esq., Krishna G. Ramaraju, Esq., Brian P. Sylvester, Esq., and Ciarra A. Toomey, Esq. for Complainant.
L. Bryan Burns, Esq., Robert W. George, Esq., Jay T. Jorgenson, Esq., and Brian P. Morrissey, Esq. for Respondent.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING DENYING REQUEST FOR ORAL ARGUMENT

On June 19, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] requested that I determine whether the Secretary of Agriculture lacks statutory authority to proceed with this action on the grounds raised by Tyson Farms, Inc. [hereinafter Tyson] (Chief ALJ's Certification of Motion to the Judicial Officer at 2).[1] On June 25, 2012, Tyson requested oral argument before the Judicial

[1] The Chief ALJ certified his request in accordance with 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] which authorize administrative law judges to certify requests to the Judicial Officer, as follows:

> **§ 1.143 Motions and requests.**

Officer regarding the Chief ALJ's certified request. On July 3, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, filed a response opposing Tyson's request for oral argument (Complainant's Response to Respondent's Request for Oral Argument). On July 3, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Tyson's request for oral argument.

Tyson requests oral argument before the Judicial Officer pursuant to 7 C.F.R. § 1.145(d), which provides, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
> (d) *Oral argument*. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

> . . . .
> (e) *Certification to the judicial officer*. The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145 shall be made by and in the discretion of the Judge. The Judge may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

7 C.F.R. § 1.143(e).

A review of the record reveals that Tyson is not a party bringing an appeal or an appellee in the instant proceeding. Therefore, I deny Tyson's request for oral argument pursuant to 7 C.F.R. § 1.145(d).

_____

In re: TYSON FARMS, INC.
Docket No. D-12-0123.
Miscellaneous Order.
Filed July 6, 2012.

PS-D.

Jonathan D. Gordy, Esq., Krishna G. Ramaraju, Esq., Brian P. Sylvester, Esq., and Ciarra A. Toomey, Esq. for Complainant.
L. Bryan Burns, Esq., Robert W. George, Esq., Jay T. Jorgenson, Esq., and Brian P. Morrissey, Esq. for Respondent.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING ON CERTIFIED QUESTION

The Chief Administrative Law Judge's Certified Question

On June 19, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] certified the following question to me: Does the Secretary of Agriculture have statutory jurisdiction to proceed with this action against Tyson Farms, Inc. [hereinafter Tyson]? (Chief ALJ's Certification of Motion to the Judicial Officer [hereinafter the Chief ALJ's Certified Question] at 2.)[1]

---

[1] The Chief ALJ certified the question in accordance with 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] which authorize administrative law judges to certify any question to the Judicial Officer, as follows:

> **§ 1.143 Motions and requests.**
>
> . . . .
> (e) *Certification to the judicial officer*. The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145 shall be made by and in the discretion of the Judge. The Judge may

Discussion

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act], and the Rules of Practice by filing a Complaint on December 20, 2011. The Deputy Administrator alleges Tyson underpaid poultry growers in violation of 7 U.S.C. § 228b-1 and has committed an unfair practice and deceptive practice under 7 U.S.C. § 192.[2]

The Chief ALJ requests that I address three independent reasons advanced by Tyson as the basis for Tyson's contention that the Secretary of Agriculture lacks statutory authority to proceed with this action.

> 1. Tyson contends that the Complaint seeks to sanction Tyson for engaging in conduct–the ranking of flocks of birds with different breeds in the same "tournament"–that the Secretary proposed to regulate in a recent proposed rule (amending 9 C.F.R. Part 201) which Congress has prohibited any funds from being used to "implement." Consolidated and Further Continuing Appropriations Act of 2012 (the "Agriculture Appropriations Bill"), Publ. L. 112-55, 125 Stat. 552 (Nov. 18, 2011). If Congress's prohibition does extend to the instant administrative proceeding, Tyson argues that the Secretary's action would violate Article I, Sections 8 and 9 of the U.S. Constitution, the Purpose Statute, 31 U.S.C. § 1301, the Antideficiency

---

> either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

7 C.F.R. § 1.143(e).

[2] Compl. ¶¶ II-III.

> Act, 31 U.S.C. § 1341, and the Administrative Procedures Act, 5 U.S.C. § 551, *et seq*.

Chief ALJ's Certified Question at 1-2.

The Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 721, 125 Stat. 552 (2011), provides:

> SEC. 721. None of the funds made available by this or any other Act may be used to write, prepare, or publish a final rule or an interim final rule in furtherance of, or otherwise to implement, "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act" (75 Fed. Reg. 35338 (June 22, 2010)) unless the combined annual cost to the economy of such rules do not exceed $100,000,000: *Provided*, That no funds be made available by this or any other Act to publish a final or interim final rule in furtherance of, or otherwise implement, proposed sections 201.2(l), 201.2(t), 201.2(u), 201.3(c), 201.210, 201.211, 201.213, or 201.214 of "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act" (75 Fed. Reg. 35338 (June 22, 2010)): Provided further, That such rules must be published in the Federal Register no later than December 9, 2011: *Provided further*, That none of the funds made available by this or any other Act may be used to implement such rules until 60 days from the publication date of such rules, and only unless such rules are otherwise in compliance with this section.

The Complaint does not refer to any proposed rule and the Deputy Administrator does not allege a violation of any proposed rule. Instead, the Deputy Administrator alleges Tyson underpaid poultry growers in violation of 7 U.S.C. § 228b-1 and has committed an unfair practice and deceptive practice under 7 U.S.C. § 192.[3] Therefore, I conclude

[3] Compl. ¶¶ II-III.

Congress's prohibition in the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 721, 125 Stat. 552 (2011), does not extend to the Complaint filed by the Deputy Administrator.

> 2. Tyson next contends that Congress has not authorized the Secretary of Agriculture to initiate administrative proceedings to adjudicate allegations of unfair and deceptive practices committed by **live poultry dealers** such as Tyson, citing *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1456 (8th Cir. 1995) and *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005).

Chief ALJ's Certified Question at 2 (emphasis in original).

The Deputy Administrator alleges Tyson underpaid poultry growers in violation of 7 U.S.C. § 228b-1. An underpayment of a poultry grower in violation of 7 U.S.C. § 228b-1(a) is considered an "unfair practice" in violation of the Packers and Stockyards Act, as follows:

> **§ 228b-1. Final date for making payment to cash seller or poultry grower**
>
> . . . .
>
> **(b) Delay or attempt to delay collection of funds as "unfair practice"**
>
> Any delay or attempt to delay, by a live poultry dealer which is a party to any such transaction, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for poultry obtained by poultry growing arrangement or purchased in a cash sale, 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. § 228b-1(b). Thus, a violation of the payment requirements in 7 U.S.C. § 228b-1(a) is also a prohibited "unfair practice" under 7 U.S.C. § 192. Pursuant to 7 U.S.C. § 228b-2, the Secretary of Agriculture may institute an administrative adjudicatory proceeding against a live poultry dealer for an alleged violation of the payment requirements in 7 U.S.C. § 228b-1, which violation is also an unfair practice prohibited by 7 U.S.C. § 192.[4] Therefore, I conclude the Packers and Stockyards Act authorizes the Secretary of Agriculture to institute this administrative adjudicatory proceeding against Tyson for alleged underpayment of poultry growers in violation of 7 U.S.C. § 228b-1 and an alleged unfair practice under 7 U.S.C. § 192.[5]

> 3. Last, Tyson argues that even were the Secretary vested with jurisdiction to bring an action pursuant to § 202 of the Packers and Stockyards Act (Act), 7 U.S.C. § 192, the Complaint in this action is fatally deficient in that it fails to plead an essential allegation that Tyson's conduct resulted in injury or a likelihood of injury to competition.

Chief ALJ's Certified Question at 2.

---

[4] The cases cited by Tyson in support of the position that the Secretary of Agriculture has no authority to initiate administrative proceedings to adjudicate allegations of an unfair practice committed by live poultry dealers are inapposite as they do not relate to proceedings instituted under 7 U.S.C. § 228b-2. (See *London v. Fieldale Farms Corp.,* 410 F.3d 1295, 1303 (11th Cir. 2005) (stating the Secretary of Agriculture has no authority under 7 U.S.C. § 193(a) to adjudicate alleged violations of 7 U.S.C. § 192 by live poultry dealers), *cert. denied*, 546 U.S. 1034 (2005); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1457 (8th Cir. 1995) (stating, under the plain language of the Packers and Stockyards Act, the administrative complaint procedure under 7 U.S.C. § 210 is not available for claims against a live poultry dealer; however, the Secretary of Agriculture is authorized to enforce administratively the prompt payment provision of the Packers and Stockyards Act (7 U.S.C. § 228b-1), which provision is not at issue in this case).

[5] The Deputy Administrator also alleges Tyson has committed a "deceptive practice" under 7 U.S.C. § 192 (Compl. ¶ III). I find the Deputy Administrator's allegation that Tyson committed a "deceptive practice" under 7 U.S.C. § 192 puzzling because 7 U.S.C. § 228b-1(b) does not provide that a violation of 7 U.S.C. § 228b-1(a) shall be considered a "deceptive practice" under the Packers and Stockyards Act; instead, 7 U.S.C. § 228b-1(b) provides only that a violation of 7 U.S.C. § 228b-1(a) shall be considered an "unfair practice" under the Packers and Stockyards Act.

The Deputy Administrator alleges Tyson violated 7 U.S.C. § 228b-1(a). The Packers and Stockyards Act contains no requirement that injury to competition or likelihood of injury to competition must be shown in order to prove a violation of 7 U.S.C. § 228b-1(a); however, 7 U.S.C. § 228b-1(b) specifically provides that a violation of 7 U.S.C. § 228b-1(a) shall be considered an "unfair practice" under the Packers and Stockyards Act. Thus, a violation of 7 U.S.C. § 228b-1(a) is a prohibited "unfair practice" under 7 U.S.C. § 192 without regard to whether injury to competition or likelihood of injury to competition is shown.

Response to the Chief Administrative Law Judge's Certified Question

The Secretary of Agriculture has statutory jurisdiction to proceed with this action against Tyson.[6]

———

[6] The Rules of Practice are applicable to administrative adjudicatory proceedings under the Packers and Stockyards Act (9 C.F.R. § 202.200). However, except for Packers and Stockyards Act adjudicatory proceedings conducted under 7 U.S.C. §§ 193, 204, 213, and 221 (7 C.F.R. § 1.131(a)), the complaint instituting the proceeding must provide that the Rules of Practice are applicable to the proceeding and the Assistant Secretary for Administration must concur with the complaint (7 C.F.R. § 1.131(b)(6)). The Complaint filed in this proceeding specifically provides that the Rules of Practice are applicable to this proceeding instituted under 7 U.S.C. § 228b-2 (Compl. at fourth unnumbered page); however, I am unable to locate the Assistant Secretary for Administration's concurrence with the Complaint. Therefore, while the Secretary of Agriculture has statutory jurisdiction to proceed with this action against Tyson under 7 U.S.C. § 228b-2, the Chief ALJ may want to ensure that the Rules of Practice have been properly made applicable to the instant proceeding.

MISCELLANEOUS ORDERS

In re: CLAYPOOLE LIVESTOCK, INC. AND TIMOTHY J. CLAYPOOLE.
Docket No. D-12-0135.
Miscellaneous Order.
Filed August 15, 2012.

PS-D.

Charles E. Spicknall, Esq. for Complainant.
Respondent, pro se.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER GRANTING COMPLAINANT'S MOTION TO MODIFY ORDER

In *In re Claypoole Livestock, Inc.*, __ Agric. Dec. ___ (June 20, 2012), I concluded that Claypoole Livestock, Inc., and Timothy J. Claypoole violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act], and the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]. I issued a cease and desist order and assessed Claypoole Livestock, Inc., and Mr. Claypoole a civil penalty to be paid within 60 days after the Hearing Clerk served them with the June 20, 2012, Decision and Order.

On August 13, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], filed a Motion to Modify Order to Extend Respondents' Time to Pay Civil Penalty in which the Deputy Administrator states Mr. Claypoole had requested an extension of time within which to pay the assessed civil penalty. The Deputy Administrator states the parties now agree that Claypoole Livestock, Inc., and Mr. Claypoole's time to pay the civil penalty should be extended to November 1, 2012.

Accordingly, I vacate the Order issued in *In re Claypoole Livestock, Inc.*, __ Agric. Dec. ___ (June 20, 2012), and substitute the following Order in its place:

ORDER

1. Claypoole Livestock, Inc., and Timothy J. Claypoole, their agents and employees, directly or indirectly through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

   a. Engaging in business in any capacity for which bonding is required without filing and maintaining an adequate bond or bond equivalent as required by the Packers and Stockyards Act and the Regulations;

   b. Purchasing livestock and failing to pay for the livestock purchases within the time period required by the Packers and Stockyards Act; and

   c. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the accounts upon which the checks are drawn to pay the checks when presented.

2. Claypoole Livestock, Inc., and Timothy J. Claypoole are prohibited from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act without first becoming properly registered.

3. In accordance with 7 U.S.C. § 213(b), Claypoole Livestock, Inc., and Timothy J. Claypoole are jointly and severally assessed an $11,000 civil penalty. However, the civil penalty in excess of $2,500 is suspended: *Provided*, *That* Claypoole Livestock, Inc., and Timothy J. Claypoole fully comply with terms of the cease and desist provisions contained in this Order for a period of 1 year. Payment of the unsuspended amount of $2,500 shall be made by certified check or money order, made payable to the "Treasurer of the United States," and sent to:

USDA-GIPSA
PO Box 790335
St. Louis, Missouri 63179-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA on or before November 1, 2012. Timothy J. Claypoole shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0135.

———

In re: SAMMY SIMMONS AND WENDY SIMMONS, D/B/A PEOPLE'S LIVESTOCK OF CARTERSVILLE.
Docket No. D-12-0131.
Miscellaneous Order.
Filed August 29, 2012.

PS-D.

Jonathan D. Gordy, Esq. for Complainant.
Respondents, pro se.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING A RESPONSE TO RESPONDENT'S APPEAL

On August 28, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], requested that I grant a 10-day extension of time within which to respond to Sammy Simmons and Wendy Simmons' appeal petition. For good reason stated, the Deputy Administrator's motion to extend the time for responding to the Simmons' appeal petition is granted. The time for filing the Deputy Administrator's response to the Simmons' appeal petition is extended to, and includes, September 7, 2012.[1]

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to the

_____

In re: ROBERT M. SELF.
Docket No. D-12-0167.
Miscellaneous Order.
Filed September 24, 2012.

PS-D.

Ciarra A. Toomey, Esq. for Complainant.
Respondent, pro se.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL

Procedural History

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 10, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [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].

The Deputy Administrator alleges Robert M. Self: (1) operated as a dealer or market agency without obtaining the necessary registration and bond, in willful violation of 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.29-.30; (2) issued checks in payment for livestock purchases, which checks

---

Simmons' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, September 7, 2012.

were returned unpaid by the bank upon which the checks were drawn because Mr. Self did not have and maintain sufficient funds on deposit and available, in the account upon which the checks were drawn, to pay the checks when presented, in willful violation of 7 U.S.C. §§ 213(a) and 228b; and (3) failed to pay, when due, the full purchase price of the livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b.[1]

The Hearing Clerk served Mr. Self with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on February 7, 2012.[2] Mr. Self failed to file an answer to the Complaint within 20 days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a). The Hearing Clerk sent a letter, dated February 28, 2012, to Mr. Self informing him that an answer to the Complaint had not been filed within the time prescribed in the Rules of Practice. Mr. Self failed to respond to the Hearing Clerk's February 28, 2012, letter.

On March 6, 2012, in accordance with 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Without Hearing By Reason of Default attached to which was a proposed Decision Without Hearing By Reason of Default. On May 17, 2012, the Hearing Clerk served Mr. Self with the Deputy Administrator's Motion for Decision Without Hearing By Reason of Default and the Hearing Clerk's service letter.[3] Mr. Self failed to file objections to the Deputy Administrator's Motion for Decision Without Hearing By Reason of Default within 20 days after service, as required by 7 C.F.R. § 1.139.

On June 29, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ], in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order: (1) concluding Mr. Self violated the Packers and Stockyards Act and the Regulations, as alleged in the Complaint; (2) ordering Mr. Self to cease and desist from violating the Packers and Stockyards Act and the Regulations; (3) prohibiting Mr. Self from engaging in business for which registration and bonding is required under the Packers and Stockyards Act without first becoming registered under the Packers and Stockyards Act; and (4) assessing

---

[1] Compl. ¶¶ II-IV.
[2] Hearing Clerk's Memorandum To The File, dated February 7, 2012.
[3] Hearing Clerk's Memorandum To The File, dated May 17, 2012.

Mr. Self a $19,600 civil penalty.[4] The Hearing Clerk served Mr. Self with the Chief ALJ's Default Decision and Order on July 6, 2012.[5]

On August 24, 2012, the Mr. Self filed an appeal petition. On September 17, 2012, the Deputy Administrator filed Complainant's Opposition to Respondent's Appeal Petition. On September 20, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Conclusions by the Judicial Officer

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.[6] The Hearing Clerk served Mr. Self with the Chief ALJ's Default Decision and Order on July 6, 2012;[7] therefore, Mr. Self was required to file his appeal petition with the Hearing Clerk no later than August 6, 2012. Instead, Mr. Self filed his appeal petition with the Hearing Clerk on August 24, 2012. Therefore, I find Mr. Self's appeal petition is late-filed.

Moreover, the Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[8] The Chief ALJ's Default Decision and Order became

---

[4] Chief ALJ's Default Decision and Order at 3-4.

[5] United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 1537.

[6] 7 C.F.R. § 1.145(a).

[7] See note 5.

[8] *See, e.g., In re Timothy Mays* (Order Denying Late Appeal), 69 Agric. Dec. 631 (2010) (dismissing respondent's appeal petition filed 1 week after the administrative law judge's decision became final); *In re David L. Noble* (Order Denying Late Appeal), 68 Agric. Dec. 1060 (2009) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Michael Claude Edwards* (Order Denying Late Appeal), 66 Agric. Dec. 1362 (2007) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); *In re Tung Wan Co.* (Order Denying Late Appeal), 66 Agric. Dec. 939 (2007) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); *In re Tim Gray* (Order Denying Late Appeal), 64 Agric. Dec. 1699 (2005) (dismissing the respondent's appeal petition filed 1 day after the chief

final 35 days after the Hearing Clerk served Mr. Self with the Default Decision and Order, namely, August 10, 2012.[9] Mr. Self filed his appeal petition on August 24, 2012, 14 days after the Chief ALJ's Default Decision and Order became final. Therefore, I have no jurisdiction to hear Mr. Self's appeal petition.

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Mr. Self's filing an appeal petition after the Chief ALJ's Default Decision and Order became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative 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*

---

administrative law judge's decision became final); *In re Jozset Mokos* (Order Denying Late Appeal), 64 Agric. Dec. 1647 (2005) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); *In re Ross Blackstock* (Order Denying Late Appeal), 63 Agric. Dec. 818 (2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); *In re David Gilbert* (Order Denying Late Appeal), 63 Agric. Dec. 807 (2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Vega Nunez* (Order Denying Late Appeal), 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

[9] See 7 C.F.R. § 1.142(c)(4).

> *Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[10]

Accordingly, Mr. Self's appeal petition must be denied.

For the foregoing reasons, the following Order is issued.

ORDER

1. Robert M. Self's appeal petition, filed August 24, 2012, is denied.

2. The Chief ALJ's Default Decision and Order, filed June 29, 2012, is the final decision in this proceeding.

_____

[10] *Accord City of Arlington v. FCC*, 668 F.3d 229, 237 (5th Cir. 2012) (stating the 60-day period to file a petition for review of an agency order in 28 U.S.C. § 2344 is jurisdictional and cannot be judicially altered or expanded); *Brazoria County v. EEOC*, 391 F.3d 685, 688 (5th Cir. 2004) (same); *Jem Broad. 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).

MISCELLANEOUS ORDERS

In re: DOUGLAS BUTLER.
Docket No. D-12-0033.
Miscellaneous Order.
Filed October 19, 2012.

PS-D.

Jonathan D. Gordy, Esq. for Complainant.
Peter F. Langrock, Esq. for Respondent.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME TO FILE A RESPONSE TO RESPONDENT'S APPEAL PETITION

On October 16, 2012, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], requested that I extend the time for filing a response to Douglas Butler's appeal petition to October 26, 2012. The Deputy Administrator's motion to extend the time to respond to Mr. Butler's appeal petition is granted. The time for filing the Deputy Administrator's response to Mr. Butler's appeal petition is extended to, and includes, October 26, 2012.[1]

---

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to Mr. Butler's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 26, 2012.

Miscellaneous Orders
71 Agric. Dec. 1158-1180

In re: H.D. EDWARDS.
Docket No. D-10-0296.
Miscellaneous Order.
Filed November 5, 2012.

PS-D.

Brian Sylvester, Esq. for Complainant.
Respondent, pro se.
Initial Decision by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION TO RECONSIDER

Procedural History

On March 23, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], filed Complainant's Petition for Reconsideration of Order Denying Late Appeal [hereinafter Petition to Reconsider] requesting that I reconsider *In re H.D. Edwards* (Order Denying Late Appeal), __ Agric. Dec. ___ (Mar. 15, 2012). On April 17, 2012, H.D. Edwards filed a response to the Deputy Administrator's Petition to Reconsider, and on April 23, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, the Deputy Administrator's Petition to Reconsider.

Discussion

In *In re H.D. Edwards* (Order Denying Late Appeal), __ Agric. Dec. ___ (Mar. 15, 2012), I found Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an oral decision at the close of the December 5, 2011, hearing. This finding resulted in my concluding that, under the rules of practice applicable to this proceeding,[1] the ALJ's oral decision

[1] The rules of practice applicable to this proceeding are 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].

was issued on December 5, 2011, any appeal of the ALJ's oral decision was required to be filed no later than January 4, 2012, and the ALJ's oral decision became effective on January 9, 2012.[2] As the Deputy Administrator filed an appeal petition with the Hearing Clerk on January 31, 2012, I denied the Deputy Administrator's appeal petition because it was late-filed.

The Deputy Administrator contends the ALJ's December 5, 2011, oral decision was a tentative oral decision; thus, time for filing an appeal petition with the Hearing Clerk did not begin to run on December 5, 2011. Instead, the Deputy Administrator asserts the ALJ's final decision was the ALJ's written Decision and Order filed with the Hearing Clerk and served on the Deputy Administrator on January 6, 2012; thus, the Deputy Administrator's appeal petition was timely filed.[3] (Pet. to Reconsider at 1-5.)

The record establishes that, at the close of the December 5, 2011, hearing, the ALJ asked the parties if they had any objection to her issuing an oral decision from the bench and both parties agreed to the issuance of an oral decision (Tr. 299). The ALJ then issued an oral decision (Tr. 299-310). As Mr. Edwards correctly points out in his response to the Deputy Administrator's Petition to Reconsider, the ALJ did not state that the oral decision was a "tentative" oral decision. While the ALJ stated the oral decision was not binding on Mr. Edwards until he received the written confirmation of the oral decision (Tr. 300), the ALJ did not state the oral decision was not binding on the Deputy Administrator (Tr. 299-310). Moreover, I find nothing in the record indicating that the ALJ vacated the December 5, 2011, oral decision. Instead, the ALJ states she "ruled from the bench (oral decision)," and the ALJ characterizes the January 6, 2012, Decision and Order as a "written confirmation" of the December 5, 2011, oral decision (ALJ's January 6, 2012, Decision and Order at 2 ¶ 6). Therefore, I reject the

---

[2] The Rules of Practice provide that the issuance date of an oral decision is the date the oral decision is announced, any appeal of an oral decision to the Judicial Officer must be filed with the Hearing Clerk within 30 days after the date the oral decision is issued, and the effective date of an oral decision is 35 days after the date the oral decision is issued. (See 7 C.F.R. §§ 1.142(c)(2), (c)(4), .145(a).)

[3] The Rules of Practice provide a party must file an appeal of a written decision with the Hearing Clerk within 30 days after receiving service of the administrative law judge's written decision. (See 7 C.F.R. § 1.145(a).)

Deputy Administrator's contention that the ALJ's statement at the close of the December 5, 2011, hearing (Tr. 299-310) was not an oral decision.

However, the record is not without ambiguity. The ALJ states that each party has 30 days from the date of service of the written Decision and Order within which to appeal to the Judicial Officer, as follows:

> This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see Appendix A).

ALJ's January 6, 2012, Decision and Order at 7 ¶ 24.

In *In re PMD Produce Brokerage Corp.* (Order Denying Pet. for Recons.), 59 Agric. Dec. 351 (2000), I held that a statement by an administrative law judge indicating that an appeal petition may be filed within 30 days after service of a written excerpt of an oral decision does not modify the time in the Rules of Practice for filing an appeal of an oral decision. In *PMD Produce Brokerage Corp. v. U.S. Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000), the Court concluded that neither the Rules of Practice nor any other action by the Secretary of Agriculture provided fair notice of the time within which an appeal of an oral decision must be filed with the Hearing Clerk, and the Court set aside *In re PMD Produce Brokerage Corp.* (Order Denying Pet. for Recons.), 59 Agric. Dec. 351 (2000), and *In re PMD Produce Brokerage Corp.* (Order Denying Late Appeal), 59 Agric. Dec. 344 (2000). At the time, 7 C.F.R. § 1.145(a) did not specifically state that an appeal of an administrative law judge's oral decision must be filed within 30 days after the administrative law judge issues the oral decision:

> **§ 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) (2000).

In response to *PMD Produce Brokerage Corp. v. U.S. Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000), the Secretary of Agriculture, in an effort to eliminate the ambiguity found by the United States Court of Appeals for the District of Columbia Circuit, issued a final rule amending 7 C.F.R. § 1.145(a) to read, as follows:

> **§ 1.145 Appeal to Judicial Officer**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

68 Fed. Reg. 6339, 6341 (Feb. 7, 2003). The Secretary of Agriculture explained the need for the amendment to 7 C.F.R. § 1.145(a), as follows:

> Appeal to the Judicial Officer
>
> The rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes (7 CFR 1.130 through 1.151) (referred to as the "uniform rules" below) provide that an administrative law judge may issue an oral or written decision. Current 7 CFR 1.142(c)(2) provides that if an administrative law judge orally announces a decision, a copy of the decision shall be furnished to the parties by the Hearing Clerk. Irrespective of the date a copy of the decision is mailed, the issuance date of the oral decision is the date the

> decision is orally announced. Current 7 CFR 1.145(a) provides that a party who disagrees with an administrative law judge's decision may appeal to the Judicial Officer within 30 days after receiving service of the administrative law judge's decision.
>
> The Judicial Officer has held that an appeal from an oral decision must be filed within 30 days after the date the administrative law judge orally announces the decision. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (order denying late appeal); *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (order denying petition for reconsideration). On appeal, the United States Court of Appeals for the District of Columbia Circuit held that current 7 CFR 1.142(c)(2) and 7 CFR 1.145(a) are ambiguous because the Secretary of Agriculture did not give fair notice that the uniform rules require an appeal to be filed within 30 days after the administrative law judge orally announces a decision. *PMD Produce Brokerage Corp. v. U.S. Department of Agriculture*, 234 F.3d 48 (D.C. Cir. 2000).
>
> The Office of the Secretary is amending 7 CFR 1.145(a) to eliminate the ambiguity found by the United States Court of Appeals for the District of Columbia Circuit. Specifically, the Office of the Secretary is amending 7 CFR 1.145(a) to provide that any appeal to the Judicial Officer from an oral decision issued by an administrative law judge must be filed within 30 days after the administrative law judge issues the oral decision.

68 Fed. Reg. 6339 (Feb. 7, 2003). Thus, I conclude the ALJ's January 6, 2012, written Decision and Order providing the parties 30 days from the date of service of the written decision to file an appeal petition with the Hearing Clerk does not modify the requirement in 7 C.F.R. § 1.145(a) that an appeal from an oral decision must be filed with the Hearing Clerk within 30 days after the administrative law judge issues the oral decision.

Finally, the Deputy Administrator expresses concern that *In re H.D. Edwards* (Order Denying Late Appeal), __ Agric. Dec. ___ (Mar. 15, 2012), will have the effect of forcing parties to appeal oral decisions without benefit of the administrative law judges' subsequent written decision (Pet. to Reconsider at 4). While I share the Deputy Administrator's concern, I am bound by the Rules of Practice which require filing of any appeal from an administrative law judge's oral decision within 30 days after the issuance of the oral decision.[4] I note, however, that under the Rules of Practice any party may request that the time for filing an appeal of an oral decision be extended to a point in time after service of the subsequent written decision.[5]

For the foregoing reasons, the following Order is issued.

ORDER

The Deputy Administrator's Petition to Reconsider, filed March 23, 2012, is denied.

_____

[4] Generally, the Rules of Practice are binding on administrative law judges and the Judicial Officer. *See In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003); *In re Jack Stepp* (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay), 59 Agric. Dec. 265, 269 n.2 (2000); *In re Far West Meats* (Ruling on Certified Question), 55 Agric. Dec. 1033, 1036 n.4 (1996); *In re Hermiston Livestock Co*. (Ruling on Certified Question), 48 Agric. Dec. 434 (1989).

[5] *Compare In re Jennifer Caudill* (Order Extending Time for Filing Appeal Pet.), AWA Docket No. 10-0416 (extending the time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson to 30 days after service of an initial decision as to Jennifer Caudill) (Appendix 1); *In re Kathy Jo Bauck* (Order Extending Time for Filing Appeal Pet.), AWA Docket No. 11-0088 (extending the time for filing an appeal petition to 30 days after the administrative law judge files a ruling on the complainant's motion for reconsideration) (Appendix 2).

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

PACKERS AND STOCKYARDS ACT

GOLDEN WEST CATTLE CO., LLC AND MICHAEL KASTNER.
Docket No. 12-0206, 12-0207.
Default Decision.
Filed September 25, 2012.

FREIGHTOUT.COM, LLC AND LLOYD H. MINIFIE.
Docket No. 12-0462, 12-0463.
Default Decision.
Filed September 27, 2012.

RONALD RYAN SHEPARD, JR., A/K/A RONALD RYAN SHEPPARD, JR., A/KA/ RON SHEPHARD; JEREMY E. PIERCE; BROOKFIELD CATTLE COMPANY, LLC.
Docket No. 12-0357.
Default Decision and Order as to Ronald Ryan Shephard, Jr.
Filed October 25, 2012.

JOHN E. LUNDGREN.
Docket No. 12-0441.
Default Decision.
Filed October 25, 2012.

JEREMY EMERSON.
Docket No. 12-0551.
Default Decision.
Filed October 25, 2012.

DEFAULT DECISIONS

THAN FOOTE.
Docket No. 12-0549.
Default Decision.
Filed December 5, 2012.

TERRY DUSTIN MATTHEWS, D/B/A MOO MOO'S CATTLE CO.
Docket No. 12-0452.
Default Decision.
Filed December 6, 2012.

BRIAN ADAMS.
Docket No. 12-0321.
Default Decision.
Filed December 17, 2012.

CONSENT DECISIONS

PACKERS AND STOCKYARDS ACT

Norberto Gonzales, a/k/a Tito Gonzales, d/b/a TG Cattle, PS-12-0403, 07/06/12.
Boswell Livestock Commission Co., Inc., Ronald R. Bullard, Jr., & Kevin R. Bullard, PS-D-12-0419, 07/06/12.
Sugarcreek Livestock Auction, Inc., PS-D-12-0079, 07/23/12.
Leroy H. Baker, Jr., PS-D-12-0080, 07/23/12.
J. Cuiksa, Inc. & Jason Cuiksa, PS-D-12-0361, 07/26/12.
Commanche Livestock, Inc., W. Raymond Brown, & Jo Ann Brown, PS-12-0425, 07/30/12.
Richard Hunter, d/b/a H&H Farms, PS-D-12-0203, 08/01/12.
Steven Demarest, Brenda Demarest, & Deborah Baldwin, d/b/a Wyalusing Livestock Market, PS-D-12-0245, 08/01/12.
New Lee's Live Poultry Market, Inc. & Shen Chen, PS-D-12-0494, 08/02/12.
Jeremy E. Pierce & Brookfield Cattle Company, LLC, PS-D-12-0357, 08/07/12.
Doyle Harms, d/b/a Harms Livestock, PS-12-0187, 08/09/12.
Lloyd Nash, PS-D-12-0170, 08/17/12.
Chad Duncan, d/b/a T&C Cattle, PS-D-12-0442, 08/28/12.
Headwaters Livestock Auction, LLC, PS-D-12-0239, 08/30/12.
Jeffrey D. Smith, a/k/a Jeff Smith & Dale T. Smith and Sons Packing Company, PS-12-0578, 09/04/12.
California All Natural, LLC & Nathan Lewis, PS-12-0518, 09/05/12.
Wayne Bradshaw, PS-12-0578, 09/06/12.
Mark Holder, d/b/a Mark Holder Livestock, PS-D-12-0171, 09/13/12.
Ronald Wayne Kitchen, PS-D-0407, 09/13/12.
Upchurch Livestock, Inc., PS-D-11-0362, 09/18/12.
Weikert's Livestock, Inc. & Todd D. Weikert, PS-12-0544, 09/20/12.
Don Boyer & Carol Boyer, d/b/a Boyer Cattle Co., PS-12-0562, 09/20/12.
Magic Valley Buying Station, Inc., Eric Drees, & Mindy Drees, PS-D-12-0453, 09/21/12.

CONSENT DECISIONS

Stephen Smeal, d/b/a Fatted Calf Cattle Farms # 6, PS-D-12-0376, 09/24/12.
Double H Cattle Co., LLC, Todd Holstein, & Tyler Holstein, PS-D-12-0631, 09/27/12.
Jeffrey D. Smith, a/k/a Jeff Smith & Dale T. Smith and Sons Packing Company, Inc., PS-12-0578, 09/28/12.
Lacy Bowman Livestock Co., Inc. & Lacy Bowman, PS-12-0502, 10/11/12.
Stephen Conley, PS-11-0441, 10/17/12.
Larry Conley, PS-11-0442, 10/17/12.
Intermountain Livestock, Inc. & Dennis Arnzen, PS-12-0514, 10/17/12.
Plainville Livestock Commission, Inc. & Tyler Gillum, PS-12-0546, 10/22/12.
Tallgrass Beef Company, LLC, PS-D-10-0206, 10/23/12.
Jeremy E. Pierce & Brookfield Cattle Company, LLC, PS-D-12-0357, 10/25/12.
ZD Quality Meats, Inc. & Jamal Sarameh, PS-D-12-0595, 10/31/12.
Mason Georges, PS-12-0561, 11/01/12.
Florence Meat Packing Co., Inc., d/b/a White House Packing Company, Gypson J. Fernandez, & Sonia G. Fernandez, PS-12-0575, 11/01/12.
United Producers, Inc., PS-12-0635, 11/08/12.
New Holland Stables, Inc. & Frank A. Fillippo, Inc., PS-12-0598, 11/27/12.
Curtis Malone, PS-D-13-0009, 11/28/12.
G&G Cattle Co., Inc., Kenneth Garrett, & Tim Garrett, PS-13-0061, 12/03/12.
Southern California Livestock Auction, Inc. & John R. Malouff, Jr., PS-12-0492, 12/14/12.
Johnny Dobson, PS-13-0059, 12/20/12.
Luke Kottke, d/b/a Kottke Cattle Company, PS-12-0543, 12/31/12.

AGRICULTURE DECISIONS

Volume 71

July – December 2012
Part Three (PACA)
Pages 1185 - 1268

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

LIST OF DECISIONS REPORTED

JULY – DECEMBER 2012

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

COURT DECISION

DEPARTMENTAL DISCIPLINARY DECISIONS

MISCELLANEOUS ORDERS

DEFAULT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

COURT DECISIONS

PERFECTLY FRESH FARMS, INC., PERFECTLY FRESH CONSOLIDATION, INC., PERFECTLY FRESH SPECIALTIES, INC., AND JEFFREY LON DUNCAN v. USDA.
Nos. 09-72434, 09-72535.
Court Decision.
Filed August 28, 2012.

PACA—Responsibly connected.

[Cite as: 692 F.3d 960].

United States Court of Appeals,
Ninth Circuit.

Before: HARRY PREGERSON, RAYMOND C. FISHER, and MARSHA S. BERZON, Circuit Judges.

OPINION

BERZON, Circuit Judge:

In 2001, two entrepreneurs founded Perfectly Fresh Marketing, Inc., a wholesale produce company, and soon thereafter founded three subsidiary companies to handle different aspects of the business. Although things started out well, before long the firms found themselves in financial straits, and declared bankruptcy before the legal proceedings that are the subject of this appeal began.

Those proceedings involve a complex, rarely litigated federal statute, the Perishable Agricultural Commodities Act ("PACA" or "the Act"), 7 U.S.C. § 499a *et seq.*, designed in part to assure that farmers are paid for their produce. In 2009, the Judicial Officer ("JO") of the U.S. Department of Agriculture determined that Perfectly Fresh Farms, Inc.,

Perfectly Fresh Consolidation, Inc., and Perfectly Fresh Specialties, Inc. had violated the PACA by failing to make prompt payment for produce purchases. *See id.* § 499b(4); *see generally In re Perfectly Fresh Farms, Inc.*, 68 Agric. Dec. 507 (U.S.D.A. 2009) ("JO Order"). All three of these entities—like their parent company Perfectly Fresh Marketing, Inc.[1]—had failed by the time the Department of Agriculture commenced administrative proceedings against them, each having filed for bankruptcy in February, 2003 and ceased doing business thereafter.

The penalty assessed against the three entities—publication of the facts and circumstances of their violations—caused them no harm, given that they were no longer in business. But the JO also determined that the two individual petitioners in this case were "responsibly connected" to the Subsidiaries. *See* 7 U.S.C. § 499a(b)(9). The Subsidiaries have conceded that it is primarily for these individuals' benefit that they have petitioned for review. The JO found that Jeffrey Lon Duncan was responsibly connected with Consolidation, of which he was the president, a director, and a ten percent owner, and that Thomas Bennett was responsibly connected with Farms, of which he was president, a director, and a ten percent owner. As "responsibly connected" individuals, Duncan and Bennett are subject to employment and licensing bans of variable duration in the perishable agricultural commodities industry. *See id.* §§ 499d(b) & 499h(b). They, and the Subsidiaries, petitioned for review of the JO's order.

I.

A.

The Perishable Agricultural Commodities Act "was enacted ... in 1930, and has undergone numerous amendments since that time. The Act was aimed at preventing unfair business practices and promoting financial responsibility in the fresh fruit and produce industry." *Farley & Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991). Central here is the PACA provision making it unlawful for "any

[1] We will refer to each company by the distinguishing word in its name (e.g., "Consolidation" or "Farms") and to the three subsidiaries collectively as the "Subsidiaries."

commission merchant, dealer, or broker ... to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any [perishable agricultural] commodity to the person with whom such transaction is had." 7 U.S.C. § 499b(4). The regulations specify that "prompt[ ]" payment for "produce purchased by a buyer" is payment "within 10 days after the day on which the produce is accepted." 7 C.F.R. § 46.2(aa)(5); *see also id.* § 46.2(aa)(11) (allowing parties to opt out of the ten-day default rule).

The Secretary of Agriculture (the "Secretary") may, upon notification of an alleged violation, commence administrative proceedings against any commission merchant, dealer, or broker. 7 U.S.C. § 499f(c)(2). At the conclusion of such proceedings, the Secretary may issue a "reparation order" requiring the respondent to pay the "person complaining" "the amount of damage ... to which such person is entitled as a result of [the] violation." *Id.* § 499g(a). The Secretary may also "publish the facts and circumstances of such violation and/or, by order, suspend the license of [the] offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender." *Id.* § 499h(a).[2]

Additionally, the Act requires all persons who "carry on the business of a commission merchant, dealer, or broker" to have a valid and effective license. *Id.* § 499c(a). There are statutory bans, usually of a year or two, on the employment and licensing of, and possible surety bond requirements for, "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) has been found ... to have committed any flagrant or repeated violation" of the Act.[3] *Id.* § 499h(b); *see id.* § 499d(b); *see also id.* § 499d(c).

The Act defines "responsibly connected" as "affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a

---

[2] As we explain later, the Secretary has delegated these responsibilities to the JO. *See infra* note 5.

[3] Under the PACA, "[t]he terms 'employ' or 'employment' mean any affiliation of any person with the business operations of a licensee." 7 U.S.C. 499a(b)(10).

partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association." *Id.* § 499a(b)(9). Congress amended the Act in 1995, making the foregoing definition of "responsibly connected" rebuttable:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence [(1)] that the person was not actively involved in the activities resulting in a violation of this chapter and [(2)] 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 owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Id. (emphasis added); *see* Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104–48, § 12(a), 109 Stat. 424. The broad definition of "responsibly connected," and the difficulty of rebutting the presumption of responsible connection, accord with the House Committee on Agriculture's observation that the PACA is "admittedly and intentionally a 'tough' law," S. Rep. No. 84–2507, at 3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701 (quoting H. Rep. No. 84–1196, at 2 (1955)), an observation with which the federal courts of appeals have generally agreed. *See Baiardi Food Chain v. United States*, 482 F.3d 238, 241 (3d Cir. 2007); *Golman–Hayden Co. v. Fresh Source Produce Inc.*, 217 F.3d 348, 351 (5th Cir. 2000); *Martino v. U.S. Dep't of Agric.*, 801 F.2d 1410, 1411 (D.C. Cir. 1986).

B.

The facts underlying these petitions for review are as follows:

Gary Tice was an experienced professional in the produce industry. He sought out Jeffrey Lon Duncan to start a produce firm with him. Duncan had also worked in the produce industry for some time and had developed an expertise in selling produce to cruise lines, "a very exacting business given that ships are in port for a very short time and are more demanding than other customers." JO Order at 520. Tice was more knowledgeable than Duncan about the ins and outs of running a business,

having spent the last few years advising other companies on strategy and operations. Together Tice and Duncan founded Perfectly Fresh Marketing, Inc. ("Marketing") in June, 2001. At the outset, Tice and his wife owned fifty-one percent of Marketing and Duncan the remainder.

Later, after a new business partner made a substantial investment in Perfectly Fresh, three subsidiaries were formed: Specialties, Farms, and Consolidation. Specialties was to sell produce to supermarkets; Consolidation was to focus on selling to cruise lines; and Farms was to develop "grower relationships, such as an exclusive agreement to distribute papayas grown by Hawaiian Pride." JO Order at 516. Marketing owned ninety percent of each of the Subsidiaries. According to the paperwork filed with the Department of Agriculture, Duncan owned the remaining ten percent of Consolidation; Thomas Bennett—a forty-year veteran of the produce industry whom Tice had brought aboard—owned the same percentage of Farms.[4]

The same papers listed Duncan as president and a director of Consolidation and Bennett as president and a director of Farms. In spite of their titles, neither Duncan nor Bennett was much involved in the legal or financial affairs of their companies. Both testified to having signed the corporate paperwork fairly casually. Indeed, according to Bennett, the "title of president was [given to him] just to allow him to deal with a higher level of personnel at the companies to which he would be selling," JO Order at 521; he did not believe himself to have authority even to sign checks on behalf of Farms.

The precise relationship between Marketing and its newly formed subsidiaries is the main issue in this case. This much, taken from the JO's order, appears clear:

> The four companies were to be run as one entity, with Perfectly Fresh Marketing, Inc., essentially managing the overall operations, and Consolidation, Farms, and Specialties handling sales, each in its own sphere of

[4] The record does not indicate the ownership of the remainder of Specialties.

> specialization.... Mr. Tice, Mr. Bennett, and Mr. Duncan all considered that the three new companies were sales entities, with Perfectly Fresh Marketing, Inc., handling all the operations including the purchasing; Perfectly Fresh Marketing, Inc., would buy all the produce and transfer it to the appropriate company; Perfectly Fresh Marketing, Inc., leased all the warehouse space; and Perfectly Fresh Marketing, Inc., handled the receiving when produce arrived at the warehouse. None of the entities ever held a board meeting.
>
> It appears that customers knew of the companies as "Perfectly Fresh" and were not aware that in reality four different companies existed.... Generally, checks from customers went first into the [Subsidiaries'] bank accounts, but were then transferred into Perfectly Fresh Marketing, Inc.'s account to keep the other accounts at a virtual zero balance. According to Mr. Tice, all the purchasing was done by Perfectly Fresh Marketing, Inc., even though the accounts payable documents ... admitted into evidence generally linked each purchase to a specific company and even though the produce payables listed in the schedules filed with the bankruptcy court generally matched those accounts payable documents, in terms of which company purchased which lot of produce.

JO Order at 516–17.

Approximately five months after the Subsidiaries had been formed, Perfectly Fresh ran into financial difficulties. The companies managed to keep their accounts current through the end of November, but in December, Perfectly Fresh ceased paying its suppliers in a timely manner. The financial problems worsened, and, on February 3, 2003, Marketing and the Subsidiaries filed for bankruptcy. In October, 2004, the Department of Agriculture commenced disciplinary proceedings against the three Subsidiaries—but not Marketing—for violating the PACA's requirement that produce dealers, brokers, and commission merchants pay for produce in full and promptly. *See* 7 U.S.C. § 499b(4).

Bennett had learned about Perfectly Fresh's financial difficulties in December; in early January, concerned about his reputation in the industry, he decided to resign. Duncan became aware of the financial troubles around the same time, but Consolidation, the Subsidiary with which he was primarily involved, remained profitable throughout. The Department of Agriculture determined that both Duncan and Bennett were "responsibly connected" individuals within the meaning of the Act, Bennett with regard to Farms, and Duncan with regard to both Consolidation and Specialties. Faced with penalties affecting their future participation in the industry, Bennett and Duncan contested the "responsibly connected" determinations at a hearing before the agency's Chief Administrative Law Judge ("ALJ"), without success. In the same proceedings, the Chief ALJ adjudged each of the Subsidiaries to have violated the Act's full-payment-promptly provision. *See id.* On appeal, the JO determined that Duncan was not responsibly connected to Specialties, but otherwise affirmed. We now deny the petitions for review and affirm.

II.

We have jurisdiction to hear petitions for review of final PACA orders. 28 U.S.C. § 2342(2). The JO's decision constitutes a final order ripe for our review. "[T]he scope of our review of administrative decisions is narrow: administrative agency decisions will be upheld unless 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law....' " *Farley & Calfee, Inc.*, 941 F.2d at 966 (quoting 5 U.S.C. § 706(2)(A)). We will affirm the JO's factual findings if they are supported by substantial evidence. *See Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 803 (9th Cir. 1996). We review his conclusions of law de novo, *id.*, but with the appropriate level of deference to his interpretations of the statute his agency administers.

As to what that appropriate level is, two other courts of appeals have concluded that the JO's interpretations of the PACA in disciplinary proceedings are entitled to deference under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Coosemanns Specialties, Inc. v. Dep't of*

Agric., 482 F.3d 560, 564 (D.C. Cir. 2007); *G & T Terminal Packaging Co. v. U.S. Dep't of Agric.*, 468 F.3d 86, 95–96 (2d Cir. 2006). We join them.

"[A]dministrative implementation of a particular statutory provision qualifies for Chevron deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). With respect to the first requirement, Congress has provided for PACA violations to be adjudicated "[a]fter opportunity for hearing," 7 U.S.C. § 499f(d), and directed that "the Secretary shall determine whether or not ... [the respondent] violated" the Act, language that implies a delegation of interpretative authority. *Id.* Congress has also vested the courts of appeals with jurisdiction to review the outcomes of these adjudications, 28 U.S.C. § 2342(2), another indication that Congress intended to create a "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie" pronouncements entitled to *Chevron* deference. *Mead*, 533 U.S. at 230, 121 S.Ct. 2164.

As to the second requirement for application of *Chevron* deference, the JO's decision was "promulgated in the exercise" of the authority Congress delegated to the agency to make rulings carrying the force of law, *Mead*, 533 U.S. at 227, 121 S.Ct. 2164:[5] The decision was

[5] That the Judicial Officer and not the Secretary himself decides PACA unfair conduct cases does not render *Chevron* deference inappropriate. *Cf. INS v. Aguirre–Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (holding that case-by-case adjudications of the BIA are entitled to *Chevron* deference, even though Congress conferred adjudicatory authority on the Attorney General). The Secretary of Agriculture has delegated the Judicial Officer authority to act "as final deciding officer" in formal adjudications, 7 C.F.R. § 2.35(a)(1), pursuant to Congressional authorization to delegate "the whole or any part of any regulatory function which the Secretary is, now or after April 4, 1940, required or authorized to perform," 7 U.S.C. § 450d (emphasis added). Congress emphasized that "[w]henever a delegation is made ... all provisions of law shall be construed as if the regulatory function ... had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made." *Id.* § 450e; *see also id.* § 450c (defining the term "regulatory function" as including "determining whether" orders, licenses, sanctions and other regulatory actions are "authorized or required by law"); *id.* § 6912(a) (also authorizing delegations of "any ... function vested in the Secretary as of October 13, 1994").

announced, after a formal hearing, by the Judicial Officer in an opinion published in Agriculture Decisions, the agency's official reporter, *see In re Perfectly Fresh Farms, Inc.*, 68 Agric. Dec. 507 (U.S.D.A. 2009); agency practice accords precedential significance to such opinions, *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351, 362 (U.S.D.A. 2000), a practice we have characterized "as the essential factor in determining whether *Chevron* deference is appropriate." *Marmolejo–Campos v. Holder*, 558 F.3d 903, 909 (9th Cir.2009) (en banc) (quoting *Alvarado v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006)) (internal quotation marks omitted). For all these reasons, we conclude that *Chevron* deference is accorded to statutory interpretations contained in JO opinions applying the PACA.

III.

As to the merits, the Subsidiaries first argue that the JO erred in determining that they failed to "make full payment promptly in respect of ... transaction[s] in" perishable agricultural commodities. 7 U.S.C. § 499b(4). Because the JO's determination that the Subsidiaries purchased produce is supported by substantial evidence, we deny the petition.

The JO's conclusion that the Subsidiaries failed to make full payment promptly was based on three independent rationales. First, the JO found that the record evidence, particularly the Subsidiaries' business records, indicated that they, and not Marketing, purchased produce from the suppliers. JO Order at 523–24. Second, the JO interpreted the Subsidiaries' bankruptcy filings as affirmative admissions that they were responsible for payments to suppliers, and even suggested that the Subsidiaries should be estopped from arguing otherwise. *Id.* at 524–27. Third, the JO concluded that Marketing served as the Subsidiaries' agent, and as such, liability for Marketing's failure to pay suppliers should "flow through" to the Subsidiaries. *Id.* at 536.

The Subsidiaries contest all of these determinations, arguing that: (1) the JO's factual determination that the Subsidiaries purchased produce is not supported by substantial evidence; (2) the bankruptcy filings do not

necessarily constitute an express admission; and (3) the JO's "flow through" conception of liability under § 499b(4) is legally erroneous. Because we hold that the JO's factual determinations are supported by substantial evidence, we need not address the Subsidiaries' challenges to the JO's other rationales.

The JO's determination that the Subsidiaries purchased produce from suppliers is supported by substantial evidence in the record. In particular, Perfectly Fresh's business records, a letter written by Tice to the agency investigator, testimony from Perfectly Fresh employees, and the bankruptcy filings of the Subsidiaries all support the conclusion that the Subsidiaries failed to make payment promptly for produce they purchased from suppliers.

The Subsidiaries' disagreement with the JO's factual findings centers on the role of Marketing in the purchasing of produce. According to the Subsidiaries, Marketing did all the purchasing of produce, which the Subsidiaries then sold. Some of the record testimony supports this view. Duncan, for instance, testified that he would put orders from Consolidation's customers into Perfectly Fresh's internal system, and then buyers from Marketing would purchase produce from suppliers to fill those orders. In other words, according to Duncan, "[b]uying was done by Perfectly Fresh Marketing."

Other testimony, however, supports the JO's conclusion that the Subsidiaries were buying produce. Bennett testified that "[Farms'] sales team, salesmen, would actually buy product that they were selling," even though "all of the invoices and everything were being paid by Perfectly Fresh Marketing." And when Duncan explained the purchasing system in more detail, it became clear that he arranged entire transactions as a unit, placing orders for produce to be purchased only after receiving orders from his customers, and calling suppliers to check availability and prices. Duncan provided an illustration of this process: First, he would receive orders from customers indicating a need for, say, leeks. Knowing his customer needed a certain quantity of leeks, Duncan would call suppliers and check their price on leeks, then call the customer back to close the deal. Duncan would then put the order into a computer system, where a Marketing employee would fill out the purchase order, on terms already ironed out by Duncan, his supplier, and his customer. Both Bennett and

Duncan also received complaints from produce sellers when they were not paid on time, suggesting that at least some suppliers believed that they were owed payments by the Subsidiaries rather than Marketing. The system, then, was one in which buying and selling were not purely separate transactions, as at a grocery store, say. While Marketing employees may have been left to fill out purchase orders, they did so at the direction of the Subsidiaries, in order to acquire particular lots of produce already destined for particular customers.

This interpretation is strongly supported by the companies' business records. The record contains numerous invoices submitted by suppliers for purchase orders of produce. Most of these invoices are addressed to Marketing, but some are addressed to "Perfectly Fresh," and some are directed to a particular Subsidiary. Each of these invoices is paired in the business records with a voucher assigning the particular order to one of the Subsidiaries. Each Subsidiary in turn maintained accounts payable files showing debts owed to particular suppliers of produce, rather than to Marketing. There was also testimony that the Subsidiaries' checks were used to pay produce suppliers.

Tice insisted that these records did not show that the Subsidiaries bought produce, arguing that a voucher was "the same thing as an invoice, if you will, from [M]arketing to [C]onsolidation, or an invoice from [M]arketing to [S]pecialities," and that Marketing did all the buying. The JO found this testimony not credible in light of a letter Tice had written to the agency investigator in which he said that Marketing "turned over all its previous business to the three [subsidiaries] and did no actual buying and selling." The JO's credibility determination is entitled to deference, and we see no basis to disturb it.

The JO also cited the Subsidiaries' bankruptcy filings as indicating that they failed to make payment promptly to their suppliers. The "Schedule F" that each of the Subsidiaries filed with the bankruptcy court lists the creditors holding unsecured claims against them and the amount of those claims. The Subsidiaries' Schedule Fs listed as creditors the same produce suppliers that were listed in the disciplinary complaints. The JO determined that the Schedule Fs therefore constituted evidence that the Subsidiaries had violated the Act's full-payment-

promptly provision, § 499b(4), as they were effectively "admissions that these debts for produce did exist at the time of the filings." JO Order at 525.

The Subsidiaries argue that the bankruptcy filings should not be interpreted as admissions that they, and not Marketing, had unpaid debts to produce suppliers. The Schedule Fs, the Subsidiaries note, contained the following disclaimer:

> CREDITORS LISTED ON THE ATTACHED SHEETS WITH AN ASTERISK (*) ARE CREDITORS WHO MAY HAVE STATUTORY TRUST INTERESTS IN THE RECEIPTS GENERATED BY THE OPERATION OF THE DEBTOR'S BUSINESS PURSUANT TO THE PERISHABLE AGRICULTURAL COMMODITIES ACT....

The Subsidiaries argue, based on this disclaimer, that they only listed debts to produce suppliers on their Schedule Fs because they believed that the proceeds from the sale of such produce might still be encumbered by a PACA trust, even if the produce itself was only directly purchased by Marketing.[6] While there appears to be no precedent for PACA trust liability "following" produce in this manner, the Subsidiaries argue that there may not be complete overlap between PACA trust liability and "full payment promptly" liability under § 499b(4), and that their decision to list debts to produce suppliers on their Schedule Fs for purposes of PACA trust liability does not necessarily constitute an admission with regards to full payment promptly liability.

Without getting into the complex statutory question of whether this argument has any merit, we note that even if it were true, it serves only

---

[6] "PACA trust" is a trust created by the statute to protect the claims of produce sellers, see 7 U.S.C. § 499e(c), that "elevate[s] the claims of unpaid perishable agricultural commodities suppliers over all other creditors of the bankrupt estate." *Middle Mountain Land & Produce, Inc. v. Sound Commodities, Inc.*, 307 F.3d 1220, 1224 (9th Cir. 2002). The PACA "requires licensed dealers to hold all perishable commodities purchased on short-term credit, as well as sales proceeds, in trust for the benefit of unpaid sellers." *Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A.*, 362 F.3d 33, 37 (2d Cir. 2004).

to defeat the assertion that the Schedule Fs constitute affirmative admissions of full payment promptly liability that would now estop the Subsidiaries from suggesting that they had no debts to produce suppliers at all. Even if the Schedule Fs do not necessarily, for purposes of estoppel, constitute admissions, the JO was still entitled to interpret them as evidence that the Subsidiaries did purchase produce from suppliers. This interpretation is, after all, consistent with the rest of the evidence, particularly the invoices and vouchers, which closely matched the debts to produce suppliers listed on the Schedule Fs. Furthermore, Marketing itself listed "virtually no produce creditors on its Schedule F," casting significant doubt on the Subsidiaries' claims that Marketing was responsible for purchasing produce and that the Schedule Fs were intended to reflect PACA trust liability. If the Subsidiaries' Schedule Fs were reflecting derivative PACA trust liability, then the Marketing Schedule Fs, prepared by the same individuals, should have listed the same obligations, as Marketing would have had primary PACA trust liability were it the entity that had purchased the produce. Moreover, when asked about the Schedule F listings at the hearing, Tice never mentioned PACA trust liability, explaining instead that the Subsidiaries listed debts to produce suppliers as "a way to be able to put the asset to the debt." The Schedule Fs therefore reinforce the JO's conclusion that the Subsidiaries purchased produce and failed to pay for it promptly.

There is therefore substantial evidence to support the JO's finding that the Subsidiaries purchased produce. The hearing testimony, business records, and bankruptcy filings all reinforce this conclusion, and while the record as a whole may be susceptible to different interpretations, we cannot say that the evidence marshaled by the JO was not adequate to support his conclusions.

IV.

The Subsidiaries next argue that the JO erred in determining that their violations were "willful" and "repeated." JO Order at 527. PACA imposes licensing and employment restrictions on individuals found to have committed "any flagrant or repeated violation of section 499b." 7

U.S.C. §§ 499d(b), 499h(b)(2).[7] Where the violations are " 'willful,' license revocation proceedings may be initiated without a prior written warning and opportunity to demonstrate or achieve compliance." Potato Sales, 92 F.3d at 804 (citing 5 U.S.C. § 588(c); 7 C.F.R. § 46.45(e)(5)). Violations that "did not occur simultaneously ... must be regarded as 'repeated' violations." *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972). For example, fifty-one transactions has been held to fall "plainly within the permissible definition of 'repeated.' " *Farley & Calfee*, 941 F.2d at 968. The JO was thus correct in determining that the violations committed by the Subsidiaries were "repeated" in light of the number of violations (286 for Consolidation, 142 for Farms, and 796 for Specialties) and the amount unpaid (over $373,000 for Consolidation, over $442,000 for Farms, and over $263,000 for Specialties). JO Order at 528.

PACA violations are " 'willful' if the violator: '(1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements.' " *Potato Sales*, 92 F.3d at 805 (quoting *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 773 (9th Cir.1985)). The Subsidiaries argue that violations premised on the JO's "flow through" theory of liability cannot be willful because, under that theory, the Subsidiaries were held responsible for the acts of Marketing and committed no violations of their own. That argument may be correct, but it has no bearing on the JO's independent determination that the Subsidiaries themselves violated PACA's full payment promptly provision, and that those violations were willful. As the JO observed, there is ample evidence that the Subsidiaries' violations were intentional or committed with careless disregard of statutory requirements. Bennett and Duncan both admitted at the hearing that the Subsidiaries continued to place orders for produce despite knowing that their suppliers were not being paid promptly.

V.

[7] Because "[t]he Act prescribes consequences for violations that are 'flagrant or repeated ... [o]ur ... finding that the violations were repeated is sufficient,' " and we need not consider whether they were "flagrant." *Farley & Calfee*, 941 F.2d at 968 n. 4; *cf. Potato Sales*, 92 F.3d at 805 (holding that the petitioner's violations were "flagrant" and thus declining to decide whether they were also "repeated").

There is also substantial evidence in the record to support the JO's conclusion that Duncan and Bennett were "responsibly connected" to the Subsidiaries.

PACA creates a presumption of responsible connection as to persons who are "affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association." 7 U.S.C. § 499a(b)(9). That presumption can be rebutted if a person can show:

> by a preponderance of the evidence [(1)] that the person was not actively involved in the activities resulting in a violation of this chapter and [(2)] that the person [ ] was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license.

Id. (emphasis added). There is no dispute that Duncan and Bennett are subject to PACA's presumption of responsible connection; they argue only that they have carried their burden of rebutting it.

The JO articulated in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (U.S.D.A.1999), the standard for determining when a person is "actively involved in the activities resulting in a violation." "The standard," the JO explained, "is as follows:"

> A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have

> been actively involved in the activities that resulted in a violation of the PACA....

Id. at 610–11.[8] Neither Duncan nor Bennett takes issue with Norinsberg's articulation of what it means to be "actively involved." The term is certainly ambiguous, and we cannot say that the JO's interpretation in *Norinsberg* is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778. We therefore accept and apply it.

This court has in one case, *Maldonado v. Department of Agriculture*, 154 F.3d 1086 (9th Cir. 1998), addressed the issue of "active[ ] involve[ment]" under § 499a(b)(9). *Maldonado* overturned the JO's determination that the petitioner was actively involved in an activity resulting in failure to pay promptly. We found no active involvement even though the petitioner "r[a]n [ ] the produce department" of the company that had failed to pay for produce promptly, stressing that the relevant company had defaulted in large part because new owners "looted" it through various fraudulent activities of which Maldonado was not aware. *Id.* at 1086, 1088.

Maldonado predated *Norinsberg*, and did not set forth general criteria for what it means to be "actively involved in the activities resulting in a violation" (largely because the JO had himself yet to develop a standard). The JO explicitly referenced Maldonado in announcing the new standard in *Norinsberg*, explaining that he believed the standard was "consistent with [his] reading of Maldonado." *Norinsberg*, 58 Agric. Dec. at 612.

In any event, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). Thus,

---

[8] The JO defined this standard after the D.C. Circuit had granted a petition for review of a "responsibly connected" determination on the ground that the JO had "inadequately articulated the factors relevant in interpreting 'actively involved.' " *Norinsberg v. U.S. Dep't of Agric.*, 162 F.3d 1194, 1196 (D.C. Cir. 1998).

Maldonado only remains good law to the extent it is consistent with *Norinsberg*. Applying *Norinsberg*, the JO noted that "the buying and selling of produce at a time when produce sellers are not getting paid pursuant to the requirements of PACA ... constitute[s] [active] involvement." JO Order at 531 (citing *In re Janet S. Orloff*, 62 Agric. Dec. 281, 290–92 (U.S.D.A. 2003)).

There is ample evidence in the record to support the JO's determination that Duncan was actively involved in the violations committed by Consolidation. In disputing this determination, Duncan again argues that Consolidation did not purchase produce, and that he himself was merely a "salesman." As we have already held, there is substantial evidence to support the JO's conclusion that Consolidation purchased produce from suppliers.

Moreover, Duncan's personal role in Consolidation was not "limited to the performance of ministerial functions only." *Norinsberg*, 58 Agric. Dec. at 611. Duncan had personal relationships with the suppliers to whom he turned when he received an order from his customers, and those suppliers looked to Duncan when they were not getting paid. As discussed earlier, Duncan called suppliers in response to orders placed by his customers, and negotiated the terms of orders that would allow produce to flow from suppliers to Consolidation to customers. Duncan would then put the order into a computer system, where a Marketing employee would fill out the purchase order, on terms already ironed out by Duncan, his supplier, and his customer. This testimony shows that the "buyers" who worked for Marketing were the ones performing "ministerial" tasks, and that Duncan was engaged in activity involving "judgment, discretion, or control." *Id.*

Orloff, on which Duncan relies, does not help him. In that case, an individual who purchased produce but was not involved in payment decisions argued that she was therefore not actively involved in the activities resulting in a violation of the PACA. *Orloff*, 62 Agric. Dec. at 290. The JO rejected this argument, observing that the Petitioner's actions were not ministerial because she "decided whether to make purchases of frozen foods ... and chose to do so even though she knew or should have known that [the company] was not paying produce suppliers

... in accordance with the PACA." *Id*. at 29192. Duncan's argument that he was not actively involved in PACA violations because he was not responsible for sending the payments directly to suppliers and because Consolidation itself was profitable is therefore foreclosed. Like the petitioner in Orloff, Duncan continued to purchase produce despite knowing that Perfectly Fresh was unable to pay its suppliers in a timely fashion.

Substantial evidence also supports the JO's determination that Bennett was actively involved in the PACA violations of Farms. Like Duncan, Bennett was in charge of his subset of the overall business of Perfectly Fresh, and he exercised "judgment, discretion, or control" with respect to that business. *Norinsberg*, 58 Agric. Dec. at 611. In particular, Bennett supervised a cadre of employees and undertook a significant outside storage business on his own initiative. Unlike Duncan, however, Bennett "instructed the salesmen not to buy product until we got some of the receivables in" after learning that Perfectly Fresh was having trouble paying its bills, and he resigned less than a month later. Bennett's efforts to avoid committing PACA violations are admirable, but, unfortunately, no less than 21 violations occurred while he was still in charge of Farms, and he cites no authority for the suggestion that his later resignation absolves him of responsibility for those violations.

The conclusion that Duncan and Bennett were actively involved in the activities resulting in the violation precludes them from rebutting the presumption that they were "responsibly connected" to the Subsidiaries. We therefore need not consider whether they have carried their burden under the second prong.[9]

---

[9] We note, however, that we are troubled by the JO's insistence that a shareholder is automatically an "owner" for purposes of the "alter ego" defense (which allows rebuttal of the presumption of responsible connection under the second prong if a person demonstrates that he "was not an 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)), even when he demonstrates that the violating licensee is the alter ego of a different owner. *See* JO Order at 539 n.15; *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 386–88 (U.S.D.A. 2000); *In re Michael Norinsberg*, 56 Agric. Dec. 1840, 1864–65 (U.S.D.A.1997), *rev'd on other grounds*, 162 F.3d 1194 (D.C. Cir. 1998), final decision on remand, 58 Agric. Dec. 604, 609 n.4 (1999). The JO has not, in our view, adequately explained the basis for such a blanket rule. In particular, his explanation does not take account of the use of the plural "owners" with regard to the alter ego factor, or of the use elsewhere in the statute of the

CONCLUSION

The JO's determination that the Subsidiaries purchased produce and failed to make prompt payment for it as required by § 499b(4) is supported by substantial evidence. The JO's further conclusion that Duncan and Bennett were responsibly connected to Consolidation and Farms under § 499a(b)(9) is therefore also supported by substantial evidence, and free of legal error.

For the foregoing reasons, the petitions for review are REJECTED.

Parallel Citations
12 Cal. Daily Op. Serv. 9842, 2012 Daily Journal D.A.R. 11,996

____

term "shareholder" as well as "owner." *See Anthony Thomas*, 59 Agric. Dec. at 388; 7 U.S.C. § 499a(b)(9).

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DISCIPLINARY DECISIONS

In re: MEZA SIERRA ENTERPRISES, INC.
Docket No. D-10-0250.
Decision and Order.
Filed August 17, 2012.

PACA-D—"No pay."

Shelton S. Smallwood, Esq. for Complainant.
Ricardo A. Rodriguez, Esq. for Respondent.
Initial Decision by Jill S. Clifton, Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Robert C. Keeney, Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on April 26, 2010. The Deputy Administrator 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].

The Deputy Administrator alleges, during the period November 2008 through January 2009, Meza Sierra Enterprises, Inc. [hereinafter Meza Sierra], willfully violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to two produce sellers, Grande Produce LTD, Co., and Kingdom Fresh Produce, Inc., of the agreed purchase prices, or the balances of the agreed purchase prices, in the total amount of $282,621.20 for 17 lots of perishable agricultural commodities (tomatoes) which Meza Sierra purchased, received, and accepted in

interstate and foreign commerce.[1] On May 18, 2010, Meza Sierra filed Respondent's Original Answer requesting dismissal of this proceeding based upon a lack of jurisdiction and denying the allegations of the Complaint.

On April 26, 2012, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order on the Written Record: (1) dismissing the portion of the Complaint relating to Meza Sierra's failure to pay Grande Produce LTD, Co., $49,724 for 5 lots of tomatoes in accordance with the PACA; (2) finding, during the period November 2008 through January 2009, Meza Sierra failed to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the amount of $215,385 for tomatoes that Meza Sierra purchased, received, and accepted in interstate commerce; (3) concluding Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4); and (4) revoking Meza Sierra's PACA license or, in the alternative, ordering the publication of the facts and circumstances of Meza Sierra's PACA violations.[2]

On May 31, 2012, Meza Sierra filed an Appeal Petition. On June 25, 2012, the Deputy Administrator filed Complainant's Response to Respondent's Appeal Petition. On June 29, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the ALJ's conclusion that Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) and the ALJ's order revoking Meza Sierra's PACA license and dismissing the portion of the Complaint relating to Meza Sierra's failure to pay Grande Produce LTD, Co.

DECISION

---

[1] Compl. at 2-3 ¶¶ III-IV and Appendix A.

[2] ALJ's Decision and Order on the Written Record at 4, 8, 10 ¶¶ 12, 26, 31-33.

Discussion

The PACA requires produce dealers to make full payment promptly for perishable agricultural commodity purchases, usually within 10 days after the day on which the produce is accepted, unless the parties agree to different terms prior to the purchase (7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa)(5), (11)).

The ALJ took official notice of filings in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010), and *Meza Sierra Enterprises, Inc. v. Kingdom Fresh Produce, Inc.*, No. 13-11-00184-CV (Tex. App.—Corpus Christi 2011).[3] In addition, the ALJ ordered the Deputy Administrator to file the Final Summary Judgment issued in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010),[4] and on May 1, 2012, the Deputy Administrator complied with the ALJ's order.[5] These Texas state court filings establish: (1) the tomatoes which are the subject of *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010), are the same tomatoes that Meza Sierra purchased from Kingdom Fresh Produce, Inc., that are the subject of the instant proceeding; (2) during the period November 2008 through January 2009, Meza Sierra, failed to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the amount of $215,385 for tomatoes which Meza Sierra purchased, received, and accepted in interstate commerce; and (3) Meza Sierra did not achieve full compliance with the PACA within 120 days of having been served with the Complaint filed in this proceeding.

---

[3] Specifically, the ALJ took official notice of the following: (1) Respondent's Proposed Exhibits RX 1-RX 2; (2) Complainant's Motion for Reconsideration of Second Ruling Concerning Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued Attach. A; and (3) Response to Ruling Attach. A.

[4] ALJ's Decision and Order on the Written Record at 7, 11 ¶¶ 22, 35.

[5] Complainant's Response to Decision and Order Attach. A.

The United States Department of Agriculture's policy in a case in which a PACA licensee has failed to make full or prompt payment for produce and failed to be in full compliance with the PACA within 120 days of having been served with a complaint is to treat the case as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, is revoked. A civil penalty is not appropriate because limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA, and it would not be consistent with the congressional intent to require a PACA violator to pay the United States while produce sellers are left unpaid. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549, 570-71 (1998).

Meza Sierra cannot show full compliance with the PACA within 120 days after having been served with the Complaint. Meza Sierra's inability to show full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. Meza Sierra's violations are "repeated" because repeated means more than one. Meza Sierra's violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. *See In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997). Meza Sierra's violations of the PACA are also "willful," as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)).[6] Willfulness is reflected by Meza Sierra's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and the number and dollar amount of Meza Sierra's violative transactions. Therefore, the appropriate sanction in this proceeding is the revocation of Meza Sierra's PACA license.

---

[6] A violation is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *See*, *e.g.*, *Allred's Produce v. U.S. 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); *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), *cert. denied*, 450 U.S. 997 (1981).

Meza Sierra's Request for Oral Argument

Meza Sierra's request for oral argument (Appeal Pet. at 1), which the Judicial Officer may grant, refuse, or limit,[7] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Meza Sierra's Appeal Petition

Meza Sierra raises four issues in its Appeal Petition. First, Meza Sierra contends the ALJ erroneously concluded she had jurisdiction to hear this case and to issue a decision in this case (Appeal Pet. at 1-3 ¶ I).

The Secretary of Agriculture is authorized to cause a complaint to be issued for any violation of the PACA and must afford each alleged violator an opportunity for a hearing on the complaint before the Secretary of Agriculture's duly authorized examiner (7 U.S.C. § 499f(c)(2)). The Secretary of Agriculture has designated administrative law judges within the Office of Administrative Law Judges, United States Department of Agriculture [hereinafter OALJ], to hold hearings, to perform related functions, and to issue initial decisions in proceedings subject to 5 U.S.C. §§ 556 and 557 arising under the PACA (7 C.F.R. § 2.27(a)(1)). This PACA proceeding is subject to 5 U.S.C. §§ 556 and 557, and, at all times material to this proceeding, the ALJ was an administrative law judge employed by OALJ; therefore, I reject Meza Sierra's contention that the ALJ did not have jurisdiction to hear this case and to issue an initial decision in this case.

Second, Meza Sierra contends the Rules of Practice are not applicable to this proceeding (Appeal Pet. at 1-3 ¶ I).

The Deputy Administrator instituted this disciplinary proceeding by filing the Complaint pursuant to the Secretary of Agriculture's authority in 7 U.S.C. § 499f(c)(2) to cause a complaint to be issued for any violation of the PACA. In the Complaint, the Deputy Administrator requests that, pursuant to 7 U.S.C. § 499h(a), the ALJ find Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) and

---

[7] 7 C.F.R. § 1.145(d).

order revocation of Meza Sierra's PACA license.[8] The Rules of Practice are applicable to adjudicatory proceedings instituted under statutes listed in 7 C.F.R. § 1.131. Sections 6(c) and 8(a) of the PACA (7 U.S.C. §§ 499f(c), 499h(a)) are included in the list of statutes to which the Rules of Practice are applicable (7 C.F.R. § 1.131(a)).[9] Therefore, I reject Meza Sierra's contention that the Rules of Practice are not applicable to this proceeding.

Third, Meza Sierra asserts its debt to Kingdom Fresh Produce, Inc., for the tomatoes in question is still being litigated in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010); therefore, the ALJ erroneously concluded the officially noticed Texas state court documents establish that Meza Sierra violated 7 U.S.C. § 499b(4) (Appeal Pet. at 3-4 ¶ II 1).

The Texas state court documents filed in this proceeding establish that the litigation between Kingdom Fresh Produce, Inc., and Meza Sierra regarding Meza Sierra's failure to pay Kingdom Fresh Produce, Inc., for the tomatoes in question has concluded. On April 19, 2010, the Texas District Court ordered Meza Sierra and Valdemar Meza, jointly and severally, to pay Kingdom Fresh Produce, Inc., $215,385 for the tomatoes in question.[10] Meza Sierra filed a notice of appeal of the judgment entered by the Texas District Court, which the Texas Court of Appeals dismissed for want of jurisdiction.[11] The ALJ properly

---

[8] Compl. at 4 ¶ 2.

[9] See *In re Midland Banana & Tomato Co.,* 54 Agric. Dec. 1239, 1318-20 (1995) (holding the Rules of Practice are applicable to disciplinary adjudicatory proceedings instituted by a complaint that contains a request that an administrative law judge find, pursuant to 7 U.S.C. § 499h(a), a respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997).

[10] *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist., Final Summary Judgment Apr. 19, 2010) (Complainant's Response to Decision and Order Attach. A).

[11] *Meza Sierra Enterprises, Inc. v. Kingdom Fresh Produce, Inc.*, No. 13-11-00184-CV (Tex. App.—Corpus Christi Memorandum Opinion Per Curiam June 16, 2011; Mandate September 8, 2011) (Complainant's Motion for Reconsideration of Second Ruling Concerning Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued Attach. A).

concluded Meza Sierra's appeal was dismissed and the judgment in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010), is final and effective.

Fourth, Meza Sierra contends the Secretary of Agriculture, by his failure to advise Kingdom Fresh Produce, Inc., to file a formal reparation complaint against Meza Sierra, has concluded that Meza Sierra did not violate the PACA (Appeal Pet. at 3-4 ¶ II 2-4).

As an initial matter, Meza Sierra does not cite any support for its contention that the Secretary of Agriculture failed to advise Kingdom Fresh Produce, Inc., to file a formal reparation complaint against Meza Sierra. The Deputy Administrator asserts the Secretary of Agriculture did afford Kingdom Fresh Produce, Inc., an opportunity to file a formal reparation complaint against Meza Sierra, but Kingdom Fresh Produce, Inc., abandoned its reparation complaint before the Secretary of Agriculture and, instead, pursued its claim against Meza Sierra in state court (Complainant's Response to Respondent's Appeal Petition at the fourth and fifth unnumbered pages). In support of this assertion, the Deputy Administrator cites Plaintiff's Verified Response to Defendant's Motion to Abate and Motion for Protective Order, filed September 30, 2009, in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010); however, I am unable to locate Kingdom Fresh Produce, Inc.'s verified response in the record before me.

Even if I were to find the Secretary of Agriculture failed to advise Kingdom Fresh Produce, Inc., to file a formal reparation complaint against Meza Sierra (which I do not so find), I would not infer that the Secretary of Agriculture must have concluded Meza Sierra did not violate the PACA. Whether the Secretary of Agriculture advises an unpaid produce seller to pursue a private cause of action against a produce dealer has no bearing on whether the Secretary of Agriculture has concluded that the produce dealer has violated the PACA. A PACA disciplinary proceeding does not deal with the relationship of a PACA violator to its produce sellers for the purpose of seeking compensation for the produce sellers but, instead, involves the relationship of the

PACA violator to the public, at least that part of the public in the business of selling and buying perishable agricultural commodities.[12]

The ALJ's Alternative Sanctions

The ALJ found Meza Sierra was a PACA licensee and ordered: (1) revocation of Meza Sierra's PACA license or (2) if Meza Sierra's PACA license was no longer in effect, publication of the facts and circumstances of Meza Sierra's PACA violations.[13] The ALJ's order is consistent with the practice of the Agricultural Marketing Service which does not generally request a suspension or revocation order when a PACA license is no longer in effect, but requests, instead, publication of the facts and circumstances of the violations. The ALJ's order is also consistent with my prior view that a PACA license no longer in effect cannot be revoked and, in lieu of revocation, the appropriate sanction would be publication of the facts and circumstances of the violations.[14]

In many PACA disciplinary proceedings, the record does not include evidence of the status of the PACA violator's PACA license at the time the administrative law judge issues a decision often leaving the administrative law judge with some doubt as to appropriate sanction. In this proceeding, the ALJ resolved that quandary by issuing an order with alternative sanctions which alternatives were dependent upon the then-current status of Meza Sierra's PACA license.[15]

I have revisited the issue of the appropriate sanction to be applied when a PACA license is in effect and when a PACA license is not in effect. While some of the legislative history of the PACA suggests suspension and revocation orders cannot be issued as to PACA licenses that are no longer in effect,[16] I find the plain language of the PACA

---

[12] *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 840 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005); *In re Edward M. Hall*, 12 Agric. Dec. 725, 733 (1953); *In re James L. (Lonnie) Cecil*, 7 Agric. Dec. 1105, 1112 (1948).

[13] ALJ's Decision and Order on the Written Record at 5, 10 ¶¶ 16, 32-33.

[14] *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589, 621 (2006), *aff'd*, 269 F. App'x 35 (2d Cir. 2008).

[15] ALJ's Decision and Order on the Written Record at 10 ¶¶ 32-33.

[16] Donald A. Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, 1 Davidson, Agricultural Law § 4.19 n. 169 (1981 and 1989 Cum. Supp). *See*

authorizes publication of the facts and circumstances of a violation "and/or" suspension or revocation of a PACA license both when the PACA license is in effect and when the PACA license is not in effect:

> **§ 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, . . . the Secretary may publish the facts and circumstances of such violation *and/or*, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. § 499h(a) (emphasis added). Numerous cases support my conclusion that the Secretary of Agriculture is authorized under 7 U.S.C. § 499h(a) to issue a suspension or revocation order and (or) to publish the facts and circumstances of PACA violations whether the PACA violator's PACA license is in effect or not.[17]

---

also Marvin Tragash Co. v. U.S. Dep't of Agric., 524 F.2d 1255, 1258 (5th Cir. 1975) (indicating a revocation order is not available to the Secretary of Agriculture if the PACA violator's license has previously been terminated).

[17] *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1150-52 (1981) (stating a suspension or revocation order can be issued notwithstanding the termination of the PACA license prior to the issuance of the order); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 686 (1980) (stating the expiration of a PACA license after the violations occurred does not preclude an order of suspension of the lapsed or expired license), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633 (1976) (stating a PACA license can be suspended or revoked for a past violation even though the license terminates before the order is issued; similarly, the facts and circumstances of a firm's violation of the PACA can be published even though the firm's PACA license terminates before the order is issued), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750 (1975) (indicating a PACA license can be revoked notwithstanding the previous expiration of the license), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re*

Therefore, as the Secretary of Agriculture is authorized under the circumstance in this proceeding to revoke Meza Sierra's PACA license, and the Deputy Administrator has only requested revocation of Meza Sierra's PACA license,[18] I revoke Meza Sierra's PACA license and I do not publish the facts and circumstances of Meza Sierra's violations.

Findings of Fact

1. Meza Sierra is a corporation registered in the State of Texas.

2. Meza Sierra's mailing address is in care of its attorney, Ricardo A. Rodriguez, Esq., 7001 N. 10th Street, Suite 302, McAllen, Texas 78504.

3. Meza Sierra was issued PACA license number 20070589 on March 15, 2007.

4. Meza Sierra, during the period November 2008 through January 2009, failed to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the total amount of $215,385 for perishable agricultural

---

J. Acevedo & Sons, 34 Agric. Dec. 120, 138-40 (1975) (holding there is no requirement in the PACA that a license be currently in effect at the time a suspension or revocation order is issued), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 252 (1973) (concluding the PACA authorizes the suspension of a PACA license that has lapsed or expired; stating it is irrelevant whether a PACA license expires before or after the complaint is issued and cases holding to the contrary will no longer be followed), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *In re Reese Sales Co.*, 28 Agric. Dec. 1150, 1155 (1969) (revoking the respondent's PACA license and publishing the facts and circumstances of the respondent's violations), *aff'd*, 458 F.2d 183 (9th Cir. 1972); *In re Cloud and Hatton Brokerage*, 18 Agric. Dec. 547, 550 (1959) (holding termination of a PACA license after a disciplinary proceeding has commenced, but before a decision is issued, does not render moot the issue of revocation; the Secretary of Agriculture has authority to enter an order of revocation under these circumstances); *In re Raymond Klein*, 15 Agric. Dec. 1152, 1160 (1956) (revoking the respondent's PACA license and publishing the facts and circumstances of the respondent's violations); *In re Nate Rosenthal*, 15 Agric. Dec. 441, 442 (1956) (same); *In re John* P. Rotton, Jr., 12 Agric. Dec. 743, 745 (1953) (same).

[18] Compl. at 4 ¶ 2.

commodities that Meza Sierra purchased, received, and accepted in interstate commerce.

5. Meza Sierra was not in full compliance with the PACA within 120 days after the Hearing Clerk served Meza Sierra with the Complaint.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over Meza Sierra and the subject matter involved in this proceeding.

2. The ALJ had jurisdiction to hear this case and to issue the ALJ's April 26, 2012, Decision and Order on the Written Record (7 C.F.R. § 2.27(a)(1)).

3. The Rules of Practice are applicable to this proceeding (7 C.F.R. § 1.131(a)).

4. Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), during the period November 2008 through January 2009, by failing to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the total amount of $215,385 for perishable agricultural commodities that Meza Sierra purchased, received, and accepted in interstate commerce.

For the foregoing reasons, the following Order is issued.

ORDER

1. Meza Sierra Enterprises, Inc.'s PACA license is revoked. Paragraph 1 of this Order shall become effective 60 days after service of this Order on Meza Sierra Enterprises, Inc.

2. The portion of the Complaint relating to Meza Sierra Enterprises, Inc.'s failure to pay Grande Produce LTD, Co., is dismissed.

RIGHT TO JUDICIAL REVIEW

Meza Sierra Enterprises, Inc., has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Meza Sierra Enterprises, Inc., must seek judicial review within 60 days after entry of the Order in this Decision and Order.[19] The date of entry of the Order in this Decision and Order is August 17, 2012.

———

In re: PRIME TROPICAL, INC.
Docket No. 12-0513.
Decision and Order.
Filed September 27, 2012.

PACA-D.

Christopher P. Young-Morales, Esq. for Complainant.
Gordon S. Benson, Esq. for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matter involves a complaint filed by the United States Department of Agriculture ("Complainant"; "USDA") against Prime Tropical, Inc. ("Prime"; "Respondent") alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. § 499a et seq. ("PACA"; "the Act"). The complaint alleged that Respondent failed to make full payment promptly in the aggregate amount of $825,808.09 to eighteen (18) sellers of the agreed purchase prices for 150 lots of perishable agricultural commodities during the period September 2010 through June 2011.

I. Procedural History

On July 5, 2012, Complainant filed a Complaint against Respondent alleging violations of the PACA. Respondent filed an Answer with the

[19] 28 U.S.C. § 2344.

Hearing Clerk for the Office of Administrative Law Judges ("OALJ") for USDA ("Hearing Clerk") on July 30, 2012. Pleadings were also filed by individuals affiliated in some way with the corporate Respondent, but the instant action names solely the corporate entity Prime Tropical, Inc. as Respondent.

On August 9, 2012, I set a schedule for pre-hearing submissions. By motions filed on September 6, 2012, Complainant requested entry of a Decision on the record without hearing, and requested that the deadlines for submissions be suspended pending a ruling on the motion for Decision. By Order issued September 7, 2012, I granted that motion. On September 19, 2012, counsel[1] for two individuals affiliated with Respondent filed a response to Complainant's motion, noting no objection to a Decision on the record with respect to the corporate Respondent Prime Tropical Inc.

On September 24, 2012, Yolanda Ramirez and Vincent P. Ramirez, Jr. filed opposition to Complainant's motions. Although these individuals may have interests in the affairs of Respondent, neither is a party to this action, and accordingly, neither has standing in this matter. I note their opposition, but find that they have presented no valid legal defense respecting the corporate Respondent Prime Tropical Inc. Accordingly, I overrule their objection to Complainant's motions. I also find it significant that Respondent's counsel has no objection to entry of Decision without Hearing, so far as the Decision affects only the named corporate Respondent.

I hereby admit to the record the attachments to Complainant's motion for Decision without hearing. This Decision and Order is issued on unopposed motion of Complainant, and incorporates all of the pleadings of the parties and all other evidence of record.

II. Findings of Fact and Conclusions of Law

A. Discussion

[1] The Benson Law Group and Gordon S. Benson, Esq. are counsel of record for the corporate Respondent.

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"), set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. Pursuant to the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. § 1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. § 1.139).

PACA requires payment by a buyer within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11).

In its Answer to the Complaint, Respondent specifically admitted Articles I and II of the Complaint. With respect to Article III, Respondent did not deny that it had failed to timely pay sellers for perishable agricultural commodities, but asserted its belief that fewer than 18 sellers were involved and that the unpaid amount was less than $825,808.00. Further, Respondent did not contend that it expects to make payment to the sellers or otherwise reach compliance with the Act. The Act requires "full payment promptly" and where "respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the [matter] will be treated as a 'no-pay' case." *In re: Scamcorp, Inc*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

I find that Respondent's disagreement with the alleged number of sellers involved and total amount that it failed to pay timely does not constitute a valid defense to liability under PACA. Respondent's denial of liability addresses only the number and total sum involved in the transactions underlying the instant action, and does not constitute a material denial of engaging in practices that violate PACA. The

outstanding balance due to sellers is in excess of $5,000.00, and axiomatically represents more than a *de minimis* amount. *See In re: Fava & Co.*, 46 Agr. Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (U.S.D.A. 1985). Complainant need not establish each of the transactions alleged, as the same sanction would be entered so long as the violations are not *de minimis*. *In re Moore Marketing International Inc*., 47 Agric. Dec. 1472, slip op. at 12-13 (U.S.D.A. 1988).

"[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed". *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (U.S.D.A. 1985). Ergo, I find that a hearing is not necessary in this matter. Where a violation of the PACA is not *de minimis*, and there is no legitimate dispute between the parties as to the amount due, "it is well-settled under the Department's sanction policy that the license of a produce dealer…is revoked…" *In re: Scamcorp, Inc.*, 57 Agric. Dec. at 547-49; *In re: Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590, order denying reconsideration, 44 Agric. Dec. 2060 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83.

A violation is repeated whenever there is more than one violation of the Act, and is flagrant whenever the total amount due to sellers exceeds $5,000.00. *In re: D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice. *Id.* at 1678. In the instant matter, pleadings from an action involving Respondent filed in United States District Court for the Central District of California demonstrate that Respondent owes produce sellers for purchases for which Respondent failed to pay. *See* Attachments to Complainant's motion. Respondent's failure to pay sellers promptly for the purchase of products covered by section 2(4) of the PACA is willful, and the violations are repeated and flagrant.

Therefore, revocation of Respondent's PACA license and publication of the facts and circumstances of Respondent's violations are appropriate sanctions.

B. Findings of Fact

1. Respondent Prime Tropical Inc. is or was a corporation organized and existing under the laws of the state of California and at all times material herein its business address was 1601 E. Olympic Blvd., Building 500, Los Angeles, California 90021.

2. At all times material hereto, Respondent was licensed under and operated subject to the provisions of the PACA, under license number 20050940, issued on June 20, 2005.

3. Respondent's license was suspended on October 28, 2011 for failure to pay a reparation award pursuant to section 7(d) of the PACA, 7 U.S.C. § 499g(d).

4. During the period from September 2010 through June 2011, Respondent failed to make full payment promptly of the agreed purchase prices in the aggregate of $825,808.09 for 150 lots of perishable agricultural commodities purchased, received, and accepted by Respondent in interstate and foreign commerce from 18 sellers.

5. The transactions that demonstrate violations of the PACA are described and enumerated in Appendix A of the Complaint filed in this matter, which are incorporated herein by reference.

6. The unpaid balances represent more than *de minimis* amounts, thereby obviating a need for a hearing.

C. Conclusions of Law

Respondent's failure to make full payment promptly of the agreed purchase prices in the total amount of $825,808.09 for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA 7 U.S.C. § 499b(4)).

ORDER

Respondent Prime Tropical Inc. willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent Prime Tropical Inc.'s PACA license is revoked.

The facts and circumstances underlying Respondent's violations shall be published.

This Order shall take effect on the eleventh (11th) day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall 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 7 C.F.R. §§ 1.139 and 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

_____

In re: AMERSINO MARKETING GROUP, LLC AND SOUTHEAST PRODUCE LIMITED, USA.
Docket Nos. 12-0221, 12-0222.
Decision and Order.
Filed July 17, 2012.

PACA.

Christopher P. Young-Morales, Esq. for Complainant.
Bruce Levinson, Esq. for Respondents.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matter involves complaints filed by the United States Department of Agriculture ("Complainant") against Amersino Marketing Group, LLC ("Amersino") and Southeast Produce Limited USA ("Southeast")("Respondents") alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a et seq.("PACA"; "the Act"). The complaints alleged that Respondents failed to make full payment promptly to ten sellers of the agreed purchase prices for forty-three (43) lots of perishable agricultural commodities during the period December 22, 2008 through August 5, 2010. The Complainant further alleged that Respondents operated from the same building, shared the same office space, shared the same two principal officers and owners, and co-mingled business activities pertaining to the buying and selling of produce.

This Decision and Order is issued on unopposed motion of Complainant.

I. Procedural History

On February 1, 2011, Complainant filed a Complaint against Respondents alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a *et seq*. ("PACA"; 'the Act"). On March 6, 2012, Complainant filed an amended complaint against Respondents. Respondents filed an Answer with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ") for the United States Department of Agriculture ("Hearing Clerk") on March 20, 2012.

On April 2, 2012, I set a schedule for pre-hearing submissions. By motions filed on June 6, 2012, Complainant requested an extension of time to file submissions and moved for a Decision and Order on the record by reason of partial admissions. Henry Wang, one of the principals for Respondents, acknowledged receipt of service of the motion on June 8, 2012. I deferred ruling on the motion for extension pending Respondents' response to Complainant's motion for a Decision and Order on the record. Respondent failed to file a response to either motion, or to file submissions, which were due not later than July 13, 2012.

I admit to the record the Attachments to Respondents' Answer, and Attachment 1 to Complainant's motion.

II. Findings of Fact and Conclusions of Law

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"), set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. Pursuant to the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. § 1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. §1.139) and further provide that "an opposing party may file a response to [a] motion" within twenty days after service (7 C.F.R. § 1.143(d)). The Rules state that Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for filing of any document or paper, except when the time expires on those dates, the period shall be extended to include the next business day. 7 C.F.R. § 1.147(h).

PACA requires payment by a buyer within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11).

In their Answer to the amended Complaint, Respondents did not deny that they had failed to timely pay sellers for perishable agricultural commodities. Respondents asserted that several sellers allowed Respondents time to pay off a balance due, and contended that they were making partial payments to one other seller. In addition, they contended that they had settled and paid a balance due to Cimino Brothers Produce, Inc. Respondents failed to address Complainant's motion, in which it

was alleged that several sellers continue to be owed more than a *de minimis* amount for the purchases.

It has been established that partial payments and agreements to make payments over time, as well as settlements of amounts due for produce purchases, do not constitute full payment under PACA. *In re: Caito*, 48 Agric. Dec. 602, 609-19 (U.S.D.A. 1989); *In re: Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 618-19 (U.S.D.A. 1993). PACA requires "full payment promptly" and where "respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the [matter] will be treated as a no-pay case." *In re: Scamcorp, Inc., d/b/a Goodness Greeness,* 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

In order to reach "full compliance" with PACA, the respondent would have to have paid all produce sellers and "have no credit agreements with produce sellers for more than 30 days". *Id.* at 549. Respondents admitted that as of the date they filed their Answer, they still owed $151,883.50 out of the $176,883.50 listed as due to sellers, exclusive of a purported "settlement" with Cimino Brothers. Respondents also admitted that they owed $28,000 out of $40,088.00 due to Morris Okun Inc. Respondents owed $19,00.00 out of $21,021.00 due to Center Maraicher. It appears from Respondents' Attachments 2 and 3 that they have not made full payments to produce sellers for almost two years. Respondents did not address whether and when they intended to fully pay the sellers.

The outstanding balance due to sellers is in excess of $5,000.00, and axiomatically represents more than a *de minimis* amount. *See, In re: Fava & Co.*, 46 Agric. Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (1985). "[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed". *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (1985). Ergo, I find that a hearing is not necessary in this matter.

A violation is repeated whenever there is more than one violation of the Act, and is flagrant whenever the total amount due to sellers exceeds $5,000.00. *In re: D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice. *Id.* In the instant matter, it is clear that Respondents knew or should have known that they would be unable to promptly pay the full amount due for the perishable produce that they ordered and accepted, yet they continued to make purchases for which they failed to pay. Respondents' actions were willful, and the violations are repeated and flagrant.

Where a violation of the PACA is not *de minimis*, and there is no legitimate dispute between the parties as to the amount due, "it is well-settled under the Department's sanction policy that the license of a produce dealer…is revoked…" *In re: Scamcorp, Inc.*, 57 Agric. Dec. at 549; *In re: Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590, order denying reconsideration, 44 Agric. Dec. 2060 (U.S.D.A. 1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 83.

Respondent Southeast's PACA license terminated on September 10, 2010, and Respondent Amersino's PACA license terminated on October 12, 2010, when Respondents failed to pay the annual required fees pursuant to section 4(a) of the PACA (7 U.S.C. § 499a). Therefore, publication of the facts and circumstances of Respondents' violations is an appropriate sanction.

A. Findings of Fact

1. Amersino Marketing Group, LLC is or was a corporation organized and existing under the laws of the state of New York and at all times material herein its business address was 580-45 47th Street, Maspeth, New York, 11378.

2. Respondent Amersino also used an address at 161 Gardner Avenue, Brooklyn, New York, 11237.

3. At all times material hereto, Respondent Amersino was licensed under and operated subject to the provisions of the PACA, under license number 20070047, issued on October 12, 2006.

4. Respondent Amersino's license terminated on October 12, 2010 when Respondent failed to pay the required annual fee.

5. Southeast Produce Limited USA is or was a corporation organized and existing under the laws of the state of New York and at all times material herein its business address was 580-45 47th Street, Maspeth, New York, 11378.

6. At all times material hereto, Respondent Southeast was licensed under and operated subject to the provisions of the PACA, under license number 20041226, issued on September 10, 2004.

7. Respondent Southeast's license terminated on September 10, 2010 when Respondent failed to pay the required annual fee.

8. Respondents operated from the same building, shared the same office space, and shared the same two principal officers and owners.

9. Respondents' business records and business activities, particularly with respect to the buying and selling of produce, were commingled.

10. During the period from December 22, 2008 through August 5, 2010, Respondents failed to make full payment promptly to at least four (4) sellers, as admitted by Respondents, of the agreed purchase prices in the aggregate of $429,031.50 for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce.

11. The unpaid balances represent more than *de minimis* amounts, thereby obviating a need for a hearing.

B. Conclusions of Law

Respondents' failure to make full payment promptly to at least four (4) sellers of the agreed purchase prices in the total amount of

$429,031.50 for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA 7 U.S.C. § 499b(4)).

ORDER

Respondent Amersino willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances underlying Respondent's violations shall be published.

Respondent Southeast willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances underlying Respondent's violations shall be published.

This Order shall take effect on the eleventh (11^{th}) day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall 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).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

———

In re: AMERICE, INC., D/B/A THE PERIMETER GROUP.
Docket No. 10-0454.
Decision and Order.
Filed August 1, 2012.

PACA.

Jonathan D. Gordy, Esq. for Complainant.
Robert Golub for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151). Robert C. Keeney, the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, initiated this proceeding by filing a Complaint on September 29, 2010, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 11 sellers of the agreed purchase prices, or the balance of those prices in the total amount of $751,682.54 for 53 lots of perishable agricultural commodities which it purchased, received and accepted, and seeking that the facts and circumstance of the violation be published.

Respondent filed a timely Answer to the Complaint and the parties were directed by Order entered on December 16, 2011 to file witness and exhibit lists with the Hearing Clerk and to exchange exhibits. Only the Complainant complied with that Order and the matter was set for hearing to commence on April 24, 2012 in the United States Department of Agriculture Courtroom, Washington, DC. The Complainant was represented by Jonathan D. Gordy, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC. Pursuant to its request, the Respondent's representative, Robert Golub participated by telephone. The Complainant called two witnesses and

introduced 16 exhibits. The Respondent's representative was the only witness for the Respondent and no exhibits were proffered on the Respondent's behalf.

Following the hearing, the parties were afforded the right to submit post hearing briefs. The Complainant submitted a brief; however, none was received from the Respondent. On the basis of all of the evidence presented, the following Findings of Fact, Conclusions of Law and Order will be entered.

Discussion

In its Answer, Respondent indicated unforeseen and uncontrollable circumstances precluded timely payment and that at no time was its failure to pay intentional and accordingly was not willful is without merit.

The evidence reflects that in September of 2008 after receiving several written reparation complaint and receiving information that Respondent was ending its operations, Senior Marketing Specialist Ivelisse Valentin conducted an on-site investigation of Respondent's operation.[1] T-15-16. Although Respondent's operations and computer systems were no longer operational, and much of the information previously requested by facsimile request in advance of her arrival in Georgia was no longer available, Valentin was able to collect a list of unpaid creditors from Respondent. Using the list, she contacted the sellers on the list and collected invoices reflected in Exhibits CX-4 through 15 and verified that the amounts listed in paragraph III of the Complaint were accurate. T-26. Valentin also discussed the list with the Respondent's former Comptroller, John Free. T-20. At the hearing, Robert Golub stipulated to the admissibility of the invoices and that the amounts listed in the Complaint were consistent with the list that he had provided Ms. Valentin. T-27-28. Following the filing of the Complaint in this action, Valentin called the unpaid vendors again to reconfirm that the amounts listed were still accurate. T-30-31.

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of

[1] Valentin had conducted a prior investigation of Respondent in 2007.

evil intent, or done with a careless disregard of statutory requirements. *In re: Ocean View Produce, Inc.*, 68 Agric. Dec. 594 (U.S.D.A. 2009). Accordingly, a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts. *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 629-30 (U.S.D.A. 1996). Willfulness is established in this action as Respondent despite having a clear statutory requirement to make full and prompt payment withheld full and prompt payment from 11 sellers from whom it purchased, received and accepted perishable agricultural commodities in the course of or in contemplation of interstate and foreign commerce.

Accordingly, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of Delaware. CX-1. Respondent ceased all business operations sometime in the fall of 2008. T-19, 41. Respondent's business address and mailing address was in Roswell, Georgia.

2. Until its license was terminated for failure to pay the required annual fee, Respondent was licensed under the provisions of the PACA. License No. 19900753 was issued to Respondent on March 2, 1990. The license terminated on March 2, 2008 pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee. CX-1, T-13.

3. Respondent, during the period of December 1, 2006 through December 14, 2007, on or about the dates and in the transactions set forth in paragraph III of the Complaint, incorporated herein by reference, failed to make full payment promptly to 11 sellers of the agreed purchase prices, or balances thereof, in the total amount of $751,682.54 for 53 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce. T-27 &-28.

4. Respondent further sold this produce in interstate commerce to customers including Wal-Mart, Quality Food Stores, and Save-A-Lot

stores. T-38.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

1. A finding is made that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and that the facts and circumstances set forth above, shall be published.

2. This decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to these proceedings 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, 1.145.

Copies of this Decision and Order shall be served upon the parties.

_____

In re: ANSHIN PRODUCE CO., INC.
Docket No. 12-0290.
Decision and Order.
Filed August 9, 2012.

PACA-D.

Charles L. Kendall, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD BY REASON OF ADMISSIONS

I. Preliminary Statement

The instant matter involves a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) ("PACA"; "the Act") and the regulations issued thereunder (7 C.F.R. Part 46) ("Regulations"), pursuant to a Complaint filed on March 13, 2012, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("AMS"; "Complainant"). Complainant alleged that Respondent Anshin Produce Co., Inc. ("Respondent") had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly for 75 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce from 8 sellers, in the total amount of $302,000.48.

II. Procedural History

In the Complaint, Complainant alleged that Respondent had willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). On April 27, 2012, Respondent's principal, Peggi M. Ortiz, filed an Answer ("Ortiz Answer"). On May 21, 2012, Respondent's principal Jay McWaters filed an Answer to the Complaint ("McWaters Answer"). These pleadings are identified respectively as RX-1 and RX-2.

By Order issued May 15, 2012, I set deadlines for the submission of documents and exchange of evidence. On May 22, 2012, Ms. Ortiz submitted a "mediation brief", which is hereby identified as RX-3. On June 12, 2012, Complainant filed a motion for an extension of time of those deadlines, pending ruling on Complainant's motion for a Decision and Order on the Record, also filed on June 12, 2012. By Order issued June 15, 2012, I suspended the deadlines for submissions and exchanges. Complainant's motion for a Decision and Order on the Record was served by certified mail, signed for by Peggi M. Ortiz on June 21, 2012. The motion was served by certified mail, signed for by Jay McWaters on June 30, 2012. On July 13, 2012, Ms. Ortiz filed correspondence

explaining the problems she encountered operating Anshin Produce Inc. That document is hereby identified as RX-4.

I admit to the record the above-described documents. I also admit to the record Attachments to the complaint, identified as Attachments "A" and "B". Those attachments are included as attachments to this Decision and Order, but shall be referred to as CX-1 and CX-2 for purposes of discussion herein.

III. Findings of Fact and Conclusions of Law

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"), set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. Pursuant to the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. § 1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. § 1.139) and further provide that "an opposing party may file a response to [a] motion" within twenty days after service (7 C.F.R. § 1.143(d)). The Rules state that Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for filing of any document or paper, except when the time expires on those dates, the period shall be extended to include the next business day. 7 C.F.R. §1.147(h).

PACA requires payment by a buyer within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11).

In their Answer to the amended Complaint, Respondent did not deny that it had failed to timely pay sellers for perishable agricultural commodities. Ms. Ortiz admitted that only four (4) of the eight (8)

vendors in question had been paid in full, and stated in pertinent part: "Your records will show that we paid off four vendors and were doing our best to pay the others." *See,* Ortiz Answer, ¶ 7. In his Answer, Mr. McWaters referred to an adversary case brought by a group of produce creditors in the United States Bankruptcy Court for the Central District of California (Dkt. No. 10-02447), alleging violations of the PACA. Mr. McWaters stated, "When the facts became evident and my legal budget had exhausted the plaintiffs settled for $4,050 out of the $179,000." *See,* McWaters' Answer, last ¶.

On April 26, 2010, Respondent filed a Voluntary Petition No. 10-26068 pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq*. CX-2. In Schedule F of the Petition, Respondent listed undisputed debts owed to the eight (8) produce vendors in the aggregate sum of $289,997.54, identified by Complainant. *See,* CX-2; CX-1.

The outstanding balance due to sellers is in excess of $5,000.00, and axiomatically represents more than a *de minimis* amount. *See, In re: Fava & Co.*, 46 Agric. Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (1985). "[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed". *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (U.S.D.A. 1985). Ergo, I find that a hearing is not necessary in this matter.

A violation is repeated whenever there is more than one violation of the Act, and is flagrant whenever the total amount due to sellers exceeds $5,000.00. *In re: D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice. *Id.* In the instant matter, it is clear that Respondents knew or should have known that they would be unable to promptly pay the full amount due for the perishable produce that they ordered and accepted, yet they continued to make purchases for which they failed to pay. Respondents' actions were willful, and the violations are repeated and flagrant.

Where a violation of the PACA is not *de minimis*, and there is no legitimate dispute between the parties as to the amount due, "it is well-settled under the Department's sanction policy that the license of a produce dealer…is revoked…" *In re: Scamcorp, Inc., d/b/a Goodness Greeness,* 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).; *In re: Veg-Mix, Inc*., 44 Agric. Dec. 1583, 1590, order denying reconsideration, 44 Agric. Dec. 2060 (U.S.D.A. 1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83. There is no legitimate dispute regarding Respondents' failure to make prompt payments under the PACA, as evidenced by the admissions in Respondent Anshin's bankruptcy pleadings.

Ms. Ortiz' submissions make it clear that she was not entirely familiar with PACA rules and regulations, and that she left many business decisions to others. I find that her statements are not relevant to this action against the corporate entity, since the action has not sought any sanction against Ms. Ortiz or Mr. McWaters. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. *In re: Great American Veal, Inc.*, 48 Agric. Dec. 183, 211 (U.S.D.A. 1989). Moreover, the Secretary has concluded that a Respondent who admits to the allegations in a complaint is in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondent. *In re: Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654, 656 (U.S.D.A. 1994). The failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. *In re: Great American Veal, Inc.*, 48 Agric. Dec. at 202-03.

Respondent was issued PACA license number 19701061 on February 2, 1970. Respondent's PACA license terminated on February 2, 2010 when Respondent failed to pay the annual required fees pursuant to section 4(a) of the PACA (7 U.S.C. § 499a). Therefore, publication of the facts and circumstances of Respondent's violations is an appropriate sanction.

B. Findings of Fact

1. Anshin Produce Co., Inc. (Respondent) is a corporation organized

and existing under the laws of the State of California. Respondent's business and mailing address was 130 S. Myers Street, Los Angeles, California, 90033.

2. At all times material herein, Respondent Anshin Produce Co., Inc. was licensed under the provisions of the PACA, License number 19701061, which was issued on February 2, 1970.

3. Respondent's PACA license terminated on February 2, 2010, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

4. Respondent, during the period of January 20, 2009, through November 22, 2009, on or about the dates and in the transactions set forth in CX-1 failed to make full payment promptly of the agreed purchase prices, or balances thereof, for 75 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce from eight (8) sellers, in the total admitted amount of $289,997.54.

5. On April 26, 2010, Respondent filed a voluntary petition in Bankruptcy in the U.S. Bankruptcy Court for the Central District of California, Case No. 10-26068, pursuant to 11 U.S.C. § 101 *et seq*.

6. In the petition at Schedule F, Respondent listed undisputed debts to the eight (8) produce vendors identified by Complainant as sellers to whom Respondent failed to make full payment in the amount of $289,997.54 during the period from January 20, 2009 through November 22, 2009. CX-1; CX-2; Attachments A & B to this Decision and Order.

7. Respondents admittedly failed to make full payment promptly to eight (8) sellers for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce.

8. The unpaid balances due to the sellers represent more than *de minimis* amounts, thereby obviating the need for a hearing.

C. Conclusions of Law

1. Respondent has admitted, in its Answers and in its Bankruptcy petition, that it purchased, received, and accepted perishable agricultural commodities in interstate commerce from the eight (8) sellers named in the Complaint filed by USDA.

2. I take official notice of the Respondent's Bankruptcy petition and Schedule F. *In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (U.S.D.A. 1997).

3. By scheduling the produce debt in its Bankruptcy petition, Respondent has implicitly asserted that there is no prospect of full payment of that debt at any future date, because the $289,997.54 produce debt that Respondent owes to the eight (8) named sellers for perishable agricultural commodities is part of the acknowledged unsecured debt for which Respondent has sought discharge from the Bankruptcy Court.

4. Respondent also admitted that it failed to make full payment promptly, during the period from January 20, 2009, through November 22, 2009, to those eight (8) sellers of the agreed purchase prices in the total amount of $289,997.54.

5. Respondent's admissions establish that Respondent Anshin Produce Co., Inc. failed to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. §499(b)(4).

6. Respondent's violations of the PACA were willful, flagrant and repeated violations of Section 2(4) of the PACA 7 U.S.C. § 499b(4)).

7. Because Respondent does not have a valid PACA license, the appropriate sanction of revocation cannot be imposed, but rather, it is appropriate that the facts and circumstances of Respondent's violations be published.

ORDER

The facts and circumstances underlying Respondent's violations shall be published. This Order shall take effect on the eleventh (11th) day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall 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).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

———

In re: CUSTOM CUTS, INC. AND CUSTOM CUTS FRESH, LLC.
Docket Nos. 12-0443, 12-0444.
Decision and Order.
Filed September 25, 2012.

PACA-D.

Shelton Smallwood, Esq. for Complainant.
Respondents, pro se.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151).

Complainant, Fruit and Vegetable Programs, Agricultural Marketing Service, initiated this proceeding against Custom Cuts, Inc. (CCI) by filing a disciplinary Complaint on May 21, 2012, alleging that Respondent CCI willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 2 sellers of

produce it purchased, received and accepted, and seeking that the facts and circumstances of the violations be published. Complainant also initiated this proceeding against Custom Cuts Fresh, LLC (CCF) alleging that Respondent CCF willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 8 sellers of produce it purchased, received and accepted, and seeking that the facts and circumstances of the violations be published. Respondents filed a timely Answer to the Complaint.

In response to Respondents' Answer, Complainant moved for a decision without hearing based on admissions pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Complainant made its motion based on admissions of fact that Respondents have made in their Answer to the Complaint. As Respondents' Answer admits a majority of the material allegations of the Complaint, no hearing is warranted in this matter.

The Complaint alleges that Respondent CCI willfully violated the Act by failing to make full payment promptly to 2 sellers of the agreed purchase prices, or balances thereof, in the total amount of $217,127.84 for 30 lots of perishable agricultural commodities. The two sellers were identified as Sun Coast Farms and Harvest Food Group in Appendix A of the Complaint. Respondent CCI denies it failed to make full payment promptly to Sun Coast Farms. In its Answer, Respondent CCI claims that "Sun Coast Farms was a minor vendor to CCI from 7/20/08 thru 10/10/08 and all outstanding invoices were paid. This is the first I have ever heard of any money owed to Sun Coast Farms. If they claim funds are owned, I have never seen proof of such." (Answer, p. 1.) Respondent CCI did not however, deny it failed to make full payment promptly to Harvest Food Group in the amount owed of $9,899.25 as listed in Appendix A of the Complaint. Having failed to deny this material allegation of the Complaint and having offered no defense to this material allegation of the Complaint regarding Harvest Food Group, Respondent CCI has implicitly admitted that it failed to make full payment promptly and still owes the amount stated in the Appendix A as it relates to Harvest Food Group.

The Complaint alleges that Respondent CCF willfully violated the Act by failing to make full payment promptly to 8 sellers of the agreed

purchase prices, or balances thereof, in the total amount of $976,398.92 for 144 lots of perishable agricultural commodities. Respondent CCF admits that "[t]he balance of $976,398.92 owed to the other eight suppliers to CCF is, I believe, sufficiently covered by funds held at the law firm of Beck, Cheat, Bamberger, and Polsky in Milwaukee." (Answer, p. 1.) Additionally, Respondent CCF states "[t]o the best of my knowledge there is sufficient funds to pay the outstanding claims." *(Id.)* Respondent CCF does not deny that it failed to make full payment promptly of the amount alleged in the Complaint and offers no defense to this material allegation of the Complaint. Rather, Respondent CCF merely directs Complainant as to where such admittedly owed amount may be collected.

Findings of Fact

1. Respondent CCI was a corporation organized and existing under the laws of the State of Wisconsin, with its last known business and mailing address in Milwaukee, Wisconsin. Respondent CCI is out of business.

2. At all times material herein, Respondent CCI was licensed under the provisions of the PACA. License No. 1999 0535 was issued to Respondent CCI on February 11, 1999. The license terminated on December 14, 2009, when Respondent CCI formed a new business entity.

3. Respondent CCI, during the period September 15, 2009 through September 25, 2009, on or about the dates and in the transactions set forth in Appendix A and incorporated herein by reference, failed to make full payment promptly to a seller of the agreed purchase prices, or balances thereof, in the total amount of $9,899.25 for one lot of perishable agricultural commodities, which Respondent CCI, purchased in the course of interstate and foreign commerce.[1]

4. Respondent CCF was a limited liability company organized and

[1] Although Appendix A of the Complaint identifies 2 sellers, Sun Coast Farms and Harvest Food Group, Respondent CCI denied failing to make full payment promptly only as to Sun Coast Farms. CCI's transactions with Sun Coast Farms involved 29 lots of produce in the total amount of $207,228.59.

existing under the laws of the State of Wisconsin with its last known business and mailing address in Milwaukee, Wisconsin. Respondent CCF is out of business.

5. At all times material herein, Respondent CCF was licensed under the provisions of the PACA. License No. 2010 0322 was issued to Respondent CCF on December 14, 2009. The license was suspended on October 7, 2011, for failure to pay a reparation award pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)). The license terminated on December 14, 2011, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

6. Respondent CCF, during the period November 21, 2010, through July 24, 2011, on or about the dates and in the transactions set forth in Appendix B and incorporated herein by reference, failed to make full payment promptly to 8 sellers of the agreed purchase prices, or balances thereof, in the total amount of $976,398.92 for 144 lots of perishable agricultural commodities, which Respondent CCF, purchased in the course of interstate and foreign commerce.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondents willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the violations found herein shall be published.

2. This order shall take effect on the day that this Decision becomes final.

3. 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 of this decision shall be served upon the parties.

———

In re: OASIS CORPORATION, D/B/A ONE OF A KIND PRODUCE.
Docket No. 12-0423.
Decision and Order.
Filed October 26, 2012.

PACA-D—Bankruptcy.

Charles L. Kendall, Esq. for Complainant.
Rosendo Gonzalez, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (PACA) and the regulations issued thereunder (7 C.F.R. Part 46)(Regulations), instituted by a Complaint filed on May 7, 2012, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that Respondent Oasis Corporation, d/b/a One of a Kind Produce (Respondent) committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly for 255 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce from 9 sellers, in the total amount of $1,628,479.54. Complainant requested findings that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that the facts and circumstances of the alleged violations be published.

A copy of the Complaint and the Rules of Practice were sent by certified mail to the Respondent's last known address; however, the mail was returned by the US Postal Service for reasons other than "unclaimed" or "refused." Counsel for the Complainant provided a new address to the Hearing Clerk's Office and service by certified mail was made to that address on June 1, 2012. On June 26, 2012, the Hearing Clerk's Office received a letter from Michelle R. Ioino requesting an extension of time "on the filings" as her PACA attorney was on vacation out of the country.[1]

By letter to counsel for the Complainant June 28, 2012, Rosendo Gonzales, Esq., Gonzales & Associates of Los Angeles, California, indicated that Respondent had filed a petition under Chapter 7 of the Bankruptcy Code, including as an attachment a PACER docket report from Case number 11-17246 in the U.S. Bankruptcy Court for the District of Nevada. On August 15, 2012, Chief Administrative Law Judge Peter M. Davenport issued an Order directing the Hearing Clerk to enter the Gonzales's June 28, 2012 letter as the Respondent's Answer.

Complainant filed a motion with supporting memorandum, seeking a Decision Without Hearing by Reason of Admissions, based on the admissions made by Respondent in its Answer and in its bankruptcy petition. In that motion, Complainant noted that official notice may be taken of the documents that Respondent has filed in connection with its Chapter 7 bankruptcy proceeding.

Opposition to the Motion was filed by Michelle Iovino, a former officer, director, and shareholder of Respondent. In the Opposition, Iovino (without complying with the Rules of Practice which contain requirements for the contents of an Answer) asserts that the Doctrines of Due Process and Fairness dictate that she should be permitted to conduct discovery and suggests that the basis for seeking the Decision without a hearing is that Respondent filed for bankruptcy protection and that although she did not specifically deny the allegations contained in the Complaint, the Complainant has not established violations of the PACA.

---

[1] Although Iovino (identified in subsequent filings as a former officer, director, and shareholder of Respondent) filed the request for extension of time, to date, no Answer has been received.

Pertinent Statutory Provisions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

> 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 such commodity to the person with whom such transaction is had;* or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act. (Emphasis added)

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

> (a) Whenever (1) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this Act (7 U.S.C. § 499b), or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), 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.

Pertinent Regulation

Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) provides:

> (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 . . .

Discussion

Iovino's invocation of the Doctrines of Due Process and Fairness are without merit. To the extent that the Gonzalez correspondence constitutes an Answer, it does not deny any of the allegations of the Complaint, but rather points to the bankruptcy filings of Respondent and of Respondent's principal.

Even were Complainant not entitled to entry of a Decision and Order based upon Respondent's failure to file either a timely Answer or one

which specifically addresses each of the allegations of the Complaint as required by Rule 1.136(b), 7 C.F.R. § 1.136(b), in the Bankruptcy Schedule F filed by Respondent, a true and correct copy of which appears of record, Respondent listed undisputed debts to 7 of the 9 produce vendors referenced in paragraph III and in Appendix A of the Complaint, in the total amount of $776,654.87. A table comparing the past due amounts alleged in the Complaint with the amounts admitted in Respondent's Schedule F was attached to Complainant's Motion for Decision without Hearing as Appendix B.[2]

The practice of taking official notice of documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings is of long standing and well established. *In re Tanikka Watford*, 69 Agric. Dec. 1533, 1535 (U.S.D.A. 2010); *In re KDLO Enterprises, Inc.*, 69 Agric. Dec. 1538 (U.S.D.A. 2010), *aff'd by Judicial Officer,* 69 Agric. Dec. ____ (Aug. 3, 2011), *Pet for Reconsideration denied*, 69 Agric. Dec. _____(Oct. 21, 2011), 2011 WL 3503526, *4; (citing *In re Judith's Fine Foods Int'l, Inc*., 66 Agric. Dec. 758, 764 (U.S.D.A. 2007); *In re Five Star Distributors, Inc.*, 56 Agric. Dec. 827, 893 (U.S.D.A. 1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (U.S.D.A. 1995); *In re Samuel S. Napolitano Produce, Inc*., 52 Agric. Dec. 1607, 1609 (U.S.D.A. 1993); *In re Allsweet Produce Co*., 51 Agric. Dec. 1455, 1457 n.1 (U.S.D.A. 1992); *In re Magnolia Fruit & Produce Co*., 49 Agric. Dec. 1156, 1158 (U.S.D.A. 1990), *aff'd,* 930 F.2d 916 (5th Cir, 1991) (Table), *printed in* 50 Agric. Dec. 854 (U.S.D.A. 1991); *In re Caito Produce Co*., 48 Agric. Dec. 602, 627 (U.S.D.A. 1989); *In re Roman Crest Fruit, Inc*., 46 Agric. Dec. 612, 615 (U.S.D.A. 1987); *In re Anthony Tammaro, Inc*., 46 Agric. Dec. 173, 175-76 (U.S.D.A> 1987); *In re Walter Gailey & Sons, Inc*., 45 Agric. Dec. 729, 731 (U.S.D.A. 1986); *In re B.G. Dales Co*., 44 Agric. Dec. 2021, 2024 (U.S.D.A. 1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (U.S.D.A. 1985); *In re Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (U.S.D.A. 1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept 29, 1986); *In re Veg-Mix, Inc*., 44 Agric. Dec. 1583, 1587 (U.S.D.A. 1985), *aff'd and remanded,* 832 F.2d 601(D.C. Cir. 1987),

[2] Motion for Decision without Hearing, Docket No. 8

remanded, 47 Agric. Dec. 1486 (U.S.D.A. 1988), *final decision,* 48 Agric. Dec. 595 (1989).

Similarly, the use of information contained in bankruptcy filings as the basis for decisions without hearing is also well established. *In re Tanikka Watford*, 69 Agric. Dec. at 1535; *In re Northern Michigan Fruit Co*., 64 Agric. Dec. 1793, 1796 (U.S.D.A. 2005); *In re Holmes,* 62 Agric. Dec. 254, 254-55 (U.S.D.A. 2003); *In re D & C Produce, Inc.*, 62 Agric. Dec. 373, 374-75, 378 (U.S.D.A. 2002); *In re Scarpaci Bros*., 60 Agric. Dec. 874, 875-76 (U.S.D.A. 2001); *In re Matos Produce Corp*., 59 Agric. Dec. 904 (U.S.D.A. 2000); *In re Peter DeVito Co*., 57 Agric. Dec. 830, 831 (U.S.D.A. 1997); *In re D & D Produce, Inc*., 56 Agric. Dec. 1999, 2000 (U.S.D.A. 1997); *In re Five Star Food Distributors, Inc*, 56 Agric. Dec. at 893; *In re Billy Newsom Produce Co*., 55 Agric. Dec. 1438, 1438-40 (U.S.D.A. 1996).

According to the Department's Judicial Officer's policy, in any PACA disciplinary proceeding in which it is alleged that a Respondent has failed to pay in accordance with the PACA, and Respondent admits the material allegations in the Complaint and makes no assertion that the Respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the Complaint was served on Respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.[3]

As Respondent does not have a valid PACA license, the proper sanction for its violations is a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations be published. Based upon a careful consideration of the pleadings and Departmental precedent cited by Complainant, official notice is taken of the bankruptcy documents filed by Respondent and the following Findings of Fact, Conclusions of Law and Order will be

[3] *See In re* Scamcorp, Inc., 57 Agric. Dec. 527, 562 (U.S.D.A. 1998).

entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Oasis Corporation (Respondent) is a corporation organized and existing under the laws of the State of Nevada.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 20001132 was issued to Respondent on April 21, 2000. This license terminated on April 21, 2011, 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. On April 26, 2010, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 101 *et seq*.) in the United States Bankruptcy Court for the District of Nevada. The petition was designated Case No. 11-17246. In the Schedule F filed by Respondent, Respondent listed undisputed debts to 7 of the 9 produce vendors referenced in paragraph III and in Appendix A of the Complaint in a total amount of $776,654.87.

4. Respondent purchased, received, and accepted perishable agricultural commodities in interstate commerce from 7 of the sellers named in the Complaint.

5. Respondent failed to make full payment promptly, during the period of April 30, 2009, through July 9, 2010, to those sellers of the agreed purchase prices in the total amount of $776,654.87.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Official notice is taken of the bankruptcy schedules filed under penalty of perjury by Respondent, listing the $776,654.87 produce debt that Respondent owed those 7 sellers for perishable agricultural commodities.

3. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. Respondent's violations are "repeated" because repeated means more than one.[4] Also, Respondent's failures to pay for its purchase obligations, which Respondent has acknowledged as liquidated, undisputed and non-contingent debts, within the time limits established by a substantive regulation – 7 C.F.R. §46.2(aa) – duly promulgated under the PACA are willful.[5]

ORDER

1. The facts and circumstances of Respondent's violations set forth herein shall be published.

2. This Order shall become final and effective without further proceeding 35 days after service thereof upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

---

[4] *See, e.g.,* Melvin Beene Produce Co. v. Agric. Mktg. Serv., 41 Agric. Dec. 2422 (U.S.D.A. 1982), *aff'd*., 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183 (9th Cir. 1972) (finding 26 violations involving $19,059.08 occurring over 2 ½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967) (concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000); *In re* Havana Potatoes of N.Y. Corp., 55 Agric. Dec. 1234 (U.S.D.A. 1996), *aff'd.*, 136 F.3d (2d Cir. 1997) (Havana's failure to pay 66 sellers $1, 960, 958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes wilful, flagrant and repeated violations of 7 U.S.C. § 499b(4), and Havpo's failure to pay 6 sellers $101, 577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes wilful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re* Five Star Food Distrib., 56 Agric. Dec. 880, 896-97 (U.S.D.A. 1997) (holding that 174 violations involving 14 sellers and at least $238, 374.08 over a 11 month period were "willful, repeated, and flagrant, as a matter of law").

[5] *Id.*

Copies hereof shall be served upon the parties.

_____

In re: ACTION PRODUCE, INC.
Docket No. 12-0512.
Decision and Order.
Filed November 1, 2012.

PACA-D—Bankruptcy.

Shelton S. Smallwood, Esq. for Complainant.
Michael Martin-Johnson, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151).

Complainant, Fruit and Vegetable Program, Agricultural Marketing Service, initiated this proceeding against Action Produce, Inc. (Respondent) by filing a disciplinary Complaint on July 5, 2012, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 12 sellers of the agreed purchase prices, or balances thereof, in the total amount of $543,195.84 for 83 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce. The Complaint alleges the violations occurred in commerce between February 27, 2010, and November 5, 2010 on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference.

The Complaint requested that findings be made that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances of those violations be published.

On July 25, 2012, Respondent filed a Request for Extension of Time to File an Answer to the Complaint. On July 31, 2012, I granted Respondent's request which gave Respondent until August 31, 2012 to file an answer.

Respondent failed to answer the Complaint in a timely manner and on September 7, 2012, Complainant moved for issuance of a Decision without Hearing by Reason of Default. Although Respondent indicated that the Answer was mailed on August 31, 2012, it was not received by the Hearing Clerk until September 10, 2012, ten days after the extended deadline. On September 18, 2012, Respondent filed a Response in Opposition to Complainant's Motion for Default Without Hearing. In that Response, while conceding that the Answer was untimely filed, Respondent requests that the Answer be deemed timely filed, *instanter,* or otherwise on the day of receipt by Counsel for the Complainant and the Hearing Clerk.

Discussion

Rule 1.147(g) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.147(g)) provides:

> (g) *Effective date of filing.* Any document pr paper required or authorized under the rules in this part shall be deemed to be filed at the time when it reaches the Hearing Clerk;……

The Judicial Officer has consistently held that the Rules of Practice are binding upon Administrative Law Judges and the Judicial Officer and that they possess very limited authority to modify the Rules of Practice in a proceeding. *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (U.S.D.A. 2000); *In re PMD Produce Brokerage Corp*., 59 Agric. Dec. 351, 361 (U.S.D.A. 2000); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4

(U.S.D.A. 1996); *In re Hermiston Livestock Co*., 48 Agric. Dec. 434 (U.S.D.A. 1989); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (U.S.D.A. 1982).

Similarly, neither an Administrative Law Judge nor the Judicial Officer can provide the type of equitable relief which Respondent seeks. *In re Carolyn & Julie Arends*, 70 Agric. Dec. _____ (U.S.D.A. 2011) (slip op. at 22, n.23 (citing *In re J. Reid Hoggan*, 35 Agric. Dec. 1812, 1817-19 (U.S.D.A. 1976).

Even were Complainant not entitled to entry of a Decision and Order based upon Respondent's failure to file a timely Answer, in the Bankruptcy Schedule F filed by Respondent, Respondent listed undisputed debts to 10 of the 12 produce vendors in Appendix A of the Complaint, in the total amount of $529,254.00. The practice of taking official notice of documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings is of long standing and well established. *In re Tanikka Watford*, 69 Agric. Dec. 1533, 1535 (U.S.D.A. 2010); *In re KDLO Enterprises, Inc.*, 69 Agric. Dec. 1538 (U.S.D.A. 2010), *aff'd by Judicial Officer,* 69 Agric. Dec. ____ (Aug. 3, 2011), *Pet for Reconsideration denied*, 69 Agric. Dec. _____(Oct. 21, 2011), 2011 WL 3503526, *4; (citing *In re Judith's Fine Foods Int'l, Inc*., 66 Agric. Dec. 758, 764 (U.S.D.A. 2007); *In re Five Star Distributors, Inc.*, 56 Agric. Dec. 827, 893 (U.S.D.A. 1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (U.S.D.A. 1995); *In re Samuel S. Napolitano Produce, Inc*., 52 Agric. Dec. 1607, 1609 (U.S.D.A. 1993); *In re Allsweet Produce Co*., 51 Agric. Dec. 1455, 1457 n.1 (U.S.D.A. 1992); *In re Magnolia Fruit & Produce Co*., 49 Agric. Dec. 1156, 1158 (U.S.D.A. 1990), *aff'd,* 930 F.2d 916 (5th Cir, 1991) (Table), *printed in* 50 Agric. Dec. 854 (U.S.D.A. 1991); *In re Caito Produce Co*., 48 Agric. Dec. 602, 627 (U.S.D.A. 1989); *In re Roman Crest Fruit, Inc*., 46 Agric. Dec. 612, 615 (U.S.D.A. 1987); *In re Anthony Tammaro, Inc*., 46 Agric. Dec. 173, 175-76 (U.S.D.A> 1987); *In re Walter Gailey & Sons, Inc*., 45 Agric. Dec. 729, 731 (U.S.D.A. 1986); *In re B.G. Dales Co*., 44 Agric. Dec. 2021, 2024 (U.S.D.A. 1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (U.S.D.A. 1985); *In re Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (U.S.D.A. 1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept

29, 1986); *In re Veg-Mix, Inc*., 44 Agric. Dec. 1583, 1587 (U.S.D.A. 1985), *aff'd and remanded,* 832 F.2d 601(D.C. Cir. 1987), *remanded,* 47 Agric. Dec. 1486 (U.S.D.A. 1988), *final decision,* 48 Agric. Dec. 595 (1989).

Similarly, the use of information contained in bankruptcy filings as the basis for decisions without hearing is also well established. *In re Tanikka Watford*, 69 Agric. Dec. at 1535; *In re Northern Michigan Fruit Co*., 64 Agric. Dec. 1793, 1796 (U.S.D.A. 2005); *In re Holmes,* 62 Agric. Dec. 254, 254-55 (U.S.D.A. 2003); *In re D & C Produce, Inc.*, 62 Agric. Dec. 373, 374-75, 378 (U.S.D.A. 2002); *In re Scarpaci Bros*., 60 Agric. Dec. 874, 875-76 (U.S.D.A. 2001); *In re Matos Produce Corp*., 59 Agric. Dec. 904 (U.S.D.A. 2000); *In re Peter DeVito Co*., 57 Agric. Dec. 830, 831 (U.S.D.A. 1997); *In re D & D Produce, Inc*., 56 Agric. Dec. 1999, 2000 (U.S.D.A. 1997); *In re Five Star Food Distributors, Inc*, 56 Agric. Dec. at 893; *In re Billy Newsom Produce Co*., 55 Agric. Dec. 1438, 1438-40 (U.S.D.A. 1996).

According to the Department's Judicial Officer's policy, in any PACA disciplinary proceeding in which it is alleged that a Respondent has failed to pay in accordance with the PACA, and Respondent admits the material allegations in the Complaint and makes no assertion that the Respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the Complaint was served on Respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.[1]

As Respondent no longer possesses a valid PACA license, the proper sanction for its violations is a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations be published. Based upon a careful consideration of the pleadings and Departmental precedent cited by Complainant, official notice is taken of the bankruptcy documents filed by Respondent and the

[1] See *In re* Scamcorp, 57 Agric. Dec. 527, 562 (U.S.D.A. 1998).

following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Action Produce, Inc. (Respondent) was a corporation organized and existing under the laws of the State of California. Its business and mailing address was in San Francisco, California.

2. At all times material herein, Respondent was licensed under the provisions of the PACA, License 2006-1077, issued to Respondent on July 17, 2006. This license terminated on April 28, 2011, when Respondent was discharged as a bankrupt pursuant to 4(a) of PACA (7 U.S.C. § 499d(a)).

3. Respondent, during the period of February 27, 2010, through November 5, 2010, on or about the dates and in the transactions set forth in Appendix A appended to the Complaint and incorporated herein by reference, failed to make full payment promptly to 12 sellers of the agreed purchase prices, or balances thereof, in the total amount of $543,195.56, for 83 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

4. On January 24, 2011, Respondent filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq*.) in the Northern District of California Bankruptcy Court. The petition was designated Case No. 11-30260. The Schedule F filed by Respondent under penalty of perjury indicates that 10 of the 12 sellers listed in Appendix A, hold unsecured claims for unpaid produce debt totaling $529,254.00[2].

[2] The amount of the claims listed on the Schedule F for three of the ten sellers is less than the amount listed in Appendix A to the Complaint.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully, flagrantly and repeatedly violated section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. 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 shall be published.

2. This Decision will become final without further proceeding 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 of this Decision shall be served upon the parties.

_____

Miscellaneous Orders
71 Agric. Dec. 1255-1266

MISCELLANEOUS ORDERS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

PERISHABLE AGRICULTURAL COMMODITIES ACT

LEONEL DIAZ HERNANDEZ.
Docket No. 11-0112.
Miscellaneous Order.
Filed July 31, 2012.

MARTHA A. DIAZ CHIDID, A/K/A MARTHA CHIDID.
Docket No. 12-0113.
Miscellaneous Order.
Filed July 31, 2012.

JEFF LATTIMER.
Docket No. 12-0418.
Miscellaneous Order.
Filed July 18, 2012.

THOMAS R. SALISBURY.
Docket No. 12-0472.
Miscellaneous Order.
Filed August 24, 2012.

MARY E. OLSEN.
Docket No. 12-0473.
Miscellaneous Order.
Filed August 24, 2012.

MISCELLANEOUS ORDERS

FLOYD J. "JEFF" OLSEN.
Docket No. 12-0474.
Miscellaneous Order.
Filed August 24, 2012.

In re: AMERSINO MARKETING GROUP, LLC AND SOUTHEAST PRODUCE LIMITED, USA.
Docket No. D-12-0221; D-12-0222.
Miscellaneous Order.
Filed September 13, 2012.

PACA-D.

Christopher P. Young-Morales, Esq. for Complainant.
Bruce Levinson, Esq. for Respondents.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME TO FILE A RESPONSE TO RESPONDENTS' APPEAL PETITION

On September 12, 2012, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], requested that I grant a 20-day extension of time within which to respond to Respondents' appeal petition. The Deputy Administrator's motion to extend the time for responding to Respondents' appeal petition is granted. The time for filing the Deputy Administrator's response to Respondents' appeal petition is extended to, and includes, October 2, 2012.[1]

———

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 2, 2012.

Miscellaneous Orders
71 Agric. Dec. 1255-1266

In re: AMERSINO MARKETING GROUP, LLC AND SOUTHEAST PRODUCE LIMITED, USA.
Docket No. D-12-0221; D-12-0222.
Miscellaneous Order.
Filed October 9, 2012.

PACA-D.

Christopher P. Young-Morales, Esq. for Complainant.
Bruce Levinson, Esq. for Respondents.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

SECOND ORDER EXTENDING TIME TO FILE A RESPONSE TO RESPONDENT'S APPEAL PETITION

On October 5, 2012, the parties, by e-mail, jointly requested that I grant the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], a 30 to 45-day extension of time within which to respond to Respondents' appeal petition.[1] For good reason shown, the parties' joint motion to extend the time for the Deputy Administrator's response to Respondents' appeal petition is granted. The time for filing the Deputy Administrator's response to Respondents' appeal petition is extended to, and includes, November 16, 2012.[2]

———

[1] See attached e-mail sent by counsel for the Deputy Administrator to the Judicial Officer on October 5, 2012.

[2] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 16, 2012.

MISCELLANEOUS ORDERS

In re: AMERSINO MARKETING GROUP, LLC AND SOUTHEAST PRODUCE LIMITED, USA.
Docket No. D-12-0221; D-12-0222.
Miscellaneous Order.
Filed October 16, 2012.

PACA-D.

Christopher P. Young-Morales, Esq. for Complainant.
Bruce Levinson, Esq. for Respondents.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING DENYING JOINT MOTION TO STAY CASE FOR 45 DAYS

On October 10, 2012, the parties filed a Joint Motion to Stay Case for 45 Days [hereinafter Joint Motion] requesting that I grant the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], a 45-day extension of time within which to respond to Respondents' appeal petition. I deny the Joint Motion only because I find the Joint Motion is merely a reiteration of a request made by the parties by e-mail on October 5, 2012, which request I granted on October 9, 2012, in Second Order Extending Time to File a Response to Respondents' Appeal Petition. Therefore, the time for filing the Deputy Administrator's response to Respondents' appeal petition remains November 16, 2012, as set forth in the Second Order Extending Time to File a Response to Respondents' Appeal Petition.[1] If the parties intend the Joint Motion to be more than a reiteration of the October 5, 2012, e-mail request, they are, of course, free to file another motion in an effort to correct my misapprehension.

———

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 16, 2012.

Miscellaneous Orders
71 Agric. Dec. 1251-1266

In re: SAMUEL S. PETRO AND BRYAN HERR.
Docket No. 09-0161, 09-0162.
Miscellaneous Order.
Filed November 13, 2012.

PACA-APP.

Richard M. Kaplan, Esq. for Petitioners.
Christopher P. Young-Morales, Esq. for Respondent.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION TO RECONSIDER DECISION AS TO BRYAN HERR

PROCEDURAL HISTORY

On February 29, 2012, Karla D. Whalen, Chief, PACA Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Division Chief], filed Respondent's Petition for Reconsideration of the Decision and Order as to Petitioner Bryan Herr [hereinafter Petition to Reconsider] requesting that I reconsider *In re Samuel S. Petro* (Decision as to Bryan Herr), __ Agric. Dec. ___ (Jan. 18, 2012). On March 20, 2012, Bryan Herr filed a response to the Division Chief's Petition to Reconsider, and on March 26, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, the Division Chief's Petition to Reconsider.

DISCUSSION

The Division Chief raises three issues in the Petition to Reconsider. First, the Division Chief contends I erroneously found Mr. Herr demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by Kalil Fresh Marketing, Inc., d/b/a

Houston's Finest Produce Co. [hereinafter Houston's Finest].[1] The Division Chief identifies three acts and one failure to act which purportedly resulted in Houston's Finest's violations of the PACA: (1) Mr. Herr's involvement with Houston's Finest's obtaining lines of credit; (2) Mr. Herr's July or August 2002 recommendation to John Kalil, president of Houston's Finest, of a person to install refrigeration equipment in Houston's Finest's warehouse; (3) Houston's Finest's payment for some of the produce which Houston's Finest purchased from Country Fresh, Inc.; and (4) Mr. Herr's failure to exercise control over Houston's Finest's finances. (Pet. to Reconsider at 3-13.)

The record establishes that Mr. Herr was involved with Houston's Finest's obtaining a line of credit from Southwest Bank of Texas in July 2002 and a line of credit from Amegy Bank in April 2003. Mr. Herr's involvement with these lines of credit was at the behest of his partner, Samuel S. Petro, whose cousin was Mr. Kalil. Mr. Petro arranged for Houston's Finest's lines of credit from Southwest Bank of Texas and Amegy Bank and paid the banks when Houston's Finest failed to pay. Based upon the record before me, I find Mr. Herr's involvement with Houston's Finest's lines of credit from Southwest Bank of Texas in July 2002 and from Amegy Bank in April 2003 was limited to ministerial functions only and did not constitute active involvement in activities that resulted in Houston's Finest's violations of the PACA, which occurred more than 4 years after Houston's Finest obtained the lines of credit in question. (Tr. 61-64, 73-79, 135-36, 147, 170-72, 228-30.)[2]

As for the recommendation of a person to install refrigeration equipment, Mr. Herr demonstrated that Marriott Corporation, one of Houston's Finest's customers, suggested that Houston's Finest add to its refrigeration capacity and that, in July or August 2002, Mr. Kalil asked Mr. Herr if he could recommend a person to install refrigeration equipment in Houston's Finest's warehouse. Mr. Herr recommended a

---

[1] Houston's Finest willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 55 sellers of the agreed purchase prices in the amount of $1,617,014.93 for 645 lots of perishable agricultural commodities, which Houston's Finest purchased, received, and accepted in interstate and foreign commerce, during the period October 11, 2007, through February 17, 2008. *In re Kalil Fresh Mktg., Inc.*, 69 Agric. Dec. 979 (2010).

[2] References to the transcript of the January 20-21, 2011, hearing in this proceeding are indicated as "Tr." and the page number.

person to Mr. Kalil, and Mr. Kalil subsequently decided to have the additional refrigeration equipment installed by the person recommended by Mr. Herr. (Tr. 357-58, 401-04.) I find Mr. Herr demonstrated by a preponderance of the evidence that his recommendation more than 5 years prior to Houston's Finest's PACA violations did not constitute active involvement in the activities resulting in Houston's Finest's PACA violations.

As for the payments made by Houston's Finest to Country Fresh, Inc., for produce purchases, Mr. Herr demonstrated by a preponderance of the evidence that he was not involved with Houston's Finest's purchase of, or payment for, perishable agricultural commodities from any produce seller (Tr. 167-68).

Moreover, I reject the Division Chief's contention that Mr. Herr's failure to exercise control over Houston's Finest's finances constitutes active involvement in the activities resulting in Houston's Finest's violations of the PACA. Generally, active involvement in activities resulting in a violation of the PACA requires more than a failure to act.[3] While I disagree with the Division Chief's contention that Mr. Herr's failure to act supports the conclusion that Mr. Herr was actively involved in the activities resulting in Houston's Finest's violations of the PACA, I do not hold that an act of omission can never constitute active involvement in activities resulting in a violation of the PACA. I only conclude, based on the record before me, that Mr. Herr's failure to act does not constitute active involvement in the activities resulting in Houston's Finest's PACA violations.

Second, the Division Chief contends I erroneously failed to state clearly whether the actual, significant nexus test used to determine whether a person was only nominally a partner, officer, director, or shareholder of a violating PACA licensee was superceded by the test articulated in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011) (Pet. to Reconsider at 18-19).

---

[3] *In re Donald R. Beucke*, 65 Agric. Dec. 1341, 1356-58 (2006) (stating, generally, active involvement in activities resulting in a violation of the PACA requires more than an act of omission), *aff'd*, 314 F. App'x 10 (10th Cir. 2008), *cert. denied*, 555 U.S. 1213 (2009); *In re Edward S. Martindale*, 65 Agric. Dec. 1301, 1318-20 (2006) (same).

The Court in *Taylor* states it was not articulating a new test that would supercede the actual, significant nexus test used to determine whether a person was only nominally an officer of a violating PACA licensee. Instead, the Court emphasized that, under the actual, significant nexus test, the crucial inquiry in determining whether a person is merely a nominal officer is whether the person who holds the title of officer has the power and authority to direct and affect a company's operations, as follows:

> Under the "actual, significant nexus" test, "the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, rather than whether the individual has exercised real authority." *Veg–Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (internal quotation marks omitted). Although we have consistently applied the 'actual, significant nexus' test, our cases make clear that what is really important is whether the person who holds the title of an officer had actual and significant power and authority to direct and affect company operations.
>
> * * *
>
> As our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry.

Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 615, 617 (D.C. Cir. 2011).

The "actual, significant nexus" test predates the November 15, 1995, amendment to 7 U.S.C. § 499a(b)(9)[4] wherein Congress amended the definition of the term "responsibly connected" specifically to provide partners, officers, directors, and shareholders who would otherwise fall

[4] *See Bell v. Dep't of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (stating a petitioner may demonstrate he was only a nominal officer, director, or shareholder by proving that he lacked "an actual, significant nexus" with the violating company); *Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983) (stating the finding that an individual was responsibly connected must be based upon evidence of "an actual, significant nexus" with the violating company).

within the statutory definition of "responsibly connected" a two-prong test whereby they could rebut the statutory presumption of responsible connection. Congress could have explicitly adopted the "actual, significant nexus" test; however, the two-prong test in the 1995 amendment to 7 U.S.C. § 499a(b)(9) contains no reference to "actual, significant nexus," power to curb PACA violations, or power to direct and affect operations. Instead, Congress provides that a partner, officer, director, or shareholder, for the second prong of the two-prong test, could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was "only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license" (7 U.S.C. § 499a(b)(9)).

In my view, continued application of the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), could result in persons who Congress intended to include within the definition of the term "responsibly connected" avoiding that status. For example, a minority shareholder, who is not merely a shareholder in name only, generally will not have the power to prevent (or even discover) the corporation's PACA violations or the power to direct and affect the corporation's operations. Similarly, a real director, who is a member of a 3-person board of directors, generally will not have the power to prevent the corporation's PACA violations or the power to direct and affect the corporation's operations. Likewise, a partner with a 40 percent interest in a partnership, who fully participates in the partnership as a partner, generally will not have the power to prevent the partnership's PACA violations or the power to direct and affect the partnership's operations. If the minority shareholder, the director on the 3-person board of directors, and the partner with a 40 percent interest in the partnership demonstrates the requisite lack of power, application of the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), would result in each of these persons being designated "nominal."

In the *Taylor* dissent, Judge Brown points out that the United States Department of Agriculture is not forever bound to apply the "actual, significant nexus" test, as follows:

> I do not mean to suggest the Department is bound forever to apply the "actual, significant nexus" test. We have previously indicated the 1995 amendment to 7 U.S.C. § 499a(b)(9) might call for different criteria. *See Norinsberg v. USDA*, 162 F.3d 1194, 1199 (D.C. Cir. 1998). . . . But the Judicial Officer in this case explicitly employed the "actual, significant nexus" test . . . and neither the parties nor my colleagues have seen fit to challenge its applicability.

Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 621-22 (D.C. Cir. 2011) (footnote omitted). *Taylor* makes clear to me that I was remiss in failing to abandon the "actual, significant nexus" test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the "actual significant nexus" test, the power to curb PACA violations, or the power to direct and affect operations. In future cases that come before me, I do not intend to apply the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). Instead, my "nominal inquiry" will be limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder "in name only."[5] While power to curb PACA violations or to direct and affect operations may, in certain circumstances, be a factor to be considered under the "nominal inquiry," it will not be the *sine qua non* of responsible connection to a PACA-violating entity.[6]

Third, the Division Chief contends I erroneously found Mr. Herr demonstrated by a preponderance of the evidence that he was only nominally a 25 percent shareholder of Houston's Finest during the period October 11, 2007, through February 17, 2008 (Pet. to Reconsider at 13-23). The Division Chief's position that Mr. Herr had authority to alter

---

[5] *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1534 (2002) (defining the noun "nominal" as "an individual that exists or is something in name or form but not in reality"); BLACK'S LAW DICTIONARY 1148 (9th ed. 2009) (defining the adjective "nominal" as "[e]xisting in name only").

[6] *See Taylor v. U.S. Dep't of Agric*., 636 F.3d 608, 618 (D.C. Cir. 2011) (Judge Brown stating, the majority makes "power and authority" the *sine qua non* of responsible connection).

the course of Houston's Finest's operations, and, therefore, was not nominal, is based in large part on the July 10, 2002, Stock Purchase Agreement executed by Messrs. Kalil, Petro, and Herr (Appeal Pet. at 28-31).[7]

On its face, the Stock Purchase Agreement gives Mr. Herr authority to curb Houston's Finest's PACA violations. However, Mr. Herr introduced ample evidence to demonstrate that the Stock Purchase Agreement did not reflect Mr. Herr's actual authority within Houston's Finest. Instead, the record establishes that Mr. Herr, based upon his relationship with his partner, Mr. Petro, merely infused Houston's Finest with capital. In exchange, Messrs. Kalil, Petro, and Herr executed the July 10, 2002, Stock Purchase Agreement, which Mr. Herr did not negotiate or draft (Tr. 159). Mr. Herr never performed any duties or exercised any authority under the Stock Purchase Agreement (Tr. 160-67), and Mr. Herr demonstrated by a preponderance of the evidence that, despite the terms of the Stock Purchase Agreement, he lacked the actual authority to curb Houston's Finest's violations of the PACA.

For the foregoing reasons, the following Order is issued.

ORDER

The Division Chief's Petition to Reconsider, filed February 29, 2012, is denied.

———

[7] Dean Klint Johnson, the Acting Assistant Regional Director for the Agricultural Marketing Service and a witness for the Division Chief, testified the sole indicator that Mr. Herr had authority within Houston's Finest is the Stock Purchase Agreement (Tr. 480-81).

MISCELLANEOUS ORDERS

In re: AMERSINO MARKETING GROUP, LLC AND SOUTHEAST PRODUCE LIMITED, USA.
Docket No. D-12-0221; D-12-0222.
Miscellaneous Order.
Filed November 13, 2012.

PACA-D.

Christopher P. Young-Morales, Esq. for Complainant.
Bruce Levinson, Esq. for Respondents.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING REQUEST TO EXTEND THE TIME TO FILE A RESPONSE TO RESPONDENTS' APPEAL PETITION

On November 8, 2012, Amersino Marketing Group, LLC, and Southeast Produce Limited, USA [hereinafter Respondents], by telephone, requested that I extend the time for filing the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture's [hereinafter the Deputy Administrator], time for filing a response to Respondents' appeal petition. On November 13, 2012, I held a telephone conference with counsel for Respondents and counsel for the Deputy Administrator to discuss the requested extension of time. During the telephone conference, counsel for the Deputy Administrator stated that the Deputy Administrator does not want an extension of time to file a response to Respondents' appeal petition; therefore, I deny Respondents' request that I extend the time for the Deputy Administrator's filing a response to Respondents' appeal petition. The time for filing the Deputy Administrator's response to Respondents' appeal petition remains November 16, 2012, as set forth in the Second Order Extending Time to File a Response to Respondents' Appeal Petition.[1]

———

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 16, 2012.

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

PERISHABLE AGRICULTURAL COMMODITIES ACT

SANDLER BROS.
Docket No. 12-0111.
Default Decision.
Filed August 2, 2012.

BIG WAY, INC.
Docket No. 12-0236.
Default Decision.
Filed August 2, 2012.

RAR ENTERPRISES, INC.
Docket No. 12-0261.
Default Decision.
Filed August 15, 2012.

CASA DE CAMPO, INC. AND HAVANA PRODUCE, INC.
Docket No. 12-0470.
Default Decision.
Filed September 17, 2012.

CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Grand Mart, Inc., Min S. Kang, & Man S. Kang, PACA-D-12-0056, 08/31/12.
Grand Mart, International Food, LLC, Min S. Kang, & Man S. Kang, PACA-D-12-0059, 08/31/12.
Lucky World Gaithersburg, Inc., Min S. Kang, & Man S. Kang, PACA-D-12-0062, 08/31/12.
Man Min, Inc., Min S. Kang, & Man S. Kang, PACA-D-12-0065, 08/31/12.
Grand Mart 7, Min S. Kang, & Man S. Kang, PACA-D-12-0069, 08/31/12.
Bacchus Fresh International, Inc., PACA-D-12-0424, 08/15/12.
The Chuck Olsen Co., Inc., PACA-D-11-0415, 09/14/12.
Manuel R. Pinon, PACA-D-12-0496, 11/07/12.
Pellegrino's Fruit & Produce, Inc., PACA-D-12-0621, 11/07/12.
Top Tomato Company, PACA-D-13-0049, 11/08/12.
Paul O. Rangel, PACA-APP-12-0162, 11/19/12.
Randall E. Lintz, PACA-APP-12-0163, 11/19/12.

AGRICULTURE DECISIONS

Volume 71

July – December 2012
Part Four
List of Decisions Reported (Alphabetical)
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

LIST OF DECISIONS REPORTED

JULY – DECEMBER 2012

(ALPHABETICALLY LISTED)

SUBJECT MATTER INDEX

JULY – DECEMBER 2012

SALARY OFFSET ACT